Neutral Citation Number: [2022] EWCA Civ 502

Case No: A3/2020/2117

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr Justice Zacaroli and Judge Jonathan Richards
[2020] UKUT 0216 (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:

KICKABOUT PRODUCTIONS LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

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- -

Jonathan Peacock QC, Georgia Hicks and Harry Sheehan (instructed by **Radcliffes Le Brasseur**) for the **Appellant**
Akash Nawbatt QC, Christopher Stone and Marianne Tutin (instructed by **the General Counsel and Solicitor for HM Revenue and Customs**) for the **Respondents**

Hearing dates: 1 and 2 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 Mr Paul Hawksbee were provided by his personal service company, the appellant Kickabout Productions Limited (KPL), under contracts with Talksport Limited (Talksport) as a presenter on Talksport Radio's "Hawksbee & Jacobs Show", a three-hour radio programme broadcast every weekday from 1pm to 4pm. The Commissioners for Her Majesty's Revenue and Customs (HMRC) determined that IR35 applied to these arrangements and that KPL was accordingly liable to pay income tax under the PAYE system and NI contributions in respect of the earnings under those contracts as if Mr Hawksbee had been employed by Talksport. These decisions related to the four tax years 2012/13 to 2014/15. The aggregate amounts involved were £89,758 PAYE and £53,368 NI contributions.

3. The First-tier Tribunal (Judge Thomas Scott and Mr Charles Baker) (the FTT) allowed KPL's appeal against these determinations, but the Upper Tribunal (the UT) allowed HMRC's appeal. KPL appeals to this court with permission granted by Newey LJ who, in giving permission, said that the arguments advanced by KPL had sufficient substance for the appeals to have a real (rather than merely fanciful) prospects of success, and that, given the evidence that similar contracts are commonly used in the radio industry, the appeal raises an important point of principle or practice (so meeting the test for a second appeal).

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. Mr Hawksbee personally performed services for Talksport, under arrangements with KPL rather than under a direct contract with Talksport.

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 KPL and Talksport on the one hand and between Mr Hawksbee and KPL on the other) and the relevant circumstances within which Mr Hawksbee worked.
>
> (2) *Stage 2.* Ascertain the terms of the "hypothetical contract" (between Mr Hawksbee and Talksport) 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.

8. If the answer at stage 3 was that the hypothetical contract was a contract for services, or a contract of self-employment, then it was common ground, both before us and before both Tribunals below, that HMRC's assessments and notices of determination should be set aside. If, by contrast, the answer at stage 3 was that the hypothetical contract was a contract of service, or a contract of employment, it was common ground that HMRC's assessments and notices of determination should stand as issued.

The facts in summary

9. The FTT made findings of fact as regards the circumstances for the purposes of stage 1 of its analysis, none of which was challenged before the UT. At [8] of its Decision, the UT helpfully summarised the findings relevant to the appeal:

> "(1) By the time of the FTT hearing, Mr Hawksbee and Mr Jacobs had been presenting the show for a period of 18 years.
>
> (2) For the three years 2012-13 to 2014-15 under appeal, the income that Mr Hawksbee, through KPL, obtained from Talksport was approximately 90% of his total income for those years.

> (3) Mr Hawksbee did not work as a radio presenter, in those tax years, for anyone other than Talksport.
>
> (4) Mr Hawksbee and Mr Jacobs have, within certain constraints, the freedom to decide on the format and content of each episode of the Show and, subject to availability, the guests who are to appear on the Show. The constraints derive largely from OFCOM regulatory requirements. For example, the Show must comply with OFCOM guidelines, must have a certain amount of news content, and must run travel bulletins twice an hour. The Show also needs to run commercials at set intervals.
>
> (5) While the Show is created and hosted by Mr Hawksbee and Mr Jacobs, who also generate its content, a production team is needed to enable the Show to be broadcast. When the Show is being broadcast, subject to the constraints outlined in paragraph (4) above, control over what is said and when rests very much with Mr Hawksbee and Mr Jacobs. Therefore, while the production team might tell the presenters during a broadcast that an advertising break is due, they will wait for the presenters' cue before cutting to that break.
>
> (6) The Show is broadcast as "live" but, as with many live shows, a short delay of around 14 seconds is built in. The presenters of the Show and the production team have access to a "dump button" which prevents material recorded within that period of delay from being broadcast. This facility could be used if, for example, something was said during the Show that breached the station's OFCOM guidelines, if foul language was used, or if defamatory comments were made."

10. In the period under appeal, there were two contracts in place between KPL and Talksport, referred to below as "Contract One" and "Contract Two" respectively. Contract One was signed on 1 January 2012. It was replaced by Contract Two with effect from 1 January 2014. The effect of some, though not many, of the provisions forming part of Contract One and Contract Two was in dispute.

Contract One

11. Contract One consisted of a Letter of Engagement to which were appended some general terms and conditions. Although stated to be a letter from Talksport to Mr Hawksbee, it has at all stages been common ground that it was intended to be, and should be read as being, a letter to KPL.

12. Clause 1 of the Letter of Engagement stated: "We [Talksport] engage you and you agree to provide to us the services referred to in Clause 3 on an exclusive basis on the terms and conditions set out in this Agreement."

