Neutral Citation Number: [2022] EWCA Civ 501

Case No: A3/2021/0769

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr Justice Marcus Smith and Judge Jonathan Richards
[2021] UKUT 37 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 April 2022

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE ARNOLD
and
SIR DAVID RICHARDS

- -

Between:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and -	
ATHOLL HOUSE PRODUCTIONS LIMITED	**Respondent**

- -
- -

Adam Tolley QC, Christopher Stone and Marianne Tutin (instructed by **The General Counsel and Solicitor to HM Revenue and Customs**) for the **Appellants**
Keith Gordon and Ximena Montes Manzano (instructed by **Sharpe Pritchard LLP**) for the **Respondent**

Hearing dates: 9 and 10 February 2022

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Approved Judgment

This judgment was handed down by the Court remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 26 April 2022

Sir David Richards:

Introduction

1. This appeal concerns the application of legislation, commonly referred to as the Intermediaries Legislation or IR35, which will, if certain conditions are satisfied, treat a person whose services are provided through a service company as an employee for the purposes of PAYE and National Insurance contributions.

2. In the present case, the services of Ms Kaye Adams were provided by her personal service company, the respondent Atholl House Productions Limited (Atholl House), under contracts with the British Broadcasting Corporation (the BBC) to present a radio show called "The Kaye Adams Programme" on BBC Radio Scotland. The Commissioners for Revenue and Customs (HMRC) determined that IR35 applied to these arrangements and that Atholl House was accordingly liable to pay income tax under the PAYE system and NI contributions in respect of the earnings under those contracts as if Ms Adams had been employed by the BBC. These decisions related to the four tax years 2013/14 to 2016/17.

3. Atholl House appealed those decisions to the First-tier Tribunal (Judge Tony Beare and Mr Duncan McBride) (the FTT). HMRC did not oppose the appeal as regards the first two of those years, for reasons which I explain below, but maintained their opposition to the appeals as regards 2015/16 and 2016/17. The aggregate amounts involved for those years were £81,150.60 PAYE and £43,290.98 NI contributions. The FTT allowed the appeals. The decision of the FTT was upheld, on different grounds, by the Upper Tribunal (Marcus Smith J and Judge Jonathan Richards). HMRC appeals to this Court with permission granted by the UT.

IR35

4. The statutory provisions relevant to the present appeal are contained, as regards PAYE, in the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) and, as regards National Insurance contributions, the Social Security Contributions (Intermediaries) Regulations 2000. Although not expressed in identical terms, it was common ground that there was no difference in their effect for the purposes of this appeal.

5. Section 49 of ITEPA provides, so far as relevant:

> "(1) This Chapter applies where —
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that —
>
> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded

> for income tax purposes as an employee of the client or the holder of an office under the client…
>
> (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."

6. There was no dispute that the conditions in paragraphs (a) and (b) of section 49(1) were satisfied. Ms Adams personally performed services for the BBC, under arrangements with Atholl House rather than under a direct contract with the BBC.

7. As regards the application of the condition in section 49(1)(c), it has been common ground between the parties that the following three stage process provides a helpful structure:

> (1) *Stage 1.* Find the terms of the actual contractual arrangements (between Atholl House and the BBC on the one hand and between Ms Adams and Atholl House on the other) and relevant circumstances within which Ms Adams worked.
>
> (2) *Stage 2.* Ascertain the terms of the "hypothetical contract" (between Ms Adams and the BBC) postulated by section 49(1)(c)(i) and the counterpart legislation as applicable for the purposes of NICs.
>
> (3) *Stage 3.* Consider whether the hypothetical contract would be a contract of employment.

The facts in summary

8. The FTT described Ms Adams's work and career in its Decision at [6]:

> "The Appellant is the personal service company of Ms Kaye Adams, who performs services for the BBC and other media organisations. Ms Adams started her career with Central Television in 1984 and has been a freelance journalist since the mid-1990s. Her work other than for the BBC has included appearances on TV in programmes such as "Loose Women" on ITV and the newspaper review on Sky, together with columns for various newspapers and magazines such as The Daily Mirror, The Sunday People and No 1 magazine. In addition, Ms Adams has worked extensively in the corporate sector, hosting events and awards evenings and giving presentations. Ms Adams also has a significant social media profile and has written two books in collaboration with her friend and colleague, Ms Nadia Sawalha."

9. The witnesses at the FTT hearing included Ms Adams and, as a witness called by HMRC, Mr Colin Paterson. Mr Paterson, an employee of the BBC, was editor in charge of The Kaye Adams Programme between April 2015 and December 2016. The FTT

summarised their evidence at [57]-[58]. Although the Decision does not contain an express finding which accepts this evidence, it seems to me implicit that it did so.

10. It is not necessary for the purposes of this judgment to set out the full summary of this evidence, but the following points may be noted:

    i) Ms Adams had been a freelance journalist for more than 20 years, during which she had provided her services to a wide variety of media organisations, including the BBC. Over that period, she had never received any employment-related benefits such as holiday pay, sick pay, maternity leave or pension contributions.

    ii) She had since 2010 presented a morning radio phone-in programme for BBC Scotland, although the number and duration of the programmes had fluctuated over that time. Her services were provided under a series of contracts, each with a term of about one year.

    iii) Under at least some of the contracts, including those covering the tax years in issue, there was a minimum commitment on her part and a minimum fee payable by the BBC. If she was unable to fulfil her minimum commitment because of her own unavailability, her minimum fee would be reduced by a pro rata amount.

    iv) Whilst on air, Ms Adams had ultimate control over which callers to take, what questions to ask and which direction the programme should follow, although other members of the team would make suggestions. She had control of the microphone and the BBC could not stop her mid-programme, but the BBC could suspend her, or in the last resort terminate her contract, for a breach of its broadcasting standards and guidelines.

    v) The contracts in the earlier years were reviewed by Ms Adams' agent, but she saw no need to incur her agent's fee as regards the later contracts, including those covering the tax years in issue.

    vi) The BBC never placed any restrictions on her work for others and she never sought the BBC's permission for her other engagements. She would often tell other members of the team what she was planning to do, but not for the purpose of seeking permission. Mr Paterson had referred to Ms Adams as "very much a broadcaster in her own right, given that she works for others, she isn't "BBC's Kaye Adams", she is a journalist who happens to work for us".

11. During the two tax years in issue, the Kaye Adams Programme ran for three hours on weekday mornings from 9am to 12 noon, with a phone-in for the first hour and items of topical interest for the rest of the programme.

Contracts between Atholl House and the BBC

12. Ms Adams' services were provided to the BBC under annual contracts with Atholl House. The contracts were in writing and, save as stated below, it was not suggested that there were any other terms which were either agreed orally or were to be inferred from the conduct of the parties. There were no relevant differences between the

contracts covering 2015/16 and 2016/17, and references below are to provisions of the contract which covered the period 16 March 2015 to 31 March 2016.

13. Part A of the contract set out a schedule of services and fees specific to Ms Adams. She was described as a contributor providing services and the services were as "presenter". It specified, for the contract period, a minimum commitment of 160 programmes ("Radio – 'Kaye Adams'") and a minimum contract fee of £155,000 (subject to clause 6.5 of part B of the contract). If the minimum commitment was exceeded, a fee of £968.75 was payable for each programme. Fees were payable monthly on completion of work.

14. Part B of the contract contained the "BBC general terms of trade (LTC) for freelance contributors (service company)" in a standard form. As used in part B, the terms "the Company" and "the Contributor" referred in this case to Atholl House and to Ms Adams respectively. In addition, a BBC employee was identified as "the "BBC Representative".

15. The FTT's decision contains a detailed summary of the terms of Part B, which it is unnecessary to repeat here. There are, however, two provisions which are important for the purposes of Atholl House's respondent's notice – clauses 8.1 and 8.2.

16. Clause 8.1 provided:

> "This Contract does not require that the Contributor's services are provided on an exclusive basis. During the Term the BBC will have first call on the freelance services of the Contributor (subject only to any prior professional commitments of the Contributor which have been confirmed to the BBC Representative in writing prior to signature hereof)."

17. Clause 8.2 provided:

> "During the Term the Contributor will not without the prior written consent of the BBC Representative, such consent not to be reasonably withheld, appear in any other third party audio and/or video visual content primarily intended for audiences in the United Kingdom and the Republic of Ireland, and it would be reasonable for the BBC Representative to withhold consent where such third party could reasonably be considered to be in direct competition with the Services (e.g. in terms of scheduling either the provision of the Services or there being made available to the public), or which would otherwise conflict with the BBC's Standards."

The FTT Decision

18. The FTT recorded in its Decision at [62]-[64] a number of legal points on which the parties were agreed. First, Atholl House's appeal against HMRC's determinations turned on whether the terms of the hypothetical contracts between the BBC and Ms Adams for each of the two relevant years were such that the contracts were contracts for services or contracts of service (ie contracts of employment). Second, the terms of

each hypothetical contract were to be derived from the terms of each actual agreement between the BBC and Atholl House. Third, in determining whether they were contracts of employment, the three-stage test set out by MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (*RMC*) at p.515 should be applied:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (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."

19. In considering the terms of the actual contracts between Atholl House and the BBC, the FTT accepted Atholl House's submission that, applying the approach set out by the Supreme Court in *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157 (*Autoclenz*) and based on the evidence it had heard, clause 8 of part B of the contracts did not reflect the terms of the actual agreement between the parties. It found that the BBC did not have the right of first call on Ms Adams's services, as stated in clause 8.1, or that she was required to seek the BBC's consent to other engagements, as stated in clause 8.2.

20. The FTT rejected Atholl House's case that the BBC did not have the contractual right, set out in clause 9 of part B, to exert control over the content of Ms Adams' programmes, although it had never been necessary to exercise it. It also found that Atholl House's very limited right of substitution in clause 16.7 of part B was illusory and that there was no right of substitution under the agreements.

21. Subject to these points, the FTT found that in all other respects the terms of the written contracts were the terms of each actual agreement between Atholl House and the BBC. It found that, with the above modifications, these would have been the terms of the hypothetical contract between Ms Adams and the BBC.

22. The FTT held that there would exist under the hypothetical contract sufficient mutuality of obligations to satisfy the first stage of the *RMC* test.

