Employment

IR35 and employment status – restating the importance of the contract?

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In *Kickabout Productions Ltd v HMRC* [2022] EWCA Civ 502 (Kickabout) and *HMRC v Atholl House Productions Ltd* [2022] EWCA Civ 501 (Atholl House), the Court of Appeal considered for the first time the application of the intermediaries legislation (commonly known as IR35). In the first of two blogs on IR35 and employment status, Marianne Tutin examines the Court of Appeal judgments and sets out her view as to whether they alter the common law test of employment.

The IR35 provisions concern the taxation of income arising out of the provision of a worker's services through a third party, typically a personal service company (PSC). The key issue for the First-tier Tribunal (FTT) to determine is whether the hypothetical direct contract between the end user and worker would have been a contract of service. In making this determination, the FTT must have regard to, but is not limited to considering, the terms of the actual contractual arrangements between the end user and PSC.

Facts

In *Kickabout*, the services of Paul Hawksbee were provided by his PSC, Kickabout Productions Limited (KPL), under contracts with Talksport Limited (Talksport) as a co-presenter on Talksport Radio's 'Hawksbee & Jacobs Show', a three-hour radio programme broadcast every weekday from 1pm to 4pm. HMRC decided that IR35 applied to the arrangements and KPL was liable to pay income tax and National Insurance contributions (NICs) in respect of the earnings under those contracts during the 2012/13 to 2014/15 tax years.

The FTT allowed KPL's appeal against those determinations. The judge (using his casting vote) found that the hypothetical contracts between Talksport and Mr Hawksbee would not have been contracts of service, applying the three-stage test from *Ready Mixed Concrete v Minister for Pensions and National Insurance* [1968] 2 QB 497 (*RMC*). The judge found that whilst there was sufficient mutuality of obligation and a framework of control, Talksport was not under any obligation to provide work to Mr Hawksbee, which pointed away from a relationship of employment.

The Upper Tribunal (UT) allowed HMRC's appeal against the FTT's decision. The UT concluded that, correctly interpreted, the actual contracts imposed an obligation on Talksport to provide at least some work to KPL for Mr Hawksbee to co-present. Given the FTT's erroneous interpretation was highly material to its overall decision, the UT set aside the decision and re-made it, finding that the hypothetical contracts would have been of service.

In *Atholl House*, the services of Kaye Adams were provided via her PSC, Atholl House Productions Limited (AHPL), to the BBC as a presenter on BBC Radio Scotland's 'The Kaye Adams Programme'. Again, HMRC decided that IR35 applied to the arrangements and AHPL was liable to pay income tax and NICs in respect of earnings under those contracts during the 2013/14 to 2016/17 tax years.

The FTT allowed AHPL's appeal against the determinations for the 2015/16 and 2016/17 tax years (HMRC had not opposed the appeal in respect of the two earlier tax years). The FTT found that the hypothetical contracts between the BBC and Ms Adams would not have been contracts of service, applying the three-stage RMC test. Whilst there was

sufficient mutuality of obligation and a framework of control, it found there were a number of features of the contracts which would not be consistent with them being of service.

On appeal, the UT concluded that the FTT had erred in its application of *Autoclenz Ltd v Belcher* [2011] UKSC 41 (Autoclenz) in construing the terms of the actual contract between the BBC and AHPL, which meant it erroneously omitted several material terms from the hypothetical contracts. The UT set aside the FTT's decision and re-made it, but found that Ms Adams would have entered into the hypothetical contracts with the BBC in business on her account and so they were not contracts of service. Therefore, the appeal was dismissed.

Court of Appeal judgments

KPL and HMRC brought appeals against the UT's decisions in *Kickabout* and *Atholl House* respectively. The same constitution of the Court of Appeal heard the appeals in consecutive weeks.

In *Kickabout*, the Court of Appeal concluded the UT had not erred in construing the nature of the obligations under the actual contractual arrangements. At [59], Sir David Richards (giving the lead judgment in both matters) explained that the effect of KPL's argument that Talksport was under no obligation to provide work was that Mr Hawksbee's ability to earn money would depend wholly on Talksport's discretion; he would not be able to work full time, or anything approaching it, for other clients or employers, which is contrary to business common sense. There was a solid basis for concluding Talksport was obliged to offer work. At [67], he held alternatively that he would have implied a term for Talksport to provide at least some work to KPL in a contract for piecework on grounds of business efficacy.