13. Clause 2.1 provided that the engagement was for a term of two years from 1 January 2012 (the Term), unless terminated by either party by not less than four months' notice given at any time during the Term. It further stated: "You will be required to work for

a minimum of 222 days per year, of the Term, and days not worked must be agreed with the Programme Director, but would normally occur if and when the services of the presenter were not required."

14. Clause 2.2 provided that, not less than six months before the end of the Term, the parties enter into good faith negotiations regarding an extension of the term.

15. Clause 3 set out the services that were to be provided. Clause 3.1 required Mr Hawksbee to be available to present (or co-present) a radio programme of three hours (or such other duration as Talksport might require) for live or pre-recorded transmission between 1:00pm and 4:00 pm on Mondays to Fridays inclusive (the "Programmes") or on such other days and times as Talksport might require, at its 18 Hatfield studios or at such other location and station as it might require from time to time.

16. Clause 3.2 provided that if any Programme was cancelled on the day of broadcast for any editorial reason and Mr Hawksbee was not required that day, the applicable fee for the day would remain payable and count towards the minimum number of days to be worked.

17. Clause 3.3 required Mr Hawksbee to make himself exclusively available for a schedule of preparation and rehearsal as Talksport should reasonably specify from time to time and for such promotional and publicity engagements as might reasonably be required from time to time.

18. Clause 3.4 provided: "We shall have first call on your services at all other times in connection with the Programmes and notwithstanding any and all other commitments which you may have".

19. By clause 4, Mr Hawksbee was free to provide his services to television broadcasters and other commercial entities, provided that (i) it did not interfere with the provision of his services to Talksport and (ii) his services were not provided to any other UK radio broadcaster.

20. By clause 5, KPL was to be paid £525 plus VAT (the Fee) for each Programme that Mr Hawksbee co-presented. This was the fee for the first year of the Term and both parties had the option to renegotiate it for the second term. Clause 5.1 also provided: "The minimum fee paid and payable by the end of the Term will be based on 222 programmes per year (such number to be reduced pro-rata if the contract is terminated before the end of the term)."

21. Clause 6 stated that the agreement was a contract for services, and not a contract of service, and that Mr Hawksbee was therefore responsible for the payment of any taxes, including income tax and NI contributions, due in respect of the Fee or other payments made under the agreement. Clause 7 contained an entire agreement provision.

22. Clause 5 of the standard terms and conditions attached to the Letter of Engagement entitled Talksport to suspend Mr Hawksbee's engagement with immediate effect "should it so require including but not limited to" a failure by Mr Hawksbee to perform any of its obligations under the contract, if production of the programmes was prevented, interrupted or delayed by any cause outside the reasonable control of Talksport and during any investigation into suspected misconduct by Mr Hawksbee.

Clause 6 entitled Talksport to terminate the contract with immediate effect "in any of the following events (which is not an exhaustive list)", which included matters such as: a failure by Mr Hawksbee to perform any of its obligations; Mr Hawsbee's incapacity; prevention of or interruption or delay to the production of programmes due to any cause outside the reasonable control of Talksport which continues for ten or more consecutive days.

Contract Two

23. Contract Two was in the form of an agreement dated 18 December 2013 between Talksport and KPL.

24. Clause 1 of Contract Two provided that:

> "[Talksport] has offered and [KPL] has accepted engagement, on the terms set out in this Agreement, to provide independent presenting services to [Talksport] and/or any of its Group Companies in relation to such projects relating to [Talksport's] business as shall, from to time be assigned to [KPL] by [Talksport]… (the Services)"

25. The UT at [47] helpfully summarised the structure of Contract Two:

> "Contract Two is therefore structured from the outset differently to Contract One. It provides a framework within which projects may be assigned from time to time to KPL. There is nothing in the body of Contract Two, for example, which identifies any services to be provided by KPL. Nor is there any limitation on the term of the agreement. These are found exclusively in the Schedule of Services attached to Contract Two (which, we note, is not referred to at all in the body of Contract Two), where the requirement to provide a minimum of 222 shows per year is found, and where the duration of the agreement is defined as two years. It is clear, in our judgment, that the Schedule of Services contained a "project" assigned to KPL within the meaning of Clause 1 of Contract Two."

26. Clause 7 stated that neither KPL nor its employees, workers or sub-contractors was an employee of Talksport.

27. Clause 8 provided:

> "It is agreed that [Talksport] is not obliged to assign Services to [KPL] under this Agreement and neither is [KPL obliged to accept the assignment of Services under this Agreement."

28. Clause 27 entitled either party to give not less than four months' notice of termination. Clause 28 entitled Talksport, by written notice, immediately to terminate the agreement without any requirement for notice or payment if (i) KPL was in breach of any terms (subject to remedy, where possible, within seven days of notice given by Talksport), (ii) KPL refused or failed to provide any of the services after agreeing to provide them,

or (iii) KPL conducted itself in any manner which in the reasonable opinion of Talksport brought or was likely to bring either KPL or Talksport into disrepute or impaired or was likely to impair KPL's ability to provide any of the services. KPL was entitled to terminate the agreement if Talksport was in breach of any term as detailed in (i) or (ii).

