



Appeal number:TC/2016/04992

***INCOME TAX AND NATIONAL INSURANCE – intermediaries legislation
– IR35 – sections 48-61 ITEPA 2003 – personal service company – if the
services were provided by the worker directly to the client, would there be a
contract of employment – expenditure reimbursed by appellant to employee
– whether tax relief available – appeal dismissed in principle***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CHRISTA ACKROYD MEDIA LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR NIGEL COLLARD**

Sitting in public in Leeds on 26-28 September 2017

Mr Grant Summers of Grant Thornton UK LLP for the Appellant

**Mr Adam Tolley QC and Mr Christopher Stone instructed by HM Revenue &
Customs Solicitor's Office and Legal Services for the Respondents**

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DECISION

Background

1. Christa Ackroyd is a television journalist who has been engaged in a variety of media roles since the 1970's. She co-presented a daily news digest known as "Calendar" for Yorkshire Television between 1990 and 2001. In 2001 she moved to present "Look North" on BBC1 which she continued to do until 2013. Ms Ackroyd worked at the BBC pursuant to two fixed term contracts between the BBC and the appellant, Christa Ackroyd Media Ltd ("CAM Ltd"). The first contract was dated 29 May 2001 and was followed by a later contract dated 4 May 2006 ("the Contract"). The Contract was terminated by the BBC on 28 June 2013.

2. This appeal is specifically concerned with the Contract. CAM Ltd is what is known as a "personal service company". HMRC have issued determinations to CAM Ltd in respect of income tax and notices of decision in respect of national insurance. Those determinations and decisions were made on the basis of the "intermediaries legislation" contained in sections 48-61 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") and equivalent provisions in the Social Security Contributions (Intermediaries) Regulations 2000 ("the 2000 Regulations").

3. The determinations under appeal cover tax years 2008-09 to 2012-13. The decision notices under appeal cover tax years 2006-07 to 2012-13. Together they total some £419,151 and were issued between March 2013 and October 2014. The extent to which there should be a set off of corporation tax paid by CAM Ltd and tax paid on dividends from CAM Ltd to Ms Ackroyd has not been agreed. Ms Ackroyd contends that the liability to tax and national insurance even if the appeal is not successful is approximately £207,000. At the invitation of the parties this decision will deal with the appeals in principle. The question of quantum may be referred back to the tribunal if necessary.

4. HMRC made the determinations and decisions on the basis that the hypothetical contract between the BBC and Ms Ackroyd which must be considered pursuant to the intermediaries legislation would have been a contract of service rather than a contract for services. In slightly simplified terms, HMRC contend that Ms Ackroyd's status for the purposes of the intermediaries legislation is that of an employee and that CAM Ltd should account for tax and national insurance accordingly. Ms Ackroyd contends that her status for the purposes of the intermediaries legislation is that of a self-employed contractor, and there is no further liability on the part of CAM Ltd.

5. We understand that the present appeal is one of a number of other appeals involving television presenters and personal service companies. However, this is not a lead case as such.

6. There is also an appeal against determinations and notices of decision for income tax and national insurance in connection with various payments by CAM Ltd to Ms Ackroyd to reimburse expenditure incurred by Ms Ackroyd. Those payments relate to subscriptions for Sky TV and additional expenditure said to have been

incurred as a result of home-working. The determinations and decisions cover periods 2007-08 to 2011-12 and together they total some £14,469. We shall deal with the legal basis for those determinations and decisions, our findings of fact and our reasoning in a separate section of this decision once we have considered the principal issue relating to the intermediaries legislation.

7. HMRC also imposed penalties on CAM Ltd in relation to both income tax and national insurance in connection with non-compliance with the intermediaries legislation. The income tax penalties were suspended and there is no appeal against those penalties. It appears that penalties were also imposed in relation to national insurance but were not suspended. It was not clear to us what if any penalties were imposed and under appeal in relation to the Sky subscriptions and the home-working expenditure. It is fair to say that the parties did not focus on the penalties in their submissions. In the circumstances the parties shall be at liberty to make further submissions in relation to penalties in the light of this decision.

8. Both parties produced helpful skeleton arguments and written notes incorporated into their oral closing submissions. In addition to the documentary evidence before us, we heard oral evidence from Ms Ackroyd and from two other witnesses on her behalf. We set out below the nature of that evidence and our findings of fact based on that evidence. All our findings are made on the balance of probabilities. Before considering the evidence we set out the legal framework which defines the principal issue to be resolved, namely whether for the purposes of the intermediaries legislation Ms Ackroyd should be treated as an employee or a self-employed contractor. The parties referred us to a considerable body of caselaw in relation to that issue which we consider in more detail when giving reasons for our decision.

Legal Framework

9. The principal issue in the present appeal is whether the intermediaries legislation applies on the facts to the relationship between Ms Ackroyd, CAM Ltd and the BBC. If the legislation does apply then it is agreed that there will be a liability on the part of CAM Ltd to income tax and national insurance, although the amount of that liability will be a matter for agreement or a subsequent hearing.

10. The purpose of the intermediaries legislation was identified by Robert Walker LJ as he then was in *R (Professional Contractors Group & Others) v IRC* [2001] EWCA Civ 1945 at [51]:

“ to ensure that individuals who ought to pay tax and NICs as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation.”

11. The question whether the intermediaries legislation applies to any particular set of circumstances is determined by reference to section 49 ITEPA 2003. The equivalent provision for national insurance purposes is regulation 6 of the 2000 Regulations. Both parties agreed that the effect of section 49 and regulation 6 for

present purposes is identical and focussed their submissions on section 49. We shall do the same in this decision. Section 49 provides as follows:

“ (1) This Chapter applies where —

5 (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 —

10 (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

...

15 (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.”

12. The parties agree that section 49(1)(a) and (b) are satisfied on the facts. Ms Ackroyd is “the worker”, the BBC is “the client” and CAM Ltd is “the intermediary”. The issue between the parties is whether 49(1)(c) is satisfied. The issue may therefore be shortly stated as follows:

20 “ If the services provided by Ms Ackroyd were provided under a contract directly between the BBC and Ms Ackroyd, would Ms Ackroyd be regarded for income tax purposes as an employee of the BBC?”

13. This is what is referred to as “the hypothetical contract” (see *Usetech Ltd v Young* [2004] EWHC 2248 at [9]). There is no dispute that the actual contractual arrangements involved CAM Ltd contracting to provide services to the BBC which it fulfilled through Ms Ackroyd. It is not suggested that Ms Ackroyd was in reality an employee of the BBC.

14. There is of course a wealth of caselaw in relation to whether an individual is an employee or self-employed. We shall deal with relevant aspects of that caselaw in our reasons below.

15. The parties agree that in this appeal the burden of establishing that Ms Ackroyd would not be regarded as an employee of the BBC pursuant to the hypothetical contract lies on CAM Ltd as the appellant.

Findings of Fact

35 (1) *Generally*

16. The evidence before us comprised witness statements and oral evidence on behalf of CAM Ltd. The witnesses were Ms Ackroyd, Ms Kathryn Apanowicz and Mr Paul Stead. Ms Apanowicz is a radio presenter on BBC Radio York. During her career she has worked as a television presenter, an actress and as a radio presenter.
5 She was the partner of the late Richard Whiteley who presented Yorkshire Television's Calendar with Ms Ackroyd. Mr Stead is the managing director of Daisybeck Productions Ltd, an independent production company. He acts as the executive producer on all programmes made by Daisybeck. We refer to their evidence below in so far as it is relevant to the issues.

10 17. Ms Ackroyd's evidence did, we think, reflect the fact that she is more used to interviewing than being interviewed. It seemed to us that at various points in her cross-examination she was more concerned with understanding where the line of questioning was going than in giving direct answers to the questions being asked. We had to remind her to answer the questions being asked on several occasions. We do
15 not consider that she was deliberately trying to evade difficult questions, but we did form the impression that she was keen to identify opportunities to present her case in the best light. She was clearly aware that cases such as this turn on value judgments as to the significance of various features, some pointing towards employment and some pointing towards self-employment. In her evidence she was keen to highlight those
20 features which she considered would help her case, occasionally at the expense of directly answering the questions being asked.

18. There are underlying reasons for Ms Ackroyd's approach to her evidence which we shall touch on later in the decision. Broadly, Ms Ackroyd has a genuine belief that towards the end of the contract between CAM Ltd and the BBC she was victimised by
25 the BBC and made a scapegoat following an internal inquiry into the BBC's use of "freelancers". She clearly now has a deep mistrust of the BBC and of HMRC, the latter based in part on HMRC's reliance on material provided by the BBC for the purposes of their enquiry into her tax affairs. It is not appropriate for us in the course of this decision to make any findings as to whether Ms Ackroyd's belief that she was
30 being victimised by the BBC is justified or not. Indeed, we did not hear any evidence from any relevant BBC employees and we are not in a position to make such findings.

19. There were also a number of inconsistencies between what was said and/or confirmed by Ms Ackroyd in correspondence and meetings compared to what Ms Ackroyd said in her oral evidence. We note some of those inconsistencies below. We
35 have to say it would have helped to clarify the position if HMRC had interviewed Ms Ackroyd in connection with their enquiry in its early stages and in any event prior to reaching their initial status opinion on 14 September 2012 and issuing determinations and decisions in March 2013. In the event they spoke only with her accountant, her husband and BBC employees before expressing their initial opinion. Ms Ackroyd had
40 been keen to have a meeting with HMRC before they reached any sort of conclusion but the investigating officer did not consider it necessary.

20. We take all these features into account in assessing the reliability of Ms Ackroyd's evidence. We do not consider that Ms Ackroyd was deliberately trying to mislead us in any way. We are satisfied that all the witnesses were honest witnesses

doing their best to assist the Tribunal. However, where there are disputes as to facts or the inferences to be drawn we do not simply accept Ms Ackroyd's evidence at face value.

21. Ms Ackroyd is a director of and shareholder in CAM Ltd. Her husband, Mr Christopher Sutcliffe is also a director and shareholder. Ms Ackroyd has been a professional journalist for 40 years. She started with the Halifax Evening Courier and her career progressed through radio and television. By 1999 Ms Ackroyd was a co-presenter with Richard Whiteley of Yorkshire Television's Calendar, an early evening news and current affairs programme. It had ratings well above those of the equivalent BBC programme, Look North. The Yorkshire region was one of the few regions where the BBC was not winning its ratings battle with ITV. The BBC wanted to change the fortunes of Look North and Ms Ackroyd was approached to join the BBC on a "freelance basis". Ms Ackroyd turned the offer down because at that time the BBC could not say who her co-presenter would be. Subsequently the BBC announced that Harry Gration would be presenting Look North.

22. In May 2001 the BBC made a second approach to Ms Ackroyd. Ms Ackroyd regarded the offer as a "defining role" in which she could use her considerable experience to change, mould and shape Look North and she accepted the offer. Ms Ackroyd started working on BBC Look North in September 2001. She entered into a contract with the BBC dated 29 May 2001. Ms Ackroyd's evidence was that she was given control over Look North and that it was agreed she could make whatever changes she wanted to the programme. She regarded Calendar as having a strong regional identity which dealt with hard news brilliantly and which was trusted by viewers. In contrast, she regarded Look North as being staid, dull and formulaic.

23. This first contract was for a period of 5 years. The parties were expressed to be the BBC and Ms Ackroyd herself, but we understand payment was made to CAM Ltd. We were not referred to this contract in terms and neither party sought to rely on its specific terms in construing the Contract. Indeed, we understand it was common ground that this contract should be treated as being between the BBC and CAM Ltd.

24. Ms Ackroyd's evidence which we accept is that it was the BBC who suggested that she should work using a personal service company and that Ms Ackroyd agreed to do so. This contract and later the Contract were drafted and negotiated by the "Talent Rights Group" of the BBC rather than by BBC News. In 2001 CAM Ltd had already been incorporated by Ms Ackroyd and when the BBC suggested she should use a personal service company she decided to use CAM Ltd. The BBC did not want Ms Ackroyd to be an employee and we also infer that they did not want any potential liability for PAYE and national insurance if she were to be classified as an employee. Ms Ackroyd had never previously come across the term "personal service company". She checked the terms of the arrangement with her accountant, Mr Biggin, who advised her that everything was in order.