23. As regards control, the second stage of the *RMC* test, the FTT said at [123] that "each hypothetical contract did give the BBC an element of control over the manner in which Ms Adams performed her services". It stated at [124]: "Even if the existence of "mutuality of obligation" and the BBC's editorial control means that each hypothetical contract met the first two of MacKenna J's conditions in *RMC*…they will not, in and of themselves, suffice if the other terms of the relevant contract are inconsistent with the relevant contract's being an employment contract." The FTT continued by considering the other terms of the contracts, without any unequivocal finding of control.

24. The FTT concluded that by reason of a number of the terms of the hypothetical contracts between Ms Adams and the BBC, including that the BBC would not have first call on

her time or any control over her other engagements (derived from "the crucial fact" that those were not terms of the actual contracts with Atholl House), the contracts would be contracts for services, not contracts of employment.

The UT Decision

25. The UT agreed with HMRC that the FTT had erred in its application of *Autoclenz*. It held at [50] that the FTT had departed materially from normal principles of contractual interpretation without a sufficiently secure basis in its examination of the written contracts and the surrounding circumstances, including the post-contractual circumstances, to make such a departure permissible.

26. The UT went on to consider the terms of the hypothetical contracts. It regarded the terms of the actual contracts between Atholl House and the BBC as "a safe starting point", but not as dictating the terms of the hypothetical contract. Section 49(1)(c) required the tribunal to look at "the circumstances", which could in an appropriate case include the parties' conduct.

27. The UT's conclusion as to the terms of the hypothetical contracts was expressed first by reference to the FTT's findings. Leaving aside those express terms which the FTT had disregarded on the basis of *Autoclenz*, the UT endorsed the terms summarised by the FTT at [102]:

> "(c) Ms Adams had no right of substitution but had instead to perform the relevant services herself;
>
> (d) the BBC had ultimate editorial control over the content of the programmes;
>
> (e) the BBC would be obliged to pay the Minimum Fee in circumstances where Ms Adams failed to achieve the Minimum Commitment because the BBC did not call on her to present a programme which she was willing and able to present;
>
> (f) the Minimum Fee would be reduced pro rata in circumstances where Ms Adams failed to achieve the Minimum Commitment because she was unwilling or unable to present a programme;
>
> (g) all intellectual property in relation to the programme content belonged to the BBC and Ms Adams waived all of her moral rights to such content;
>
> (h) Ms Adams was required to attend editorial training and to undergo a full medical, in each case should the BBC so request;
>
> (i) Ms Adams was responsible for providing her own clothing;
>
> (j) Ms Adams was not entitled to holiday or sick pay, maternity leave or any pension entitlement; and
>
> (k) Ms Adams was not entitled or obliged to receive a review, was not subject to the formal procedures applicable to BBC

> employees when a change was made to the nature of their work obligations and was not entitled to apply as an insider for internal vacancies."

28. In addition, the UT held at [70] that the hypothetical contract would have included the following terms:

> "(1) A right in the BBC to restrict Ms Adams's other engagements as set out in clause 8.2 of the Written Agreement.
>
> (2) A BBC right of "first call" on the terms set out in clause 8.1 of the Written Agreement modified as follows:
>
> (a) Ms Adams did not have to notify all of her competing engagements to the BBC before signature of the Written Agreement.
>
> (b) The BBC had to have a good reason for insisting that Ms Adams give it first call on her services at the expense of other engagements. Non-exhaustive examples of good reasons were that the competing engagements were unsuitable from a BBC perspective: either because they could have reflected poorly on the BBC or because they would involve Ms Adams not being available for an episode of the Kaye Adams Show.
>
> (c) Before enforcing its contractual right of first call, the BBC had to engage in reasonable discussions with Ms Adams to see if adjustments to the schedule could be made to accommodate her reasonable other commitments, for example, by allowing Ms Adams to present the show from a different location. The obligation of flexibility that this imposed on the BBC was higher in relation to any episode of that show beyond the 160th.
>
> (3) An obligation on the BBC to provide, and Ms Adams to present, at least 160 episodes of the Kaye Adams Show per year.
>
> (4) An obligation on Ms Adams to attend at such times and such places as the BBC reasonably required, with the question of what attendance is "reasonable" to be determined so as to give Ms Adams a reasonable opportunity to undertake other appropriate non-BBC engagements.
>
> (5) An obligation on Ms Adams to adhere to BBC editorial policies and applicable OFCOM guidelines to the same extent as set out in the Written Agreement."

29. On the basis that the FTT made an error of law in omitting the BBC's rights to first call and to restrict Ms Adams' other engagements from the actual and hypothetical contracts, the UT set aside the FTT's decision and re-made it.

30. It was common ground that there was sufficient mutuality of obligations to satisfy the first stage of the *RMC* test.

31. The UT concluded, contrary to Atholl House's submissions, that there was a sufficient framework of control to satisfy the second stage of the *RMC* test.

32. When it came to consider the third stage of the *RMC* test, the UT accepted Atholl House's case that the hypothetical engagement of Ms Adams by the BBC was inconsistent with a contract of employment. It therefore dismissed HMRC's appeal, albeit on different grounds from the grounds for the FTT's decision.

33. As HMRC's appeal to this court challenges the UT's approach and conclusion on this aspect of the case, it is necessary to set out the UT's reasoning in a little detail.

34. At [108], the UT state as their starting point that, given their conclusion on mutuality of obligations and control, "the prima facie conclusion is that, under the hypothetical contract, Ms Adams would have been an employee of the BBC" and that they would therefore consider whether there was "a reason for that prima facie conclusion to be displaced".

35. The UT held that the prima facie conclusion should be displaced because, when entering into the hypothetical contract, Ms Adams would have been carrying on business on her own account.

36. The UT addressed questions of principle as regards the significance in this context of a person carrying on business on their own account at [75] to [89].

37. The UT cited a passage from the judgment of Mummery J in *Hall v Lorimer* [1992] 1 WLR 939, endorsed on appeal by the Court of Appeal, on which Atholl House relied to show the breadth of the factual enquiry. I shall set out this passage later in this judgment, but Mummery J emphasised that it was necessary to consider many different aspects of a person's work activity, requiring a decision to be made by identifying the detail and then "making an informed, considered, qualitative appreciation of the whole".

38. There was no challenge by HMRC before the UT, nor before this court, to the authority of *Hall v Lorimer*. HMRC did, however, submit that any analysis of the sort contemplated in that case "should be rigorous, should be directed at the contracts whose employment status is disputed and should involve something more than a purely impressionistic analysis of such facts as strike a tribunal as relevant". They argued that the FTT was required "to consider the particular engagements with which it was concerned in the context of the overall pattern of work in the two relevant years, but not to place them in the context of Ms Adams' career as a whole".

39. While agreeing that a rigorous analysis was required, the UT did not accept the analysis could be performed only by reference to the contract in issue or evidence confined to the tax years in issue. It said at [79]: "The reason why a self-employed plumber doing some work on the first day of the tax year is not an employee is to be found not just in the contractual terms and conditions governing that piece of work, but also in the continuum of that plumber's working life over previous tax years."

40. The UT considered that the degree of dependency on one source of engagement, the length of engagements and the number of people for whom the person in question worked were all relevant factors. However, the extent of Ms Adams' economic

dependence on the BBC, and the amount of time that she would spend discharging her responsibilities under the hypothetical contracts, were unlikely to be decisive on their own. Reliance was placed on the decision of this court in *O'Kelly v Trusthouse Forte plc* [1983] ICR 728, from which the UT drew the conclusion that it would be possible for Ms Adams to be carrying on a business on her account, even if the BBC provided her only material source of income.

41. The FTT had found that "over her career, Ms Adams had tended to carry out a profession on her own account". As the hypothetical contract could be prevented from being an employment contract if Ms Adams entered into it as part of a business carried out on her own account, the UT held that it was relevant for the FTT "to consider the extent to which she had, whether in the tax years in dispute or previously, carried on any such business".

42. The UT rejected HMRC's argument that the FTT's finding was flawed because it did not have evidence to determine whether Ms Adams had been self-employed over her 20-year career. It referred to evidence given by Ms Adams as to her freelance work for the majority of her career and her engagement as a co-presenter of "Loose Women" on ITV, as well as the uncertainties involved in such work, all of which was said by the UT to be entirely consistent with a conclusion that Ms Adams' other work was undertaken as an independent contractor.

43. At [112], the UT accepted that these findings did not dispose of the issue. The mere fact that a person carries out some business on their own account in a tax year does not prevent even similar activities from being undertaken as an employee. The UT continued:

> "It is, therefore, necessary to consider whether the activities that Ms Adams performed for the BBC under the hypothetical contract were of the same nature and kind as those that she carried on as an independent contractor. It is also necessary, when doing so, to consider whether there is some relevant difference between the activities undertaken for the BBC and those performed as an independent contractor."

44. As regards the first sentence, the UT referred to the FTT's finding that Ms Adams' activities under the hypothetical contracts were similar in nature to those she performed in the course of her self-employed profession.

45. The UT went on to address HMRC's submission that the extent of Ms Adams' economic dependency on the BBC constituted a relevant difference so that the hypothetical contracts were employment contracts. The UT accepted that if the hypothetical contracts took up a significant amount of Ms Adams' time, or if they introduced a significant degree of economic dependence on the BBC, those factors could negative the inference that she entered into the contracts as part of her self-employed profession. However, this needed to be judged by reference to an appropriately broad sample of her professional career rather than simply by reference to the two tax years in question. Her dependence, if any, had to be "understood in the context of Ms Adams's profession as conducted in surrounding tax years".

46. The UT accepted that Ms Adams' work under the hypothetical contracts would have taken up "a good proportion of her available working time" in the two years in question. The FTT had found that between 50% and 70% of her gross income in those years would have come from the hypothetical contracts and that she would be committed to a minimum of 160 programmes a year.