29. Under the heading "Nature of Work", the schedule of services annexed to and forming part of Contract Two provided, among other things, as follows:

> "Kickabout Productions will provide Paul Hawksbee to present the daily 13.00–16.00 show for live or pre-recorded transmissions for analogue and/or digital means for a minimum of 222 shows per year at the talkSPORT studios at 18 Hatfields, London and at any such other times, locations and stations as the Company [ie Talksport] may require from time to time. Paul Hawksbee agrees to arrive in reasonable time to prepare for the shows. The Company reserves the right to make changes to the show times as and when required…
>
> Paul Hawksbee will make himself exclusively available for a schedule of preparation, rehearsal, programming meetings, conferences, interviews and contributions to the SPORT magazine and any meetings as talkSPORT shall reasonably specify from time to time and for such planning, promotional and publicity engagements as talkSPORT may reasonably require from time to time (including studio webcam)…
>
> The Company may have reasonable call on Paul Hawksbee's services at all other times in connection with the programmes which he will endeavour to attend where reasonably practicable."

30. The term of the contract was stated as two years from 1 January 2014. Fees were stated to be £575 plus VAT per show. In addition to specifying a minimum of 222 programmes per year and a two-year term, the schedule provided for KPL to be paid a fee of £575 plus VAT for each programme.

The FTT Decision

31. The parties differed in their interpretation of certain terms of the contracts.

32. As regards Contract One, the FTT held in favour of KPL's construction in two respects material to the present appeal.

33. First, as regards clause 2.1, the FTT said at [94]:

> "[KPL] submitted that this wording obliged Mr Hawksbee to perform the required work, and not, or not merely, to make himself available for that work. We agree. [HMRC] submitted that this wording also gave rise to an obligation, implied if not express, on Talksport to provide 222 days of work a year. We

> accept that there are arguments in favour of [HMRC's] contention. We do not consider that the wording of the contract can be interpreted as imposing an express obligation to this effect. It is however arguable that such an obligation should be implied, given the repetitive nature of the services and the expectations of the parties, but on balance we conclude that this clause (and the contract as a whole) imposes an obligation on Mr Hawksbee but not on Talksport."

34. As regards the provision in clause 5.1 that "the minimum fee paid and payable by the end of the Term will be based on 222 Programmes per year":

> "97…. [HMRC's] position was that "this means what it says"—namely that (absent early termination) Talksport would be obliged to pay Mr Hawksbee at least £116,550 per year, regardless of the number of shows which Talksport required him to perform. It was, said [HMRC], a guaranteed minimum payment or retainer, and as such a powerful indication of an employment relationship.
>
> 98. We reject [HMRC's] interpretation. First, we accept the clear evidence of both Mr Hawksbee and Mr Fisher that this was definitely not their understanding of the agreement between the parties. Rather, the mutual understanding was that KPL would be paid for shows done, and if a show was not done then (unless it was cancelled on the day) no fee would be paid or payable. Given the quantum of the amount which would be payable on [HMRC's] interpretation, we think it extremely unlikely that the parties could each have misunderstood the basic bargain between them in such a fundamental respect. Secondly, the wording in question must be construed not in isolation but in the context of the contract as a whole. We consider that the wording should be read together with the requirement in Clause 2.1 (discussed above) that Mr Hawksbee would be required to work for a minimum of 222 days per year. The respective obligations on Mr Hawksbee and Talksport are both set out by reference to the "minimum of 222" shows or days. So, provided that Mr Hawksbee meets his minimum obligation under Clause 2.1, the minimum fee from Talksport will be "based on" the number of shows required to meet that obligation."

35. In relation to Contract Two, the FTT construed clause 8 as providing that, if a "project" is assigned to KPL under clause 1, "then, by virtue of the Schedule of Services KPL must provide the services of Mr Hawksbee for a minimum of 222 shows per year. There is no corresponding obligation on Talksport to offer any minimum number of shows".

36. These provisions, and the equivalent provisions in Contract Two, were directly relevant to the issue whether, under the contracts, there existed the mutuality of obligation which is a pre-condition to the existence of an employment contract. HMRC submitted that this was satisfied because (i) not only was KPL obliged to provide Mr Hawksbee's services for a minimum of 222 programmes per year but Talksport was obliged to offer

those programmes and (ii) in any event, Talksport's obligation to pay for each programme in fact presented by Mr Hawksbee was sufficient to meet the test for mutuality of obligation propounded by MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (*RMC*) that "[t]he 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". KPL submitted that, in order to satisfy the requirement for mutuality of obligation, there needed to be an obligation on Talksport to provide programmes for Mr Hawksbee to present and no such obligation existed under either contract.

37. The FTT rejected HMRC's case that Talksport was obliged to provide programmes but accepted HMRC's second submission that the narrow test set out by MacKenna J was satisfied. Nonetheless, it further held that the presence of obligations to provide, as well as to perform, work "is a touchstone of employment status, while their absence renders the bare existence of mutuality of limited assistance in determining employment status". Accordingly, the absence of any obligation on Talksport to provide work meant that "the mutuality which arises is not strongly indicative of an employment relationship".

38. The FTT's decision on whether Talksport was under an obligation to offer programmes was reached by the use of the casting vote of its presiding member, Judge Thomas Scott. The other member of the tribunal, Mr Baker, disagreed. He considered that the obligation on KPL to provide Mr Hawksbee's services to present the programme not less than 222 times a year "carried with it an implicit obligation on Talksport to provide him with the opportunity to do so".