The Court of Appeal also concluded that the UT had not erred in its approach to considering the framework of control or 'multi-factorial assessment' at the second and third stages of the *RMC* test. As to the former, Sir David Richards held, at [87], that the right to control the content of the programmes was highly material and gave Talksport more control over the provision of Mr Hawksbee's services than e.g. a hospital trust has over the provision of the services of its surgeons.

In *Atholl House*, the Court of Appeal concluded that the UT erred in its approach to the third stage of the *RMC* test, namely by its singular focus on whether Ms Adams was in business on her own account and the factors which UT had considered (or failed to consider). In reaching this conclusion, Sir David Richards undertook a wide-ranging review of the authorities in respect of the test of employment, noting at [60] the disadvantages of having multiple legal tests which could lead to different results.

In considering the correct approach to the issue of employment status, Sir David Richards held, at [71], that mutuality of obligations and a right of control are necessary "*pre-conditions*" of employment, following which the consistency of the terms of a contract with a relationship of employment need to be considered. However, he noted at [76] that the extent of any right of control could be considered again at the third stage of the *RMC* test, which is 'multi-factorial' assessment.

Sir David Richards recognised, at [123], that "*the more difficult question*" was what limit there is on the choice of factors in the multi-factorial assessment. He held at [124] that if the worker is known to carry on business on their own account, it would be "*myopic*" to ignore it and the weight to be attached to it is a matter for the decision-maker. However, he held at [130] that any other engagements had to be "*known or reasonably available*" to the end user if they are to be taken into account and confirmed the terms of the engagement with the end user "*remain central*" to the enquiry.

The Court of Appeal also rejected the cross-appeal brought by AHPL, which argued that the FTT had not erred in its application of *Autoclenz* in construing the terms of the actual contract between the BBC and AHPL. Sir David Richards held that the purposive approach to construction outlined in *Autoclenz*, expanded in *Uber BV v Aslam* [2021] UKSC 5 (*Uber*), did not apply in IR35 appeals. At [156], he held that the justification for the approach outlined in *Autoclenz*/*Uber* (i.e. the protection of workers' rights) was entirely absent in the present case. Therefore, the FTT was not entitled to construe the contractual arrangements as it had done.

The Court of Appeal decided to remit the question of whether the hypothetical contracts were ones of service to the UT. Neither the FTT nor the UT had correctly considered the terms of the hypothetical contracts and their effects, and the circumstances in which such contracts would have been made, such that the Court was unable to re-make the decision.

Comment

The Court of Appeal judgments include many interesting comments regarding the common law test of employment and its application to IR35 appeals. The judgments reinforce the importance of a singular, unified test of employment status (albeit that different approaches to construction are to be adopted, depending on the statutory context).

The terms of the contractual arrangements and their effects remain of central importance, although wider factors may be considered at the third stage of the *RMC* test, provided that information is known or reasonably available to the contracting parties. It remains interesting to see how courts or tribunals will grapple with determining whether there is a sufficient framework of control at the second stage of the *RMC* test, but assess the extent of such control at the third stage.

In the context of IR35 appeals, it will be difficult for parties to argue that written terms of the actual contracts should be disregarded as a 'sham' in the *Autoclenz* sense. Such an approach is markedly different from how employment tribunals consider the issue of employee or worker status. However, that does not prevent parties from construing contracts realistically or considering facts outside of the contractual arrangements in determining the terms of the hypothetical contracts.

In our second blog on IR35 and employment status, Harry Sheehan provides his view of the effect of the Court of Appeal judgments and the extent to which they alter the way in which practitioners should approach cases involving employment status.

Marianne Tutin practises all areas of employment law and industrial relations. She has considerable experience of high-value and complex tribunal litigation acting for both claimants and respondents, as well as substantive appeals, in which she has appeared unled against leading employment silks. She is ranked as an Up & Coming Junior by Chambers UK and as a Rising Star by Legal 500.

Marianne appeared for HMRC in *Kickabout* and *Atholl House*, led by Christopher Stone in both appeals and Akash Nawbatt QC in the *Kickabout* appeal. Georgia Hicks and Harry Sheehan, led by Jonathan Peacock QC (11 New Square), represented Kickabout Productions.

Nothing in this post represents legal advice or the views of the parties in the litigation.