25. In 2006, CAM Ltd was offered a new fixed term contract. Ms Ackroyd's evidence is that her role did not change and we accept that evidence. In contrast we understand that Harry Gration at that time had a two year "freelance contract" but that

he became an employee of the BBC in or about 2006. Ms Ackroyd was never offered an employment position at the BBC.

26. The viewing figures improved almost immediately following Ms Ackroyd's move to Look North in 2001. Look North went from a position of being substantially behind its ITV rival to being substantially ahead.

27. Ms Ackroyd's evidence is that when she came to work for the BBC she was given a guarantee of "independence" and "control". We do not accept that was control of the programme itself and the BBC's output. If anything, it would have been control over the way in which she provided her services to the BBC. We consider these aspects of control later in the decision

(2) The Contractual Arrangements

28. We set out in the Appendix to this decision all relevant terms of the Contract. Ms Ackroyd said in evidence that she had other contracts in relation to other work which she did for the BBC but if those contracts were in writing they were not in evidence. We had no other evidence as to the terms of those contracts.

29. As stated, the Contract was drafted by the BBC Talent Rights Group. There was no evidence before us as to the relationship between that group and, for example, BBC News in terms of the engagement of presenters.

30. The Contract followed on from Ms Ackroyd's original contract in 2001 which was for 5 years. In 2006 she was offered a new 5 year contract but she turned that offer down because she wanted a 7 year contract. At the same time there were discussions about Ms Ackroyd giving up a newspaper column which she wrote for the Sunday Express. The BBC wanted her to give up the column and she also had personal reasons for wanting to do so, including a family illness and the amount of time she had to devote to the column. In due course she negotiated a new 7 year contract with the BBC together with an ex gratia payment of £40,000 plus VAT which appears to have been linked to Ms Ackroyd giving up her newspaper column. Clause 8.2 of the Contract provided that Ms Ackroyd could not provide her services for publications of any kind for anyone other than the BBC without first obtaining consent from the BBC.

31. Ms Ackroyd was reluctant to accept in evidence that she had a contract of employment with CAM Ltd. We put that reluctance down to the fact that she had not really addressed her mind to her relationship with CAM Ltd beyond being a director and shareholder of the company. Certainly there was no written contract of employment but we find that work carried out by Ms Ackroyd for the BBC was pursuant to what must have been a contract of employment between Ms Ackroyd and CAM Ltd. Ms Ackroyd acknowledged that CAM Ltd effectively controlled her working activities, as recorded in Clause 1 of the Contract. She was paid for that work and CAM Ltd properly accounted for tax and national insurance on her employment income under the PAYE regulations.

32. Ms Ackroyd also received dividends as a shareholder in CAM Ltd. Income tax was properly accounted for on those dividends. Ms Ackroyd was not aware of the tax advantages associated with dividends. She appears to have left such matters entirely to her professional advisers, namely Mr Biggin and Mr Sutcliffe.

5 33. Ms Ackroyd considered herself to be in control of her own work, through CAM Ltd. She acknowledged that CAM Ltd was controlled by herself and her husband together but there were no outside influences. CAM Ltd was therefore in a position to ensure that Ms Ackroyd fulfilled the obligations of CAM Ltd under the contract.

10 34. Ms Ackroyd did not accept that the BBC had any control over her as a presenter, either in terms of the continuing changes she introduced to Look North or indeed in relation to editorial matters. She considered that she had “day to day editorial control”, whilst accepting that the BBC had “editorial responsibility”. We do not accept that Ms Ackroyd did have day to day editorial control over her work. That would have been inconsistent with clause 5 of the Contract.

15 35. Ms Ackroyd in oral evidence contended that she had the last say, for example in relation to the stories she would cover and present, but that the BBC would have responsibility for her actions. That may well have been the case for practical purposes in relation to issues arising whilst Ms Ackroyd was live on air. However, if issues or differences of opinion arose during pre-production meetings then we have difficulty
20 accepting that Ms Ackroyd had the ultimate decision-making authority in relation to Look North or her work on the programme. Indeed, in a letter dated 4 December 2012 from Mr Biggin responding to HMRC’s initial status opinion it was accepted that “the BBC is the ultimate arbiter”. Elsewhere, it was accepted on Ms Ackroyd’s behalf that “of course she could be told who she was interviewing”.

25 36. Clearly in relation to what might happen whilst Ms Ackroyd was on air in a live programme she would have de facto control. She could ad lib, change the scripts and effectively decide how long an item would last. That is the nature of her professional expertise. One example was given, when the script described three murder victims as “prostitutes”. Ms Ackroyd would not use the word. This was the only example in 13
30 years at the BBC when Ms Ackroyd felt so strongly about something that she insisted her voice should prevail and where the BBC effectively deferred to her view. We regard this as a professional difference of opinion. The fact that the editor on that occasion deferred and Ms Ackroyd’s view prevailed does not in our view reveal much if anything about where control lay. If it had been so minded the BBC could have
35 informed Ms Ackroyd pursuant to clause 14 of the Contract that she would not be presenting Look North that evening. There could still have been an issue as to whether that day counted towards her obligations under clause 3.1. In practice however, the relationship was never adversarial and no such issue ever arose.

40 37. The Contract is silent on the point but the context suggests to us that the BBC through the Editor would have control over content given the BBC’s editorial responsibility. That is also consistent with the BBC’s Editorial Guidelines which we consider further below.

38. Ms Ackroyd complained that she had provided a list of people from the BBC who could confirm her evidence, but HMRC had not approached those people. Whether there is substance to that criticism, it was always open to CAM Ltd to call BBC employees as witnesses in the tribunal. If for any reason they were reluctant then she could have applied for a witness summons. On the evidence before us we find that the Editor had the right on behalf of the BBC to decide which stories were covered and in what order. There was room for professional disagreement but we are satisfied that ultimately these were decisions for the BBC.

39. Clause 2 of the Contract provided for a fixed term of 7 years, subject to the termination provisions. In oral evidence Ms Ackroyd did not consider that a 7 year fixed term contract was unusual at the BBC. She was then taken to comments she had provided in relation to a meeting between HMRC and the BBC on 22 May 2012. At that time Ms Ackroyd's comment on the notes of that meeting was that a 7 year contract was "not normal" and that her contract was unique in this regard. In the end she accepted that the Contract was unusual and unique, especially for an older woman at the BBC. We find that it was unusual for someone in Ms Ackroyd's role to have a 7 year fixed term contract.

40. Clause 3 gave the BBC "first call" on Ms Ackroyd's services for up to 225 days per year. The Contract did not provide any means to deal with any dispute as between the BBC and CAM Ltd over the availability of Ms Ackroyd. In our view however Clause 3 gave the BBC the right to require CAM Ltd to provide Ms Ackroyd's services on any particular day subject to reasonable notice and also that she had not already worked 225 days for the BBC at the time of year they required her services. In practice the days Ms Ackroyd worked at the BBC were mutually agreed.

41. Clause 3 is not well worded but we are satisfied that the BBC could require Ms Ackroyd not only to work on a particular day, but also it could direct what work she did. They could require her if necessary to report on a particular story without also presenting the Look North programme. That is the effect of the words "as it may require". There is no evidence that happened in practice, but we find that the BBC was contractually entitled to do so. Ms Ackroyd accepted in cross-examination that the BBC ultimately had the right to specify what services CAM Ltd would provide, subject to it being in connection with her role as a presenter and reporter on Look North.

42. Ms Ackroyd did not have a desk at the BBC and used her own computer and mobile phone. The Contract specified that Ms Ackroyd could be required for up to 225 days per year. The contract is silent on the point, but the understanding was that those days were in relation to Look North. In practice Ms Ackroyd would tell the BBC which days she was not available for Look North. Ms Ackroyd was not aware of the BBC keeping a log of the days she worked and there was no reliable evidence that they did so. She kept her own diaries.

43. In addition to the 225 days where the BBC would have first call on Ms Ackroyd's services, clauses 3.2 and 3.4 envisaged the BBC might request her services for BBC radio or other contributions. We say request, because the provision of

services pursuant to clauses 3.2 and 3.4 was subject to mutual agreement. In theory Ms Ackroyd could have withheld agreement unless she was paid an additional fee if she had been minded so to do. In contrast clause 3.3 enabled the BBC to require Ms Ackroyd's attendance at public events. We construe this to be in addition to the 225 days referred to in clause 3.1 which relate only to the output of BBC Yorkshire.

44. Ms Ackroyd's evidence was that in practice, attendance at public events amounted to two events per year: Children in Need, where she would act as a regional presenter, and possibly at annual BBC open days. Ms Ackroyd regarded this as part of the 225 days, but little if anything turns on that. There was no contractual right to additional remuneration for attendance at public events.

45. Ms Ackroyd's evidence was that the 225 days under clause 3.1 left her plenty of time to do other things, although she also said that part of the reason why she wanted to end her Sunday Express column in 2007 was that it increasingly took up too much time. 225 days is equivalent to 45 working weeks of 5 days, but as a professional journalist we accept she might often work 7 days a week. There were no set hours in the Contract and she would work a 60-80 hour working week if that was what was needed to do the job. We are quite satisfied that Ms Ackroyd was devoted to doing a job she loved and was prepared to work long and hard to ensure the output she was involved in was as professional as possible.

46. Clause 7 provided for CAM Ltd to be reimbursed travel and subsistence payments at the rates payable to freelance contributors. In addition, Ms Ackroyd was entitled to a payment of up to £3,000 per year for the purchase of suitable clothing, on production of receipts. This sum was paid in each year of the Contract.

47. Clause 8.1 restricted Ms Ackroyd from providing any services in respect of television or radio in the UK or Republic of Ireland without the consent of the BBC, or for online services for anyone other than the BBC. Ms Ackroyd described this as "mutually beneficial" in that it was consistent with what she wanted to achieve with Look North. We do not consider that the clause itself was "mutually beneficial". It was a clear restriction on what Ms Ackroyd could do in relation to other activities, whether or not she wanted to engage in such activities. The effect was that she could not provide services as a television presenter or broadcaster in the UK or the Republic of Ireland without the consent of the BBC. She could not provide services for publications other than for the BBC without the consent of the BBC.

48. Clause 9 refers to the BBC's undertakings in relation to "Programme Standards" pursuant to an agreement it had with the Secretary of State for Culture Media and Sport, in particular in relation to impartiality. Ms Ackroyd was obliged pursuant to clause 9 not to engage in any conduct which would compromise or call into question the impartiality or integrity of the BBC or Ms Ackroyd. The clause goes on to restrict Ms Ackroyd in relation to certain activities without the prior written consent of the BBC. The restricted activities included involvement or association with anyone having a trading relationship with the BBC, providing interview training, being publicly associated with any charity or government initiative or promoting goods or services.

49. Ms Ackroyd did not consider that these restrictions had any impact on her. For example, she considered that the restriction on being associated with a charity only applied to “Christa Ackroyd BBC” and not “Christa Ackroyd the person”. We do not accept that there was any such distinction. The restrictions applied to Ms Ackroyd generally. In practice the BBC had no real cause to enforce these restrictions until shortly before termination of the contract in 2013 when the BBC appears to have decided to enforce strictly the terms of the Contract.

50. Clause 12 provided for CAM Ltd to indemnify the BBC for any breach of the warranties given in clauses 5 and 11, including any liability for breach of copyright or defamation by Ms Ackroyd.

51. Clause 14 provided that the BBC were not obliged to call on Ms Ackroyd’s services, although they would still be obliged to pay CAM Ltd its fees under the Contract if they did not do so. In practice the BBC did always call upon Ms Ackroyd’s services for Look North until March 2013.

52. Clause 18 prohibited CAM Ltd from using a substitute for Ms Ackroyd.

53. Ms Ackroyd did not have a line manager as such and she was not subject to formal appraisals. In contrast, Harry Gration’s line manager was Editor of Look North, who was Mr Tim Smith for at least part of the period up to 2013. Ms Ackroyd had no set hours and subject to programming commitments she was able to come and go as she pleased. She had to give reasonable notice if she was not available to present Look North. That would usually be 2-3 weeks notice if there was something else in her diary. She had no entitlement to sick pay, holiday pay, maternity leave, pension rights or other benefits. That was because the Contract was with CAM Ltd. Such matters would have been subject to Ms Ackroyd’s employment contract with CAM Ltd.