47. The UT continued at [115]:

> "Those figures are significant. However, they have to be understood in the context of Ms Adams's chosen profession. Her second witness statement in particular paints a vivid picture of the uncertainties inherent in it. Not only are audiences fickle, but a change of a show's producer might result in a reduction of airtime. Even ostensibly successful and popular shows like "Loose Women" could go off air for 12 months. Understood in those terms, we do not consider the stability and economic dependence which the hypothetical contract afforded to be inconsistent with a conclusion that it was entered into in the course of Ms Adams's profession as a freelance journalist and broadcaster. Rather, the conclusion that we have reached is that, in an uncertain profession, Ms Adams had succeeded in those tax years for the time being at least in securing a reasonably stable revenue stream that was material in amount. No doubt the longer that state of affairs persisted, the less likely it would be that successive renewals of the hypothetical contract would be entered into in the course of her freelance profession. Similarly, if, over time, Ms Adams's other revenue streams had diminished so that the BBC work represented a greater percentage of her gross income, she might have tipped over into employment. However, HMRC accepted that in the tax years 2013/14 and 2014/15, the hypothetical contract was not of employment (see [3] of the Decision). We do not consider that the degree of economic dependence in just two following tax years was sufficient to displace that conclusion."

48. The UT concluded at [116]:

> "We therefore do not consider that there was any relevant difference between the characterisation of Ms Adams's activities under the hypothetical contracts in the 2015/16 and 2016/17 tax years and the characterisation of either (i) her activities under hypothetical contracts with the BBC in 2013/14 and 2014/15 or (ii) her other activities as a self-employed journalist and broadcaster in other tax years. Therefore, we consider that the prima facie conclusion reached at the end of Stage 2 is to be displaced because, when entering into the hypothetical contracts here at issue, Ms Adams would have been entering into business on her own account."

49. On these grounds the UT dismissed HMRC's appeal.

HMRC's grounds of appeal

50. HMRC has two grounds of appeal. First, the UT erred in law in its interpretation and application of the third stage of the *RMC* test. This ground has three principal aspects, as submitted by HMRC. First, the UT erroneously adopted a test of whether Ms Adams was in business on her own account instead of the correct analysis required at the third stage of the *RMC* test. Second, the UT approached the third stage as though there were an evenly balanced starting point, notwithstanding the prior conclusions as to mutuality of obligations and control. Third, the UT did not limit the analysis at the third stage to the relevant terms of the hypothetical contracts; alternatively, it did not take those terms into account.

51. This first ground raises significant issues of principle as to the correct approach to determining whether a contract is one of employment.

52. The second ground of appeal is that, even if the UT was entitled to apply a test of business on own account, it failed to take into account relevant considerations and took into account irrelevant considerations in its approach to that issue in relation to the hypothetical contracts.

Respondent's notice

53. Atholl House has advanced two further grounds for upholding the UT's decision. First, the FTT was right to find, in accordance with the principles established in *Autoclenz*, that the terms of the written contracts between Atholl House and the BBC did not reflect the actual agreement between the parties as regards the BBC's first call on Ms Adams' services and its right to exercise control over some of her outside activities. Second, but this is dependent on success on the first ground, the UT erred in holding that the BBC would have sufficient control over the performance by Ms Adams of her services under the hypothetical contracts to result in her being an employee.

54. If the first or both of these grounds is or are made out, it follows that the UT did not have a proper basis for setting aside the FTT's decision. In consequence, the FTT's decision would stand.

55. I will address first the grounds of appeal advanced by HMRC.

Test for employment

56. It might be supposed that, and it would certainly be desirable if, there were one clear test or approach to determining whether a person was an employee. Important legal consequences flow from this determination. While some statutory work-related rights are available to the wider category of "worker", others, such as the right to make a claim for unfair dismissal, are available only to those who are or have been employed. As this appeal illustrates, status as an employee will also lead to a different treatment of income for the purposes of taxation and National Insurance contributions. It is often the case that the treatment may be more favourable if the person is an independent contractor, but that is not always so. In some cases, the tax consequences are more favourable to an employee than to the self-employed: see *Davies v Braithwaite* [1931] 2 KB 628, *Matthews v HMRC* [2012] UKUT 299 (TCC); [2014] STC 297.

57. HMRC submit that, while the UT stated that it was applying the *RMC* test, it erroneously applied a different test of whether Ms Adams was in business on her own account. Having satisfied itself that her hypothetical contract with the BBC would contain both the mutuality of obligations and a sufficient right of control by the BBC in her performance of the contract to meet the first and second stages of the *RMC* test, the UT then asked whether her work for the BBC fitted into the pattern of her work on her own account, rather than simply applying the test at stage three in accordance with the terms of MacKenna J's judgment.

58. The point of principle raised by HMRC's appeal is the breadth of the factors that a court or tribunal may take into account at the third stage of the test. HMRC's position was that they are confined to the express and implied terms of the contract under which the putative employee was engaged. Relying on the judgments at first instance and in this court in *Hall v Lorimer*, Atholl House submitted that the court or tribunal was not confined in this way but could have regard to a broader range of factors, including whether the individual was in business on his or her own account.

59. As I mentioned earlier, HMRC made clear that they were not challenging the authority of *Hall v Lorimer*. Mr Tolley QC on their behalf said that he was not suggesting that it was wrongly decided. He did, however, submit that where, as in this case, the tribunals below had decided to apply the *RMC* test, there was no room for the application of any broader range of factors as might be contemplated in *Hall v Lorimer*. He also suggested that recent authorities had established the primacy of the *RMC* test.

60. These submissions raise the possibility that whether an individual is, in law, an employee could depend on which test the court or tribunal chose to apply. This cannot be, or certainly should not be, the state of the law. It would be intolerable if an individual's employment rights or tax position could depend on the choice of one out of two or more different, and potentially conflicting, tests.

The authorities

61. I will below review some of the authorities and the way they have developed. From this review, I have reached a number of conclusions relevant to this appeal. First, there is not a dichotomy between the *RMC* test on the one hand and the approach in *Hall v Lorimer* and the line of authorities of which it is part on the other. They do not represent significantly different tests for determining employment. Second, the question posed in *Hall v Lorimer* and other authorities as to whether a person is in business on their own account is, for the most part, simply another way of asking whether they are an independent contractor. If the evidence establishes that they do in fact conduct a business on their own account, quite apart from the engagement in dispute, that may be a relevant factor in the determination of the issue – a point to which I will return. But, as used in the authorities, that is not the situation to which this phrase is generally applied. See in this respect the observation of Dillon LJ in *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 614, which I set out below when referring to that case. Third, the factors to which a court or tribunal can have regard when assessing whether a contract is a contract of employment or a contract for services are not confined only to the terms of the contract and the effects of those terms.

62. Before looking at the authorities beginning with *RMC* itself, it is worth noting the decision of Rowlatt J in *Davies v Braithwaite*, which was cited at length with approval

by Sir John Pennycuick V-C in *Fall v Hitchen* [1973] 1 WLR 286, an authority on which HMRC rely.

63. The taxpayer in *Davies v Braithwaite* was an actress who, during the three years in issue, had acted in various stage plays in England and in one play in the United States, had acted in films, and had performed for the BBC and for recording companies. The Revenue assessed her to income tax under schedule D as a self-employed person, while she contended that for all her engagements (apart from those with the recording companies) she was employed and chargeable to income tax under schedule E. The advantage to her, if she was right, was that her foreign earnings, which had not been remitted to the UK, would not be chargeable to tax.

64. Rowlatt J decided a number of issues which have remained good law. First, the issue did not depend on whether or not the taxpayer was highly skilled. Second, the mere duration of the engagement is not the criterion. Third, a person could be both in employment and carrying on a self-employed business or profession at the same time – "a musician who holds an office or employment under a permanent engagement can at the same time follow his profession privately."

65. In determining the case before him, Rowlatt J said at pp.635-66:

> "…it seems to me that where one finds a method of earning a livelihood which does not consist of the obtaining of a post and staying in it, but consists of a series of engagements and moving from one to the other - and in the case of an actor's or actress's life it certainly involves going from one to the other and not going on playing one part for the rest of his or her life, but in obtaining first one engagement, then another, and a whole series of them - then each of those engagements cannot be considered an employment, but is a mere engagement in the course of exercising a profession, and every profession and every trade does involve the making of successive engagements and successive contracts and, in one sense of the word, employments."

66. It is clear that Rowlatt J was not there confining his attention to the terms of each of the taxpayer's contracts but was taking a wider view of her activities.

67. In *Fall v Hitchin*, the taxpayer, at the start of his career as a dancer, entered into an engagement with Sadler's Wells. Sir John Pennycuick held that virtually all the relevant factors pointed to it being a contract of employment. He cited substantial parts of Rowlatt J's judgment, including that set out above, and said at p.296:

> "I do not think most people today would use the word "post," which does not seem very apt to cover the countless instances of employment in the sense of a contract of service; but every word of that judgment is applicable as between the carrying on of a profession and an engagement in the course of carrying on that profession, on the one hand, and a contract of employment, on the other hand. The fact that an actor normally undertakes a succession of engagements in the course of carrying on that

> profession in no way involves the result that if an actor enters an acting employment in the nature of a post, then he is not assessable under Schedule E in respect of the income arising from that employment."

68. I have earlier quoted the passage from the judgment of MacKenna J in *RMC*, where he set out his three-stage test. The principal significance of his judgment lies in its affirmation that, first, mutuality of obligation and a right of control are necessary elements of a contract of employment and, second, that the right of control is not determinative, contrary to earlier authority. An obligation to do work subject to another's control "is a necessary, although not always a sufficient, condition of a contract of service" (p.517).

69. The third condition in the *RMC* test is that the "other provisions of the contract are consistent with its being a contract of service". Although the condition is there expressed positively, MacKenna J went on to describe it at p.516 as a negative condition and said at p.517: "If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant."

70. I would at this stage make the following comments about MacKenna J's judgment.

71. First, its insistence on treating mutuality of obligation and a right of control separately from other factors, and as pre-conditions to a finding of employment, is clearly correct and has been accepted in all (or almost all) subsequent authorities.

72. Second, there has been a tendency in some later cases, and it was evident also in HMRC's submissions in the present appeal, to treat the words of the judgment as if they were a statute, laying down an exhaustive and immutable test. No judgment should be treated in that way, and it is apparent that the *RMC* test has itself undergone modification. The first condition, as stated by MacKenna J, is that the employee "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". By way of further explanation, the judge said at p.515: "There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may be".

