Neutral Citation: **[2024] UKUT 00094 (TCC)**

Case Number: UT-2022-000067

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing Venue: **The Rolls Building,**
Fetter Lane, London EC4A 1NL

Income Tax, PAYE, National Insurance Contributions, whether Section 49(1)(c)(i) ITEPA and Regulation 6(1)(c) Social Security Contributions (Intermediaries) Regulations 2000 (SI 2000/727) apply - yes

Heard on: 10 October 2023
Judgment date: 05 April 2024

Before
JUDGE PHYLLIS RAMSHAW
JUDGE NICHOLAS PAINES

Between
McCANN MEDIA LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr M Paulin, counsel, instructed by Tax Networks Limited

For the Respondents: Mr R Anderson, counsel, instructed by the Office of the Advocate General for Scotland

DECISION

INTRODUCTION

1. The Appellant appeals against a decision of the First Tier Tribunal (Tax Chamber) ("the FTT") released on 10 March 2022 ([2012] UKFTT 104 (TC) ("the FTT Decision")). The FTT

dismissed the Appellant's appeal against a number of Determinations and Notices in respect of the tax years 13/14 – 17/18 in relation to PAYE and National Insurance Contributions ("NICs") issued by HMRC on the basis that Chapter 8 of Part 2 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") (the "Intermediaries Legislation" (commonly referred to as IR35)) and the Social Security Contributions (Intermediaries) Regulations 2000 (SI 2000/727) ("the Intermediaries Regulations") applied to the contractual arrangements entered into by the Appellant with British Sky Broadcasting Limited ("Sky"). The Appellant supplied the services of Mr McCann to Sky.

2. The FTT found that under the terms of the hypothetical contract, envisaged by section 49 of ITEPA 2003, (the terms of which the FTT set out at [112]) Mr McCann could not be considered to be in business on his own account and concluded that the provisions of the hypothetical contract were consistent with a contract of employment.

3. The Appellant applied to the FTT for permission to appeal which was refused. Following an oral hearing of the Appellant's application to the Upper Tribunal for permission to appeal, permission was granted on limited grounds. The grounds of appeal upon which permission to appeal was granted are set out below.

4. References to paragraph numbers are to paragraphs in the FTT decision unless otherwise indicated and references to page numbers are to the bundle of documents before the Upper Tribunal.

BACKGROUND

5. The background facts are not in dispute. They were set out by the FTT as follows:

> 1. McCann Media Limited ("MML") is the personal service company ("PSC") of Neil McCann. Mr McCann is a former Scottish Premiership footballer who played international football representing Scotland, and later became a qualified coach. During the relevant tax years Mr McCann provided his services through MML. MML entered into services agreements with British Sky Broadcasting Ltd ("Sky"), the terms of which are summarised below.
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> …
>
> 5. The directors of MML are Mr McCann and his wife, Mrs Karen McCann. Mrs McCann is currently the sole shareholder of MML; prior to 1 September 2017, Mr McCann and Mrs McCann each owned 50% of the issued share capital.
>
> 6. Mr McCann is a former Scottish Premiership footballer, notably for Rangers FC, and represented Scotland. After retiring as a player, he moved into punditry. He and Mrs McCann formed MML in August 2009. He also qualified as a football coach, obtaining a UEFA PRO licence.
>
> 7. Mr McCann was the only person who provided services on behalf of MML under the Sky Contracts (or otherwise). Furthermore, there was no evidence of Mr McCann providing services to, or being engaged by, anyone other than MML during the tax years in issue.
>
> **Agreements entered into with Sky**
>
> 8. … There was no dispute as to whether these written agreements were entered into or into what was stated therein. MML does deny that these written agreements represent the actual contractual arrangements; that is considered separately after we make our findings of fact on the basis of the evidence before us…
>
> 9. MML entered into the following contracts:

(1) Services Agreement with British Sky Broadcasting Ltd ("Sky") dated 2 May 2012 (the "2012 Sky Contract"); and

(2) Services Agreement between the Sky and the Appellant dated 18 February 2014 (the "2014 Sky Contract" and, together with the 2012 Sky Contract, the "Sky Contracts").

10. Mr McCann was also required to sign, and did sign, a Non-Disclosure Agreement (the "NDA"), which was scheduled to each of the Sky Contracts.

11. The periods covered by the Sky Contracts were:

(1) under the 2012 Sky Contract, the "Assignment" was from 1 July 2012 to 30 June 2014 "on an ad hoc as and when required basis"; and

(2) under the 2014 Sky Contract, the "Term" was 1 July 2014 to 30 June 2017.

…

Dundee FC

18. In April 2017 MML was in the process of negotiating a new three-year contract with Sky. Mr McCann was approached by Dundee Football Club ("Dundee FC") (via his agent, Blair Morgan) to see if Mr McCann was willing to accept a short-term appointment as interim manager to try to save the club from relegation from the Scottish Premiership. Mr McCann was keen to take this appointment.

19. Dundee FC and MML entered into a services agreement which:

(1) required MML to provide the services of a football manager and coach, requiring MML to use best endeavours to use Mr McCann;

(2) included a substitution clause; and

(3) had a term of 18 April to 29 May 2017.

…

22. The notices and determinations issued by HMRC do not relate to the fees paid by Dundee FC to MML. Accordingly, we make only the findings in relation to that agreement which we consider are necessary for the purposes of this appeal, and in that regard we find as facts that:

(1) Mr McCann was appointed as interim manager of Dundee FC from 18 April to 29 May 2017;

(2) Dundee FC agreed to pay MML a fixed fee for this period, and a bonus was payable if Dundee FC was not relegated from the Scottish Premier League at the end of the 2016-17 season.