54. The material before us contained a sample BBC employment contract and freelance contract. We were not referred to those contracts in detail and we heard no evidence as to the detailed terms of any other BBC employees. In our view it is not a worthwhile exercise to compare the contract with CAM Ltd to employment contracts entered into by the BBC. We must construe the hypothetical contract on its own terms.

(3) Payment of Fees

55. Clause 6 provided for fees to be paid by the BBC to CAM Ltd in respect of the services to be provided by Ms Ackroyd. Fees were payable in accordance with the Schedule and the sums payable were exclusive of VAT. The BBC produced what are known as “self-billed” invoices for VAT purposes and CAM Ltd accounted for VAT accordingly.

56. The payments provided for in the Schedule started at £163,233 for the year ended 31 December 2007, increasing in line with the RPI in each subsequent year of the Contract. The amount payable was a single amount in respect of each year, payable by monthly instalments. It was not dependent on the number of days or hours

worked by Ms Ackroyd, provided Ms Ackroyd was available for work when required by the BBC pursuant to clause 3. In the event that Ms Ackroyd failed for any reason to render the services in clause 3 then clause 6.2 provided that the payment was to be reduced proportionately unless the BBC decided otherwise. In practice the question of
5 reduction never arose. Provided Ms Ackroyd made herself available and performed the services for at least 225 days, which she did, then CAM Ltd was entitled to the payment

57. Paragraph H of the Schedule provided for CAM Ltd to receive a further payment of £7,500 for each 6 month period if ratings for the programming of Ms
10 Ackroyd consistently and significantly exceeded the ratings of the BBC's commercial competition. All parties understood this to mean the ratings of Look North against the ratings of Calendar. Ms Ackroyd objected to this being described as a bonus and preferred to describe it as a success fee. She did acknowledge that it was a performance related payment. Ms Ackroyd understood that she was the only person
15 ever to negotiate such a clause at the BBC but we have no evidence that is in fact the case. In every year during which Ms Ackroyd worked at the BBC the performance related bonus was paid because the ratings of Look North significantly exceeded those of Calendar.

58. Ms Ackroyd's evidence was that she was paid much more than the equivalent
20 rate for a newsreader, a journalist or a producer. She said that she was paid "as talent". It was not clear what Ms Ackroyd meant by this, but in her evidence she described herself as unique within the BBC because of her role and what was expected of her in terms of initially winning the ratings battle with ITV and then keeping Look North ahead of the ITV equivalent. We have already made findings as
25 to the nature of Ms Ackroyd's role. We cannot say that it was unique but we are satisfied that she was expected to drive ratings and was entitled to a performance related bonus in that regard.

(4) Working Practices

59. Ms Ackroyd's witness statement described her involvement in Look North at
30 the time she joined the BBC as follows:

"I was genuinely consulted with from the beginning ... on the very fabric, style and perception of BBC Look North. I was asked for my views on style and delivery and then tasked with changing the format in line with my ideas... In particular, I suggested
35 (and it was acted upon) that the BBC change and soften the actual set in order to make the programme more reflective of the light and shade of the county of Yorkshire and to encourage the Producers to do so. It was also my suggestion and indeed, written into negotiations, that a make-up department be established, because I advised (on the basis of my past experience) that guests and contributors to the programme needed to feel better supported and nurtured than in the past."

40 60. We accept that evidence entirely. Ms Ackroyd was a very successful television journalist and presenter. We are satisfied that her journalistic and presenting skills contributed in large measure to the success of BBC Look North after she joined the programme. It is notable in this passage of her evidence in chief, derived from a letter

which Ms Ackroyd sent to HMRC on 11 April 2013, that Ms Ackroyd uses phrases such as “I was asked for my views”, “in line with my ideas”, “I suggested”, “it was also my suggestion” and “I advised”. It is clear from that phraseology and from clause 3 of the Contract that Ms Ackroyd was not being paid to produce an end product. We are satisfied that the ultimate decision as to how the programme might be changed lay with the BBC. Having said that, Ms Ackroyd made editorial contributions and was expected to drive change and maintain strong viewing figures. She did drive change including changes to the lighting, the sound, the sets, introducing make-up facilities for guests and in other areas.

61. Ms Ackroyd acknowledged that producing Look North was a “team effort” with some tremendous journalists and incredible people on the team. She maintained that she was “leading that team”. We accept that Ms Ackroyd drove the changes that enabled Look North to stay significantly ahead of Calendar. We also accept Ms Ackroyd’s evidence that she ran training programmes for on-air staff and mentored technical staff. We do not accept solely on the basis of Ms Ackroyd’s evidence that she led the team in the sense of control and decision-making.

61. Ms Ackroyd was the “anchor” for Look North together with Harry Gration. This role was usually carried out in the studio, but she would also anchor the programme when conducting an outside broadcast. There was no typical day. She may have a major interview to prepare for. She would do her own research. Arranging such interviews could take days, weeks or months. In one case she led a small team for nine months investigating the background to a series of murders known as the Crossbow Cannibal killings. She controlled the research, filming and subsequent broadcast material. She described herself as the researcher, producer and presenter in relation to this work and we are satisfied that is an accurate description. However, we are satisfied that it was a matter for the BBC to decide whether and in what way to use the story. They also had the right to edit Ms Ackroyd’s material.

62. More usually, Ms Ackroyd would present Look North 5 days a week. This would involve presenting the flagship programme at 6.30pm. It might also include presenting lunchtime and late night news programmes which came under the Look North title.

63. A working day would usually start with a blank sheet of paper. There would be a producers’ breakfast meeting at 9.30 – 10.00 am with discussions about what to include in the programme. Ms Ackroyd would not be at that meeting. She would already have had discussions with the producers and may have set off to cover a particular story. The producers would dispatch various reporters to various stories. Ms Ackroyd would go out and research a news story or conduct an interview on camera. She would cover the biggest stories, or the stories in which she had most interest. If she had a major interview she might be forceful in demanding that it should be a lead news item. There were no set timings or shifts. Production discussions would take shape during the day. The only constant was that Look North would be on air at 6.30pm and Ms Ackroyd would be presenting it with Harry Gration unless either was unavailable for some reason.

64. Discussions about content would take place throughout the day to shape the programme. There would be a 3pm meeting in the newsroom when the material from various reporters came in. Usually there would be a natural running order for the stories. There may be a debate, but it was a collaborative effort. That meeting would
5 involve the Editor, the producers, the sound and floor-manager and the Director. Harry Gration would be there. Ms Ackroyd would be there as often as she could but she might still be out covering a story. The other journalists would not attend because they would probably still be out covering stories.

65. In practice Ms Ackroyd would use her time as she saw fit during the day, but
10 she would almost always be back at the BBC studios in Leeds by 3.30pm for pre-production. She would oversee the editing of her material. Look North had a number of editors who would edit pieces, dealing technically with the recorded image and sound. Ms Ackroyd chose to oversee the editing of her material as part of her professional approach to working on the programme. By virtue of clause 3 the BBC
15 could if necessary have required her to do that work as part of the “reasonable ancillary services” it could require CAM Ltd to provide.

66. The producers would prepare outlines of the running order and the scripts which would be accessible by computer. Those details would be sent as a package to the Director. In broad terms the Director’s job was to make the programme happen,
20 including how the programme looked and what camera shots to use.

67. According to Ms Ackroyd the scripts would then be “greened” by a producer. This involved finalising the wording of a script and the length of an item, but Ms Ackroyd could and would change the script constantly right up to final delivery on air. Back at the studio Ms Ackroyd might completely re-write her script on the
25 computer. For example, she might want to ensure that it used language that “sounded like” her. That process could take place right up to the last minute and continue whilst on air.

68. In late 2011/early 2012 Tim Smith the Editor of Look North spoke with Ms Ackroyd about last minute changes to scripts. Mr Smith wanted such changes to be
30 made earlier and Ms Ackroyd agreed, although it is in the nature of a live news programme that changes may have to be made right up to the end of the programme. We are satisfied that Ms Ackroyd would lead such changes and that her role was not simply reading a script from an autocue. Interviews, whether with high profile individuals or others simply caught up in a news story, would almost always be
35 unscripted.

69. Ms Ackroyd would wear an earpiece during a programme whether she was in the studio or on an outside broadcast. The earpiece enabled “talkback” from the gallery of the studio. It was not used to give Ms Ackroyd instructions, but to give her information such as timings to ensure the smooth running of the programme.

40 70. Immediately after each programme there would be a post-production meeting to hear feedback about the programme. It was not in any sense an appraisal. It would be

a short discussion usually about what had not happened in the programme. There would be no recriminations as such if anything had not gone to plan.

5 71. Ms Ackroyd maintained that she “was in charge of [her] part” of the programme and effectively could not be overruled. However, following a meeting she had with HMRC on 13 August 2013 Ms Ackroyd accepted that she could be told who she was interviewing. She maintained that how the interview was conducted was a matter for her. We accept that is the case, particularly in relation to a live interview. To a very large extent Ms Ackroyd was expected to use her professional judgment in the work she did.

10 72. The role of the Editor was to have an overview of the whole programme each day. In particular the Editor would oversee and have responsibility for the producers. The Editor was also Harry Gration’s line manager.

15 73. It is in the nature of a news programme that a story may break during the day or indeed during the programme. For example Ms Ackroyd covered the kidnapping of Shannon Matthews on location from Dewsbury. She anchored the programme by way of outside broadcast. Similarly, Ms Ackroyd anchored the programme from Hebden Bridge when the town was flooded and from London during the 2012 Olympics. In those circumstances there may be no producer on site, no director, no script, no autocue and no monitor. The broadcast would effectively be controlled by Ms Ackroyd.

20 74. Ms Ackroyd was part of the public face of the BBC in the Yorkshire region through her role as a presenter of Look North. Having said that, some members of the public still associate her with her time as a presenter of Calendar for ITV.

(5) Other Activities

25 75. The scope of the services to be provided by CAM Ltd were defined by clause 3. That clause was supplemented by clause 11.1 by which CAM Ltd warranted that no other contract or engagement or any other reason would inhibit or prevent Ms Ackroyd from fulfilling her obligations under the Contract.

30 76. At the time Ms Ackroyd was approached by the BBC to present Look North she had a newspaper column in the Daily Express, later in the Sunday Express. In 2004 the BBC wanted Ms Ackroyd to give up the column but Ms Ackroyd refused. She continued to write the column until January 2007 as previously described. At that time her fee for writing the column was approximately £40,000 per year.

35 77. Ms Ackroyd does not make personal appearances in what she described as a “show and go”. She did not do what she considered to be “inconsequential appearances” such as the opening of an event or “cutting a ribbon”. She did however offer her services as a presenter at conferences and events in which she had a particular interest. For example, presenting a “Women in the Workplace” conference for Morrisons Supermarkets, presenting award ceremonies for various emergency services and supporting organisations such as Bradford University and the Yorkshire

Tourist Board. Ms Ackroyd also appeared as herself in a TV network drama called “The Syndicate” and in the film “The Calendar Girls”.

78. Ms Ackroyd’s evidence was that she did not seek permission from the BBC before accepting such engagements, although she might inform the Editor of Look North as a courtesy. We accept that evidence, although strictly CAM Ltd was required to ensure that Ms Ackroyd had consent from the BBC for such activities pursuant to clauses 1, 8 and 9 of the Contract.

79. Ms Ackroyd had a high profile in Yorkshire. Many people would contact her directly about engaging her services. If anyone tried to contact her through the BBC then they would be told they should contact Ms Ackroyd directly.

80. Ms Ackroyd told us and we accept that she had a lot more freedom and flexibility to take on other engagements compared to colleagues who were employed by the BBC, such as Harry Gration. Prior to 2013 she was never prevented from undertaking any activity. In relation to many events Ms Ackroyd made no charge for her services because she considered they were worthy causes. It was common ground that Ms Ackroyd was not pro-active in seeking other clients. She did not need to be because she regarded the Contract as very lucrative and she was content to devote her energies to Look North. In early 2012 Harry Gration and the weatherman on the show were told by the Editor that they could no longer charge for outside appearances. In contrast it was accepted by the Editor that Ms Ackroyd could continue to charge because she was not an employee.