73. It has become clear in subsequent authorities that this is correct as far as it goes but that it is not a full statement of the mutuality of obligation required **in all cases** for a contract of employment. Most contracts of employment – and it may well be that MacKenna J had these in mind when formulating the first stage of his test for employment - stipulate that the employee is to work a number of hours and days per week for the employer and the employer is to pay remuneration. Under such contracts, the employer is not required to provide work for the employee in addition to payment of the agreed remuneration: see *Turner v Sawdon & Co* [1901] 2 KB 653 (CA), *Collier v Sunday Referee Publishing Co Ltd* [1940] 2 KB 647 at 650, both cited in *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 at 623 per Stephenson LJ.

74. This approach cannot apply to those contracts under which the putative employee is to be paid only for work which he undertakes. In order to satisfy the requirement for mutuality of obligation, do there need to be obligations not only on the part of the employee to undertake some work but also on the part of the employer to offer some work or pay remuneration in place of offering work? It was long ago established that under a piecework contract the employer must offer work to the employee: *Devonauld v Rosser & Sons* [1906] 2 KB 729. It is now established that, while a single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment, an overarching or umbrella contract lacks the mutuality of obligation required to be a contract of employment if the putative employer is under no obligation to offer work: see *Nethermere (St Neots) Ltd v Gardiner, Carmichael v National Power plc* [1999] 1 WLR 2042 at 2047A-B per Lord Irvine of Lairg LC, *Usetech Ltd v Young* [2004] EWHC 2248 (Ch) at [55]-[65], *Professional Game Match Officials Ltd v HMRC* [2021] EWCA Civ 1370; [2021] STC 1956 at [120]-[124].

75. Third, emphasis has been placed in a few cases, and it was certainly placed by Mr Tolley QC for HMRC in this appeal, on the third condition being negative. In other words, there will be a contract of employment unless the other terms of the contract are inconsistent with employment. Mr Tolley submitted that this recognised what he described as the potency of the first two conditions in establishing a contract of employment. Once mutuality of obligation and control were established, there had to be a clear inconsistency in the other terms of the contract to displace the conclusion of employment. Whether the third condition is one of consistency or inconsistency with a conclusion of employment strikes me as a largely arid debate. The court or tribunal will in any event have to analyse the terms of the contract and reach a conclusion whether they are consistent or inconsistent with a relationship of employment. Given that mutuality of obligation and control are necessary elements of employment, there will inevitably have to be factors pointing in the opposite direction, but it is, in my view, no more than that.

76. Fourth, and this is to some extent allied to the point just covered, it was submitted by HMRC that there was a binary choice on the issues of mutuality of obligation and control and, if they were established, they played no part in the assessment at the third stage of the *RMC* test. This submission is, on any view, overstated. Even on HMRC's argument, the court or tribunal is required to weigh any terms of the contract which are contrary to a conclusion of employment against those terms, including mutuality of obligation and control, which favour a conclusion of employment. What is said is that no account should be taken of the strength or weakness of the finding of control. I am unable to accept this. In some cases, the control may be so pervasive as to make it very difficult, if not impossible, to conclude that it is not a contract of employment. In others, the decision on whether the right of control is sufficient may be borderline. I can think of no good reason why account should not be taken of these differences in what all agree is a multi-factorial process addressing all the relevant factors. I agree with Kerr J in *Augustine v Econnect Cars Ltd* [2019] UKEAT 0231/18 (20 December 2019) at [66]:

> "I see no reason why it was not open to the tribunal to decide that, while the degree of the employer's control was sufficient at stage two of the enquiry, the worker's degree of autonomy in deciding whether to subject himself to that degree of control,

> how often and when, was a factor pointing away from a contract of service at stage three of the enquiry."

77. The line of cases which includes *Hall v Lorimer* can fairly be said to start with another first instance decision of the High Court, less than a year after *RMC*. The issue in *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173 (*Market Investigations*) was whether Mrs Irving, a member of a panel of part-time interviewers of a market research company, was an employee of the company. She would be asked if she was willing to do a number of days' work on a particular survey. If she was, she was sent detailed instructions for the assignment, including the persons to be interviewed and the questions to ask. She was paid for the number of days that the company considered that the interviews would take. Provided she completed the work within the allotted time, she was free to choose which days she worked and to work for others during the assignment. The Minister decided that Mrs Irving was an employee of the company for national insurance purposes. The company appealed. Cooke J dismissed the appeal, holding that there was a separate contract for each assignment.

78. Cooke J reviewed the authorities on the primacy, or otherwise, of control, including *RMC*. He concluded that although "there was at one time a school of thought according to which the extent and degree of the control which B was entitled to exercise over A in the performance of the work would be a decisive factor…it has long been apparent that an analysis of the extent and degree of such control is not by itself decisive" (p.183). At p.184, Cooke J said:

> "If control is not a decisive test, what then are the other considerations which are relevant. No comprehensive answer has been given to this question, but assistance is to be found in a number of cases."

79. Having referred to authorities in the Privy Council, the Court of Appeal and the US Supreme Court, Cooke J said at pp.184-85:

> "The observations of Lord Wright, of Denning L.J. and of the judges of the Supreme Court suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no," then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he

> has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

80. At p. 183, Cooke J had found that the first condition in the *RMC* test was clearly satisfied: Mrs Irving agreed, in consideration of remuneration, to provide her own work and skill in the performance of a service for Market Investigations Limited. He repeated this at p.185 and continued by identifying the two further issues, which in large part track the second and third stages of the *RMC* test:

> "In the present case it is clear that on each occasion on which Mrs Irving engaged herself to act as an interviewer for a particular survey she agreed with the company, in consideration of a fixed remuneration, to provide her own work and skill in the performance of a service for the company. I therefore proceed to ask myself two questions: First, whether the extent and degree of the control exercised by the company, if no other factors were taken into account, be consistent with her being employed under a contract of service. Second, whether when the contract is looked at as a whole, its nature and provisions are consistent or inconsistent with its being a contract of service, bearing in mind the general test I have adumbrated."

81. Cooke J found that the control which the company had the right to exercise was so extensive as to be entirely consistent with Mrs Irving being employed under a contract of service: see p.186. He therefore turned to the next and final question. There were factors pointing both in favour of, and against, an employment relationship and the judge concluded, "[t]aking all the factors into account", that Mrs Irving was an employee. He specifically took into account

> "…the more general question whether Mrs. Irving could be said to be in business on her own account as an interviewer. In considering this more general question I take into account the fact that Mrs. Irving was free to work as an interviewer for others, though I think it is right to say that in this case there is no finding that she did so. I also take into account the fact that in her work as an interviewer Mrs. Irving would, within the limits imposed by her instructions, deploy a skill and personality which would be entirely her own. I can only say that in the circumstances of this case these factors are not in my view sufficient to lead to the conclusion that Mrs. Irving was in business on her own account. The opportunity to deploy individual skill and personality is frequently present in what is undoubtedly a contract of service. I have already said that the right to work for others is not inconsistent with the existence of a contract of service. Mrs. Irving did not provide her own tools or risk her own capital, nor did her opportunity of profit depend in any significant degree on the way she managed her work."

82. There are some points to note about Cooke J's judgment. First, like MacKenna J in *RMC*, Cooke J rejected control as the sole decisive factor in whether a contract was one of service or for services. Second, he referred "in particular" to *RMC* as one of the

recent cases in which the distinction between such contracts had been extensively reviewed: see p.183A-B. Third, there is no suggestion in the judgment that Cooke J thought that his approach represented a different, still less a conflicting, approach to that adopted by MacKenna J in *RMC*. Fourth, on the contrary, he in effect applied the three-stage approach set out in *RMC*: see the passage at p.185 quoted above.

83. If there is a difference with the test set out by MacKenna J, it is that the language used for the third stage is widened a little to include the "nature" as well as the "provisions" of the contract.

84. Cooke J made this further observation at p.185B-C:

> "The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him."

85. In *Fall v Hitchen* at p.292, Sir John Pennycuick cited the passage from *Market Investigations* at p.184 quoted above, noting that it had been cited with approval by Lord Widgery CJ in *Global Plant Ltd v Secretary of State for Social Services* [1972] 1 QB 139.

86. In *O'Kelly v Trusthouse Forte plc* [1984] 1 QB 90, it was common ground that the correct approach for a tribunal was to "consider all aspects of the relationship, no single feature being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate to determine whether the person was carrying on business on his own account" (per Ackner LJ at p.104G), an approach which Sir John Donaldson MR said at p.762 was "wholly correct as a matter of law". There were eighteen factors which the tribunal had taken into account, most of which derived from the contracts in question, but they also included "the recognised custom and practice of the industry that casual workers are engaged under a contract for services". Ackner LJ said at p117A that it was "a factor, although not a particularly important factor, which the industrial tribunal were entitled to take into account as part of the background against which the parties regulated their relationship".

87. The approach of Cooke J was adopted and applied by the Court of Appeal in *Young & Woods Ltd v West* [1980] IRLR 201 and in *Nethermere (St Neots) Ltd v Gardiner*, albeit the test of being in business on one's own account was considered to be "very helpful" or "useful", rather than "fundamental" as Cooke J had described it. It was likewise applied by the Court of Appeal in *Lane v The Shire Roofing Company (Oxford) Ltd* [1995] EWCA Civ 37; [1995] IRLR 493, a personal injuries case, where Henry LJ (with whom Nourse and Auld LJJ agreed) acknowledged the importance of control but recognised that it may not be decisive and that a broader enquiry into whose business the worker was carrying on might be required.

88. In *Nethermere*, Dillon LJ made the important observation on the meaning of "carrying on business on own account" at p.633, to which I have earlier referred:

> "In some cases, as for instance, with a jobbing gardener or a carpenter or a music teacher, who is found to be carrying on the activities in question for several customers or clients as part of his or her own business, the test may be very helpful indeed, but in many other cases the answer to the question whether the person concerned is carrying on business on his or her own account can only come as the corollary of the answer to the question whether he or she was employed under a contract of service."

89. The passage from Cooke J's judgment at pp.184-85, quoted above, was approved by the Privy Council in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 at 382, on appeal from Hong Kong. Lord Griffiths, giving the advice of the Board, said that "the matter had never been better put". On the facts of the case, and applying "all the tests, or perhaps it is better to call them indicia" mentioned by Cooke J, the Privy Council held that the appellant had been employed by the respondent.