39. As regards the issue of control, the FTT addressed the evidence and the terms of the contracts in some detail at [184]-[196] and summarised its view at [230(2)] and [234]. Surprisingly, given that the presence of control is essential to the status of employment, the FTT nowhere expressed a clear conclusion on the issue of control. It did, however, list among the factors to be considered at stage three: "Controlled services largely restricted to delivering The Show".

40. The FTT, by Judge Thomas Scott's casting vote, held after a review of all factors, including the absence of any obligation on the part of Talksport to offer any programmes, that under the hypothetical contracts Mr Hawksbee would not be employed by Talksport. Mr Baker reached the opposite conclusion.

The UT Decision

41. HMRC appealed to the UT on grounds which may be summarised as: (i) the FTT erred in law in finding that under the actual contracts Talksport was not obliged to provide any programmes for Mr Hawksbee to present; (ii) the FTT failed to apply the second stage of the *RMC* test properly because it did not determine whether there was a sufficient framework of control to constitute a contract of employment; and (iii) in its overall assessment, the FTT took irrelevant factors into account and failed to take relevant factors into account.

42. The UT held that under the terms of both actual contracts Talksport was obliged to offer programmes to KPL.

43. As regards both contracts, KPL laid stress in its submissions to the UT on the absence of any express obligation on Talksport to offer programmes. As to that submission as it related to Contract One, the UT said at [35]:

> "In our judgment, however, that approach ignores the provisions that are set out in Contract One. By Clauses 1 to 3 of the Letter of Engagement, Talksport specifically engaged KPL to provide the Services which consisted of Mr Hawksbee presenting, or co-presenting, a three-hour radio show between 1pm and 4pm on Mondays to Fridays, or such other days and times as Talksport stipulated. KPL was engaged to do so for a period of two years (subject to earlier termination). We consider that, in the context of the contract as a whole, the express engagement of KPL for a fixed period to provide the Services was sufficient to constitute a binding commitment by Talksport to provide at least some work. This is not a case where the contract provided merely a framework within which Talksport would offer particular pieces of work (such as in *Clark v Oxfordshire Health Authority* [1999] IRLR 125, where nurses working as "bank staff" would be offered work as and when a temporary vacancy occurred). There was no need for a separate offer of particular pieces of work, given the engagement to carry out the Services for a fixed term, in the same way as a company engaging a person as ship's captain is necessarily agreeing to provide the ship in question. No further express clause was needed to constitute an obligation on Talksport to provide Mr Hawksbee with some shows to present."

44. The UT considered that this conclusion was supported by reference to other provisions in the contract. First, the right for either party to terminate the contract on four months' notice made little sense if Talksport was entitled simply to stop providing programmes. Second, the provisions for suspension in clause 5 of the standard terms and conditions made sense only if Talksport was obliged to provide work for KPL. Third, as the UT put it at [38]:

> "Third, by clause 2.1 Mr Hawksbee had to make himself available for work on the Show for at least 222 days per year and give Talksport "first call" on his services in connection with the Show at all other times. KPL was only paid per programme that Mr Hawksbee actually co-presented and Mr Hawksbee could not work for another UK radio broadcaster. On KPL's interpretation, despite KPL having accepted obligations that would make it extremely difficult for Mr Hawksbee to earn a living by working full-time for anyone else, Talksport was not obliged to offer KPL or Mr Hawksbee any work at all. We regard that outcome as so contrary to business common sense as to call into question whether it was the true effect of Contract One. Business common sense points, on the contrary, to a conclusion that Contract One set out a contractual regime under which, in normal circumstances, Mr Hawksbee was, during the term of that

> contract, to be provided with a show to co-present on every weekday between 1pm and 4pm. The fact that Talksport was (by reason of clause 3.1) not obliged to offer work on a particular day or time does not negate the obligation to provide work at all."

45. The UT concluded that Talksport was required to offer KPL at least 222 programmes per year, unless it exercised its right of termination or suspension.

46. The UT considered that the relevant provisions of Contract Two were materially the same as those in Contract One, and in particular: KPL was obliged to make Mr Hawksbee available for a minimum of 222 programmes per year; KPL was to be paid a flat fee per programme presented by Mr Hawksbee; the termination and suspension arrangements, and the non-compete provisions, were materially similar to those in Contract One.

47. The UT noted that the FTT's conclusion that the hypothetical contracts contained no obligation on Talksport to provide work was highly material to its overall conclusion. It weighed heavily in the balance in its majority conclusion that Mr Hawksbee would not have been an employee of Talksport under the hypothetical contracts. The UT therefore considered that it should set aside the FTT's decision. Given that, once the issue of Talksport's obligation to provide work was resolved, there was almost no dispute as to the terms of the hypothetical contracts nor as to findings of primary fact, the UT decided that it could properly perform the necessary evaluation and did not therefore remit the case back to the FTT.

48. The UT proceeded to reconsider the issue of employment by reference to the three-stage test in *RMC*.

49. In view of its decision that the contracts imposed obligations on Talksport to provide work for KPL as well as an obligation on KPL to provide the services of Mr Hawksbee, the UT was satisfied that the requirement for mutuality of obligation was met.