Relevant Legislative Provisions

6. The Intermediaries Legislation is set out in sections 48 – 61 of ITEPA 2003. The key provision is section 49, as in force from tax years 13-14, which provides (as relevant):

(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.

7. A materially similar but not identical test is applied for the purposes of NICs by Regulation 6 of the Intermediaries Regulations:

(1) This Part applies where–

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client") who is not a public authority,

…

(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and

(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client.

(2) Paragraph (1)(b) has effect irrespective of whether or not–

(a) there exists a contract between the client and the worker, or

(b) the worker is the holder of an office with the client.

…

(3) Where this Part applies

(a) the worker is treated, for the purposes of Parts I to V of the Contributions and Benefits Act, and in relation to the amount deriving from relevant payments and relevant benefits that is calculated in accordance with regulation 7 ("the worker's attributable earnings"), as employed in employed earner's employment by the intermediary, and

(b) the intermediary, whether or not he fulfils the conditions prescribed under section 1(6)(a) of the Contributions and Benefits Act for secondary contributors, is treated for those purposes as the secondary contributor in respect of the worker's attributable earnings, and Parts I to V of that Act have effect accordingly.

(4) Any issue whether the circumstances are such as are mentioned in paragraph (1)(c) is an issue relating to contributions that is prescribed for the purposes of section 8(1)(m) of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (decision by officer of the Board).

8. There was no dispute between the parties as to the application of section 49(1)(a) and (b) - the Appellant agreed that those conditions were met. It was accepted that there was no material difference in terms of the application of the Intermediaries Regulations. We therefore focus on the Intermediaries Legislation in our decision as did the FTT.

THE ISSUES

9. Before we address the grounds of appeal, we set out briefly the purpose of the provisions and the now well-trodden approach that a Tribunal should adopt in considering the Intermediaries Legislation. The purpose of the legislation is to ensure that individuals who ought to pay tax and NICs as employees cannot, by the assumption of a corporate structure,

reduce or defer the liabilities imposed on employees – see *R (on the application of Professional Contractors Group Ltd) v IRC* [2001] EWCA Civ 1945 at [51].

10. The issue in the instant case is the application of sub-section (c) of section 49(1) (and its corresponding provision in the Intermediaries Regulations). Henderson J (as he then was) described the effect of this sub-section as enacting a statutory hypothesis asking one to suppose that the services in question were provided under a contract made directly between the client and the worker. If that hypothetical contract would be regarded for income tax purposes as a contract of employment the legislation will apply - *Dragonfly Consultancy Ltd v HMRC* [2008] EWHC 2113 at [9].

11. In broad terms, the Intermediaries Legislation applies where an individual ('the worker') personally performs services for another person ('the client'), pursuant to arrangements involving a third party ('the intermediary') in circumstances where, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax and NICs purposes as an employee of the client - 'the hypothetical contract'. In this case, Mr McCann is the worker, Sky is the client and the Appellant is the intermediary. During the relevant period the Appellant provided the services of Mr McCann to Sky pursuant to two contracts between the Appellant and Sky.

12. The issues in this appeal concern the FTT's approach to consideration of the contract between the Appellant and Sky, ascertaining the terms of a hypothetical contract and the question of whether Mr McCann would have been an employee of Sky, under a contract of service, or whether he would have been providing his services as a self-employed person under a contract for services. The distinction between employment and self-employment arises in many contexts. In the context of the Intermediaries Legislation, there have been a number of recent decisions of the Upper Tribunal and the Court of Appeal in which the distinction has been considered in relation to television and radio presenters.

13. It is common ground that section 49(1)(c) should be approached by reference to a three-stage process identified in Revenue *& Customs Commissioners v Kickabout Productions Ltd* [2020] UKUT 216 (TCC) ("*Kickabout"*). The three-stage process was recently described by the Court of Appeal in *Revenue and Customs Comrs v Atholl House Productions Ltd* [2022] EWCA Civ 501 *("Atholl CA")* (decided after the FTT decision was released) as follows:

> 7. As regards the application of the condition in section 49(1)(c), it has been common ground between the parties that the following three-stage process provides a helpful structure:
>
> '(1) *Stage 1.* Find the terms of the actual contractual arrangements (between Atholl House and the BBC on the one hand and between Ms Adams and Atholl House on the other) and relevant circumstances within which Ms Adams worked.
>
> 2) *Stage 2.* Ascertain the terms of the "hypothetical contract" (between Ms Adams and the BBC) postulated by s 49(1)(c)(i) and the counterpart legislation as applicable for the purposes of [National Insurance Contributions].
>
> (3) *Stage 3.* Consider whether the hypothetical contract would be a contract of employment.'

14. The Appellant argues that the FTT erred in its application of the above three-stage process (Ground 3).

15. Stage 3 is to be determined by reference to the well-known three-stage approach outlined by MacKenna J in *Ready Mixed Concrete* (*South East*) *Ltd v Minister of Pensions and National Insurance, Minister of Social Security v Greenham Ready Mixed Concrete Ltd, Minister of Social Security v Ready Mixed Concrete* (*South East*) *Ltd* [1968] QB 497 at 515 ("*RMC*"). MacKenna J held that a contract of service exists if the following 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 [the "mutuality of obligation" condition].

(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 [the "control condition"].

(iii) The other provisions of the contract are consistent with its being a contract of service [the "other circumstances" condition].

16. The Appellant does not dispute the FTT's findings on the control issue. The approach of the FTT to mutuality of obligation is disputed (Ground 1) and the other circumstances condition (Ground 2).

GROUNDS OF APPEAL

17. The grounds of appeal upon which permission to appeal was granted are:

> GROUND 1: The Tribunal erred in law with respect to the issue of mutuality of obligation.
>
> GROUND 2: The Tribunal erred in law by failing to take into account and/or properly apply the third limb of RMC, namely other factors of the contractual relationship were inconsistent with employment.
>
> GROUND 3: The Tribunal erred in law in applying the three-stage test set out in *Kickabout*.