81. It is clear that the vast majority of Ms Ackroyd’s income during the period of the Contract, until the Contract was terminated in 2013, came from the BBC. Her income from other sources was very small by comparison as indicated by the following figures:

Year ended 31 December	Gross Income from BBC £	Other Gross Income £	Proportion from BBC
2009	202,316	4,000	98%
2010	176,596	6,416	96.5%

82. Ms Ackroyd obtained some work through The Speakers Agency. In one contract with the Speakers Agency dated 15 January 2010 Ms Ackroyd’s address was given as c/o BBC Look North. On occasion correspondence in relation to Ms Ackroyd’s other activities would be addressed to Ms Ackroyd c/o BBC Look North. That is not surprising because the BBC published Ms Ackroyd’s profile and contact details on its website and it was well known that Ms Ackroyd worked at the BBC in Leeds.

83. There was one example of CAM Ltd invoicing the BBC for work other than in relation to Look North. That was in September 2004 when Ms Ackroyd presented a

national news programme from London. This seems to have been an isolated example. Ms Ackroyd had no desire to work outside the Yorkshire region.

84. We heard evidence from Mr Paul Stead. He has known Ms Ackroyd for many years and engaged Ms Ackroyd to do a voice over for a television documentary called Georgia's Story which told the story of an obese 15 year old girl. The engagement was arranged directly between Mr Stead and Ms Ackroyd, not via the BBC. Ms Ackroyd re-wrote the script. The programme was shown on the BBC and sold around the world. Ms Ackroyd invoiced Daisybeck £500 plus VAT for her work. Mr Stead would discuss ideas with Ms Ackroyd a couple of times a year, although Georgia's Story is the only time Ms Ackroyd has worked for Daisybeck. He described her role as akin to a producer.

85. The Contract required Ms Ackroyd to attend public events as required by the BBC. Ms Ackroyd said that these would be few and far between. If she was attending an awards dinner then she considered she was attending as herself, and not on behalf of the BBC.

(6) Control Generally

86. Ms Ackroyd provided extracts from her diary entries between 2007 and 2013, principally to demonstrate that she was able to choose when she worked, coming and going outside the established shift pattern subject to fulfilling her obligation to work 225 days per year. We accept that evidence. On occasion she worked for other organisations without question from the BBC. We are satisfied that is what happened in practice. Having said that, there was no reason for the BBC to assert its rights under the Contract to restrict the activities of Ms Ackroyd unless the BBC considered there was a significant breach of contract.

87. Ms Ackroyd was able to use her journalistic skills to identify and develop stories however as she chose. She worked on high profile stories such as the kidnap of Shannon Matthews, the shooting of PC Sharon Beshenivsky and many others. At the time of the shooting of PC Sharon Beshenivsky Ms Ackroyd received a tip off that a police officer had been shot in Bradford. Her contacts confirmed that it was a female PC. At the time she was hosting an outside broadcast in relation to Children in Need. She told us that she "demanded to go back to the studio" so that she would be there as the story developed. We accept that evidence.

88. We are satisfied that Ms Ackroyd had a high degree of autonomy in carrying out her work and in identifying the stories she wished to follow. We heard evidence from Ms Kathryn Apanowicz who had been interviewed by Ms Ackroyd on a number of occasions and her evidence is consistent with that finding.

89. Ms Ackroyd considered herself to be unique at the BBC in this regard, reflected in the amount she was paid which she described as far more than any other regional presenter and many national newsreaders. Ms Ackroyd suggested that this was because she was much more than a newsreader. We cannot say whether Ms Ackroyd was unique in this sense, but we are satisfied that she was not simply a newsreader.

90. Ms Ackroyd's relationship with the BBC and its employees working on Look North was not adversarial. No-one ever tried to stop her from doing anything. It was understood that if there was a big story, Ms Ackroyd would be there. Ms Ackroyd considered that HMRC were seeking to portray her as someone who is given a script and reads from an autocue. We are satisfied that is not the case. Indeed, it was not how Mr Tolley put the case on behalf of HMRC.

91. HMRC allege that Ms Ackroyd attended BBC training events. Ms Ackroyd accepted that she attended a training session on social media on 24 March 2011. Having been invited, she asked rhetorically why she would not go. She also accepted that she attended a training session on Safeguarding BBC Values on 13 February 2013, shortly before she was told by the BBC that she was being withdrawn from presenting Look North. She also recalled telling the trainer that the restriction on associating with charities did not apply to her because she was freelance.

92. Ms Ackroyd denied attending a training session on Safeguarding Trust – English Regions on 26 February 2008 because her diary indicated this was in the middle of the Shannon Matthews abduction. In a meeting with HMRC, Ms Helen Thomas the BBC Head of Region for Yorkshire said that no-one could read the news if they had not done the Safeguarding Trust training session. This training session appears to relate to the BBC's Editorial Guidelines. It is not clear however whether Ms Ackroyd attended this particular training session.

(7) BBC Editorial Guidelines

93. The BBC's "Editorial Guidelines" encapsulate the values of the BBC and the editorial standards that every producer of BBC content is expected to follow. They are revised every four or five years. New editions were produced in 2005 and in October 2010. It is HMRC's case that Ms Ackroyd was contractually bound by the Editorial Guidelines, and that this is one aspect of the BBC's control over Ms Ackroyd's work.

94. The suggestion that Ms Ackroyd was bound by the Editorial Guidelines appears first to have been made by Ms Thomas in a meeting she had with HMRC on 2 August 2013. The notes of that meeting suggested that Ms Thomas equated the Editorial Guidelines with the Programme Standards referred to in Clause 9.1 of the Contract. In written comments by Ms Ackroyd on the notes of that meeting Ms Ackroyd, who was not present, states "these were the guidelines". At first sight it seemed that Ms Ackroyd was accepting that the Programme Standards were the Editorial Guidelines. In oral evidence however she was adamant that was not the case.

95. The Editorial Guidelines were mentioned in emails from Mr David Smith of the BBC Tax department to HMRC in 2014. Mr Smith also suggested that a reference to Programme Standards in clause 9.1 of the Contract was a reference to the Editorial Guidelines.

96. Mr Tolley put to Ms Ackroyd and submitted to us that the reference to Programme Standards in Clause 9 of the Contract was a reference to the BBC's Editorial Guidelines.

97. It is striking that there is no evidence from the BBC in this appeal, in relation to this issue and others. It is common ground that the Editorial Guidelines were previously called the Producers' Guidelines. There was an extract from the fourth edition of the Producers' Guidelines in evidence. It is not clear what date these were published but it was sometime before June 2005 when they became the Editorial Guidelines. The introduction to the Producers' Guidelines was by Mr Greg Dyke, the then Director General. He states:

“ These Guidelines are a public statement of [the BBC's] values and standards and how we expect our programme-makers to achieve them. They detail the BBC's approach to the most difficult editorial issues and provide guidance which programme makers at all levels need to be aware of and follow

...

These Guidelines are a working document for programme teams to enable them to think their way through some of the more difficult dilemmas they may face ...

Our staff, those freelances working with us, and the independent producers we commission – all need to be familiar with these Guidelines and to apply their underlying principles. **This is more than just a moral responsibility; it is also a contractual obligation for everyone who makes programmes for the BBC ...**”

Emphasis added

98. The Producers' Guidelines comprise some 359 pages dealing with values such as impartiality, fairness, taste and decency; issues in programmes such as children in programmes and the reporting of suffering and distress; programme funding and external relationships; politics and various other matters.

99. In June 2005 a new version of the Editorial Guidelines was published. They were said to be shorter and clearer, but were still 201 pages in length dealing with similar issues as the previous Producers' Guidelines. The introduction by Mr Mark Thompson, the then Director General, included the following:

“ Many of the guidelines are advisory, but some are mandatory and have the force of instructions... So please read the guidelines and keep them by your side as you work ...”

100. The Editorial Guidelines were available on the BBC website. A section on the BBC's Editorial Values contained the following remarks:

“ The BBC Editorial Guidelines are a statement of the Values and standards we have set for ourselves over the years. They also codify the good practice we expect from the creators and makers of all BBC content, whether it is made by the BBC itself or by an independent company working for the BBC ...”

101. In 2010 a new version of the Editorial Guidelines was published. They were described by Sir Michael Lyons, the Chairman of the BBC, as “one of the most important documents the BBC publishes”. By way of introduction he said:

“ ... these Guidelines set out the standards required of everyone making programmes and other content for the BBC.”

102. A section on Using the Guidelines contained the following:

5 “ The BBC Editorial Guidelines apply to all of our content whoever creates or makes it and wherever and however it is received.

...

10 Any proposal to step outside the Editorial Guidelines must be editorially justified. It must be discussed and agreed in advance with a senior editorial figure or, for independents, with the commissioning editor. Director Editorial Policy and Standards must also be consulted.

...

2.2.1 Editorial responsibility in the BBC rests with the editorial chain of management from programme or content producer, whether in-house or independent, through to divisional director, and to the BBC’s Director-General, who is the editor-in chief.”

15 103. Ms Ackroyd’s evidence was that there was no discussion of the Producers’ Guidelines at the time she first started to work at the BBC. Her evidence was that she had only ever been given one copy of any guidelines. She said this was in 2004 when a copy was put in everyone’s pigeonhole. There was no reference to the Editorial Guidelines at the time the Contract was being negotiated in 2006. She said that she
20 had never referred to the Editorial Guidelines nor was she ever referred to them. She considered the Editorial Guidelines she had been given were guidance for less experienced journalists which simply described what was best practice. She had read the Editorial Guidelines but would have no need to refer to them specifically. She felt they were more a part of the BBC’s “mission statement” and that they were there to
25 demonstrate the BBC’s values to the public. Ms Ackroyd said that “they didn’t apply to me”. She would operate her own professional guidelines such as honesty, integrity and respecting human dignity.

104. Ms Ackroyd said that she would expect a reference to the Editorial Guidelines in her contract if she was bound by them as a matter of contract. She did not regard
30 them as contractually binding but she did regard them as “of great interest”.

105. On a number of occasions Ms Ackroyd referred to having received only one copy of guidelines throughout the time she was working at the BBC, which was in 2004. When she was taken to the 2010 Editorial Guidelines she said that she had never seen the document or read the introduction. However, we are satisfied that Ms
35 Ackroyd received a round robin email from Mr Thompson dated 11 October 2010 drawing her attention to the launch of the new BBC Editorial Guidelines. The email expressly said as follows:

“ The Guidelines show you how to ask and answer important questions like these – and where we have to follow rules, they’ll tell you what the rules are too.

As before, the new Guidelines are being published as a book – everyone involved with our content should get a personal copy by the end of the week. From tomorrow we are also launching a new Guidelines website ... It contains the whole of the Guidelines, together with Editorial Policy Guidance ...

5 Whatever your role in making the BBC’s content, what you do and how you do it makes a difference. Using the Guidelines, and reflecting their values in your work, is at the heart of making the BBC’s content something we can be proud of.”

106. There was some suggestion that Ms Ackroyd went to a roadshow explaining the Editorial Guidelines at the time the 2010 version was introduced but she had no
10 recollection of doing so. There is no reliable evidence that she did and we make no finding in that regard.

107. Ms Ackroyd’s approach to the Editorial Guidelines seems at odds with the introductory remarks contained in various versions of the Editorial Guidelines, including the Producers’ Guidelines which she received in 2004 and Mr Thompson’s
15 email. However, we are not satisfied that the Programme Standards referred to in Clause 9 of the Contract is a reference to the Producers’ Guidelines or the Editorial Guidelines. There is no direct reliable evidence that is the case, nor is there any evidence as to the content of the “agreement” with the Secretary of State referred to in Clause 9.