50. Although HMRC submitted that the FTT had made no decision on control, the UT held that it had done so. Unless it was satisfied as regards control, it would not have proceeded to consider the third stage of the *RMC* test. However, as it was remaking the decision, the UT considered for itself the question of control. It concluded that there was clearly a sufficient framework of control to meet the second stage of the *RMC* test.

51. At [82]-[96], the UT considered the multiple factors relevant to the issue of employment. It regarded the factors pointing against the "prima facie affirmative conclusion" of a contract of employment reached after satisfying stages one and two of the *RMC* test (see *Weight Watchers (UK) Ltd v HMRC* [2011] UKUT 433 (Briggs J) (*Weight Watchers*) at [42]) as relatively slender as against other factors that pointed to an employment relationship. Its conclusion at [96] was:

> "Taking all of the relevant factors into account, therefore, we consider that viewed as a whole they are not inconsistent with the hypothetical contracts being contracts of employment."

52. The UT accordingly allowed HMRC's appeal.

Grounds of appeal

53. KPL's grounds of appeal are:

    i) The UT erred in its interpretation of the contracts as regards the obligation of Talksport to provide work.

    ii) The UT erred in its approach to the jurisdiction to remit or remake the decision.

    iii) The UT erred in its evaluation of the issue of control.

    iv) The UT erred in its approach to the evaluative exercise to be undertaken at stage three of the *RMC* test.

Mutuality of obligation

54. KPL's central submission is that there is no provision in either of the contracts obliging Talksport to offer any programmes. Particularly in view of the entire agreement clauses in both contracts, KPL submitted that it followed that both parties must be taken to have intended that Talksport should be under no such obligation. It challenged the reasoning contained in the UT's decision at [35] which I have set out above, and it submitted that the UT's reliance on the provisions entitling Talksport to suspend or terminate the contracts was misplaced. Further, it submitted that, in finding an obligation to offer programmes, the UT failed to identify whether it arose as a matter of construction of the contracts or by way of an implied term. It also confused business common sense, on which the UT explicitly relied, with the business necessity test for implied terms.

55. Dealing first with the basis of the UT's decision on this issue, before coming to its merits, it is clear to me that it reached its decision as a matter of construction of the contracts, and not by an implied term. At [26]-[27] it referred to leading decisions of the Supreme Court on the construction of contracts, but it did not refer there or elsewhere to *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 or other authorities on the implication of terms. At [35], which I have earlier set out, the UT stated that KPL's reliance on what it submitted was the absence of an express obligation to offer programmes "ignores the provisions that <u>are</u> set out in Contract One". It referred to clauses 1-3 of the Letter of Engagement in Contract One by which "Talksport specifically <u>engaged</u> KPL to provide the Services which consisted of Mr Hawksbee presenting, or co-presenting, a three-hour radio show between 1pm and 4pm on Mondays to Fridays" and that it was engaged to do so for two years. It said that "in the context of the contract as a whole, the express engagement of KPL for a fixed period to provide the Services was sufficient to constitute a binding commitment by Talksport to provide at least some work…No further express clause was needed to constitute an obligation on Talksport to provide Mr Hawksbee with some shows to present."

56. The issue is therefore whether, as a matter of the construction of the contracts, the UT was correct to reach this conclusion. I propose to take both contracts together, in view of the close similarity of their terms and the substantial degree of overlap in the submissions made on behalf of KPL. I will note any differences of substance.

57. KPL advanced the following grounds for its contention that the UT was wrong.

(1) There is no provision which in terms states that Talksport was under any obligation to offer programmes.

(2) It was wrong to say at [38] that an absence of any such obligation "would be so contrary to business common sense as to call into question whether it was the true effect of Contract One". The same submission was made as regards Contract Two. The reasons advanced for the submission (leaving aside those directed at whether it would be a proper case for implying a term) were:

i) A court should be slow to reject the natural meaning of a provision simply because it appears be a very imprudent term for a party to have agreed. This, however, merely re-states the main issue. The question is what term did the parties agree? In any event, while it would have force as a separate point if there had been an express term providing that Talksport was under no obligation to offer any programmes, neither contract contains such a term.

ii) There was no construction pursuant to which Talksport was under any express obligation to offer work. Again, this merely re-states the issue.

iii) The UT failed to take into account or give sufficient weight to (a) the fact that when Talksport did call on Mr Hawksbee to provide the contracted services, he would be paid for them; and (b) the FTT's finding that the extent of Mr Hawksbee's paid work outside the programmes had overall been "considerable". I deal with these points below.

(3) The UT failed to take into account provisions of the contracts which supported KPL's case, including (i) clauses 3.2 and 5 of the Letter of Engagement, and clauses 2, 10 and 13 of Contract Two and a similar provision in the schedule of services, pursuant to which KPL was paid only for programmes performed; and (ii) clause 4.1 of the standard terms and conditions of Contract One whereby Talksport was not liable for any loss arising from it not "requiring the Services" of Mr Hawskbee.

(4) The UT's reliance on the suspension and termination provisions of both contracts was flawed. KPL submitted that it was wrong for the UT to say that the suspension provisions would only make sense if Talksport was obliged to offer work. It submitted that suspension enabled Talksport to distance itself publicly from KPL or Mr Hawksbee if good reason for doing so arose.

