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UT (Tax & Chancery) Case Number: UT/2019/0000122

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Hearing venue: Rolls Building
Fetter Lane
London
EC4A 1NL

Heard on: 10 February 2025
Judgment date: 07 April 2025

INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS – IR35 – intermediaries legislation – FTT not entitled to make certain findings as to the terms of the hypothetical contract – material error of law – decision of FTT set aside and remade

BETWEEN

GEORGE MANTIDES LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE THOMAS SCOTT
JUDGE JONATHAN CANNAN

Representation:

For the Appellant: Michael Paulin, instructed by way of direct access

For the Respondents: Sadiya Choudhury KC, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against a decision of the First-tier Tribunal ("the FTT") released on 13 June 2019 ("the Decision"). 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 appellant received income 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 2013 to August 2013 and at MMH in the period 16 September 2013 to 21 October 2013.

2. HMRC determined that the income was liable to income tax and national insurance contributions. The determination regarding income tax and the decision regarding national insurance contributions were made by HMRC on the basis of the application 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.

3. Mr Mantides appealed to the FTT against the determination and decision. 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 the application for permission was submitted late and the FTT refused to extend time. A further application by HMRC to this tribunal to extend time was also refused.

4. As regards Mr Mantides' work at RBH, the FTT found that the circumstances were such that if his services 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 appealed that decision pursuant to permission granted by the FTT on the following grounds:

> (1) Ground 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;
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> (2) Ground 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) Ground 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.

5. There was a fourth ground, which was dismissed, and it is not necessary for us to make any further reference to it.

6. The appeal was heard in part in July 2021 and a decision of this tribunal (Mrs Justice Bacon and Judge Jonathan Cannan) was released on 11 August 2021 ("the UT Decision"). References below in the form FTT[x] are to paragraphs of the Decision, and references in the form UT[x] are to paragraphs of the UT Decision.

7. The Upper Tribunal held in the UT Decision that the appellant had established the errors of law set out in Grounds 1 and 2 of its appeal. Consideration of Ground 3 was deferred until

after the final determination of an appeal against a decision of the Upper Tribunal in *HM Revenue & Customs v Professional Game Match Officials Limited* [2020] UKUT 147 (TCC) ("*PGMOL*").

8. The judgment of the Court of Appeal in *PGMOL* was handed down on 17 September 2021. The taxpayer obtained permission to appeal to the Supreme Court, which handed down its judgment on 16 September 2024.

9. As stated above, this tribunal held in the UT Decision that the errors of law alleged in Grounds 1 and 2 were established. It concluded as follows at UT[59]:

> 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*…

10. Both parties served further written submissions following the judgment of the Court of Appeal, and further written submissions following the judgment of the Supreme Court. We are grateful to both counsel for their succinct written and oral submissions.

11. At UT[11] to [15] there is a summary of the FTT's findings of fact, including the FTT's findings at FTT[103] as to the terms of the hypothetical contract between Mr Mantides and RBH. The errors of law in Grounds 1 and 2 of the appellant's grounds of appeal were established in the UT Decision. When construed in light of the UT Decision, the RBH hypothetical contract must now be treated as comprising the following terms:

> (1) It would be for a fixed term.
>
> (2) It would be terminable early by either party without notice.
>
> (3) It would be for the personal services of Mr Mantides to work as a urologist grade SpR. Mr Mantides would have no right to provide another person to step into his shoes.
>
> (4) It would require Mr Mantides to provide the services notified to him by the weekly rota in facilities provided by the hospital.
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> (5) It would require Mr Mantides to be available for 10 half day sessions in each week. With the consent of RBH he could take holidays and miss occasional sessions.
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> (6) RBH would have no obligation to provide work to Mr Mantides.
>
> (7) RBH would pay Mr Mantides the agreed rates per hour worked.
>
> (8) Mr Mantides would attend the morbidity and mortality meetings.
>
> (9) There would be no entitlement to holiday pay, sickness pay or pension benefits.

THE DECISION

12. The FTT considered s 49 ITEPA 2003 and associated authorities as they then stood at FTT[68]–[101].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 ("*RMC*") which it described as follows at FTT[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.

