Employment

Kickabout and Atholl House – changing the landscape of employment status

Posted on 26 May, 2022 by | Harry Sheehan

In both *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 the application of the intermediaries legislation, commonly known as IR35. In part 2 of this blog, Harry Sheehan gives his view of the effect of the Court of Appeal's judgments, and the extent to which they alter the way in which practitioners should approach cases involving employment status and provide scope for novel arguments to be run in future cases.

In part 1 of this blog, Marianne Tutin addressed the Court's judgments in *Kickabout* and *Atholl House*, summarising the facts and outcomes of both cases. This article does not restate that background but takes a closer look at the consequences of the judgments for future cases. References to paragraphs are to paragraphs in the Court of Appeal decisions (citations above), unless otherwise indicated.

The three most important points from the decisions are as follows: (1) the scope and application of *Autoclenz* in the tax context; (2) the status and scope of the business on own account test; and (3) the correct application of the *Ready Mixed Concrete* test.

Construing contracts of employment and the application of *Autoclenz* and *Uber*

In *Autoclenz Ltd v Belcher* [2011] UKSC 41 (*Autoclenz*) the Supreme Court found that terms in a contract between "valeters" and Autoclenz did not represent the true agreement between the parties, but without finding that those terms were a sham or by seeking to rectify the contract. In cases where the parties were of unequal bargaining power, the Supreme Court found that the court's role was to "ascertain the true agreement between the parties", conscious that "armies of lawyers" could seek to insert clauses to insert clauses denying any obligation to provide work in employment contracts even where such terms did not reflect the real relationship between the parties (see paras 25 and 26, endorsing the comments of Elias J as he then was). *Autoclenz* was recently applied by the Supreme Court in *Uber BV v Aslam* [2021] UKSC 5 (*Uber*) and Lord Leggatt explained that the justification for the approach adopted in *Autoclenz* was that a different approach should be taken where the primary question is actually one of statutory interpretation rather than contractual interpretation.

Uber and *Autoclenz* were relied on in both *Kickabout* and *Atholl House*. In *Kickabout*, HMRC relied on *Uber* to argue that clauses in Kickabout's service contracts stating that they were not contract of employment should be ignored (see para 96). In *Atholl House* the taxpayer adopted a similar approach in arguing that the First-tier Tribunal had been right to find that the terms of the written contracts between Atholl House and the BBC did not reflect the actual agreements between the parties (para 53). In both cases, those arguments were rejected (see para 96 of Kickabout and para 159-160 of Atholl House). Sir David Richards (who delivered the leading judgment in both cases) explained in *Atholl House* that it was not a case which raised any issue of statutory construction, and that in those circumstances it was not legitimate to apply the *Autoclenz* approach (para 156 of *Atholl House*).

Following *Atholl House* and *Kickabout*, it will be difficult for either party in an IR35 case to argue that terms of a written contract should be disregarded by applying the approach in *Autoclenz* and *Uber*. This is a development that can cut both ways: it is common for service contracts to include terms excluding any obligation to provide work or allowing an

unfettered right to substitute. Following *Kickabout* and *Atholl House*, it will be more difficult for HMRC to argue that such clauses can be disregarded on the basis that they do not reflect the true agreement between the parties. Similarly, however, the same reasoning may cause difficulties for taxpayers who seek to disregard terms, such as exclusivity clauses that point towards employment, such as the clause that was present in in *Atholl House* (see paras 15-17) – even where they might never be operated in practice.

Uber is still a fairly recent decision, and there appears to be uncertainty as to when the approach Lord Leggatt took is apposite (as both HMRC and Atholl House sought to apply it in the context of the IR35 provisions). We know from *Uber* that a purposive approach is to be taken to determining worker status under inter alia section 230(3) of the Employment Rights Act 1996 and *Kickabout* and *Atholl House* suggest that such an approach should not be taken to the determination of employee status under the hypothetical contract postulated by the IR35 provisions, but it remains to be seen how far the *Uber* approach can be taken and in what other contexts it may be relevant. Could there, for example, be scope for a purposive approach when dealing with questions of continuous employment under the Employment Rights Act 1996 where the court or tribunal has to determine at what time the putative employee's relations were "governed by a contract of employment" for the purposes of section 212?

Moreover, Sir David Richards based his conclusion on the fact that both parties agreed that the statutory context in Kickabout and Atholl House gave no special meaning to the term employee. In *Atholl House* he said, *"[b]oth sides agreed that the statutory context gave no special meaning to the term "employee". This is not therefore a case which raises any issue of statutory construction of a term such as "worker"…"* (at para 156). This may not be agreed in future cases, particularly given the consequence that agreement had in Kickabout and Atholl House, and there may be arguments that the statutory context is relevant to the meaning of "employee" even though the common law test for employment applies.

***Hall v Lorimer* and the business on own account test**

The most authoritative test for employment status can be found in case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (*RMC*) which gives the well-known three-stage test. The first two stages ask whether the contract contains sufficient "mutuality of obligation"[1] and whether the putative employer had a sufficient right of control over the putative employee. The third stage is at one point described in *RMC* as whether "*'[t]he other provisions of the contract are consistent with its being a contract of service."* It is common for parties seeking to dispute employment status to rely on *Hall v Lorimer* [1992] 1 WLR 939 for the principle that the third stage of the *RMC* stage requires an extremely broad factual enquiry.