18. To avoid confusion, we have not followed the numbering of the grounds of appeal set out by the Appellant (and as followed by HMRC) in this appeal which followed from the grounds of appeal set out in the application for permission to appeal made on 23 June 2022. In that application Ground 1 above constituted Ground Two, Ground 2 above constituted Ground Three and Ground 3 above constituted Ground Four of that application.

19. Permission to appeal was refused in respect of two of the grounds of appeal. We need to set out briefly Ground One of the June 2022 grounds because in his oral submissions Mr Paulin transgressed into including submissions that, in our view, relied on matters encompassed by this ground. The appellant had argued that the FTT erred with respect to the issue of substitution submitting that the FTT ought to have analysed who could be a substitute and then considered the hypothetical contract, a wide range of possibilities existed. In refusing permission to appeal the UT considered that this ground was an *Edwards v Bairstow* challenge to the findings of fact made by the FTT and considered that the FTT's finding that Mr McCann would not propose to use a substitute that was not already part of the talent pool was not unreasonable.

Ground 1 – mutuality of obligations

Appellant's submissions

20. Mr Paulin submitted that the FTT erred in law with respect to the issue of mutuality of obligation, relying on *Atholl CA* (at paragraphs 46 and 98) for the proposition that an irreducible minimum of mutuality of obligation and control must be satisfied before a contract of employment could be found to exist.

21. Mr Paulin argued, at paragraph 7 of his skeleton argument, that the FTT, having found as a fact:

> Mr McCann's engagement with Dundee FC (at, it was submitted at first instance, the peak period of the football season) did affect his availability to provide services to Sky (paragraph 92).
>
> Mr McCann was appointed as interim manager of Dundee FC during the term of the Sky contracts, which was for a six-week period (paragraph 99).
>
> MML would have been entitled to submit a similar invoice (to those submitted in April and June 2017) in May 2017 (paragraph 99), even though MML was during the same period providing its services to another master, namely Dundee FC. The Tribunal accepted that the evidence showed that Mr McCann's contractual autonomy and free agency was such that he could undertake a role (during peak football season) at his own discretion and with an organisation that was wholly distinct from BskyB.

it was not reasonable for it to have concluded that there was the necessary "irreducible minimum" of contract of service between the parties - reference was made to *Carmichael v National Power plc* [1999] ICR 1226 at 1330.

22. Mr Paulin argued that Mr McCann's contractual autonomy and free agency were wholly inconsistent with the irreducible minimum for the existence of a contract of employment. Mr McCann was entitled to undertake work as the interim manager of Dundee FC, at his own sole discretion and without any consultation with Sky during the peak period of the football season.

23. He argued that the FTT erred in applying *HMRC v Professional Game Match Officials Ltd* [2021] EWCA Civ ("*PGMOL*") and in holding at [121]:

> The Court of Appeal thus confirmed that individual contracts can be contracts of employment if they merely provide for a worker to be paid for the work he did, and provisions which enable either side to withdraw before performance do not of themselves negate mutuality of obligations.

24. He argued that the present case is in a distinct legal matrix from that under consideration in *PGMOL* and additionally that as that decision was subject to appeal to the Supreme Court it could not be relied on. The Tribunal erred in taking irrelevant considerations pertaining to potential individual worker's contracts into account. He submitted that in the present case the FTT failed to place emphasis on the factor of the irreducible minimum of mutuality of obligation, and subsequently fell in error in relying on the Court of Appeal's decision in *PGMOL* as providing a legal basis upon which it could construe the contract between the Appellant and Sky as being one in which, pursuant to any hypothetical contract, there would have been mutuality of obligation. When asked to identify where the FTT relied on *PGMOL* he referred to [99] and the FTT's finding regarding the failure to provide services.

25. In oral submissions Mr Paulin argued that the FTT failed to place weight on the fact that the Appellant (through Mr McCann) was able to undertake co extensive engagements parallel in time which, as acknowledged by the FTT, affected his ability to provide services and that this did not amount to a breach of the contract. This is counter to a mutuality of obligation. He also argued that the FTT erred in considering that Mr McCann engaged directly with Dundee football club at [92] and that this indicates a lack of care and the wrong approach taken by the FTT.

26. He drew our attention to the invoices, issued by the Appellant, arguing that it is clear that the Appellant was providing services to different entities at certain times (p61-63 and paragraph [88] for example). This is inconsistent with mutuality of obligation. He also emphasised the fact that no invoice had been submitted in May 2017.

27. In relation to the contract between Sky and the Appellant Mr Paulin argued that there was no obligation on the part of Sky to provide work – he referred to the contract at p21 which clearly indicates that the assignment was on an "ad hoc" basis. There similarly was no obligation on the Appellant to provide services. The whole point of mutuality of obligation is

that the master agrees to provide work and the servant agrees to provide services. The contract is, he submitted, entirely inconsistent with the required mutuality of obligation.

28. Mr Paulin submitted that when the appellant failed to provide services in May 2017, the FTT did not ask the question as to why this was not a breach of contract. The FTT erred in failing to make a finding regarding what he described as the mysterious appearance of Mr McCann in May – it may have been pro bono. It is not clear on what basis he appeared. He also argued that the regularity of a fee structure is not indicative of itself that a contract of employment exists. He argued that the FTT failed to analyse the relevance of the co-existence of contracts with several other companies and of the fact that the Appellant was a business providing business services on its own account.

HMRC's submissions

29. Mr Anderson referred to the test in *RMC*. He emphasised the limited scope to interfere with an evaluative judgment of the FTT referring to *Red White & Green Ltd v Revenue & Customs Commissioners* [2023] UKUT 83 (TCC) ("*Red White and Green*") at [36]-[37].