13. We shall refer to these conditions as the first stage, the second stage and the third stage of the *RMC* test to determine whether a contract of employment exists. The FTT went on to consider subsequent authorities on the application of those three stages. We should point out that at the time of the Decision the authorities did not include *PGMOL* or any of the other authorities referred to below.

14. The FTT set out its findings in relation to the first stage and the second stage at FTT[104] to [110]:

> 104. Personal service: the contract would oblige Mr Mantides to provide his own work and skill. It would be a contract for his personal service. It is a pointer towards employment.
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> 105. Control: Mr Mantides would be subject to a measure of control by the hospital. It would not be control of all aspects of his work but some of his activities would be dictated in part by the hospital or to some degree supervised by it.
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> 106. He would be obliged to conduct the sessions in the mornings or the afternoons specified in the rota; he would have to deal with the patients on the list. This was a measure of control over what he did and when he carried out his work, but it points only weakly towards employment
>
> 107. He would be obliged to work in the rooms and theatres provided by the hospital. I see this however as only a weak indicator of control: those rooms were the only place his work with the hospital's patients could sensibly be conducted. A self-employed decorator is not subject to the relevant kind of control because he can only decorate the room he has contracted to paint.
>
> 108. Mr Mantides's work would not be closely supervised: he was not told how to deal with outpatients or how to operate. But in the case of an expert professional this does not seem to me to be a factor which points strongly away from the existence of employment. That is because the work of a professional employee will normally be overseen only "at a distance" by others, so that when problems arise corrective action is taken. I accept that there would be an accumulation of feedback from the other staff which would enable some monitoring of his work. The automatic referral of cancer patient management to the multidisciplinary team provided some measure of the kind of oversight which may in these circumstances be regarded as control.
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> 109. Taking these factors together I conclude that, although tight control was not exercised over what Mr Mantides did, the hospital would be entitled to exercise sufficient control to pass the irreducible minimum test in *Ready Mixed Concrete*. But overall I do not consider that the level of control points strongly towards employment.
>
> 110. Mutuality: there would in my view be sufficient mutuality of obligation to satisfy this condition. There would be an obligation to work and obligation to pay for the work done. There would be no obligation on either party to work or provide work or pay after the end of the contract nor would there be an absolute obligation on the part of the hospital to provide 10 half day sessions per week during the period of the contract. Those latter factors cast some doubt on whether this would have been an employment contract, but I have found it likely that the hospital would have been under a duty to use reasonable endeavours to provide those sessions during the period of the contract, and that, when taken with the obligations to work and to pay, is, in my view is sufficient to satisfy the requirement for mutuality and points towards employment.

15. It can be seen that when the FTT considered the first stage and the second stage, it noted whether each factor, namely the element of personal service, control and mutuality of obligation, was a pointer towards employment and if so whether it was a strong or weak pointer. It is clear that the strength of these factors was something which the FTT went on to consider

at the third stage. At the third stage it also considered "other factors" which it described at FTT[112] to [119]:

> 112. During 2013/14 Mr Mantides' services were provided through GML to three hospitals [The appellant was also engaged by Royal Shrewsbury Hospital in 2013-14]. The successive provision of services to different clients may point to the carrying on of a business on one's own account. The more engagement the stronger the pull: in *Hall v Lorimer* Mr Lorimer worked for 20 engagers under engagements often lasting no more than a day: that was a pointer to being in business on his own account. Mr Mantides' three longer engagements do not point to self employment.
>
> 113. Had the hospital sent Mr Mantides batches of patients to be seen and dealt with in his own consulting rooms and operating theatre, furnished with his own equipment and helpers, that would have been a strong pointer towards self-employment. But given the circumstance that what was plainly required by the hospital was only his skill and expertise applied to patients who came to the hospital and the fact that patients' records would be held on the hospital computer system, I find the fact that he used the hospital's equipment and helpers points only weakly towards employment.
>
> 114. Mr Mantides would bear the risk that his contract terminated early (albeit in my judgement on some notice) and of having to find new work. He would also bear the risk that the number of hours he worked each week would be less than 37½ (although that risk would be mitigated by the hospital's obligation to use reasonable endeavours to provide 10 sessions a week). He would negotiate his rates of pay. He would bear the costs of training and complying with GMC registration requirements and of travel and accommodation when away from home. Conversely he would receive the benefit when he worked longer hours. These factors point only weakly to self-employment: most are risks borne by a salaried employee.
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> 115. HMRC suggest that if he were engaged directly he would not need to bear the cost of insurance since he would be covered by the NHS indemnity scheme. However it seemed to me that the indemnity scheme applied only to employees of the NHS, and the notice explaining the scheme indicated that self employed doctors could not benefit from it. Thus only if he were employed would the absence of this cost point towards employment. Given that the MMH contact required GML to carry insurance I think that the better resolution of this circle is to assume that the direct contract also required insurance cover and that this cost would be borne by Mr Mantides. I do not think however that this adds greatly to the strength of the pointer towards self employment.
>
> 116. The instructions to "carry on as usual" in the Locum Booking Confirmation may indicate some integration with the hospital organisation as did the fact that Mr Mantides did some on call work at RBH, but I do not think that it could be said that Mr Mantides was part and parcel of the hospital's organisation. He neither trained nor managed others, and he would attend only one regular meeting. This consideration points weakly to employment.
>
> 117. I find that the degree of control that would *actually* be exercised over Mr Mantides is a neutral factor. In practice it appeared that he was told when and where but not how to work.
>
> 118. I have found it likely that the contract was terminable at least a week's notice. That is not an indication of self-employment.
>
> 119. The lack of any employee benefits points away from employment. Although the rate of pay was said to include holiday pay that was nevertheless only an element of pay for hourly work. It was not pay for not working.

16. The FTT then concluded at FTT[120]:

120. Taking all these factors together and standing back I conclude that had Mr Mantides' services been provided under a contract with RBH he would have been an employee (both on the income tax and the NI tests).

17. The FTT went on to consider the MMH Contract. It made findings at FTT[121] as to the terms of that hypothetical contract:

121. In my judgement the hypothetical contract between MMH 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 one day's notice on either side;

(3) it would be for the personal services of Mr Mantides to work as a urologist grade SpR, but permit a substitute to undertake the work if the agency, after consultation with the hospital (in which consultation the hospital had no veto) considered that the substitute was suitable on the basis of the hospital's usual criteria. (I do not consider that the warranty in clause 13.7 of the agreement between MMH and GML that the substitute be a director of the company can be reflected in the notional contract).

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

(5) it would require Mr Mantides (or the substitute) to be available for 10 half day sessions in each week

(6) MMH would have no obligation to provide, or try to provide, any sessions in a week.

(7) MMH would pay Mr Mantides the agreed rates per hour worked.

(8) Mr Mantides would attend the morbidity and mortality meetings.

(9) There would be no entitlement to holiday pay, sickness pay or pension benefits.

(10) Travelling time between the hospital's sites would be paid by MMH. Other travel and accommodation expenses would not be paid.

18. The FTT then went on to identify three material differences between the MMH Contract and the RBH Contract at FTT[122] and found at FTT[123] that, on balance, the MMH Contract was one of self-employment:

122. The circumstances of Mr Mantides's work for MMH differ in three material respects from those of his work for RBH:

(1) under the notional contract with MMH Mantides would have a right to send a substitute if that substitute was approved by the agency.

This right would not in my view be illusory: it could have been exercised and taken effect, and although its counterpart in reality was not exercised its existence would be a relevant pointer away from employment.

The qualified nature of the right, and the fact that Mr Best's evidence indicated that the hospital might have resisted its exercise convinced me that the contract could, just, be described as one for Mr Mantides's personal service, but the existence of the right points away from employment.

(2) The notional contract with MMH could be terminated on one day's notice. Whereas I found that at least a week's notice that had to be given under the RBH contract, one day's notice is almost illusory and does not point to employment.

> (3) The notional contract with MMH would have contained no obligation on MMH to try to provide either 37½ hours or 10 half day sessions in a week. There would not have been even a qualified obligation to provide work. That points away from employment.
>
> 123. In other respects, the circumstances of the MMH engagement would be the same as those of the RBH engagement, and I reach the same conclusion as to the import of the other relevant factors as I do in relation to RBH. But standing back and looking at those factors together with the three noted above I find that the balance lies on the side of self-employment (both as regards the income tax and the NI tests).