58. The central part of the UT's reasoning is that, under the terms of the contracts, KPL was engaged to provide Mr Hawksbee's services as a presenter of a three-hour radio programme on Mondays to Fridays on an exclusive basis for a minimum of 222 days per year over a two-year period. 222 weekdays amount to 44 weeks and 2 days. The effect was that Mr Hawksbee had to be available, during a very substantial part of the year, for a three-hour programme and further time for preparation, rehearsal and promotional and publicity engagements. His evidence, accepted by the FTT, was that he would normally be present at Talksport's studios for between 4¼ and 4¾ hours on the day of each programme (arriving between 11.30 am and 12.15pm and leaving by 4.15 pm). He would be unable to take on work which conflicted with this obligation. KPL was also limited in the other work that it could take on for Mr Hawksbee, especially as regards radio broadcasting

59. If KPL is right and Talksport was not required to offer any programmes for Mr Hawksbee to present, it would mean that whether he or KPL could earn any money for those periods would depend wholly on the discretion of Talksport to offer programmes. Mr Hawksbee could not work full time, or anything approaching full time, for other clients or employers. As the UT said at [38], that outcome is contrary to business common sense. Against that background, there is a solid basis for interpreting the engagement of KPL as carrying with it an obligation to offer 222 programmes per year.

60. KPL laid stress on the provisions whereby the fee (£525 under Contract One and £575 under Contract two) was payable per programme, so no obligation to pay arose unless a programme was made (save where it was cancelled on the day of broadcast). It does not, however, follow that Talksport was not obliged to offer 222 programmes per year. The fee accrues as a debt when a programme is made. If the UT is correct in its interpretation of the contracts, a failure to offer 222 programmes would nonetheless be a breach of contract entitling KPL, as the UT said, to claim damages for breach of contract, taking account of Talksport's right to terminate the contract on four months' notice. No damages would, however, be payable in respect of a programme which had been offered but Mr Hawksbee had been unable to present, for reasons of ill-health or otherwise. The provision in clause 5.1 of the Letter of Engagement that "[t]he minimum fee paid and payable by the end of the Term will be based on 222 programmes per year" took account, by using the words "will be based on", of the possibility that Mr Hawksbee would not present each programme that was offered, but it was otherwise indicative of an obligation on Talksport to offer 222 programmes per year.

61. KPL relied on some differences in the terms of the contracts. I do not, however, regard as significant that, under Contract One, Talksport had "first call" on the services of Mr Hawksbee while, under Contract Two, it had "reasonable call" on his services. Nor do I regard as significant in the overall context of the contracts that, under Contract One, Mr Hawksbee's services were not to be provided to any other UK radio broadcaster while, under Contract Two, they were not to be provided to any competing radio broadcaster.

62. As regards the provisions which it is said that the UT should have taken into account, the fact that in the particular circumstance of a programme being cancelled on the day of broadcast the fee was nonetheless payable (clause 3.2 of the Letter of Engagement) does not assist KPL to establish that there was no obligation on Talksport to offer 222 programmes. KPL relied also on clause 4.1 of the standard terms and conditions of Contract One, excluding any liability of Talksport's part for any loss of publicity or opportunity to enhance Mr Hawksbee's reputation if it delayed or abandoned production or exploitation of the programmes. Clause 4.1 is directed at forms of consequential loss, not at any obligation on the part of Talksport to offer programmes. Whether or not that obligation exists, the purpose and effect of clause 4.1 remains the same, although it may be said to be more obviously consistent with a contract imposing an obligation on Talksport to offer programmes.

63. As regards the FTT's finding that the extent of Mr Hawksbee's paid work outside his radio show for Talksport "overall has been considerable", it covered a long period. It also found that, for the three years covered by the appeal, the income from Talksport comprised on average approximately 90% of his total income. The critical point is that under the two contracts in question, the commitment to provide Mr Hawksbee's services very substantially reduced his ability to do other work.

64. As regards the provisions for suspension, the UT said:

> "…the provisions for suspension make sense only if Talksport was obliged to provide work to KPL. The evident purpose of the right of suspension was to protect Talksport from the risk of having to continue to offer KPL work in circumstances where, for example, it was not practicable for the Show to be aired or if it was investigating possible misconduct by Mr Hawksbee… In contrast, on KPL's interpretation, Talksport would not need to invoke its right to suspend the contract, for example, if it was investigating Mr Hawksbee for misconduct; it could simply decide to offer KPL no work."

65. In my view, the point made by the UT was well taken. It is hard to see any purpose in these provisions if Talksport could in any event simply not offer any programmes to KPL. If it wanted to distance itself publicly from KPL or Mr Hawksbee, it could do so, on KPL's case, by announcing publicly that it was not broadcasting the programmes, permanently or temporarily, and giving the reason. Equally, it is hard to reconcile KPL's case with Talksport's unconditional right to terminate the contracts on four months' notice. Mr Peacock said that it enabled Talksport to terminate its obligations but its only obligation under Contract One was to enter into good faith negotiations at least six months before the end of the term regarding an extension of the term.

66. The express terms of the contracts whereby Talksport engaged KPL to provide the services of Mr Hawksbee on the terms discussed above are well capable of including, as a matter of construction of the contracts, an obligation on Talksport to offer the number of programmes that Mr Hawksbee was required to present. In my judgment, the UT was correct to hold that they did contain that obligation.