In *Atholl House*, the parties disagreed as to the proper application of *Hall v Lorimer.* HMRC submitted that the factors the court or tribunal could take into account were limited to the express and implied term of the contract under which the putative employee was engaged (see para 58), and their effect. More broadly, HMRC argued that recent authorities had established the 'primacy' of the *RMC* test over the approach expounded in *Hall v Lorimer* (para 59). The Court of Appeal rejected HMRC's submissions. Sir David Richards concluded that there was no dichotomy between the *RMC* test and the approach in *Hall v Lorimer*, and the factors to which a court or tribunal could have regard was not confined to the terms of the contract and the effect of those terms (*Atholl House* at para 61 and 122).

The Court of Appeal's decision endorses a more expansive test for employment status, and one which allows the court or tribunal to consider more potentially relevant factors than the restrictive approach HMRC contended for. Naturally, a broader test gives more scope for creativity when preparing cases. As the taxpayer will generally have a more complete understanding of the working relationship between the putative employer and employee, as well as the background of the putative employee's professional life and background, this may be advantageous to a well-prepared taxpayer.

This is subject to two notable caveats. The first is that a broader test can, in some cases, assist HMRC as well. This was the case in *Kickabout*, for example, where the Upper Tribunal had regard to the fact that 90% of Mr Hawksbee's income during the years under appeal had been obtained from Talksport (see paras 9(2) and 63).

The second is that the Court of Appeal placed clear limits on what factors can be relevant. Sir David Richards stated that, *"it is a relevant fact, if known or reasonably available to the putative employer, that the individual performs similar services as an independent contractor, but it goes no further than that."* (*Atholl House* para 128). Similarly, Lord Justice Arnold stated, *"[i]t also follows that a factual circumstance not known or reasonably available to one party… cannot be taken into account."* (Atholl House para 170). Taxpayers who seek to rely on matters outside the content and effect of

the terms of the contract must be prepared to establish that those matters were known and/or reasonably available to both parties and should expect this to be robustly contested by HMRC where the evidence is not compelling.

Control and Mutuality of Obligation at the third stage of the RMC test

As alluded to above, *RMC* describes a three-stage test: there must be sufficient mutuality of obligation, a sufficient framework of control, and the contract as a whole must not be inconsistent with a contract of service. This broad-textured third stage is described in *Hall v Lorimer*. In both *Kickabout* and *Atholl House*, however, it was HMRCs' case that mutuality of obligation and control were only relevant at the first and second stages respectively and could not be taken into account at the third stage (see *Atholl House* para 76). This submission was rejected by the Court of Appeal, with Sir David Richards stating that, *"I can think of no good reason why account should not be taken of these differences in what all agree is a multi-factorial process addressing all the relevant factors."* (see also *Kickabout* at para 105).

Again, as with the Court of Appeal's endorsement for the *Hall v Lorimer* approach, this conclusion may favour the taxpayer in some disputes and HMRC in others. On balance, however, it is a development that is positive for taxpayers. There are cases that point towards the requirements at the first and second stages of RMC being relatively modest. For example, it is established that what matters at the second stage is the right of control, not how or if the right is exercised and also that an employer may be expected to have little control over highly skilled people while still maintaining a sufficient framework of control (see para 84 of *Kickabout*). Following *Kickabout* and *Atholl House*, a putative employer may have just enough control to pass through the second *RMC* stage, but still have a sufficiently limited right of control that it is a factor that weighs against employee status at the third stage. That was what the First-tier Tribunal found to be the case in *Kickabout,* and the Court of Appeal considered this possibility at para 89.

There are, however, circumstances in which the degree of control may assist HMRC at the third stage. In cases where the putative employer exercises particularly pervasive control over the employee, an attempt to rely on other factors of the employment relationship that point away from employment (such as the degree of economic risk undertaken by the putative employee, or their provision of their own tools) may be unpersuasive.

HMRC also relied upon *Weight Watchers (UK) Ltd v HMRC* [2012] STC 265 for the proposition that stage 3 of the *RMC* test included a prima facie conclusion in favour of a contract of employment if the first and second conditions are satisfied. HMRC argued that this was because of the importance of mutuality of obligation and control. Sir David Richards rejected this submission as well, although he noted that the court or tribunal would have to analyse the terms of the contract in any event (*Atholl House* para 75, see also *Kickabout* para 104). He cautioned against both putting a gloss on the words of MacKenna J in *RMC* and against treating his test as a statute (at paras 113 and 72 of *Atholl House* respectively). This is certainly a positive development for taxpayers.

Conclusion

This article has considered three aspects of the Court of Appeal's decisions in *Kickabout* and *Atholl House*, but there is certainly more to each judgment and they are likely to become essential reading for every practitioner who regularly acts in cases where employment status is disputed.

---

[1] That term was not used in *RMC* but is commonly used in more recent cases. See for example the recent case of *Professional Game Match Officials Ltd v HMRC* [2021] EWCA Civ 1370.

Harry Sheehan has a broad practice covering all areas of employment law. He is regularly instructed to appear at both preliminary and final hearings in the Employment Tribunal and acts for both claimants and respondents. Harry has also received instructions in the Employment Appeal Tribunal and is comfortable with complex appellate litigation.

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

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