30. In relation to the argument that "Mr McCann was entitled to undertake work…at his own sole discretion and without any consultation with Sky" he submitted that this was not a fair characterisation of the evidence because i) Mr McCann did not want to burn his bridges with Sky [58], ii) he did inform Sky in advance of taking the Dundee interim appointment [92], iii) Mr McCann's work as an interim manager for Dundee was consistent with his restrictive covenants and the approach of the Appellant and Sky to seek mutual agreement [95], [99] and [134], iv) Mr McCann in fact made himself available to work for Sky during the 6 week period [58] v) the hypothetical contract would have been subject to restrictive covenants [112(10)] and Sky would have enforced its covenants had Mr McCann sought to work for another broadcaster [133(4)].

31. In relation to the Appellant's characterisation of the FTT's findings at [92] and [99], as demonstrating that Mr McCann's "contractual autonomy and free agency" was "wholly inconsistent with the irreducible minimum for the existence of a contract of employment" Mr Anderson argued that this was hyperbole. He drew attention to the FTT's findings that Mr McCann spoke with Sky in advance of taking the Dundee appointment [92] because he did not want to burn his bridges with Sky [58] and that Mr McCann's work for Dundee FC did not infringe the restrictive covenants in the Sky contract [95], [99] and [134]. Many employees serve more than one employer; or can be employed by one employer but in business on their own account in relation to other clients - *Red White and Green* at [137(2)].

32. Mr Anderson submitted that it was not an error of law for the FTT to bear in mind the conclusions of a Court of Appeal decision which, at the time, represented the most recent appellate guidance. The FTT expressly recognised that *PGMOL* was dealing with different issues and its conclusion on mutuality of obligation at [123-124] is amply supported by its reasoning. *PGMOL* was not the basis for the FTT's evaluative exercise. The FTT [98] held that the contract before it was not merely one for work done. The Appellant invoiced Sky in equal monthly instalments, irrespective of the number of games covered. At [119] it rightly held that an established feature of an employment contract is that the employer is obliged to pay the employee regardless of whether or not the services in question are performed – *Atholl CA* at [73] and under such contracts, the employer is not required to provide work for the employee in addition to payment of the agreed remuneration. In constructing the hypothetical contract, on the basis of the evidence it had heard, the FTT found that the hypothetical contract would have contained this feature (i.e., of payment irrespective of the amount of work done) of the actual arrangements. Mr Anderson referred to p64 of the bundle which set out the Appellant's

income analysis. He submitted that the overall picture was that payments were made monthly even when outside the football season.

33. Mr Anderson submitted that there was nothing in the FTT decision to support the notion that Mr McCann mysteriously showed up in May 2017 and may have agreed to undertake work on a pro bono basis. The FTT reasonably inferred that the Appellant could have invoiced for May.

34. He submitted that there was an obligation in the contract to provide services on an ad hoc basis otherwise, as the FTT found [60], if he was unavailable Sky could terminate the contract. There was an equal obligation on Sky to either provide work or to pay in lieu as evidenced by the fee structure.

Discussion

35. The Appellant did not raise the argument, advanced in oral submissions before us, that there was no obligation on Sky to offer any work in the grounds of appeal upon which permission to appeal was granted or in the skeleton argument for the appeal before the Upper Tribunal. It does not appear to have been an argument pursued with any vigour before the FTT. No application to amend the grounds of appeal was made. We deal with it briefly.

36. In our view it is an argument that is bound to fail given the findings of the FTT. We note that the obligation on an employer is to provide work **or in the alternative** to provide some sort of consideration in the absence of work – see for example *Atholl CA* at [73].

37. The FTT made the following findings:

> 86. The Sky Contracts specify an annual fee (increasing annually) and provide for the fee to be payable in equal monthly instalments upon submission of an invoice.
>
> 87. Mr Leslie submitted that the arrangement in practice did not involve MML being paid for Mr McCann to be available, but that it was on services delivered. However, that submission is not borne out by the evidence and the facts as we have found them.
>
> 88. We conclude that the payments from Sky to MML were in accordance with the payment terms specified in the Sky Contracts…
>
> …
>
> 98… We do not accept that Mr McCann was only paid for work done –he regularly invoiced the agreed fee in equal instalments, irrespective of the number of games covered in any month, and this continued outside of the football season.

38. On the basis of the findings made we consider that the FTT was correct to hold at [119] that an established feature of an employment contract is that the employer is obliged to pay the employee regardless of whether or not the services in question are performed. That proposition is consistent with the holding in *Atholl CA*, at 73, that under a contract in which the employer is obliged to pay remuneration, the employer is not required to provide work for the employee in addition to payment of the agreed remuneration.

39. Further, there are other findings of the FTT and clauses in the contracts that are inconsistent with the propositions that Sky was under no obligation to offer any work or Mr McCann to perform any. The FTT found that Sky may terminate the contract with the Appellant if Mr McCann was unavailable to provide services for a period in excess of four weeks (clause 5.1(a) p27). We also note clauses 5.1(b), (d) and (e).

40. We accept that Mr McCann, as personnel of the Appellant, was entitled to undertake work as the interim manager of Dundee FC without having to obtain approval from Sky. Mr Paulin referred to the findings at [92 and 99] in support of the submission that the relationship was wholly inconsistent with the irreducible minimum for the existence of a contract of employment.

41. Firstly, discussed further below, an employee may serve more than one employer concurrently. Secondly there were restrictions on work that could be undertaken which is inconsistent with the argument that Mr McCann had contractual autonomy and free agency. As set out by the FTT [14(2)], Clause 2.1 of the contracts restricted the services that Mr McCann (as personnel of the Appellant) could provide prohibiting the supply of services (similar to those supplied to Sky) to any other television and/or radio organisation and/or media, print or betting organisations. Further the NDA, as set out by the FTT at [15(4)], included non-solicitation and non-compete obligations.