20 108. Mr Tolley submitted that even if compliance with the Editorial Guidelines was not a contractual obligation, Ms Ackroyd was still obliged to follow them. The source of that obligation was not explained but in practical terms we accept the submission. If Ms Ackroyd did not act in accordance with the Editorial Guidelines then her
25 contract might not be renewed, albeit she had a 7 year contract. Alternatively, in any particular situation the BBC could decide not to call on Ms Ackroyd to present or work on Look North, although arguably they would remain liable to make payments under the contract. In our view the real significance of the Editorial Guidelines in the present case is that they provide part of the context in which the parties entered into the Contract. We also consider that they were in part the standards by reference to
30 which Ms Ackroyd would be judged professionally by the BBC and others working on Look North. We return to the Editorial Guidelines in our reasons below.

(8) HMRC’s Enquiry

109. HMRC’s enquiry into the tax affairs of CAM Ltd commenced on 22 February 2011. It was described as a “check of employer and contractor records”. It was not
35 clear from the opening letter that it was an enquiry into Ms Ackroyd’s status for the purposes of IR35. In the circumstances Ms Ackroyd did not attend the initial meeting on 1 September 2011 which was attended by Mr Sutcliffe and Mr Biggin. Ms Ackroyd’s husband is a director of CAM Ltd. He is an accountant and acts as a bookkeeper for CAM Ltd. The meeting covered in detail the nature of Ms Ackroyd’s
40 work for the BBC. It is unfortunate that the significance of that meeting was not made apparent to Ms Ackroyd because HMRC rely on answers provided by Mr Sutcliffe concerning the relationship between Ms Ackroyd and the BBC. However, Ms Ackroyd did at least have an opportunity to comment in correspondence on the notes

of what was said at the meeting and at other meetings between HMRC and BBC employees.

110. Notes of the meeting were provided by HMRC and CAM Ltd was invited to agree the notes. Mr Biggin replied setting out points where issue was taken in relation
5 to the notes. Thereafter Ms Ackroyd said that she tried to meet with the HMRC officers but they would not meet with her until after they had made their decision that IR35 was engaged.

111. The enquiry was conducted by Mr Ian Pannett and he set out his opinion and reasons for the application of IR35 to CAM Ltd on 14 September 2012. It was a
10 decision in principle and there was no assessment at that stage. CAM Ltd was invited to provide any further information within 35 days. Documentation to quantify the tax and national insurance that would be due was also requested in separate correspondence.

112. The first decisions and determinations in relation to years 2006-07 and 2007-08
15 were issued to CAM Ltd on 7 March 2013. There was a subsequent meeting between Ms Ackroyd and HMRC on 13 August 2013, after Ms Ackroyd's contract had been terminated.

113. In the course of HMRC's enquiry, Mr Pannett spoke with Mr Smith of the BBC tax department and with Ms Thomas. Ms Ackroyd was critical of the enquiry because
20 she did not consider that these individuals had any first hand knowledge about her role. She had never met Mr Smith. She knew Ms Thomas very well but as Head of Region she would rarely have contact with her. Ms Thomas trusted Ms Ackroyd to work "without interference". Neither individual was involved in negotiating the contracts between the BBC and CAM Ltd. Ms Ackroyd considered that the officer
25 had reached his conclusion on inadequate information as to her role. In particular, that he wrongly understood she was simply a presenter using an autocue who was fed questions and controlled by the producers.

114. Mr Summers submitted that the evidence of HMRC's dealings with the BBC during the enquiry suggested that there may have been some "collusion" between the
30 two bodies. We do not accept that any such case is made out.

115. Ms Ackroyd said that when HMRC contacted the BBC for the purposes of their enquiry in or about May 2012 the BBC became very concerned. The enquiry led the BBC to question Ms Ackroyd's integrity and "out of the blue" in early 2013 she was taken off air. Thereafter the BBC refused to meet with Ms Ackroyd or her advisers.

116. Between 3 May 2013 and 17 May 2013 there was a chain of email correspondence between Ms Ackroyd, Ms Thomas and Mr Tim Smith in which Ms
35 Ackroyd effectively asked for permission from the BBC to be involved in various engagements. In particular, to become President of the Friends of the Bronte Church, to attend a Marie Curie lunch in aid of Bradford Hospice and to demonstrate cooking
40 at the World Curry Festival in Bradford. Permission to become President of the Friends of the Bronte Church was refused on the basis of the Editorial Guidelines.

The Editorial Guidelines provided that those involved in the production of BBC content must have no significant connection with the organisations featured and it was suggested that a story about the church roof might be featured in future. The appearance at the World Curry Festival was approved. Ms Ackroyd said that she sent these email requests ‘tongue in cheek’. She was trying to make a point by asking permission for every little event which previously she would never have asked permission for. By then the relationship had completely broken down.

117. We do not consider that much weight is to be given to this email correspondence. Nor do we consider that Ms Ackroyd’s failure to challenge the refusal based on Editorial Guidelines adds much weight to HMRC’s case that Ms Ackroyd was contractually bound by the Editorial Guidelines. We accept Ms Ackroyd’s evidence that at this stage there were stories in the newspapers about her relationship with the BBC. She felt that the BBC was effectively trying to establish control retrospectively and she did not take it seriously. More likely in our view is that the BBC began relying on what they understood to be their strict contractual rights.

(8) Termination of the Contract

118. On 22 May 2012 there was a meeting between Ms Thomas and Mr Smith of the BBC and HMRC in connection with CAM Ltd and Ms Ackroyd’s work at the BBC.

119. On 5 July 2012 Helen Thomas wrote a rather opaque letter to Ms Ackroyd ahead of any negotiations there might be at the end of the Contract in 2013. The underlying message was that the “market value” for presenters had fallen since 2007. In fact it does not appear that any negotiations followed this letter.

120. Ms Ackroyd considered that the BBC’s attitude towards her changed from the beginning of 2013. This followed evidence from the BBC given to the House of Commons Public Accounts Committee in July 2012 and the publication of a review undertaken by Deloitte on behalf of the BBC into freelance engagements at the BBC. We know that the review was published on 7 November 2012. The review recognised that the BBC required a large number of freelancers to make its programmes and referred to the BBC’s policy of engaging a small number of “on air” individuals via personal service companies. As a result of the review the BBC changed the way it viewed personal service companies. It no longer intended to engage on air talent with long term contracts through personal service companies. The BBC anticipated that a number of such individuals would be offered employment contracts when their current contracts expired. No employment contract was ever offered to Ms Ackroyd.

121. There was a meeting between Ms Ackroyd and Ms Thomas on 21 February 2013 where the HMRC investigation was discussed. On 4 March 2013, following a conversation, Helen Thomas wrote to Ms Ackroyd to say that she was being withdrawn from her presenting duties with immediate effect. The BBC purported to be exercising its rights under clause 9 of the Contract. Relevant parts of the letter read as follows:

“ ... [as] HMRC has now issued a formal demand against you for unpaid tax which you are unable to pay and propose to challenge, the BBC has decided that it is in both your interests and the BBC’s that you be withdrawn from your presenting duties...

5 We feel it is important to allow you to focus on the dispute with HMRC, but also, and importantly, the BBC must ensure that it complies with its obligations of impartiality and avoids any conflict of interest with your role as a presenter ... For reference the relevant obligations are set out in the BBC Charter and Agreement, and in the BBC’s Editorial Guidelines, including in sections 4, 14 and 15. We are also concerned to ensure that the BBC is not brought into disrepute.

10 ...

Finally, I wish to remind you of the obligations under clauses 8 and 9 of the contract, as imposed upon you by clause 3 of the inducement letter dated 11 May 2006.”

122. Shortly thereafter Ms Ackroyd herself became a news story. We were told that there were newspaper stories about her being a “tax cheat”, although we were not
15 taken to any specific stories. We stress that HMRC have never suggested that is the case, or that Ms Ackroyd has ever acted in any way dishonestly.

123. Ms Ackroyd did not recall receiving any “inducement letter” from the BBC. The existence of an inducement letter was also referred to in subsequent letters from Ms Thomas to Ms Ackroyd on 12 and 14 March 2013. It is true that Ms Ackroyd did
20 not question the existence of an inducement letter in her replies dated 12 and 13 March 2013 and 5 April 2013. She did however question the reasons given by the BBC for withdrawing her from presenting duties. In particular she maintained that whilst there was a routine enquiry by HMRC, her tax affairs and those of CAM Ltd were perfectly in order, and no tax demand had been made by HMRC.

25 124. HMRC relied on the existence of an inducement letter but they were unable to produce a copy. What was produced in evidence was said to be an example of a standard inducement letter from a broadcaster to the BBC in 2006 and read as follows:

“BBC NEWS

30 CONTRACT FOR TRADING WITH SERVICE COMPANY FOR SERVICES OF BROADCASTER

FROM:

TO: BRITISH BROADCASTING CORPORATION

Dear Sirs,

35 In order to induce you to enter into an Agreement with Limited (hereinafter referred to as ‘the Lender’) dated the day of 2006 (‘the Agreement’) for the rendering of my services as a broadcaster and in consideration of your execution and delivery thereof I the undersigned hereby:

1. ...

2. ...

5 3. Subject to all the terms and conditions thereof agree to render all of the services therein required of me and to be bound by and duly perform and observe each and all of the terms and conditions of the Agreement requiring performance or compliance on my part .

...

SIGNED by

In the presence of:"

10 125. Ms Ackroyd had taken legal advice in relation to her responses in March and April 2013. Whilst her responses did not question the existence of an inducement letter her evidence was that she did not recognise the example and had no recollection of receiving such a letter. She was sure that she had not signed such a letter. The only
15 contemporary correspondence at the time the Contract was signed was a formal letter from a BBC lawyer in the BBC Talent Rights Group dated 11 May 2006 enclosing a signed copy of the Contract. There was no reference to any inducement letter of the same date.

20 126. We note that the example of an inducement letter was headed BBC News, whereas Ms Ackroyd's contract negotiations were with BBC Talent. In the absence of any copy of an inducement letter or any evidence from Ms Thomas as to what caused her to think that there was an inducement letter we are not satisfied that Ms Ackroyd did sign or send any inducement letter to the BBC.

25 127. On 28 June 2013 the BBC Litigation Department wrote to CAM Ltd terminating the Contract. The BBC relied on Clause 13.1 of the Contract on the basis of a material breach of Clause 9.1 of the Contract dealing with conflicts of interest. In particular the BBC relied on:

- (1) Determinations by HMRC that CAM Ltd and Ms Ackroyd had failed to account for tax and national insurance in accordance with the IR35 Legislation.
- (2) The making of inappropriate claims for relief from tax in relation to
30 expenditure incurred.
- (3) The making of inaccurate representations to HMRC.
- (4) An unauthorised personal appearance at an event allowing the Look North brand to be used in advertising amounting to a breach of the Editorial Guidelines.
- 35 (5) Accepting invitations to at least one event without obtaining prior consent of the BBC

128. It is not part of our role in this appeal to make any finding as to whether there was a material breach of the Contract by Ms Ackroyd, and we say nothing about whether the Contract was validly terminated.

5 129. HMRC again relied on Ms Ackroyd's failure to question the BBC's reliance on the Editorial Guidelines as recognition that she was bound by the Editorial Guidelines. It is notable that Ms Ackroyd did not dispute in her response that she was bound by the Editorial Guidelines. However, Ms Ackroyd was having to deal with the media fallout. She also understood that Ms Thomas had described her as "toxic". She had become isolated. We can understand that Ms Ackroyd's main concern was to
10 refute the fact that her integrity was being questioned. We do not treat Ms Ackroyd's responses to correspondence referring to the Editorial Guidelines as an acceptance by her that she was contractually bound by them.

Reasons

15 130. It is worth re-stating at this stage the principal issue which we must decide as follows:

" If the services provided by Ms Ackroyd were provided under a contract directly between the BBC and Ms Ackroyd, would Ms Ackroyd be regarded for income tax purposes as an employee of the BBC?"

20 (1) *General approach*

131. There was no real disagreement as to the principles we should apply in determining this issue. We were referred to a number of relevant authorities. There is no statutory definition of employee or employment in this context. The classic statement on the conditions required for a contract of service is that of MacKenna J in
25 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515:

30 " (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. (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. (iii) The other provisions of the contract are consistent with its being a contract of service."

132. The first condition is what is known as "mutuality of obligation". The second condition is that of control to a sufficient degree. The third condition operates as a negative condition. If the first two conditions are satisfied, the contract will be a
35 contract of employment unless there are other provisions of the contract which are inconsistent with that conclusion and of sufficient importance that the Tribunal can conclude that the contract is not one of service (see *Ready Mixed Concrete* at p516 to 517 and *Weightwatchers (UK) Ltd v HMRC* [2012] STC 265 per Briggs J at [41] to [42] and [111]).