19. The FTT therefore dismissed the appeal in relation to sums paid under the RBH Contract and allowed the appeal in respect of sums paid under the MMH contract.

GROUND 3

20. We must now consider what effect the errors of law identified in the UT Decision have for the purposes of Ground 3. Ground 3 asserts that the errors of law pursuant to Ground 1 and Ground 2 caused the FTT to err in law in concluding that the RBH hypothetical contract was a contract of employment.

21. It is important to note in this context that at UT[20] – [30], the appellant was refused permission to add a further ground of appeal alleging that the FTT erred at the third stage in concluding that the other provisions of the RBH hypothetical contract were consistent with a contract of employment. It was granted permission in so far as necessary to amend or clarify Grounds 2 and 3 so as to encompass not only an allegation that the FTT's conclusion was not available to it on the evidence, but also an argument that the FTT erred in law in finding that there was mutuality of obligation.

22. In the circumstances, the appellant does not have permission to challenge the FTT's approach to the third stage, save as regards the errors of law found (in the UT Decision) to have been made in relation to two matters taken into account by the FTT at the third stage. The first error was that the FTT took into account a notice period of one week. The second was that the FTT took into account an obligation on RBH to use reasonable endeavours to provide Mr Mantides with 10 half hour sessions of work per week. In fact the RBH hypothetical contract could be terminated without notice and there was no obligation on RBH to provide any work to Mr Mantides. We must consider the effect of these errors on the FTT's overall finding at the third stage that the RBH hypothetical contract was a contract of employment.

23. The appellant's case, as set out in Mr Paulin's further written submissions and orally, is that the FTT's errors under Grounds 1 and 2 led it to err in its consideration of mutuality of obligation at the third stage.

AUTHORITIES SINCE THE DECISION

24. There have been a number of authoritative decisions of the Upper Tribunal and the higher courts since the FTT Decision. Most notably, the Supreme Court in *PGMOL (HMRC v Professional Game Match Officials Ltd* ([2024] UKSC 29)) confirmed at [30] that (1) at the first and second stages of the RMC test, mutuality of obligation and control are necessary, but not necessarily sufficient conditions for a contract of employment, and (2) at the third stage, it is necessary to consider all the terms of the contract and all the surrounding circumstances in determining whether or not the contract is a contract of employment.

25. Lord Richards, with whom the other Justices agreed, explained what is meant by mutuality of obligation as follows:

> [40] It is an essential element of a contract of employment that the employee provides his or her personal service for payment by the employer. This requirement has been variously

> described, for example as 'the wage-work bargain': see *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, para 48 (EAT, Langstaff J). This perhaps more clearly pinpoints its focus than the usual but bland term 'mutuality of obligation', which could be applied to all bilateral contracts of any description. However, in this case, as in many others, it has been adopted as the label for the first prerequisite of any contract of employment and, with some reluctance, I shall also use it.

26. The Supreme Court rejected a submission by PGMOL, recorded at [43], that mutuality of obligation involves more than merely payment in return for personal work, but requires an obligation on the engager to provide work or payment in lieu of work. The cases relied on by PGMOL in support of that submission were cases where the courts were considering successive assignments and the claimant was seeking to establish an overriding or umbrella contract to show continuing employment between the assignments. Lord Richards stated at [49], [50] and [55]:

> [49] None of these authorities establishes that, where there is a single engagement (such as officiating at a particular match), there must be mutual obligations in existence before the engagement commences, for example before the referee arrives at the ground on the day of the match. On the contrary, there are authorities that establish the contrary. In *Clark v Oxfordshire Health Authority*, immediately following the passage quoted above, Sir Christopher Slade said, 'I can find no such mutuality subsisting during the periods when the applicant was not occupied in a "single engagement" '.
>
> [50] The point is made in clear and direct terms in a number of authorities that a contract of employment may exist covering only the period while the employee carries out work for which he or she is paid.
> …
>
> [55] In the light of these authorities, it is clearly established that there may be sufficient mutuality of obligation to satisfy one of the essential requisites of a contract of employment, even if the obligations subsist only during the period while the putative employee is working for the putative employer…