42. In light of the FTT's factual findings that Mr McCann did not want to burn his bridges with Sky [58], that he did inform Sky in advance of taking the Dundee interim appointment [92], that Mr McCann's work as an interim manager for Dundee was consistent with the restrictive covenants and the approach of the Appellant and Sky to seek mutual agreement [95, 99], that Mr McCann in fact made himself available to work for Sky during the 6 week period [58] and that Sky would have enforced its covenants had Mr McCann sought to work for another broadcaster [133(4)] we reject the characterisation of the relationship between Sky and the Appellant and/or Mr McCann as one in which Mr McCann had contractual autonomy and free agency. Clearly there were significant contractual restrictions on services the Appellant and/or Mr McCann could provide such that neither the Appellant nor Mr McCann had contractual autonomy or free agency. The findings of the FTT at paragraph 112 regarding the terms of the hypothetical contract are entirely consistent with the above findings.

43. Linked to the argument on contractual autonomy is the argument that the FTT failed to place weight on the fact that the Appellant (through Mr McCann) was able to undertake coextensive engagements parallel in time.

44. The FTT found at [134]:

> Whilst we recognise that Mr McCann was able to take other roles and exploit other opportunities (in areas not covered by the restrictive covenant), notably in his role at Dundee FC, this is not inconsistent with the relationship between Mr McCann and Sky being one of employment as it can occur when there is flexibility in the performance of services which are not expected to be provided full-time.

45. We have already set out paragraph [88] above in which the FTT noted that the Appellant had invoiced Sky during April 2017 whilst services were being supplied to Dundee FC.

46. To a very limited extent during the periods under appeal the Appellant provided services on occasion to other clients. The FTT was aware of this as is clear from [91]. The vast majority of the Appellant's, and as personnel Mr McCann's, income arose solely from the services supplied to Sky. Mr Paulin sought to rely on the invoices to clients other than Sky as supporting his submissions. In the years under appeal in years 13/14, 14/15 and 15/16 the Appellant had no income other than from the services supplied to Sky. In 15/16 there was a total of £500 invoiced to two other clients out of a total income of £132,166.64 and in the year 17/18 (including the Dundee FC period) slightly over half of the total income of £61,299.99 was in relation to Sky.

47. An employee can serve more than one employer or can be employed by one employer but be in business on their own account in relation to other clients as recently affirmed in *Red White and Green* [137(2)]. The weight to be placed on evidence is generally a matter for the

Tribunal that has heard and evaluated the evidence that was put before it. The Upper Tribunal should be slow to interfere with an evaluative judgement of the FTT. In our view there is plainly no error in the FTT's decision, on the facts of this case, in terms of the weight it placed on the fact that the Appellant provided limited services to other clients concurrently with services to Sky.

48. We reject Mr Paulin's argument that the FTT erred in failing to ask the question as to why, if Mr McCann failed to provide services, this was not a breach of contract and that it erred in failing to make a finding regarding the mysterious appearance of Mr McCann in May. The FTT found that Mr McCann did appear on Sky broadcasts in April and May 2017 [58] (during the time the Appellant had entered into a contract with Dundee FC). It also found that the dates on which Mr McCann provided his services were reached by mutual agreement. There was no obligation on the FTT to make a finding on breach of contract in light of those factors and the FTT were not invited to do so by the Appellant's representative. The FTT was not given any evidence as to the basis upon which Mr McCann appeared on Sky broadcasts in May 2017 (nor was it given evidence as to the April appearances). We consider that the FTT was under no obligation to make a specific finding as to the basis on which he had appeared - in the absence of evidence any such finding would be purely speculative. The inference drawn by the FTT that the Appellant would have been entitled to submit an invoice for May 2017 is reasonable based on the evidence particularly given that an invoice was submitted for April 2017 in similar circumstances.

49. Regarding the argument that the FTT erred by relying on *PGMOL* we do not accept that it would be an error of law for a FTT to rely on a decision of the Court of Appeal in circumstances where that decision is subject to appeal to the Supreme Court. The FTT is bound by such a decision if it is relevant to the circumstances in the appeal before it. The FTT expressly recognised that *PGMOL* was dealing with different issues around individual engagements and overarching contracts. Mr Paulin referred to the FTT's conclusion at [121]. When pressed by the Tribunal as to where the FTT had incorrectly applied *PGMOL* he referred to the findings in [99] regarding the failure to provide services.

50. The context in which the FTT referred to *PGMOL* is relevant. The Appellant's representative had made submissions regarding the essential requirements for mutuality of obligation to exist, recorded by the FTT at [116]:

> 116. Mr Leslie submitted that the required level of mutuality consists of five elements – an obligation on the employer to provide ongoing work; an obligation on the employee to accept and perform the work offered; being paid if work is actually done; an obligation on the employee to make themselves available for work; and an obligation on the employer to pay the employee for making themselves available, whether work is offered or not. He submitted that all of these elements are required, and they were not met where Mr McCann was free to choose which offers of work to accept, there was no minimum level of work specified in the contract and he was only paid for work done.

51. After setting out a paragraph from the Court of Appeal's decision addressing mutuality of obligations the FTT set out:

> 121. The Court of Appeal thus confirmed that individual contracts can be contracts of employment if they merely provide for a worker to be paid for the work he did, and provisions which enable either side to withdraw before performance do not of themselves negate mutuality of obligations.
>
> 122. We do not consider that the authorities provide support for Mr Leslie's submission that there are five required components for a mutuality of obligations, and in particular reject the

propositions so far as they focus on obligations to accept all work offered and remain available for work (impliedly at all times).