133. The mutuality of obligation to perform personally work offered and to pay remuneration is the “*irreducible minimum ... necessary to create a contract of service*” (see *Carmichael v National Power Plc* [1999] 1 WLR 2042 at 2047). The requirement of mutuality will be satisfied where there is a contractual requirement on the employer to provide payment, in the nature of a retainer for a minimum number of hours per year, irrespective of whether those hours are actually worked (see *Usetech Ltd v Young* at [64]).

134. The right of control in respect of what is to be done, and where when and how it is to be done is an important indicator of an employment relationship, but is not by itself decisive. The key question in this regard is not whether in practice the worker has actual day to day control over his own work, but whether there is, to a sufficient degree, a contractual right of control (see *White v Troutbeck* [2013] IRLR 286 at [40]-[43] per Richardson J, upheld in the Court of Appeal at [2013] IRLR 949, and *Morren v Swinton and Pendlebury BC* [1965] 1 WLR 576). The question whether control is “sufficient” for this purpose must take into account the practical realities of a particular industry, considering those aspects of the performance of work that could be controlled in that industry.

135. The significance of control was considered by the Court of Appeal in *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318. That was a case of an agency worker seeking to establish that she was an employee of the agency. Buckley J (with whom Brooke and Longmore LJ agreed) considered the position of employees with a high degree of autonomy. He stated as follow at [19]:

“ 19. MacKenna J made plain [in *Ready Mixed Concrete*] that provided (i) and (ii) are present (iii) requires that all the terms of the agreement are to be considered before the question as to the existence of a contract of service can be answered. As to (ii) he had well in mind that the early legal concept of control as including control over how the work should be done was relevant but not essential. Society has provided many examples, from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent. In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment. MacKenna J cited a passage from the judgment of Dixon J in *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 from which I take the first few lines only:

‘The question is not whether in practice the work was in fact done subject to a direction and control exercised by any actual supervision or whether any actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.’”

136. The same point was made by Vinelott J in *Walls v Sinnett* [1987] STC 236 at p246c in relation to a professional singer who lectured in music at a technical college:

5 “ The other point that was very much stressed by the taxpayer is the modest degree of control which in practice was exercised by the governors and the principal of the college. In some contexts the degree of control exercised may be very important in deciding whether someone is an employee or servant, but in the case of a senior lecturer at a college of further education, more particularly one who like the taxpayer came into teaching from active work as a singer, it is not surprising to find that he was given a very wide degree of latitude in the organisation of his work and time.”

10 137. In identifying whether there is a right of control, the starting point is the express terms of the contract. If the express terms do not answer the question, then it is necessary to consider the implied terms of the contract (see *Ready Mixed Concrete* at p516A).

15 138. Absence of control as to the detailed way in which work is performed is not inconsistent with the employment of a skilled person (see *Morren v Swinton and Pendlebury Borough Council* [1965] 1 WLR 576 per Lord Parker CJ at 582A-C; *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 per Lord Griffiths at 384A; and *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318 per Buckley J at [19]). The significance of control is that the employer can direct what the employee does, not necessarily how he does it (see *Various Claimants v Catholic Child Welfare Society & Ors* [2012] UKSC 56 per Lord Phillips at [36]).

20 139. If the genuine contractual right of control to a sufficient degree does exist, it does not matter whether that right is actually exercised (see *Autoclenz v Belcher* [2011] UKSC 41 per Lord Clarke at [19]).

25 140. In *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938 at [76] Ward LJ said that the question of control is not merely about the legal power to control, but that it should be viewed more in terms of accountability and supervision by a superior. That was said in the context of vicarious liability of the Church for sexual abuse by priests. In our view Ward LJ was not suggesting here that the legal power to control was less important.

30 141. Mr Summers relied on the Court of Appeal decision in *Cowell v Quilter Goodison & Co Limited* (1989) IRLR 392. That was a case involving an equity partner in a firm of stockbrokers, and it was held that he was not an employee for the purposes of unfair dismissal rules. The Master of the Rolls said that as an equity partner “[he] was not the servant of anyone”. Mr Summers suggested we should look to see whether Ms Ackroyd was a servant and submitted that she was not. However, 35 the Master of the Rolls also described the terms ‘master’ and ‘servant’ as old terms and emphasised that it was the nature of the relationship that was important and not the terminology. We agree with Mr Tolley that in the light of subsequent authorities (see for example *Various Claimants v Catholic Child Welfare Society* at [36]) the question of whether an individual “looks like a servant” is not a helpful test.

40 142. It was recognised in *Ready Mixed Concrete* that the right to provide a substitute to carry out work is inconsistent with a contract of service. Again, it is the right to provide a substitute that is relevant. It does not matter that the right in practice was not used (see *Autoclenz Ltd v Belcher* at [19]). The existence of a right to substitute is

not determinative of self-employment (see *Usetech Ltd* at [53]). Mr Summers also accepted that the absence of a right to provide a substitute may suggest employment, but again it is not determinative (see *R (atao Professional Contractors Group Ltd) v IRC* per Burton J at [48v]).

5 143. Long term contracts where the whole or substantially the whole of the individual's working week is devoted to performing the services tend to suggest employment (see *Usetech Ltd* at [59]). *Hall v Lorimer* [1992] 1 WLR 939; [1994] 1 WLR 209 was a case involving a freelance vision mixer who was found to be self employed. At 945B Mummery J viewed as relevant the degree of continuity in the relationship, how many engagements are performed and whether they are performed
10 mainly for one person. He also considered it useful to consider whether the person performing the services was 'part and parcel' of the organisation of the other party. Similarly, at 218C Nolan LJ in the Court of Appeal suggested that the extent to which the individual was dependent upon or independent of a particular paymaster and the duration of engagements may be significant. Further, it is not inconsistent with a contract of employment that the individual is free to work for others (see *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at 186G).
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144. In *Market Investigations Ltd*, Cooke J suggested at 184G that the question of whether a worker is an employee could be answered by determining whether the individual who performs the services is performing them as a person in business on
20 his own account. There is no exhaustive list of factors, but he identified a number of relevant factors at 185A-B as follows:

- (1) whether the worker provides his own equipment;
- (2) whether he hires his own helpers;
- 25 (3) what degree of financial risk he takes;
- (4) what degree of responsibility for investment and management he has; and
- (5) whether and how far he has an opportunity of profiting from sound management in the performance of his task

145. Financial risk involves the ability to earn a profit or make a loss from how the work is performed (see for example *Global Plant Ltd v Secretary of State for Social Security* [1972] 1 QB 139 per Lord Widgery at 152). In this context, the risk only of not being able to find alternative employment is not a relevant factor as it is a risk shared by all casual employees (see *Lee Ting Sang v Chung Chi-Keung* at 384D).
30

146. In the case of a profession or vocation the question of whether the individual is in business on his own account may not be very helpful. In such cases a significant factor may be the extent to which the worker is dependent upon the client for financial exploitation of his talents; conversely whether the worker is able to exploit his talents in the wider market and to a number of clients (see *Hall v Lorimer* per Nolan LJ at 218).
35

40 147. It is not appropriate to adopt a mechanistic or 'check list' approach. Different factors will have difference significance and weight in each case. Having considered

all the relevant factors, it is necessary to stand back from the detail and make a qualitative assessment of the facts as found (see *Hall v Lorimer* per Nolan LJ at p216, approving the views of Mummery J in the High Court).

148. Each case must be determined on its own facts. However, Mr Tolley relied on a decision of the Employment Appeal Tribunal in *ABC News Intercontinental Inc v Gizbert EAT (21 August 2006) (unreported)*. The EAT concluded that a contract which provided for ABC to provide 100 days' work to an experienced journalist, or at any event 100 days' pay at agreed rates, involved mutuality of obligation (see [21]-[22]). It also concluded that the contract was one of service, notwithstanding the purported description of the contract as for the provision of freelance services. The conclusion took into account, amongst other matters the degree of control exercised, the individual's place within the organisation, the restrictions on working for competitors and a requirement to keep the company informed of commitments outside the agreement (see [23]).

149. Mr Summers referred us to a number of decisions of the Special Commissioners and the First-tier Tribunal, albeit they are not of course binding on us. He referred us to *Lewis t/a MAL Scaffolding v Revenue & Customs Commissioners [2006] STC (SCD) 253*, *Paya Ltd v HMRC [2016] UKFTT 660 (TC)* and *Tomlinson v Revenue & Customs Commissioners [2017] UKFTT 0489 (TC)*. *Paya Ltd* was a similar case to the present involving BBC presenters but the decision concerned a procedural point which does not assist us, although incidentally it does indicate the BBC's position of not wishing to be aligned with HMRC or the appellant. *Lewis* and *Tomlinson* were both decided on their own facts, applying the authoritative principles set out by the higher courts to their own facts. Again, they do not give us much assistance.

(2) *The Hypothetical Contract*

150. In identifying the terms of the hypothetical contract the stated intentions of the parties, in this case Ms Ackroyd, CAM Ltd and the BBC, cannot prevail over the true legal effect of the actual agreements. This point was considered by Henderson J in *Dragonfly Consultancy Ltd v Revenue & Customs Commissioners [2008] EWHC 2113 (Ch)* as follows:

“ 53. ... statements by the parties disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement between them. It is true that in a borderline case a statement of the parties' intention may be taken into account and may help to tip the balance one way or the other: see *Ready Mixed Concrete* ([1968] 2 QB 497 at 513) and *Massey v Crown Life Insurance Co* [1978] 2 All ER 576, [1978] 1 WLR 676. In the majority of cases, however, such statements will be of little, if any, assistance in characterising the relationship between the parties.

55. I would not, however, go so far as counsel for HMRC who submitted that, as a matter of law, the hypothetical contract required by the IR35 legislation must be constructed without any reference to the stated intentions of the parties. If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even

then, however, the weight to be attached to such a hypothetical statement would in my view normally be minimal, although I do not rule out the possibility that there may be borderline cases where it could be of real assistance.”

5 151. There was no issue between the parties that the hypothetical contract with which we are concerned in the present appeal is based on the terms of the Contract, with Ms Ackroyd herself agreeing to provide those services to the BBC on the terms set out in the Contract. We are satisfied that the hypothetical contract contained the following terms derived from the Contract:

10 (1) The contract was for a term of 7 years pursuant to clause 2, terminable only pursuant to clause 13.

(2) Ms Ackroyd was contractually obliged to perform the services in clause 3 and the BBC was contractually obliged to pay the fees set out in the payment Schedule in monthly instalments. If Ms Ackroyd failed to perform the services including a minimum of 225 days for Look North then the fees would reduce proportionately.

15 (3) The BBC was not bound to call on the services of Ms Ackroyd but it remained liable to pay the fees pursuant to clause 6 where it did not.

(4) The BBC was entitled to edit Ms Ackroyd’s contributions to Look North and other contributions pursuant to clause 5.

20 (5) Travel and subsistence expenses would be reimbursed as for freelance contributors, together with a clothing contribution of £3,000 per year.

(6) There were no set hours or set working days, subject to Ms Ackroyd being available to present Look North at 6.30pm as required by the BBC. There was no set location where Ms Ackroyd would work, either in the studio or on an outside broadcast.

25 (7) Ms Ackroyd was subject to the restrictions in clause 8 and clause 9. Otherwise she was entitled to undertake other paid or unpaid activities outside the BBC.

30 (8) Ms Ackroyd was not contractually bound by the Editorial Guidelines. She did not have an identified line manager and was not subject to formal appraisal procedures.

(9) Ms Ackroyd had no right to provide a substitute to perform the services and was expressly prohibited from doing so by clause 18.

35 (10) There was no express provision for payment of holiday pay, sick pay or pension entitlement.

152. Mr Summers submitted that there were also terms of the hypothetical contract as follows:

40 (1) Ms Ackroyd would control stories covered, how they would be presented, who should be interviewed and whether there should be an outside broadcast.

(2) Ms Ackroyd could make such changes to the Look North format as she wanted.