90. The issue arose out of a claim for compensation under local legislation for injuries sustained at work. Lord Griffiths observed that the legislation was clearly modelled on the English Workmen's Compensation Acts and the question was to be answered by applying English common law standards to determine whether the appellant was working as an employee or as an independent contractor: see pp. 381E and 382C. As in effect a decision on English common law, the Privy Council's advice in *Lee Ting Sang* is to be regarded as being of "great weight and persuasive value": see *Willers v Joyce (No 2)* [2016] UKSC 44; [2018] AC 843 at [12].

91. *Hall v Lorimer* was a tax case. The taxpayer was a vision mixer, a skilled editing job. Between 1984/85 and 1988/89, he worked for over 800 days on short-term contracts normally lasting one to two days. The longest was for ten days. While bookings were confirmed in writing, often stating the date, rate of pay and place and time of work, there were no formal written conditions of engagement. The taxpayer was assessed to income tax under schedule E on the grounds that he was in employment. The Special Commissioner allowed his appeal against the assessments, holding that he was self-employed, and the Revenue's appeals were dismissed by Mummery J and the Court of Appeal.

92. It was common ground in that case, as it is in the present case, that the question of whether the taxpayer was an employee was to be determined by reference to the general law of employment: see [1992] 1 WLR 939 at 943. At p.944, Mummery J referred to *RMC, Market Investigations* and *Lee Ting Sang* as the leading cases and then said:

> "It is clear from these cases that there is no single satisfactory test governing the question whether a person is an employee or is self-employed. As Lord Griffiths observed in the last, most recent and authoritative case the question has never been better put than by Cooke J. in the *Market Investigations* case, at p. 184G. The question is: does the taxpayer perform his services as a person in business on his own account? If he does, his work as a vision mixer for the various television production companies must be regarded as performed under a series of contracts for services, entered into by him in the course of carrying on his own

> business. If he does not, his work must be regarded as performed under a series of contracts of employment with those companies.
>
> In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another."

93. At 944-45, Mummery J said:

> "The decided cases give clear guidance in identifying the detailed elements or aspects of a person's work which should be examined for this purpose. There is no complete exhaustive list of relevant elements. The list includes the express or implied rights and duties of the parties; the degree of control exercised over the person doing the work; whether the person doing the work provides his own equipment and the nature of the equipment involved in the work; whether the person doing the work hires any staff to help him; the degree of financial risk that he takes, for example, as a result of delays in the performance of the services agreed; the degree of responsibility for investment and management; how far the person providing the services has an opportunity to profit from sound management in the performance of his task. It may be relevant to consider the understanding or intentions of the parties; whether the person performing the services has set up a business-like organisation of his own; the degree of continuity in the relationship between the person performing the services and the person for whom he performs them; how many engagements he performs and whether they are performed mainly for one person or for a number of different people. It may also be relevant to ask whether the person performing the services is accessory to the business of the person to whom the services are provided or is "part and parcel" of the latter's organisation."

94. It should be noted that there is no suggestion in the judgment of Mummery J that he understood himself to be propounding an approach that was at odds with *RMC*, although he expressly set out his approach by reference to *Lee Ting Sang* and the Privy Council's endorsement of *Market Investigations*. The list of factors which might be relevant include many that will or may derive from the terms of the contract but also include some that appear to be separate from those terms.

95. The Court of Appeal ([1994] 1 WLR 209) dismissed the Revenue's appeal. *RMC* was referred to in argument but not cited by Nolan LJ in his judgment, with which Dillon and Roch LJJ agreed. Like Mummery J, Nolan LJ cited at length from *Lee Ting Sang*. The Revenue invited the court to adopt the same approach as that of Lord Griffiths in applying the test or indicia set out by Cooke J in *Market Investigations,* but Nolan LJ said at p.216 that he viewed this invitation with some reserve. He explained that: "In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another" and followed this by citing with approval the passage from Mummery J's judgment at p.994 quoted above. Nolan LJ was here referring to a mechanistic application to the facts of that case of the factors seen as appropriate to the very different facts of *Lee Ting Sang*. The factors which are relevant will inevitably depend on the precise facts of each case.

96. In this connection, Nolan LJ went on to say that the question whether an individual is in business on his own account, though often helpful, "may be of little assistance in the case of one carrying on a profession or vocation. A self-employed author working from home or an actor or a singer may earn his living without any of the normal trappings of a business." Clearly, Nolan LJ was not suggesting that an author or actor was less likely to be self-employed than a person carrying on a commercial business on their own account, only that the indicia applicable to a commercial business ("the trappings of a business") might well be inapplicable to a person carrying on a profession or vocation. Pointing out that the taxpayer in *Hall v Lorimer* customarily worked for twenty or more production companies and that the vast majority of his assignments lasted only a single day, Nolan LJ said "there is much to be said for the traditional contrast between a servant and an independent contractor. The extent to which the individual is dependent upon or independent of a particular paymaster for the financial exploitation of his talents may well be significant." Again, Nolan LJ was bringing into account factors which went beyond the terms of each separate engagement.

97. Contrary to the previous authorities, the judgment of Waite LJ (with whom McCowan and Potter LJJ agreed) in *McMeechan v Secretary of State for Employment* [1997] ICR 549 could be read as suggesting that control was not a necessary feature of a contract of employment but was just one of the factors to be considered, along with other relevant factors, in deciding the nature of the contract.

98. This was corrected by the Court of Appeal in *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318; [2001] ICR 819. Each of the judgments made clear that the "irreducible minimum" of mutuality of obligation and control must be satisfied before a contract of employment could be found to exist. Longmore LJ said at [46]:

> "Whatever other developments this branch of the law may have seen over the years, mutuality of obligation and the requirement of control on the part of the potential employer are the irreducible minimum for the existence of a contract of employment."

99. Brooke LJ said at [47]:

> "…there is a consistent line of authority contained in decisions of this court, binding both on this court and on inferior tribunals, to the effect that the three elements of a contract of service identified by MacKenna J…must be present before a contract of

> service can be identified, *whatever other elements there may be which point one way or another*." (emphasis added)

100. The ratio of the decision in *Montgomery* is that the industrial tribunal, having made a clear finding of no or insufficient control over the applicant by the respondent, erred in finding that she had nonetheless been employed by the respondent. It had been wrong to reduce "the two basic and essential facts" of mutuality of obligation and control "to no more than material for the melting pot": see [24]. Giving the lead judgment, Buckley J said at [18] that he considered "the safest starting point to be the oft quoted passage of MacKenna J" in *RMC* and at [19] that MacKenna J had made plain that "provided (i) and (ii) are present (iii) requires that all the terms of the contract are to be considered before the question as to the existence of a contract of service can be answered". He said at [23]:

> "For my part, I regard the quoted passage from *Ready Mixed Concrete* as still the best guide and as containing the irreducible minimum by way of legal requirement for a contract of employment to exist. It permits tribunals appropriate latitude in considering the nature and extent of "mutual obligations" in respect of the work in question and the "control" an employer has over the individual. It does not permit those concepts to be dispensed with altogether. As several recent cases have illustrated, it directs tribunals to consider the whole picture to see whether a contract of employment emerges. It is though important that "mutual obligation" and "control" to a sufficient extent are first identified before looking at the whole."

101. In *R (Professional Contractors Group Ltd) v IRC* [2001] EWCA Civ 1945; [2002] STC 165, Robert Walker LJ (with whom Auld and Dyson LJJ agreed) said at [12]:

> "The whole of the IR35 regime is restricted to a situation in which the worker, if directly contracted by and to the client 'would be regarded for income tax purposes as an employee of the client'. That question has to be determined on the ordinary principles established by case law (see for instance two cases mentioned in the written evidence, [*Market Investigations*] and *Hall v Lorimer*)."

102. *Synaptek Ltd v Young* [2003] EWHC 645 (Ch); [2003] ICR 1149 was an appeal from the general commissioners concerning liability under the IR35 regime as regards social security contributions. Hart J observed at [8] that "[d]eciding, in a borderline case, whether a particular contract is a contract of service or a contract for service is notoriously difficult". Having cited the passage containing the three-stage test in *RMC*, Hart J continued at [17]: "The authorities show that there is no one test which is conclusive for determining into which category a particular contract falls. As Nolan LJ put it in *Hall v Lorimer* [1994] ICR 216, 226: "In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another"".

103. Hart J rejected a submission made on behalf of the taxpayer that once it was established that a person was carrying on a business on their own account in respect of other

engagements, it was "an extremely powerful pointer" to the engagement in question forming part of that business. He said at [20]:

> "The fact that Synaptek (and notionally Mr Stutchbury) was in business on its (notionally his) own account is no doubt an important contextual circumstance to be taken into account in determining whether the particular contract under which Mr Stutchbury was engaged by the client was one for service or of service. But it is no more than that. The weight to be given to it was, in my judgment, a matter for the general commissioners."

104. Although not decisive, Hart J accepted that the taxpayer being in business on his own account was an important contextual circumstance to be taken into account. This cannot be reconciled with a submission which excludes at stage three all factors except the terms of the contract in issue.

105. In *Usetech Ltd v Young* [2004] EWHC 2248 (Ch); [2004] STC 1671, Park J, citing *Synaptek Ltd v Young*, said at [53]: "As it seems to me the present state of the law is that whether a relationship is an employment or not requires an evaluation of all the circumstances". At [58], he said: "The judgment of Cooke J in [*Market Investigations*] contains a valuable and much cited discussion of principles which are relevant to distinguishing between contracts of employment and contracts for services rendered in a self-employed capacity."

106. The issue in *Bunce v Potsworth Ltd t/a Skyblue* [2005] EWCA Civ 490; [2005] ICR 577 was whether the appellant had been employed for the purposes of a claim for unfair dismissal. The employment tribunal had held that he was not an employee. It referred to a number of authorities including *RMC*. Assuming that there was the necessary mutuality of obligation, it considered whether the other factors present indicated a contract of employment. It approached the issue by considering the factors set out in the judgment of Mummery J in *Hall v Lorimer*. The Court of Appeal rejected the appellant's criticisms of the tribunal's approach. Keene LJ (with whom Gage LJ and Sir Martin Nourse agreed) said: "As Mummery J (as he then was) emphasised in *Hall v Lorimer* itself, the factors he referred to were not intended to be exhaustive nor were they to be applied in a mechanistic way…But what is clear is that the tribunal sought to apply the approach commended in *Hall v Lorimer* – indeed, it quoted from the relevant passage in that case, and I can see no basis for criticising its conclusion."