27. The Supreme Court rejected an argument that the right to terminate an engagement without penalty negated the existence of mutuality of obligation at the first stage. However, it did accept that this was a factor, albeit one amongst many, that would be relevant at the third stage. It also held that at the third stage it is not just the existence of mutuality of obligation that is relevant, but also the nature and extent of the mutual obligations:

> 59. In my judgment, the right to terminate is irrelevant at the first stage of determining whether there exists the mutuality of obligation required for a contract of employment. Where there exist the necessary mutual obligations under the contract, as was the case with each engagement to officiate at a match, and the contract remains in place, it satisfies the condition of mutuality. Mr Peacock's submission that it did not greatly matter whether this point came in at the first or third stage overlooks that, if it did come in at the first stage and was held to be decisive on the facts of the particular case, the contract in question could not be one of employment. By contrast, if it is a relevant factor at the third stage, it is just one of many factors that may be relevant to determining the nature of the contract.
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> 60. I do, however, accept that the nature and extent of the mutual obligations are relevant to determining whether the contract is one of employment.

28. *PGMOL* was not concerned with IR35, but the Supreme Court endorsed the approach taken by the Court of Appeal in *HM Revenue & Customs v Atholl House Productions Limited*

[2022] EWCA Civ 5 ("*Atholl House*") in applying the *RMC* test in the context of IR35. In *Atholl House*, the Court of Appeal held that the Upper Tribunal had erred in law at the third stage when it came to remake the decision of the FTT in that case. It noted at [126] that the Upper Tribunal had accepted the FTT's findings that Ms Adams (the service provider) had throughout her career carried on her profession as an independent contractor and that her activities as such included activities similar to those she performed for the BBC under the relevant hypothetical contract. The test which the Upper Tribunal had set itself was whether there was "*some relevant difference between the activities undertaken for the BBC and those performed as an independent contractor*". Unless there was some such difference, the Upper Tribunal had decided, Ms Adams would be performing her services under the hypothetical contract with the BBC as an independent contractor.

29. The Court of Appeal held that this was the wrong approach for various reasons. An individual could perform similar services as an employee and as an independent contractor in the same tax year. What was important was the capacity in which and the terms on which the services were carried out. The fact that the individual performed similar services as an independent contractor was a relevant fact, if known to the putative employer, but nothing more than that (see [128)]. Additionally, the terms and circumstances of other engagements could not be held up as a "gold standard" against which the contracts with the BBC were to be judged (see [129]).

30. Finally we note the Upper Tribunal decision in *HM Revenue & Customs v S & L Barnes Limited* [2024] UKUT 262 (TCC). In that case, the Upper Tribunal gave guidance at [105] – [108] as to the approach that a tribunal should take at the third stage. This included the following guidance at [108(3)] and [108(6)]:

> (3) In terms of the structure of the analysis, while there is no template, an approach which involves identifying and dividing material provisions of the hypothetical contract and other circumstances between those which point towards (or are, in the *RMC* terminology, consistent with) employment, those which are not, and those which are neutral, may minimise any risk that the analysis proceeds from the wrong starting point or strays too far from the statutory question.
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> …
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> (6) In considering the Third RMC Stage, no single factor is decisive. It is not a mechanical exercise of running through items on a checklist, but rather is about painting a picture from an accumulation of detail and then standing back to make an informed qualitative assessment…

31. In fact, the FTT in the present case adopted a similar approach.

DISCUSSION

32. Mr Paulin's principal submission was that taking into account the errors made by the FTT on Grounds 1 and 2, the RBH hypothetical contract was indistinguishable from the MMH hypothetical contract which the FTT had found was not a contract of employment. It had now been established in the UT Decision that the RBH hypothetical contract contained no provision for notice and no obligation for RBH to use reasonable endeavours to provide Mr Mantides with work. As such, the only material point of difference between the two hypothetical contracts was the existence of a qualified right of substitution in the MMH contract. Mr Paulin said that in both cases the FTT had found that there was the requisite obligation to provide personal service and he described the difference between the two hypothetical contracts as

"vanishingly small". In order to ensure consistency and legal certainty, he argued, we should therefore set aside the decision of the FTT in relation to payments under the RBH contract and remake the decision so as to allow the appellant's appeal.