(3) Ms Ackroyd could develop human interest stories of her own for future screening.

5 153. Based on our findings of fact we are not satisfied that these were terms of the hypothetical contract. These were matters in which she was subject to direction by the BBC.

10 154. Mr Summers also relied on the intentions of the parties that Ms Ackroyd should be employed by CAM Ltd and not by the BBC. We have found that was the intention of the parties. The services provided by Ms Ackroyd are described in Clause 3 as “freelance services”. However, for the reasons which follow we do not regard this as the borderline case that Henderson J had in mind when he suggested that the intentions of the parties may tip the balance.

15 155. The burden is on CAM Ltd to establish facts that support its case that the hypothetical contract was a contract for services and not a contract of service. Ms Ackroyd criticised HMRC for the fact that during their enquiry they declined to approach certain BBC employees who would have been able to confirm facts to support her case. However, CAM Ltd could have adduced evidence from those persons in the present proceedings, obtaining a witness summons if necessary. The same applies to Mr Summers criticism of HMRC for not calling Mr Pannett to give evidence. If he considered that Mr Pannett had material evidence to give then again CAM Ltd could have applied for a witness summons.

20 156. The task we have to perform in deciding the principal issue in this appeal is essentially a balancing exercise taking into account all the factors described above. Some factors will have more weight than others.

(3) Mutuality of Obligation

30 157. It was not in dispute that a pre-requisite for a contract of employment was present, namely mutuality of obligation. Ms Ackroyd was required to work for the BBC for at least 225 days in any one year, and the BBC was required to pay the fees set out in the Contract. Mr Summers submitted that this was a neutral factor. We agree it is not a factor which points one way or the other. It is the “irreducible minimum” which must be present if a contract is to be construed as a contract of employment. We are satisfied that it is present in the hypothetical contract.

(4) Control

35 158. HMRC confirmed their determinations and decisions in a letter dated 19 August 2016. In that letter the right of control was described as a “crucial factor”. In submissions to us Mr Tolley relied on control but he accepted that the BBC could not control the words which Ms Ackroyd chose to use during a live television programme. He submitted that she was given and exercised a professional discretion which was not inconsistent with control over Ms Ackroyd’s work residing with the BBC.

159. Mr Tolley submitted and we accept that it is a necessary premise of clause 1 of the Contract that Ms Ackroyd was subject to the control of CAM Ltd. It states in terms that “*The Company [CAM Ltd] controls the services of Christa Ackroyd*”. It is clearly possible therefore to control someone in the role Ms Ackroyd was performing at the BBC.

160. Clause 3 of the Contract gave the BBC first call on the services of Ms Ackroyd “as it may require”. We consider that the reference to what the BBC may require was a reference to such of Ms Ackroyd’s services that it may require, whether as presenter, reporter or providing reasonable ancillary services, for example assisting with the editing of material. The BBC could direct which of those services it required Ms Ackroyd to perform. The BBC could also require Ms Ackroyd to attend and represent the BBC at public events pursuant to clause 3.3.

161. Ms Ackroyd’s evidence was that she would never have entered into a contract with the BBC if it meant that the BBC would control the way in which she worked. However, we are concerned with the hypothetical contract. At most this has only marginal relevance in a finely balanced case as a statement of intention.

162. Ms Ackroyd maintained that the BBC was obliged to accept and act upon her suggestions. We do not accept that evidence. There is no express term to that effect in the Contract. Further it is inconsistent with the terminology used by Ms Ackroyd when describing her role in her witness statement. We have found that the Editorial Guidelines were not incorporated as terms of the hypothetical contract, but they do form part of the context in which we must construe the hypothetical contract. In our view it would be inconsistent with the Editorial Guidelines if Ms Ackroyd were to have control over the content of Look North or her contribution to the programme as submitted by Mr Summers. It seems unlikely to us that the BBC would give Ms Ackroyd an entirely free role in Look North without at least an expectation that in carrying out her work she would abide by the Editorial Guidelines. It was not necessary for the BBC to bind Ms Ackroyd contractually to the Editorial Guidelines because it was entitled to direct what work she did and how she did it. Much would be left to her professional judgement but if the BBC considered that she was breaching the Editorial Guidelines in a material way then in our view it could direct her to work in a way consistent with the Editorial Guidelines.

163. We accept that the BBC did implement changes suggested by Ms Ackroyd, but there is no evidence that Ms Ackroyd would have the last word on the implementation of changes. There are no real examples of her having the last word, except in one instance where there was a difference of opinion as to how she should describe three murder victims. We do not consider that example carries much weight.

164. We are not satisfied that as a matter of contractual obligation the BBC was in any sense required to act on Ms Ackroyd’s direction. If that was the intention of the parties at the time the Contract was negotiated then we have no doubt that express provision would have been made to that effect. In practice, the BBC did act on Ms Ackroyd’s advice and suggestions. That is because she was an experienced,

professional and successful television journalist and presenter. CAM Ltd was engaged and the contract renewed because Ms Ackroyd possessed such qualities.

165. Mr Summers relied on the fact that Ms Ackroyd had no line manager and was not subject to the BBC appraisal procedure. Looked at in isolation this may suggest
5 that the BBC did not control Ms Ackroyd's work. Looked at in context, however, for the reasons given we are satisfied that the BBC did have ultimate control over what work Ms Ackroyd did and how she did it. There was no evidence of examples where they exercised such control but we consider that as a matter of contract they were entitled to do so. It is consistent with the fact that the BBC were expressly entitled to
10 edit Ms Ackroyd's contributions.

166. Mr Summers submitted that HMRC viewed Ms Ackroyd's role pursuant to the hypothetical contract as simply a newsreader. He accepted that if that were a true reflection of her work then she would properly be treated as an employee pursuant to the hypothetical contract. We accept that her role was much more than simply
15 presenting the news and reading a script. Indeed, Mr Tolley acknowledged as much.

167. Mr Summers rightly submitted that the contract had no express term dealing with control. Control of Ms Ackroyd's work pursuant to the hypothetical contract must lie somewhere, either with Ms Ackroyd or with the BBC. We are not satisfied that it lay with Ms Ackroyd. We consider that the BBC did have ultimate control in
20 how, where and when Ms Ackroyd carried out her work. We accept a submission by Mr Tolley that this was an implied term of the hypothetical contract in order to give that contract business efficacy. In the context of Ms Ackroyd's role it was necessary for the BBC to at least have the power to direct Ms Ackroyd's work, otherwise Look North as a programme ran the risk of not complying with the Editorial Guidelines. For
25 example, if Ms Ackroyd consistently failed to comply with the Editorial Guidelines, it is inconceivable that the parties intended that the BBC should be obliged to continue to pay Ms Ackroyd for her work even if as a result she was not called on to present Look North.

(5) Other Relevant Factors

30 168. There was no right pursuant to the hypothetical contract for Ms Ackroyd to provide a substitute. In fact, the hypothetical contract went further and expressly provided that Ms Ackroyd could not provide a substitute. We accept Mr Summers submission that this is not determinative of the issue and Mr Tolley did not suggest that it was determinative. Mr Summers acknowledged that it was a pointer towards an
35 employment contract. We agree that it points towards employment, but it is not a significant factor. In the context of the anchor of a current affairs programme, whether or not that person is self-employed it is unlikely that they would be entitled or expected to provide a substitute save possibly where production of the actual programme was being contracted out. That was not the position here.

40 169. Ms Ackroyd was inevitably seen as a part of the BBC because she presented a nightly news and current affairs programme. However, an external observer would not know the details of the hypothetical contract. Ms Ackroyd had a BBC email

address and for example she received the round robin email from Mr Thompson. She attended training seminars. We accept that anyone approaching the BBC to engage her services would be directed to Ms Ackroyd. Further, it was known to those she worked with that she was entitled to undertake outside activities, although they did not necessarily know on what terms. It seems to us that Ms Ackroyd was to some extent part and parcel of the BBC, but we do not consider this to be a significant factor in this case.

170. It is a relevant factor that Ms Ackroyd had the benefit of a 7 year contract. This was unusual at the BBC. Mr Summers' argued that the length of the Contract simply reflected the BBC's desire to tie Ms Ackroyd to a lengthy contract because of the value she added to Look North, and did not reflect the fact that they regarded her as an employee. We do not accept that submission. Whether the BBC regarded Ms Ackroyd as an employee is of marginal relevance, and in any event we are not satisfied that they did. She could not be an employee because the BBC had contracted with CAM Ltd. There is no suggestion that the Contract could ever have established Ms Ackroyd as an employee, unless it was a sham which has never been suggested. Indeed, we have found that the BBC wanted to contract with a personal service company to avoid any possibility of Ms Ackroyd being an employee. In our view a hypothetical contract of that length for at least 225 days per year and terminable only for a material breach points towards a contract of employment. The existence of a 7 year contract meant that Ms Ackroyd's work at the BBC was pursuant to a highly stable, regular and continuous arrangement. It involved a high degree of continuity rather than a succession of short term engagements. That is a pointer towards an employment contract.

171. We do not consider that the fact the fees were payable on a monthly basis akin to the way an employee might be paid is significant. Nor is the absence of any provision for holiday, sick pay or pension entitlement. The Contract was between CAM Ltd and the BBC and both parties accept that the Contract was not an employment contract. It would not be expected to contain such provisions. Mr Tolley suggested that as a "worker" Ms Ackroyd would have a statutory entitlement to such rights, but he accepted that did not assist the Respondents in establishing whether Ms Ackroyd was an employee. Mr Summers relied on the fact that if Ms Ackroyd had been an employee then she would have been entitled to employment rights on the eventual termination of the Contract. Again, this is not a relevant factor because the BBC and CAM Ltd were governed by the Contract, and not the hypothetical contract.

172. The authorities suggest that it may be helpful to consider whether Ms Ackroyd was in business on her own account. Mr Summers submitted that under the hypothetical contract Ms Ackroyd should be seen as being in business on her own account. In particular he relied on the fact that she was able to profit from sound management of her business because she was entitled to "success payments" of £15,000 per year if the ratings of Look North were consistently and significantly in excess of those for ITV's Calendar.

173. It was not realistically possible for Ms Ackroyd to make a loss in performing the Contract. She could increase her income by way of the success fee. We do not

regard that result as being referable to sound management of a business, but from sound performance of her role in Look North. We are satisfied that the success of Look North was in large measure due to the changes Ms Ackroyd drove, her performance as a journalist and presenter and the contributions of other team members. As such Ms Ackroyd was not managing a business, but performing her significant role in the team to a high standard.

174. Ms Ackroyd was entitled to payment of an additional fee of £7,500 for each 6 month period in which the ratings of Look North exceeded those of Calendar. Mr Tolley referred to this as a “bonus” whereas Ms Ackroyd preferred to describe it as a “success fee”. The terminology is not important. It was a performance related payment amounting to approximately 9% of the principal fee payable at the beginning of the Contract in 2007. We consider that such a performance payment is a neutral factor in our decision. It is certainly not inconsistent with a contract of employment.

175. To a limited extent Ms Ackroyd did provide her own equipment. She used her own laptop and mobile phone. That is not unusual in the case of an employee. She also had her own Sky subscription. Otherwise she used BBC equipment to produce her contributions to Look North. It was not suggested that she invested in her business, other than the investment of her own expertise. Nor was there significant management of any such business. She performed professional services but she did not profit from sound management of a business nor did she take any financial risk as such. The amount of other work she performed for payment was very small compared with the fees she received by virtue of the hypothetical contract. It was not a case of managing a number of separate contracts in addition to the hypothetical contract. The most significant example of other activities was Ms Ackroyd’s contract with Express Newspapers but this was terminated at the time she entered into the Contract.

176. We do not consider that Ms Ackroyd could fairly be described as being in business on her own account. She was economically dependent on the hypothetical contract with the BBC which took up most if not all of her working time.

177. There were restrictions as to what other work Ms Ackroyd could do, subject in some circumstances to consent from the BBC. We are satisfied that those restrictions did not in practice prevent Ms Ackroyd from undertaking various outside activities that she wished to pursue, at least until 2013 prior to termination of the Contract. However, the fact remains that those restrictions were part of the hypothetical contract. The BBC could refuse permission for any reason and was not obliged to give reasons.