52. In our view, if there was any reliance on *PGMOL*, it was simply to lend support to the rejection of the Appellant's submissions as set out in [116] – this can be seen from [122] which immediately follows [121] relied on by Mr Paulin. In relation to [99] (set out earlier) we have already dealt with the findings contained in this paragraph above. We do not discern any reliance on *PGMOL* in this paragraph. We agree with HMRC's submission that the FTT's evaluation and conclusion on mutuality of obligations at [123-124] is amply supported by its reasoning and *PGMOL* was not the basis for the evaluative exercise.

53. We reject the argument that there was a lack of care evident from the FTT decision and that it adopted the wrong approach as indicated by it considering that Mr McCann engaged directly with Dundee football club [92]. Whilst it is correct that the Appellant entered into a contract with Dundee FC not Mr McCann this paragraph must be read in context. At [90] the FTT had summarised Mr McCann's evidence concerning his role at Dundee FC and the comment at [92] was simply following that summary. The FTT's decision is detailed and carefully considered.

54. For the above reasons we find there is no error of law in the FTT's analysis and conclusions on mutuality of obligation.

Ground 2

Appellant's submissions

55. Mr Paulin submitted that the FTT erred in law by failing to take into account and/or properly apply the third limb of *RMC*. He argued that the FTT erred by failing to take account core and salient provisions of the actual contract. A number of specific clauses in the contracts were referred to including a number of "indemnity" clauses:

i) Pursuant to Clause 1.6 (p.41) The Company agreed to: "protect, defend, indemnify and hold BSkyB harmless from and against all claims, liabilities, demands, causes of action, losses and/or damages and all costs and expenses (including legal fees) incurred in connection therewith which may be asserted against or incurred by BSkyB or any Associated Company arising from any failure of the Company to comply with this Agreement including clauses 1.4 and 1.5 or any breach of a Non-Disclosure Agreement".

ii) Pursuant to Clause 2.3, the Company also agreed to indemnify Sky against any claim that an employment relationship exists between any Personnel and Sky [p.42 Bundle]. The fact that, as a matter of contract, the Company agreed to indemnify Sky in relation to any employment rights or worker status claims brought by any Personnel of the Company as against Sky is inconsistent with a contract of employment and was a relevant and essential consideration in construing both the actual and hypothetical contract.

iii) Similarly, the Company agreed to indemnify Sky for any claims as against Sky by any potential Personnel instructed by the Company pursuant to the Working Time Regulations 1998. This provision was salient and necessary to any construal of the actual and hypothetical contract, yet the Tribunal erred in failing to consider the same.

iv) Pursuant to Clause 5.1, Sky had the right to terminate the agreement "with immediate effect at any time" [p.45]. The Tribunal erred by failing to take account of the inconsistency of this termination clause with a contract of employment.

56. Mr Paulin argued that the above onerous and extensive contractual obligations are prima facie inconsistent with a contract of employment and ought to have been considered in construing the hypothetical contract.

57. Mr Paulin submitted that the FTT was obliged to consider the totality of the actual contract as a matter of law in the process of then going on to consider the terms of the hypothetical contract. He argued that it would be prima facie unfair for a Tribunal to ignore specific clauses in the actual contract in undertaking its judicial determination of the hypothetical contract when such clauses and contractual terms are of obvious evidential weight and relevance. He relied on *Michael Burgess & Ors v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0578 (TCC) (at paragraph [36]):

> In our judgment, *Hargreaves v Revenue and Customs Commissioners* [2014] UKUT 0395 cannot be relied upon for a general proposition that the scope of an appeal must be conclusively determined by reference to the case put by an appellant. The scope of an appeal, and the issues that fall to be determined by the FTT, must be established by reference to all the circumstances. Those circumstances will include, in our view, the legislative framework, the burden of proof in relation to relevant issues and the way in which the respective cases of the parties have been put.

58. In amplifying the grounds of appeal Mr Paulin argued that the Appellant had a contractual right to substitution and the indemnity clauses applied to any substituted company or person. When considering the third limb of *RMC* the actual contract included such liability on the part of the Appellant. He referred to paragraph 84 of *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51 ("*Pimlico Plumbers*") arguing that an unfettered right to substitution is inconsistent with an undertaking to do personal service. He stressed that the relevant consideration of the general indemnities was against any personnel provided and any subcontracts. He argued this amounted to a cascading series of indemnities that the FTT was required of its own motion to consider. He argued that it was inconsistent with a contract of employment for the Appellant to enter into such indemnities. He submitted that the FTT accepted at [85] that substitution could happen. Mr Paulin, when pressed, rowed back from the submission that an indemnity clause is prima facie inconsistent with a contract of employment.

HMRC's submissions

59. Mr Anderson submitted that the FTT's approach was consistent with the guidance in *Atholl CA* at [122]-[124].

60. In relation to the clauses in the contract relied on by the Appellant Mr Anderson argued:

> Clause 1.6 (p23 and [41]) refers back to clauses 1.4 and 1.5. Clause 1.4 deals with substitution. Permission to appeal in relation to clause 1.4 has been refused.
>
> Clause 1.5 deals with the need for all Personnel to be subject to a direct contractual arrangement with Sky by way of an NDA. That direct contractual relationship was considered by the FTT5-16, 52, 89.
>
> Clause 2.3 (p24 and [42]) of each contract stated inter alia that both parties declared that they did "not wish to create or imply any mutuality of obligations". The FTT did consider this provision in the context of considering the proper characterisation of the hypothetical contract [133(5)]. The weight to be attached to such a contractual statement will normally be minimal, other than in a borderline case. In this case, the FTT [133(5)] held that it placed no weight on the statement.