67. By a respondent's notice, HMRC seek to uphold the UT's conclusion on the alternative ground that such obligation was to be implied into the contracts. If I was not satisfied on the question of construction, I would uphold the UT's conclusion on this alternative ground. For the reasons given in *Devonald v Rosser & Sons* [1906] 2 KB 728, such a term is to be implied in a contract for piecework on grounds of business efficacy. The case falls within the category described by Lord Neuberger in the *Marks and Spencer* case at [23]:

> "…the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy."

Jurisdiction to remit or remake the decision

68. The jurisdiction of the Upper Tribunal is set out in section 12 of the Tribunals, Courts and Enforcement Act 2007 (TCEA):

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal—
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either—
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.
>
> (3) In acting under subsection (2)(b)(i), the Upper Tribunal may also—
>
> (a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;
>
> (b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.
>
> (4) In acting under subsection (2)(b)(ii), the Upper Tribunal—
>
> (a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and
>
> (b) may make such findings of fact as it considers appropriate."

69. In the present case, the UT held that the making by the FTT of its decision had involved the making of an error of law, by holding that Talksport was under no obligation to offer programmes. The UT accordingly had under section 12 a discretion whether to set aside the FTT's decision and, if it did, a discretion whether to remit the case to the FTT or to remake the decision itself.

70. The UT considered that in this case it should set aside the FTT's decision, explaining its reasons at [63]:

> "The FTT's conclusion that the hypothetical contracts contained no obligation on Talksport to provide work was highly material to its overall decision. At [233], the FTT concluded that "the lack of obligation on Talksport to provide work points away from a relationship of employment". Although, at [234], the FTT acknowledged that the perceived absence of an obligation to provide work was not decisive, it clearly weighed heavily in the balance, and was the first factor identified in [236] as pointing away from a contract of employment. We therefore consider that our conclusion on Ground 1(a) of itself means that we should

> exercise our power under s11 of the Tribunals, Courts and Enforcement Act 2007 to set aside the Decision"

71. The UT recorded the submission on behalf of KPL that the case should be remitted to the FTT, on the grounds that, to decide whether the hypothetical contracts were for employment or self-employment, it was necessary, echoing the words of Mummery J in *Hall v Lorimer* [1992] 1 WLR 939, to paint a picture from an accumulation of detail and then stand back to assess the overall result, which was best performed by the FTT which had all the relevant factual evidence before it.

72. The UT rejected this submission and exercised its discretion to remake the decision itself, as explained at [66]:

> "We acknowledge that, to a degree, the determination of whether the hypothetical contracts were of employment or self-employment involves a multi-factorial assessment. However, once Ground 1(a) is resolved, there is almost no dispute between the parties as to the terms of the hypothetical agreements, nor as to other findings of primary fact. Moreover, it is not suggested that the FTT ought to have made primary findings of fact on any other issues relevant to the determination of the issues before it. Therefore, we consider that we can ourselves perform the necessary evaluation by reference to the FTT's findings of primary fact and that it would be proportionate for us to do so."

73. On the assumption that the FTT had erred in law in holding that Talksport was under no obligation to offer any programmes, KPL submitted that the UT should have set aside the FTT's decision only so far as it related to that issue, which it identified as the first stage in the *RMC* test of mutuality of obligation. It submitted that the remaining parts of the process, involving the evaluative judgments at stages two and three, were not vitiated by the error and should have stood.

74. For the reasons given by the UT at [63], I reject this submission. The FTT's finding that there was no obligation on Talksport to offer programmes clearly played an important part in its overall assessment that Mr Hawksbee would not be employed under the hypothetical contracts. There was no alternative to setting aside the FTT's decision.

75. Alternatively, KPL submitted that, if the whole decision was to be remade, it should have been remitted to the FTT. As the UT's decision to remake the decision itself was a matter for its discretion, KPL must point to an error of principle in the UT's approach or to reliance on an irrelevant factor or to a failure to have regard to a relevant factor. It was submitted that, as a matter of principle, the UT should not remake a decision where it is in any doubt about how the FTT, as the primary fact-finding body, would have decided the case with the benefit of the UT's own decision on the issue(s) on appeal. It relied on what Henderson LJ said in *Newey (t/a Ocean Finance) v HMRC* [2018] EWCA Civ 791; [2018] STC 1054 at [110]-[111]:

> "110…The decisions of both Tribunals are (as I have held) vitiated by material errors of law, with the consequence that the evaluation of the facts required by the CJEU has not yet been performed by a fact-finding body which has directed itself

> correctly in law. In those circumstances, I see no escape from the conclusion that the case must be remitted so that this task can for the first time be properly performed in all respects.
>
> 111. The alternative would be for this court to embark on the task itself, but for a number of reasons that would be unsatisfactory. The principal role of this court is appellate and supervisory. Save in exceptional circumstances, it does not find facts itself, and we have not heard evidence from the witnesses. Nor have we been supplied with a transcript of the hearing before the FTT. I therefore consider that our power under section 14 of TCEA 2007 to re-make the decision, and for that purpose to make such findings of fact as we consider appropriate, is one which we should exercise sparingly, if at all. We should not do so if we feel any real doubt about how the FTT, as the primary fact-finding body, would have decided the case if it had the benefit of (a) the guidance given by the CJEU, (b) the relevant case law (both European and domestic) since April 2010 (including, in particular, the decision of the Supreme Court in *Pendragon* and the judgment of this court in the *University of Huddersfield* case), (c) the UT Decision, and (d) our judgment on this appeal."