107. *McGregor v Edinburgh Leisure* [2007] UKEAT 0027/07/2908 (29 August 2007) was a decision of Elias J, sitting alone as President of the EAT, on appeal against a decision on a preliminary issue that the appellant was not an employee of the respondent. In the course of his judgment, Elias J set out the three-stage test from *RMC*, on which the appellant relied, but dismissed the appeal, explaining at [36]:

> "In my judgment there are two interrelated issues that I have to decide. The first is whether there was a proper evidential basis for the conclusion that the Claimant was self-employed. In my judgment there was. Undoubtedly there were, as Ms Robertson pointed out, numerous factors which pointed in favour of a contract of service. But that is not the issue, as the decision in *Hall v Lorimer* vividly illustrates. In my judgment, contrary

> to the submissions of Ms Robertson, there were some features of the relationship which were more consistent with a self-employed rather than an employee relationship. These included the fact that the Claimant provided some equipment, paid her own expenses, paid for some of her training, and worked for a number of clients. In addition, she was treated differently to employees with regard to clothing and in the form which appraisals took…It does not seem to me that the only proper conclusion in the circumstances is that the Claimant must be treated as an employee."

108. Elias J was there taking account of factors which went beyond the terms of the contract.

109. The issue in *Autoclenz Ltd v Belcher*, which is central to Ms Adams' respondent's notice, concerned the circumstances in which a term in a written contract engaging an individual to provide services should be disregarded in determining the individual's status, whether as an employee or as a "worker" or as self-employed. Smith LJ referred to the three-stage test in *RMC* as the "classic description of a contract of employment" (see [2009] EWCA Civ 1046; [2010] IRLR 70 at [11]), which Lord Clarke repeated with approval on appeal to the Supreme Court: see [2011] UKSC 41; [2011] ICR 1157. The nature and content of the test was not in issue.

110. *Weight Watchers (UK) Ltd v HMRC* [2011] UKUT 433 (TCC); [2012] STC 265 was an appeal by the taxpayer company to the Upper Tribunal (Briggs J) from a decision of the FTT that meeting "leaders" were employees of the appellant, albeit on a meeting-by-meeting basis.

111. Briggs J said at [20]: "The essential tools for identifying an employment relationship are, and have for many years been, well settled. The tribunal must apply the three conditions set out by MacKenna J" in *RMC*, which he then quoted. He said that its "continuing authority" had been re-confirmed by the Supreme Court in *Autoclenz.* He discussed the irreducible minimum of mutuality of obligation and control at [22]-[43]. Noting at [41] that MacKenna J had described the third condition as "a negative condition" and that the third condition is stated as "the other provisions of the contract are consistent with its being a contract of service", Briggs J said: "Taken together, those two parts of his description mean that the substance of the third condition is that the terms of the contract, taken as a whole, should not be inconsistent with it being a contract of service".

112. At [42], Briggs J said:

> "Putting it more broadly, where it is shown in relation to a particular contract that there exists both the requisite mutuality of work-related obligation and the requisite degree of control, then it will prima facie be a contract of employment unless, viewed as a whole, there is something about its terms which places it in some different category. The judge does not, after finding that the first two conditions are satisfied, approach the remaining condition from an evenly balanced starting point, looking to weigh the provisions of the contract to find which predominate, but rather for a review of the whole of the terms

> for the purpose of ensuring that there is nothing which points away from the prima facie affirmative conclusion reached as the result of satisfaction of the first two conditions."

113. HMRC rely on the decision in *Weight Watchers* not only for its emphatic endorsement of the *RMC* three-stage test but also for its adherence to the precise terms in which it was expressed by MacKenna J, with an exclusive focus on the terms of the contract at stage three, and for Briggs J's analysis of the test as creating a prima facie conclusion in favour of a contract of employment if the first and second conditions are satisfied. For the reasons I have earlier given, I am unable to accept the approach in these respects adopted by Briggs J. It is clear from *Market Investigations* and many subsequent cases, including but by no means restricted to *Hall v Lorimer*, that the court or tribunal is not restricted in its analysis to the terms of the contract. Briggs J does not refer to any of those cases in his judgment nor is there any indication that he was referred to them. Nor do I think it appropriate to add a gloss of a "prima facie affirmative conclusion" of a contract of employment if the pre-conditions of mutuality and control are satisfied. I again agree with Kerr J who in *Augustine v Econnect Cars Ltd* said at [61]:

> "I do not think the judgment of Briggs J (as he then was) in the *Weight Watchers* case should be treated as creating something like a legal presumption of an employment relationship in cases where the first two stages of the three stage test are met. The obligation of the tribunal is to "paint a picture from an accumulation of detail" (as Mummery J (P) put it in *Hall v. Lorimer (Inspector of Taxes)* [1992] ICR 739, at 744F-H). An "informed, considered, qualitative appreciation of the whole" may be gained by standing back from the picture, he said."

114. The following year, the Upper Tribunal (Mann J) gave judgment in *Matthews v HMRC* [2012] UKUT 229 (TCC); [2014] STC 297, in which the taxpayers contended that they were employees and HMRC argued that they were self-employed. If the taxpayers were right, they were not chargeable to income tax on their earnings as entertainers on cruises, but they were so chargeable if they were self-employed. Mann J upheld the decision of the FTT that they were self-employed.

115. In arguing their case, it was the taxpayers who sought to concentrate on the terms of their contracts with the cruise operators while HMRC concentrated "on the working pattern of the appellants" and contended that "they enter into numerous separate engagements in the course of their self-employment, the terms of each separate engagement not being of particular significance": para [6] of the FTT decision, quoted by Mann J at [8].

116. At [10], Mann J quoted further from the FTT's decision, including the following:

> "10. One of the problems is that a standard contract may be used for actors who fall into either category [i.e. employed or self-employed]. The context in which the contract is entered into has to be considered as well as the terms of a particular contract…
>
> 13. The factor principally relied on by HMRC is the pattern of work and the distinction made in *Davies v Braithwaite* between

> a post (or a series of posts) and engagements entered into as part of self-employment. We consider that the Appellants are firmly on the *Davies v Braithwaite* and *Hall v Lorimer* side of the line and not the *Fall v Hitchens* side. They do not have a series of posts with various cruise lines, lasting an average of only 13 days for Mr Sidwick, or 4 days for Mr Matthews, but earn their living by entering into a series of separate engagements with a number of different cruise lines in a similar way to actors but with far shorter engagements than normally for actors."

117. Before Mann J, the taxpayers relied principally on the level of control over their work which the cruise operators were entitled to exercise under the contracts. While accepting that control was a necessary condition, as set out in the *RMC* test, Mann J said that it was not there given a determinative status and the "third element of MacKenna J's formulation leaves room for a lot of other factors": see [16]. The FTT had weighed control against other matters and in particular the pattern of engagements, and Mann J held that the FTT's assessment that the taxpayers were self-employed was open to them: see [17].

118. The Court of Appeal in *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735; [2013] IRLR 99 held that a lap dancer at the respondent's clubs was not employed by the respondent because it was under no obligation to pay her. The agreement between them lacked the mutuality of obligation required by the first condition of the *RMC* test, and indeed by *Market Investigations* and the cases following it. The judgment of Elias LJ (with whom Ward and Pitchford LJJ agreed) was directed at this issue. Elias LJ stated the central issue at [45]:

> "The critical question was as to whether [sic] the nature of those contractual obligations. Were they such as to render it a contract of employment? To use the language of McKenna J [sic], were the provisions of the contract consistent with it being a contract of service? In my view, the most important finding in that regard was the Tribunal's inference from the evidence that the employer was under no obligation to pay the dancer anything at all."

119. In an introductory passage, Elias LJ made some more general observations about the distinction between contracts of employment and contracts for services. He noted at [6] that various tests had been proposed in the cases, starting with control as the sole determinant, although none had won universal approval. He said at [7] that "the test most frequently adopted, which has been approved on numerous occasions and was the focus of the employment tribunal's analysis in this case, is the approach adumbrated by MacKenna J in the *Ready Mixed Concrete* case". At [6], Elias LJ had described this approach as "the multiple or multi-factorial test…(involving an analysis of many different features of the relationship)". He said at [8]:

> "This approach recognises, therefore, that the issue is not simply one of control and that the nature of the contractual provisions may be inconsistent with the contract being a contract of service. When applying this test, the court or tribunal is required to examine and assess all the relevant factors which make up the

> employment relationship in order to determine the nature of the contract."

120. In *White v Troutbeck* [2013] EWCA Civ 1171; [2013] IRLR 949, Sir John Mummery (with whom Longmore and Rimer LJJ agreed) agreed with the employment tribunal that "the agreement is the starting point for determining the nature of the relationship between the parties…the dispute between the parties turns on the characterisation of the nature of the relationship created by it". At [38], he said: "The error in this case was in treating the absence of actual day-to-day control as the determinative factor rather than addressing the cumulative effect of the totality of the provisions and all the circumstances of the relationship created by it." He concluded at [41] that "…viewed in the round, the relationship between the parties recorded in the agreement in the setting of the surrounding circumstances presented the principal elements of employment".

121. Subsequent cases have continued to cite, and apply, both *RMC* and *Hall v Lorimer*: see, for example, *Guimaraes v Findlater* [2017] UKEAT 0236_16_3101 (HHJ Eady QC, now Eady J), *Christa Ackroyd Media Ltd v HMRC* [2019] UKUT 326; [2019] STC 2222 (Mann J and Judge Thomas Scott), *Augustine v Econnect Cars Ltd* and *Varnish v British Cycling Federation* [2021] ICR 44.