33. We do not consider that is the correct approach. We agree with Ms Choudhury that it is not appropriate for the purposes of Ground 3 to simply compare the position in relation to the RBH hypothetical contract with the FTT's findings in relation to the MMH hypothetical contract. We are concerned solely with an appeal against the decision of the FTT in relation to RBH. Whilst similar services were supplied by Mr Mantides on similar terms it is necessary to focus on the terms of the RBH hypothetical contract in determining the status of that contract. It serves no purpose to explore the FTT's decision in relation to the MMH payments when the focus must be on its decision in relation to the RBH payments. That is especially the case when the authorities in this area have moved on since the Decision.

34. The appellant's approach in our view involves the same sort of error that the Court of Appeal in *Atholl House* identified on the part of the Upper Tribunal at [126] – [129]. We do not accept Mr Paulin's attempt to distinguish *Atholl House* in that respect. Ultimately, Mr Paulin accepted during the course of oral submissions that it was not appropriate to determine the status of the RBH hypothetical contract by reference to the FTT's findings in relation to the MMH hypothetical contract.

35. Mr Paulin's alternative submission was that the absence of a notice period and the absence of any obligation on RBH to provide work to Mr Mantides were strong factors pointing away from employment. If the FTT had correctly taken those factors into account at the third stage then its decision might have been different and we should therefore set aside the FTT Decision and remake it.

36. It was common ground (as Mr Paulin confirmed in the hearing) that the errors of law established in Grounds 1 and 2 did not mean that there was no mutuality of obligation at the first stage. Nor was there any issue as to the existence of a sufficient framework of control at the second stage. Mr Paulin also acknowledged that he did not have permission to challenge any of the FTT's findings of fact or its evaluative findings at the third stage. However, he submitted that taking into account the errors of law and the FTT's other findings we should remake the Decision and find that the RBH hypothetical contract was not a contract of employment.

37. In the UT Decision, the Upper Tribunal stated as follows at UT[51] and [52] in relation to the two errors:

> 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.
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> 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.

38. In our view, the errors of law identified were material errors in the sense that they *might* have made a difference to the FTT's ultimate conclusion as to the nature of the RBH

hypothetical contract. We agree with Ms Choudhury that the error in Ground 1 would not in itself have been sufficient to make any difference to the FTT's decision. However, the error in Ground 2 and the two errors taken together do lead us to conclude that those errors might have made a difference to the FTT's decision. As such we should exercise our discretion to set aside that part of the Decision and we will remake the decision (in accordance with the approach set out by Henderson LJ in *Degorce v HM Revenue & Customs* [2017] EWCA Civ 1427 at [95]).

39. As noted above, the case put by Mr Paulin was that as a result of the FTT's errors under Grounds 1 and 2, it erred in its analysis of the strength of mutuality of obligation at the third stage.

40. Mr Paulin relied on the FTT's error under Ground 1 in finding that the RBH hypothetical contract contained a term that it was terminable on one week's notice. It is clear from *PGMOL* at [59] that the right to terminate a contract is irrelevant at the first stage in relation to the existence of mutuality of obligation, but may be a relevant factor for consideration at the third stage.

41. In the course of its analysis at the third stage, the FTT stated at FTT[118] that a contract terminable on one week's notice was not an indication of self-employment. We are satisfied that the FTT thereby erred in law. It ought to have taken into account that the RBH hypothetical contract was terminable without notice. This was not in the context of mutuality of obligation, but in its consideration at the third stage of the terms of the hypothetical contract and all the circumstances of the case. In our view it is a factor which points against employment. However, it is a weak factor in the context of a relatively short, temporary engagement.

42. Mr Paulin also relied on the FTT's error under Ground 2 in finding that RBH had an obligation to use reasonable endeavours to provide Mr Mantides with 10 half day sessions in a week. Mr Paulin accepted that on the authority of *PGMOL* the absence of such an obligation did not mean that there was no mutuality of obligation at the first stage. However, he submitted that the extent of the mutuality of obligation was thereby reduced. Relying on *PGMOL*, he submitted that the FTT ought to have taken into account at the third stage the reduced extent of the mutual obligations.

43. At FTT[114], the FTT noted that Mr Mantides bore the risk of his contract being terminated early and that he could be provided with less than 37 ½ hours work per week. It treated these as factors which pointed weakly to self-employment.