178. Mr Summers relied on a submission that certain well known presenters at the BBC were permitted to work for other broadcasters. We had no evidence as to the terms on which those presenters were contracted to the BBC and we do not consider that this adds anything to Ms Ackroyd’s case.

40 *Overall Assessment*

179. We must consider all the factors above and the relative weight attaching to those factors. In our view the most significant factors in the present case include the fact that the BBC could control what work Ms Ackroyd did pursuant to the hypothetical contract. It was a 7 year contract for what was effectively a full time job. Standing
5 back and making an overall qualitative assessment of the circumstances we consider that Ms Ackroyd was an employee under the hypothetical contract. If the services provided by Ms Ackroyd were provided under a contract directly between the BBC and Ms Ackroyd, then Ms Ackroyd would be regarded for income tax purposes as an employee of the BBC.

180. We acknowledge that this is a value judgement. It is in the nature of a value judgement that different people may come to different conclusions. We do not criticise Ms Ackroyd for not realising that the IR35 legislation was engaged. She took professional advice in relation to the contractual arrangements with the BBC and she was encouraged by the BBC to contract through a personal service company.

15 *Tax Relief for Expenditure*

181. CAM Ltd reimbursed Ms Ackroyd for the costs of her subscription to Sky TV in tax years 2007-08 to 2011-12. The average cost in those years was approximately £750 per year. Mr Sutcliffe and Mr Biggin who prepared Ms Ackroyd's accounts and self-assessment tax returns were content for tax relief to be claimed in relation to
20 these sums.

182. The BBC did not require Ms Ackroyd to have a subscription to Sky TV. The subscription covered various sky channels including Sky Sport and Sky Movies. Ms Ackroyd said that she "deemed it necessary to have access to news and sport". Sport and popular culture was part of the Look North programme. For example, she
25 considered it necessary to know how the Yorkshire County Cricket team was doing. She did not accept that the subscription was in part for personal use. Ms Ackroyd's evidence was that she would not often watch television with her husband. She would go to a separate room keeping abreast of news and current affairs.

183. Mr Summers argued that Ms Ackroyd's role and working pattern meant that it was necessary for her to have a Sky TV subscription. She was a journalist and not just
30 a newsreader. She needed to keep up to date on current breaking news and to research stories with a regional angle.

184. We accept that Ms Ackroyd watched Sky TV in the way she described but we do not accept that there was no element of personal use and enjoyment. It seems likely
35 to us and we are satisfied that at least part of the reason for having a Sky TV subscription was for Ms Ackroyd and her husband to enjoy watching the content at leisure.

185. It was common ground that the reimbursement of Ms Ackroyd's liability to Sky constituted earnings for the purposes of PAYE and NIC pursuant to section 62 ITEPA
40 2003. CAM Ltd did not treat the payments as such. The issue arising is whether CAM

Ltd was entitled to treat the payments as being subject to relief pursuant to section 336 ITEPA 2003 which provides as follows:

“ (1) The general rule is that a deduction from earnings is allowed for an amount if—

(a) the employee is obliged to incur and pay it as holder of the employment, and

5 (b) the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment.”

186. In *Fitzpatrick v CIR [1994] 1 WLR 306* the House of Lords was concerned with journalists claiming relief for the cost of purchasing newspapers. It was held that relief was not available. Lord Templeman said this:

10 “ ... in the present cases it seems to me that a journalist does not purchase and read newspapers in the performance of his duties but for the purpose of ensuring that he will carry out his duties efficiently... A journalist who reads newspapers does so in order to be able to perform his duties to the highest possible standard but he does not read in performance of his duties.”

15 187. There is no evidence that CAM Ltd required Ms Ackroyd have a subscription to Sky TV. More significantly, we are not satisfied that the amounts spent by Ms Ackroyd were incurred exclusively in the performance of her duties as an employee of CAM Ltd. They were incurred for the purpose of ensuring that she could carry out her duties efficiently. We are also satisfied that Ms Ackroyd’s object in subscribing to
20 Sky TV included obtaining the private benefit for herself and her husband of being able to watch the content at leisure (see *Mallalieu v Drummond [1983] 2 AC 861* and *MacKinlay v Arthur Young McClelland Moores & Co [1990] 2 AC 239*).

188. We are satisfied therefore that CAM Ltd ought to have treated the payments to Ms Ackroyd as being subject to PAYE and NIC.

25 189. CAM Ltd also made payments to Ms Ackroyd said to be additional household expenditure arising from the fact that Ms Ackroyd had to work from home.

190. We are satisfied that Ms Ackroyd had no desk or computer at the BBC offices and that she regularly worked from home. She is a journalist and she has an office at home which she calls ‘the snug’. This is where she would write her newspaper
30 column and work on stories for Look North. She received secretarial support paid for by CAM Ltd. She would use the snug as a base to do her work for the BBC and for her small number of other clients.

191. During the enquiry HMRC required information from CAM Ltd by way of a notice pursuant to Schedule 36 Finance Act 2008. That information included details
35 of the arrangements between Ms Ackroyd and CAM Ltd for home working, together with details of the additional household costs incurred by Ms Ackroyd from working at home. The information was not provided.

192. Section 316A ITEPA 2003 provides as follows:

“(1) This section applies where an employer makes a payment to an employee in respect of reasonable additional household expenses which the employee incurs in carrying out duties of the employment at home under homeworking arrangements.

5 (2) No liability to income tax arises in respect of the payment.

(3) In this section, in relation to an employee—

10 “homeworking arrangements” means arrangements between the employee and the employer under which the employee regularly performs some or all of the duties of the employment at home; and

15 “household expenses” means expenses connected with the day to day running of the employee’s home.”

193. There was no evidence of any conscious agreement between CAM Ltd and Ms Ackroyd in relation to her homeworking arrangements. More importantly there was no evidence as to the additional costs incurred by Ms Ackroyd as a result of working from home. In those circumstances we are not satisfied that relief under section 316A was available. CAM Ltd ought to have treated the payments to Ms Ackroyd as being subject to PAYE and NIC.

Conclusion

194. For the reasons given above we dismiss the appeal in principle, subject to:

25 (1) any reference to the Tribunal in relation to the quantum of the determinations and decisions concerning the intermediaries legislation, and

(2) any issues which remain outstanding in relation to penalties.

195. The parties shall inform the Tribunal in writing within 42 days from the date of release of this decision whether they wish the Tribunal to determine either of these matters in which case we will give further directions.

196. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

40

**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 10 FEBRUARY 2018

5

APPENDIX

Extracts from the Contract

5

1. THE COMPANY

10 The Company controls the services of CHRISTA ACKROYD ('the Broadcaster') and agrees to provide the services of the Broadcaster to the BBC and further agrees with the BBC that it shall observe and perform and (where appropriate) shall ensure that the Broadcaster observes and performs the terms and conditions of this Agreement.

15 2. TERM

This Agreement shall (subject to any other terms providing for prior termination) be for a period of Seven Years from the First day of January Two Thousand and Seven to the Thirty First day of December Two Thousand and Thirteen ('the Term').

20

3. SERVICES

During the Term the BBC shall (subject to reasonable notice) have first call on the freelance services of the Broadcaster (including acting as presenter reporter and reasonable ancillary services normally associated with such a role) as it may require to the output of the BBC, to include in particular:-

25

3.1 up to Two Hundred and Twenty Five (225) days in each year of this Agreement for the output of BBC Yorkshire

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3.2 such days as may be mutually agreed for BBC radio stations in the North region

3.3 attendance at/representation of the BBC at such public events as required by the BBC

35

3.4 such other contributions as shall be mutually agreed.

5. MORAL RIGHTS

40 The Company grants the BBC the unlimited right to edit copy alter add to take from adapt or translate all the Broadcaster's contributions made under this Agreement and warrants that the Broadcaster has waived irrevocably any 'moral rights' which he may have now or in the future

45 6. FEE

6.1 In respect of the services of the Broadcaster the rights granted under Clause 4 above and the waiver given in clause 5 above the BBC shall pay to the Company the sums set out in the Schedule hereto during the term which sums exclusive of VAT shall be payable by equal monthly instalments not later than 14 days after the end of the relevant month.

50

6.2 In the event of the Broadcaster failing for any reason to render the services under this Agreement the payment shall (unless the BBC otherwise decides) be reduced by an amount proportionate to the period during which the Broadcaster failed to render the services.

7. EXPENSES

7.1 The Company shall be entitled to the appropriate BBC travel and subsistence payments for freelance contributors.

7.2 The BBC shall make a contribution of up to Three Thousand Pounds (£3,000) in each contract year to the Broadcaster in respect of the purchase of suitable clothing ... subject to the supply of suitable receipts. Beyond this contribution the Broadcaster will be required to provide appropriate contemporary clothing for carrying out the services ...

8. ENGAGEMENTS FOR THIRD PARTIES

8.1 During the Term the Broadcaster shall not without the prior written consent of the Head of Regional and Local Programmes, BBC Yorkshire (referred to hereafter as ‘the BBC Representative’ ...) provide services of any kind in respect of any form of television or radio intended for audiences in the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland or for on-line services for any party other than for the BBC.

8.2 The Broadcaster shall not provide her services for publications of any kind for any party other than the BBC without first obtaining the prior written consent of the Head of BBC Yorkshire.

9. CONFLICTS OF INTEREST

9.1 The Company acknowledges that the BBC under its Agreement with the Secretary of State for Culture Media and Sport has given certain undertakings in relation to Programme Standards including in particular impartiality and accordingly agrees in furtherance of the mutual interest of the BBC and the Broadcaster that the Broadcaster will not engage in any conduct which compromises or calls into question the impartiality or integrity of the BBC or any of its programmes or the Broadcaster and in particular without limitation thereto the Broadcaster will not without the prior written consent of the BBC Representative

9.1.1 be involved or associated in any way with any person or organisation which has a trading relationship with the BBC its subsidiaries or associates or which is itself or in association with others in competition with the BBC its subsidiaries or associates or which is tendering for work from or which supplies goods or services to the BBC its subsidiaries or associates

9.1.2 provide training in how to be interviewed for radio or television#

9.1.3 be publicly associated with the work of any charity or government initiative ...

11. WARRANTIES

The Company warrants that:-

5 11.1 there is no other contract or engagement or other reason (including prior conduct) which would inhibit or prevent the Broadcaster from entering into or fulfilling the terms of this Agreement

10 11.2 the Broadcaster's contributions under this Agreement are and will be the Broadcaster's original work and do not and shall not contain anything which is an infringement of copyright or related rights or which is defamatory or which may bring the BBC into disrepute ...

12. INDEMNITY

15 The Company shall at all times keep the BBC fully indemnified in respect of any consequences which may ensue upon breach of any of the warranties given by the Company pursuant to Clauses 11 and 5 hereof

13. TERMINATION

20

13.1 If the Company or the Broadcaster shall commit a material or irremediable breach of this Agreement ... then the BBC shall have the right to terminate this Agreement forthwith ...

25 **14. ENHANCEMENT OF REPUTATION**

The BBC shall not be obliged to call on the services of the Broadcaster hereunder or to use all or any of the Broadcaster's contributions and if it does not do so it shall not be liable to the Company or to the Broadcaster for any loss or damage suffered by the Company or the Broadcaster ...

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18. ASSIGNMENT

35 The Company shall not assign transfer charge or deal in any other manner with this Agreement or sub-contract any or all of the Broadcaster's obligations under it.

...

40

THE PAYMENT SCHEDULE

(referred to in clause 6.1)

45 A 1st January 2007 to 31st December 2007

One Hundred and Sixty Three Thousand Two Hundred and Thirty Three Pounds (£163,233) which shall be payable via equal monthly instalments in arrears

50 [B-G contain provision for annual increases (if any) in the Retail Prices Index in the previous year up to 1st January 2013 to 31 December 2013]

H In addition the BBC agrees to make payment to the Company of Seven Thousand Five Hundred Pounds (£7,500) at the end of June and the end of December in each year of this Agreement SUBJECT TO the programming of the Broadcaster consistently and significantly exceeding the ratings of its commercial competition (in the opinion of the
5 BBC) over the relevant preceding Six Month period.

which sums are all expressed as exclusive of VAT.

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