61. In relation to the indemnities Mr Anderson argued that insofar as clauses 1.6, 2.3, or 3.4 involve the Appellant providing an indemnity to Sky in relation to claims arising out of employment, there is within the contracts a recognition that the parties' attempted characterisation of the relationship may not be correct. The Appellant has not suggested that the intermediary indemnity provisions could or would have formed part of the hypothetical contract between Mr McCann and Sky. As the hypothetical contract is a direct contract between Mr McCann and Sky a term of the actual contract involving a third-party indemnity could not translate into the hypothetical contract.

62. Regarding Clauses 3.3 and 3.4. the FTT accepted that, in the hypothetical contract, Mr McCann would have no entitlement to holiday pay beyond his statutory rights. As per *Kickabout* [2022] EWCA Civ 502, [2022] at [97] there was no misdirection or error of law in the FTT's decision in this respect.

63. Regarding Clause 5.1. the termination provisions were considered by the FTT [14(6)]. Mr McCann accepted that if he were not to make himself available for a period of four weeks, Sky would ask questions and may exercise its right to terminate FTT [60]. It was not a matter left out of account.

Discussion

64. As set out above permission to appeal was refused in relation to the FTT's findings on substitution (there being no substitution clause in the hypothetical contract). We have therefore disregarded the submissions made by Mr Paulin insofar as he relied on indemnities in relation to any substitution and we therefore do not need to refer to the point Mr Paulin relied on in *Pimlico Plumbers.*

65. The Appellant was represented before the FTT and whilst we accept that the FTT was required to consider the totality of the contracts between the Appellant and Sky it was not required to set out every single clause that it had considered particularly where such clauses were not relied on by the Appellant.

66. Mr Paulin accepted before us that indemnity clauses are not prima facie inconsistent with a contract of employment.

67. We agree with HMRC's submission that the indemnity clause in 1.6 would not translate directly into the hypothetical contract to which the intermediary is not a party. Any such indemnity would be required to be expressed in terms of a direct contract between Mr McCann and Sky. We do not consider that had this clause, in a modified form, been included in the hypothetical contract it would be per se inconsistent with a contract of employment and neither do we consider that it is of obvious evidential weight and relevance such that the FTT was bound, of its own motion, to refer directly to it when it was not a clause relied on by the Appellant.

68. Clause 1.4 is irrelevant given that no substitution clause is included in the hypothetical contract. Clause 1.5 was considered by the FTT [15-16, 52,89] and in relation to Mr McCann an NDA clause is included in the hypothetical contract.

69. In relation to Clauses 2.3, 3.3 and 3.4 (p24 and [42]) the FTT considered these provisions [112(6)], [133(5)]. An express clause disavowing the existence of an employment agreement or mutuality of obligation and "workers'" rights will not normally count greatly in the balance – see paragraph [92] *Kickabout*. The FTT [133(5)], on the facts of this case, was entitled to conclude that no weight should be placed on the statement.

70. Regarding Clause 5.1. the termination provisions were considered by the FTT [14(6)]. It was not a matter left out of account. Although Mr Paulin submitted that this clause is inconsistent with a contract of employment and whilst it would not override statutory rights such as protection from unfair dismissal, no authority was cited to suggest that an unqualified power of termination is incompatible with an employment relationship at common law.

71. The FTT conducted a thorough analysis of the relevant Clauses in the actual contract and relevant circumstances. In our view it properly directed itself as to the approach to be adopted (see [71-72] and [129-132]) when considering the third limb of *RMC*. There is no error of law in the FTT's analysis and reasoning.

Ground 3

Appellant's submissions

72. Mr Paulin argued that the FTT erred in its application of the three-stage test set out as set out in *Kickabout* at [6]. He referred to paragraph 82 of the *Commissioners for Her Majesty's Revenue and Customs v Atholl House Productions Limited* [2021] UKUT 0037 (TCC) ("*Atholl UT*") arguing that the FTT erred in law by incorrectly construing the UT's ruling and guidance. The Upper Tribunal in *Atholl UT* was not holding that there could be a "blurring" between stages 1 and 2, as the FTT erroneously held at [70].

73. He argued that the Upper Tribunal was explaining that it could be appropriate to hold elements of the actual contract "in abstract" while simultaneously considering how the hypothetical contract may be formed from relevant 'circumstances' as required by the statutory provisions in question. The Upper Tribunal was issuing a judicial warning that care must be taken to ensure that ordinary principles of contractual interpretation are applied at stage 1, because any error in that respect could "infect" the ascertainment of the terms of the hypothetical contract at stage 2.

74. Mr Paulin submitted that the FTT erred by; i) failing to take care to ensure that ordinary principles of contractual interpretation were correctly applied at Stage 1, ii) wrongly construing the terms of the actual contracts and iii) permitting such errors to infect the ascertainment of the terms of the hypothetical contract at Stage 2.

75. He argued that the errors are evident in the FTTs self-direction at [70]. The FTT erred by presupposing that it could blur and conflate the process of identifying whether there was a relationship of employment by virtue of the terms of actual contract made by them, with the subsequent process of construing the terms of any hypothetical contract.

76. Mr Paulin argued that at [99] the FTT analysed the fact that Mr McCann was employed as interim manager of Dundee FC for a six-week period. He submitted that the Appellant did not provide Sky with any substantive services in May 2017 and so no invoice was raised. Yet, in construing the terms of the actual contract, and before the FTT went on to consider the terms of the hypothetical contract it held that: "we consider that MML would have been entitled to submit a similar invoice in respect of May 2017". The Tribunal thereby ruled as to the terms of the actual contract based on a hypothetical term that had no basis. The FTT reverse engineered the terms of the actual contract by considering what "would" have been the Company's contractual right. It is submitted that this error renders the FTT's decision irredeemably incorrect as a matter of law and that such an error is a fundamental one.