122. In my judgment, this review of the authorities bears out the propositions which I earlier stated. It is wrong to treat *RMC* and the line of cases including *Hall v Lorimer* as representing two separate tests, with the possibility that the result in any particular case could depend on which test is applied. Both approaches recognise mutuality of obligation and the right of control as necessary pre-conditions to a finding that a contract is one of employment. Once those necessary, but not necessarily sufficient, conditions are satisfied, both approaches require the identification and overall assessment of all the relevant factors present in the particular case. In other words, they are both multi-factorial in their approach. A strict reading of the third condition in the *RMC* test might exclude consideration of any factor beyond the express and implied terms of the contract, and this is certainly the way that it has been interpreted in some of the authorities. There are, however, many other authorities in which a wider range of factors was taken into consideration and indeed, as recently as 2012, HMRC were successfully inviting the Upper Tribunal to do just that: *Matthews v HMRC*.

123. The more difficult question, in my view, is not whether other factors can be taken into consideration but what limit there is on the choice of such factors. For this, there must be a return to first principles. The relationship of employment is created by the employer and employee through the contract made by them. The question for the court or tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could be reasonably be supposed to be known, to both parties. Those circumstances are the same as those comprising the factual matrix admissible for the interpretation of contracts: the "facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties" (*Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 at [21]).

124. If the person providing the services is known to carry on a business, profession or vocation on their own account as a self-employed person, it would in my judgment be myopic to ignore it, when considering whether or not the parties intended to create a relationship of employment. In many of the cases, it has been taken into account for that purpose. The weight to be attached to it is a matter for the decision-making court or tribunal. If the contract provides, as did Ms Adams' contracts with the BBC, that she was a freelance contributor, the relevance of this fact arises directly from the contract's express terms.

The UT's decision in the present case: discussion

125. With those principles in mind, I turn to the decision of the UT in the present case. The part which is critical to their conclusion that Ms Adams was not employed by the BBC is contained in the section headed "Stage Three" at [108]-[117]. I have earlier summarised, and set out passages from, that section.

126. Having accepted the FTT's findings that Ms Adams had tended over her professional career generally to carry on her profession as an independent contractor and that her activities as an independent contractor included activities similar to those she performed for the BBC, the test which the UT set itself at [112]-[116] was whether there was "some relevant difference between the activities undertaken for the BBC and those performed as an independent contractor". Unless there was some such difference, Ms Adams would be performing her services under the hypothetical contract with the BBC as an independent contractor.

127. In my judgment, this approach is with respect to the UT flawed in a number of important respects.

128. First, as the UT recognised in the first sentence of [112], *Fall v Hitchen* had made clear that an individual can in the same tax year perform similar services both as an employee and as an independent contractor. It is not the activities that matter but the capacity in which, and the conditions under which, they are performed. For that purpose, it is a relevant fact, if known or reasonably available to the putative employer, that the individual performs similar services as an independent contractor, but it goes no further than that.

129. Second, insofar as this approach is concerned with the terms and circumstances under which Ms Adams performed her services, it is not the terms and circumstances of her other engagements which are in issue, but the terms and circumstances of her hypothetical contracts with the BBC. The terms and circumstances of her other engagements may well themselves have been varied and it cannot be assumed that, if analysed, all or indeed any of them would be found to be engagements as an independent contractor. They cannot be held up as a gold standard against which the contracts with the BBC were to be judged. Even if the FTT had received evidence of these other engagements and the circumstances in which they were made, the approach of the UT is misguided.

130. Third, save as regards the amount of time that Ms Adams' contractual commitment to present at least 160 shows a year took up ("a good proportion of her available working time"), there is no consideration at all by the UT of the terms of the hypothetical contracts. While I have rejected the notion that it is only those terms that may be

considered, the terms of the contracts remain central to the enquiry. The UT failed to have regard to any other terms, including those that pointed in the direction of employment.

131. Fourth, when considering the time commitment for Ms Adams, the UT said that it needed "to be judged by reference to an appropriately broad sample of Ms Adams's professional career rather than simply by reference to a snapshot in the two years in dispute" and that any economic dependence on the BBC in those years "has to be understood in the context of Ms Adams's profession as conducted in surrounding tax years". I accept, of course, that the tribunal should not shut its eyes to the fact that Ms Adams had been performing as an independent contractor, if known or reasonably available to the BBC, for a period before the start of the years in dispute but again it goes no further than that. The critical periods remain the years in dispute, during which she may have become employed by the BBC for some of her working time, an issue which depends on an assessment of the hypothetical contracts in the circumstances in which they were made. If the UT's reference to "surrounding tax years" was intended to include years after the years in question, that must be wrong. Ms Adams' activities in later years cannot be used to assess whether she was employed in earlier years.

132. There is a further problem with this section of the UT's decision. When discussing economic dependence at [115], the UT said:

> "…if, over time, Ms Adams's other revenue streams had diminished so that the BBC work represented a greater percentage of her gross income, she might have tipped over into employment. However, HMRC accepted that in the tax years 2013/14 and 2014/15, the hypothetical contract was not of employment (see [3] of the [FTT] Decision). We do not consider that the degree of economic dependence in just two tax years was sufficient to displace that conclusion."

133. This in turn led to the UT's conclusion at [116]:

> "We therefore do not consider that there was any relevant difference between the characterisation of Ms Adams's activities under the hypothetical contracts in the 2015/16 and 2016/17 tax years and the characterisation of either (i) her activities under hypothetical contracts with the BBC in 2013/14 and 2014/15 and (ii) her other activities as a self-employed journalist and broadcaster in other tax years."

134. Unfortunately, the UT misstated HMRC's position as regards Ms Adams' work for the BBC in 2013/14 and 2014/15. Before the FTT, HMRC did not resist Atholl House's appeal against the determinations for those tax years, for the reason explained in their skeleton argument for the FTT hearing:

> "The Respondent remains of the view that the contracts in question for those years have all of the hallmarks of contracts of employment. However, the engagements in question took up a smaller proportion of Ms Adams' time than those in later years. In addition, income generated from those contracts during those

> periods is relatively low when considered against the total income generated by the Appellant. Different factors would therefore require to be considered by the Tribunal in considering those years than arise in 2015/16 and 2016/17. Given the level of the tax in issue in 2013/14 and 2014/15, the Respondents have formed the view that it would not be an appropriate use of resources to continue to oppose the appeals in respect of those years."

135. The FTT simply stated in its decision at [3] that in their skeleton argument, HMRC indicated that they no longer wished to oppose the appeal as regards the first two years. The UT appear to have read rather more into this than the FTT stated, but it is fair to say that it does not appear that it was given the fuller explanation set out in the skeleton argument, nor was the point picked up by the parties when the UT's decision was circulated in draft to them.

136. Whatever the reason, this misunderstanding undermines the UT's decision and provides a further reason to set it aside.

137. For these reasons, while rejecting some of HMRC's general submissions on the approach to identifying a contract of employment, I accept their case that the reasoning behind the UT's conclusion that Ms Adams' hypothetical contracts with the BBC would not have been contracts of employment cannot stand. Leaving aside the issues raised by the respondent's notice, I would therefore allow the appeal and set aside the UT's decision.

138. However, if Atholl House's case under its respondent's notice is well-founded, the UT was not justified in interfering with the FTT's own decision that the hypothetical contracts would not have been contracts of employment. In that case the FTT's decision would stand and HMRC's appeal would be dismissed.

139. I therefore turn to the issue concerning the application of the approach approved in *Autoclenz*.

Autoclenz

140. Atholl House submits that the FTT was right to hold that, applying the reasoning of the Supreme Court in *Autoclenz*, clauses 8.1 and 8.2 of Part B of the contracts between Atholl House and the BBC did not reflect the true agreement between the parties and should therefore be ignored. I have earlier set out those provisions. In short, clause 8.1 gave the BBC first call on Ms Adams' services, subject only to prior professional engagements confirmed to the BBC before the contract was signed. Clause 8.2 provided that Ms Adams would not appear in any third party audio and/or video content primarily intended for audiences in the UK and the Republic of Ireland without the prior written consent of the BBC, such consent not to be unreasonably withheld. On the basis that the contracts were to be read as if they did not contain those provisions, the FTT found that the contracts were not contracts of employment.

141. The UT correctly summarised the FTT's reasons for its finding that clauses 8.1 and 8.2 did not reflect the true agreement as being (i) the BBC did not in practice control Ms Adams' other engagements or insist on a right of first call on her services, (ii) neither

Ms Adams nor Mr Paterson of the BBC believed, as a subjective matter, that the BBC had a right of first call or a right to control her other engagements, and (iii) Ms Adams had not herself read the contracts and in practice conducted herself in accordance with the terms she thought had been agreed with the BBC.

142. The UT accepted that, in considering whether clauses 8.1 and 8.2 reflected the parties' true agreement, the FTT was entitled to have regard to such factors. It held, however, that the FTT failed to address whether the rights conferred by those provisions were "unrealistic" at the time that the contracts were made or whether it was unrealistic to suppose that the BBC might, even if only as a last resort, enforce those rights. It concluded that there were circumstances in which the BBC might realistically wish to do so. It held that the FTT erred in its application of *Autoclenz* by departing materially from normal principles of contractual interpretation without a sufficiently secure basis in a "realistic and worldly wise" examination of the contracts and the surrounding circumstances, including post-contractual circumstances.

143. Atholl House submitted that the FTT was correct in its application of *Autoclenz* on the evidence in this case. The UT was wrong in its approach, in particular by imposing a test of realism to the contested terms. Such a test is irrelevant to the only relevant question, which is directed to the terms of the true agreement.

144. In addressing these submissions, I shall first consider the Supreme Court's decision in *Autoclenz*.

145. The issue in *Autoclenz* was whether "valeters" engaged by Autoclenz to provide car cleaning services to clients of Autoclenz were, as its contracts with the valeters described them, "sub-contractors", or whether they were "workers" within the meaning of the National Minimum Wage Regulations 1999 and the Working Time Regulations 1998. If they were "workers", they were entitled to be paid in accordance with the 1999 Regulations and were entitled to receive statutory paid leave under the 1998 Regulations. The definition of "worker" was in materially identical terms in both Regulations and provided that a worker meant "an individual who has entered into or works under…(a) a contract of employment ["limb (a)"]; or (b) any other contract…whereby the individual undertakes to do or perform personally any work and services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual" ["limb (b)"]. A "contract of employment" in limb (a) was not defined in the regulations and would prima facie bear its common law meaning.