44. We are satisfied that the FTT erred in law in failing to take into account the true extent of the mutual obligations under the RBH hypothetical contract. It failed to take into account that whilst there was mutuality of obligation in the sense of a wage-work bargain, there was no obligation whatsoever on RBH to provide Mr Mantides with work. However, we do not consider that the absence of an obligation to provide work significantly increased the strength of the factors pointing towards self-employment. The fact that there was no obligation on RBH to provide work, or to use reasonable endeavours to provide work, reflects the fact that the contract was terminable without notice. Whilst the combination of those two factors points against employment, they are not particularly strong pointers in the context of a relatively short, temporary engagement.

45. The FTT found at FTT[104] that the RBH hypothetical contract was a contract for Mr Mantides' personal service which was a pointer towards employment. It found at FTT[105] – [109] that Mr Mantides was subject to a sufficient measure of control but not such that pointed strongly towards employment. The FTT also considered and evaluated other factors at FTT[112] – [119].

46. Save in relation to Grounds 1 and 2, there has been no challenge to the FTT's findings or its evaluative judgment in relation to those findings. At one stage during his submissions, Mr Paulin did seek to criticise the FTT's evaluative judgment in relation to some of its other findings. However, he acknowledged that he was not seeking to re-open the FTT's evaluative exercise at the third stage other than in relation to Grounds 1 and 2. In remaking the decision, we shall therefore adopt the FTT's findings and its evaluative judgments at the third stage, save in relation to the errors of law identified in Grounds 1 and 2. In doing so, it should not be assumed that we would necessarily have attached the same significance and weight as the FTT attached to these factors if we had been considering the third stage entirely afresh.

47. The RBH hypothetical contract was a contract for personal service which the FTT found was a pointer towards employment: FTT[104]. Unlike the MMH Contract, which would have contained a limited right of substitution, the RBH Contract would have been for the personal services of Mr Mantides, and there would have been no right of substitution: FTT [103(3)].

48. There was a sufficient framework of control for that contract to be an employment contract and there was mutuality of obligation in the sense of a wage-work bargain.

49. We have set out above our view as to the significance of the right to terminate the RBH hypothetical contract without notice and of the absence of any obligation on RBH to provide work to Mr Mantides. In addition, we adopt the following evaluative judgments of the FTT:

(1) While successive engagements may in some cases point to the carrying on of a business on one's own account, in this case the existence of three separate engagements in 2013-14 does not point to self-employment (see FTT[112]).

(2) The fact Mr Mantides used the hospital's equipment and staff points only weakly to employment (see FTT[113]).

(3) The fact that Mr Mantides negotiated his rates of pay, bore the cost of training and complying with GMC registration requirements and of travel and accommodation when away from home, and would receive the benefit when he worked longer hours, point only weakly to self-employment (see FTT[114]).

(4) The fact Mr Mantides bore the cost of insurance cover does not add greatly to the strength of the pointers to self-employment (see FTT[115]).

(5) There was some integration with the hospital organisation, which points weakly to employment (see FTT[116]).

(6) The degree of control actually exercised over Mr Mantides was a neutral factor (see FTT[117]).

(7) The lack of any employee benefits points away from employment (see FTT[119]).

50. We must now stand back and consider all the terms of the RBH hypothetical contract and all the circumstances. Taking into account the errors identified above, together with the FTT's other findings, on balance we are satisfied that the RBH hypothetical contract was a contract of employment. We therefore remake that part of the FTT Decision accordingly. Whilst we have set aside the decision of the FTT in relation to payments to the appellant from RBH, we are satisfied that the FTT ultimately came to the right conclusion.

CONCLUSION

51. For the reasons given above, we are satisfied that the errors of law identified by the appellant in Ground 1 and Ground 2 were material errors of law and that we must set aside the

decision of the FTT. We have re-made the decision and for the reasons given above we are satisfied that the RBH hypothetical contract was a contract of employment. We therefore dismiss the appellant's appeal against HMRC's determination for income tax purposes and against HMRC's decision for national insurance purposes.

THOMAS SCOTT **JONATHAN CANNAN**

UPPER TRIBUNAL JUDGES

Release date: 07 April 2025