77. In his oral submissions in response to questions from the panel as to where, other than at [99], the FTT blurred the construing of the actual and hypothetical contracts, he referred to [73 to 88] arguing there is a paucity of references to the actual words of the contract and in glossing over the terms in [88] by using the term "would" demonstrates how the FTT blurred the stages.

HMRC's submissions

78. Mr Anderson submitted that the FTT was directed to the UT's decision in *Atholl UT* which the FTT quoted at [69]. He argued that the three stage *Kickabout* process is a "helpful structure" and that the observation in *Atholl CA* (at [72]) that the three limbs of the *RMC* test are not "an exhaustive and immutable test" apply with equal force to the three stage *Kickabout* test.

79. Mr Anderson argued that the principal ground of attack appears to be focussed on the FTT's reference in [70] to a "blurring" between the stages of analysis and the reference to "would" in [99]. He submitted that the FTT has simply recognised that step 2 must be informed by what has been found at step 1 because that is what s 49(4) ITEPA requires. On orthodox principles, the proper construction of the terms of a written contract is an iterative process - *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [11]-[13]. In any event the FTT did clearly carry out a thorough analysis of each stage. He argued that on entirely orthodox principles, the FTT [98-99] found that, on the actual contractual arrangements, the Appellant had a contractual right to invoice for the single month in May 2017. That was a perfectly proper finding. It reflected the position under both contracts that the annual fee was payable in equal monthly instalments.

80. He submitted that this ground appears to be an attempt to identify a misdirection by way of the sort of narrow textual analysis that has been deprecated at the highest levels - *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at 2(vi) and authority there cited, *Red White & Green* at [35]-[36]. The FTT correctly and fully addressed each stage of the test - Stage 1 at [73-100] and Stage 2 at [101-112]. In relation to the hypothetical contract, the FTT considered the content of that contract separately and distinctly from the actual contract.

81. Mr Anderson submitted that the reference to "blurring", or the use of a conditional "would" do not amount to any error of law and on no view can it be considered that they amounted to a fundamental misdirection or misunderstanding of the position and still less would any infelicity of language render the FTT's decision in this case "irredeemably incorrect".

Discussion

82. The two essential points relied on by Mr Paulin were the use of the word "blurring" and the word "would". Although Mr Paulin, in oral submissions, attempted to bolster this ground by inviting us to find that the paucity of references to the actual words of the contract in [73-88] and the glossing over the terms in [88] demonstrates how the FTT blurred the stages he failed to provide any specific examples other than the two points identified.

83. The FTT at [69] set out paragraph [8] of the decision in *Atholl UT* including sub paragraph 8(2):

> It follows from this that it is not necessary to defer all analysis of the hypothetical contract, at Stage 2, until all terms of the actual contract have been comprehensively determined at Stage 1. It may often be appropriate – in the iterative way identified by Lord Hodge JSC in *Arnold v Britton* [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619, at [77] – to construe the actual contractual arrangements (using the usual canons of construction) whilst considering at the same time how these arrangements would work when determining the content of the hypothetical contract. That approach is suited to the task of synthesising a single hypothetical contract from relevant 'circumstances' that include the terms of two distinct contracts. That said, care must still be taken to ensure that ordinary principles of contractual interpretation are correctly applied at Stage 1 since, if the terms of actual contracts are wrongly construed, any error has the potential to infect the ascertainment of the terms of the hypothetical contract at Stage 2.

84. At [70] the FTT said:

> These observations remind us that we need to construct the terms of the hypothetical contract between Sky and Mr McCann, and also indicate that, whilst following the three-stage approach set out in Kickabout, there may be a blurring between stages 1 and 2, as it is not necessary to defer all analysis of the hypothetical contract until all terms of the actual contract have been conclusively determined.'

85. From [73] the FTT considered the actual contractual arrangements having described the written terms earlier in its decision. We do not accept that there is a paucity of reference to the actual terms of the contract – the FTT did not need to set out again in these paragraphs the written terms that the FTT had set out and considered from [8-17]. We can see no evidence of blurring in [73-88]. In [88] (and similarly at [99]) the FTT concluded:

> We conclude that the payments from Sky to MML were in accordance with the payment terms specified in the Sky Contracts. There is only one exception to that, which concerns the absence of an invoice from MML to Sky for services in May 2017, and the resulting absence of any fee being paid by Sky for that month. However, whilst we have found that no invoice was submitted, we have also found that Mr McCann did provide services during May 2017 (his coverage of the Scottish Cup Games), MML did invoice for services in April 2017 (and was paid for such services) even though Mr McCann was unavailable for part of that month, and the monthly invoices were for regular amounts. We therefore infer that, if MML had submitted an invoice to Sky for the monthly pro rata amount for services in May 2017, such invoice would have been payable in accordance with the terms of the Sky Contract, and Sky would have paid such invoice.'

86. The FTT was considering the actual contract. Its finding that, if the Appellant had submitted an invoice for May 2017, it would have been payable is not a reference to the hypothetical contract. The use of **would** in this context is simply a reference to the contractual obligation arising under the terms of the actual contract if they were enforced.

87. We discern no error of law in the FTT's approach. Whilst the use of the term "blurring" may not be an apt description of the Upper Tribunal's observations in *Atholl UT* the FTT clearly understood the import of those observations. In this case the FTT appears to have deferred analysis of the hypothetical contract until after it determined the terms of the actual contract.

DISPOSITION

88. For the above reasons we find that there is no error of law in the FTT's decision. The appeal is dismissed.

JUDGE PHYLLIS RAMSHAW
JUDGE NICHOLAS PAINES

Release date: 05 April 2024