146. The Supreme Court, affirming the decision of the Court of Appeal, held that those terms of the contracts which served to support the description of the valeters as sub-contractors did not represent the true agreement of the parties and that the remaining terms showed that they were employees and hence "workers" under limb (a). The court went on to say that, if they had not fallen within limb (a), they would have been "workers" within limb (b). This conclusion was not reached either as a matter of construction of the contracts or by way of rectification or on grounds that the contracts were shams.

147. Lord Clarke, giving the only judgment, with which the other Justices agreed, made clear that the well-established principles of interpretation of contracts continued to apply to

ordinary contracts, particularly commercial contracts, but there was "a body of case law in the context of employment contracts in which a different approach has been taken".

148. Lord Clarke cited with approval the judgment of Elias J in *Kalwak v Consistent Group Ltd* [2007] IRLR (EAT):

> "57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship…
>
> 58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.
>
> 59. … Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance…"

149. Lord Clarke also cited with approval from the judgment of Smith LJ in *Autoclenz* itself:

> "[53] In my judgment the true position, consistent with *Tanton*, *Kalwak* and *Szilagyi*, is that where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right…"

150. Lord Clarke said at [35] that the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.

151. These parts of the judgment contain the essential features of the enquiry approved in *Autoclenz*, as to its purpose (to find what the parties in truth agreed), the approach to be adopted (see, in particular, the extract from the judgment of Elias J in *Kalwak* and Lord Clarke at [35]), and the evidence and circumstances which the court or tribunal should take into account (see, in particular, the extract from the judgment of Smith LJ).

152. Since the hearing of the present case by the UT, the Supreme Court has given judgment in *Uber BV v Aslam* [2021] UKSC 5; [2021] ICR 657. The issue was whether Uber drivers were "workers" so as to qualify for benefits under the same regulations as were in issue in *Autoclenz* and for rights in respect of a whistle-blowing claim under the Employment Rights Act 1996.

153. The only judgment was given by Lord Leggatt. He underlined that the approach adopted in *Autoclenz* to determine whether the individuals fell within the definition of "worker" did not form part of the ordinary principles of contractual construction and that, if such principles had been applied, the court could not have concluded that they were workers. It was clear that, in the context of the issue in *Autoclenz*, the Supreme Court had adopted a different approach but "[w]hat was not…fully spelt out in the judgment was the theoretical justification for this approach" ([68]).

154. In supplying the theoretical justification, Lord Leggatt said that it was critical that the relevant rights were not contractual rights but were created by legislation. The task for the tribunals was not to determine whether under the contracts Autoclenz had agreed to pay the valeters the minimum wage but to determine whether they "fell within the definition of "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation." ([69]).

155. Having reviewed the purposes of the Regulations and of the 1996 Act, which in short were to provide protection to vulnerable workers, Lord Leggatt said:

> "76. Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it…
>
> 78. This is, as I see it, the relevance of the emphasis placed in the *Autoclenz* case (at para 35) on the relative bargaining power

> of the parties in the employment context and the reason why Lord Clarke described the approach endorsed in that case of looking beyond the terms of any written agreement to the parties' "true agreement" as "a purposive approach to the problem"."

156. The Supreme Court's decision in *Uber* raises as a threshold issue whether it is, in the very different context of the present case, permissible to apply the approach adopted in *Autoclenz* and *Uber*. It is common ground that whether the individual (Ms Adams in this case) would be "regarded for income tax purposes as an employee of the client" (the BBC in this case) under section 49 of ITEPA is to be determined by the application of the common law tests of employment. Both sides agreed that the statutory context gave no special meaning to the term "employee". This is not therefore a case which raises any issue of statutory construction of a term such as "worker" which is to be understood in the context of the purpose of the legislation and the need to ensure that such purpose is not defeated by the way the relevant contract is drafted. The justification, as analysed and identified by the Supreme Court in *Uber*, for the application of the approach approved in *Autoclenz* is entirely absent in the present case. In those circumstances, it follows in my judgment that it is not legitimate to apply the *Autoclenz* approach.

157. On this ground, therefore, which was not of course available for the UT to consider, the UT's rejection of the FTT's reasoning and conclusion on the application of *Autoclenz* was correct.

158. In any event, I consider that the UT was right to reject the FTT's decision on this issue for the reasons it gave.

159. The principal criticisms of the UT's decision on this issue, made on behalf of Atholl House, are that it took account of the absence of any obvious imbalance in the bargaining power between Ms Adams and the BBC and that it imposed a condition of "unrealistic" before it would depart from the written contractual terms. However, in my judgment, the UT was right to take these matters into account. I have cited above the passage from the judgment of Elias J in *Kalwak* which was quoted with approval by Lord Clarke. This makes clear that it was entirely appropriate for the UT to ask whether clauses 8.1 and 8.2 "genuinely reflect what might realistically be expected to occur", in the unlikely event that there was disagreement between Ms Adams and the BBC. I have also summarised what Lord Clarke said at [35] that "the relative bargaining power of the parties must be taken into account". The FTT was too influenced by the fact that there had not been any instance of disagreement between Ms Adams and the BBC and therefore the opportunity for the BBC to exercise its rights under clause 8.1 or clause 8.2 had not arisen. In *Autoclenz*, Lord Clarke stated as uncontentious: "If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement." The same point was made by Smith LJ in the passage from her judgment in *Autoclenz* cited with approval by Lord Clarke and quoted above.

160. I accordingly reject Atholl House's case based on *Autoclenz* and would therefore affirm the UT's decision on this ground.

161. Atholl House raised a second issue in its respondent's notice concerned with control, but that was predicated on success on the *Autoclenz* issue. It does not therefore arise for consideration.

Conclusion and disposal

162. For the reasons given above, I would allow HMRC's appeal and set aside the UT's decision.

163. The findings that the hypothetical contracts would satisfy the irreducible minimum of mutuality of obligation and the right of control remain. What is now required is an assessment of whether overall there would under the hypothetical contracts have existed an employment relationship between Ms Adams and the BBC. For this purpose, there need to be taken into account the terms of the hypothetical contracts and their effects, and the circumstances in which such contracts would have been made insofar as they would have been known to both parties or were reasonably available to both parties.

164. This is an assessment which has yet to be made in this case on a correct basis. The FTT wrongly proceeded on a basis that left clauses 8.1 and 8.2 out of account. As explained above, the UT largely failed to take account of the many features of the contractual terms and their effects, some of which may be seen as pointing to an employment relationship while others may be seen as consistent with Ms Adams being an independent contractor. It largely focused on Ms Adams' freelance career and engagements without considering their relevance to her hypothetical contract with the BBC in the two years in question or the extent to which such information was known or reasonably available to the BBC.

165. This court has previously made clear that its own power to re-make a decision should be used sparingly and only if the court feels no real doubt about how the FTT or the UT, properly directed, would have decided the case: see *Newey (t/a Ocean Finance) v HMRC* [2018] EWCA Civ 791; [2018] STC 1054 at [111]-[112]. Like Henderson LJ in that case, I do not feel confident enough about the correct conclusion for this court to make the decision.

166. It is therefore, unfortunately, necessary for the case to be remitted. My provisional view is that the case should be remitted to the UT for the decision to be remade on the basis of the FTT's findings of fact, as corrected by the UT's decision on the *Autoclenz* point. I would, however, give the parties the opportunity to argue, if either wishes to do so, that further facts should be found and, if so, whether the parties should be confined to the existing evidence or (and, if so, on what basis) either party should be permitted to adduce further evidence. If any further fact-finding or evidence were permitted, it would then be necessary to decide whether the case should be remitted to the UT or the FTT.

Lord Justice Arnold:

167. I agree that this appeal should be allowed for the reasons given by Sir David Richards, and with the outcome that he proposes. Without detracting from the rest of his judgment, I would like to emphasise four points which he makes.

168. First, as Sir David says at [60] and [122], it cannot be right to treat *RMC* and *Hall v Lorimer* as representing two separate tests which may be applied by the court or tribunal potentially leading to different results. Both approaches have a common core: mutuality of obligation and a right of control are necessary, but not sufficient, conditions for a contract of employment, and if those conditions are satisfied it is necessary to go on to consider a range of other factors.

169. Secondly, as Sir David says at [75]-[76] and [113], if mutuality of obligation and a right of control are present, then there will inevitably have to be one or more factors pointing the other way if the court or tribunal is to conclude that the contract is not one of employment; but that does not mean that the court or tribunal should divorce its evaluation of the other factors from its assessment of the first two conditions. In particular, it may well be relevant to take into account the extent of the control exercisable by the alleged employer.

170. Thirdly, as Sir David says at [123], the answer to the question as to what limit there is on the factors to be taken into account is supplied by basic principles of contract law. In a case like the present, the issue is one of interpretation of a written contract (or, to be more precise, a hypothetical contract derived from a written contract with the alteration of the identity of one of the contracting parties). That contract, like any other agreement in writing, should not be construed in a vacuum, but in the light of the admissible factual matrix. It follows that a factual circumstance known to both parties at the date of the contract (such as, for example, the fact that the person providing the work has an established career as a freelance) should be taken into account. It also follows that a factual circumstance not known or reasonably available to one party (such as, for example, the precise terms on which the person doing the work has performed work for other parties if those terms have not been disclosed to the alleged employer) cannot be taken into account.

171. Fourthly, as Sir David makes clear at [126]-[131] and [164], the enquiry concerns the *relevant* contract(s), interpreted in the light of the admissible factual matrix. In the present context, that means the contract(s) relevant to the tax year(s) in question. The position under earlier contracts between the same parties is admissible as part of the factual matrix, since it will be known to both parties at the date(s) of the relevant contract(s), but not the position under later contracts between the same parties. It is necessary to bear in mind, however, that an individual may move from being an independent contractor to being an employee, and vice-versa, while working for the same contractual counterparty. It is also necessary to bear in mind that an individual may simultaneously be engaged under a contract of employment with one counterparty and under contracts for the provision of services with one or more other counterparties.

Lord Justice Peter Jackson:

172. I also agree that the appeal should be allowed for the reasons given by Sir David Richards, and with the outcome that he proposes.