76. It is clear that Henderson LJ was there addressing the role of the Court of Appeal, as a second appellate court. He was not addressing the quite different role of the UT. There is no ground for implying into section 12 of TCEA the limitation suggested by KPL nor is there any feature of the UT's role in the Tribunal system which should restrict the exercise of its discretion to remake a decision to those cases where there can be little or no doubt as to how the FTT would decide the case.

77. In the further alternative, KPL submitted that it was not in the interests of justice to remake the decision when the UT did not have before it all the necessary evidence. It did not matter that there was no dispute as to primary findings of fact and no submission that the FTT ought to have made any further findings of fact. The UT needed all the evidence in order to conduct the overall evaluative process, involving identifying and then standing back from the accumulation of detail.

78. In my view, it is wrong to suggest that, in remaking the decision, the UT needed to have all the *evidence* before it. It had the FTT's unchallenged findings of fact on all relevant matters. It did not need to, and it would not normally be appropriate to, go behind the findings to examine the evidence on which those unchallenged findings were made.

79. In my judgment, the UT was right to say at [66]: "…we consider that we can ourselves perform the necessary evaluation by reference to the FTT's findings of primary fact and that it would be proportionate for us to do so." The question of proportionality on which the UT rightly relied is important. In circumstances where the UT is well-placed to remake the decision, the avoidance of delay and additional cost for the parties and the proportionate use of the resources of the tribunal system are factors that the UT must, and in this case did, take into account in exercising its discretion.

80. In my judgment, there is little or nothing in ground two of KPL's grounds of appeal and I would reject it.

Control

81. I have earlier commented that the FTT did not clearly and explicitly state that there would under the hypothetical contracts be a sufficient framework of control by Talksport over Mr Hawksbee to satisfy the requirement of control which is a pre-requisite to the existence of an employment relationship: see *RMC* at 515-16 and 516-17 and *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173 at 185C-D. Nonetheless, it proceeded to deal with the multi-factorial question which arises only if there is a sufficient degree of control, and it summarised its conclusion at [230(2)]:

> "In relation to control, certain facets of control are not indicative as they apply to employees and non-employees alike. Talksport controls where and when services are performed. In relation to how services are performed, Talksport lacks effective control over a live broadcast, but that is not significant as an indicator. Mr Hawksbee has a very high degree of control over the format and content of The Show, but the ultimate right of control in this respect, which the authorities indicate is more important, lies with Talksport, by necessary implication under Hypothetical Contract Two. Talksport's control over what services are performed is limited, because the substantive obligations relate only to delivery of The Show."

82. The UT made its own evaluation of the issue of control. It stated that there was no real dispute as to the legal test to be applied and quoted from the judgment of MacKenna J in *RMC* at 515F:

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."

83. At [75], the UT listed relevant findings of primary fact made by the FTT:

> "(1) Under both hypothetical contracts, Talksport would have control over "where" and "when" Mr Hawksbee did his work ([187]).
>
> (2) While the Show was being broadcast, with the limited exception of the "dump button", Talksport had little practical control over how Mr Hawksbee did his job ([188]).
>
> (3) In practice, Mr Hawksbee had a high degree of editorial control over the content and format of each episode of the Show. He was not required to read from a script, he chose the interviewees and he chose the stories or events to include ([190]). In practice, disagreements between Mr Hawksbee and Talksport in relation to the content of a forthcoming episode of

> the Show were resolved amicably, generally with Mr Hawksbee's view prevailing ([191]). However, under both hypothetical contracts, even though Talksport was in practice happy to give Mr Hawksbee considerable artistic freedom, ultimately Talksport enjoyed the right to decide on the format or content of a particular episode of the Show.
>
> (4) Under both hypothetical contracts, Talksport had relatively narrow rights of control over what tasks Mr Hawksbee performed. Talksport could only require him to prepare and present episodes of the Show and undertake ancillary obligations relating to the promotion of the Talksport brand."

84. At [78], the UT held, on the FTT's findings of fact, that Talksport could control "where" and "when" Mr Hawksbee performed his duties and that it had material rights of control over "what" tasks Mr Hawksbee performed because it had the ultimate *right* to decide on the form and content of a particular programme. The fact that, in practice, Talksport was content to give him a high degree of autonomy did not alter that conclusion as the control test focuses on the right of control and not how, or if, that right is exercised: see Langstaff J in *Wright v Aegis Defence Services (BVI) Ltd* (2018) UKEAT/0173/17. The fact that Talksport had little control over how Mr Hawksbee presented the programmes put him in the same category as other highly skilled people, such as a surgeon or a footballer, but did not prevent the existence of a sufficient framework of control for these purposes. The UT concluded that such framework of control would exist in the case of Talksport and Mr Hawksbee.

85. This conclusion represented an evaluative judgment on the part of the UT, and KPL must show that it made some error of principle or had regard to irrelevant factors or disregarded relevant factors, or that it was perverse, before this court will interfere with it.

86. KPL submitted that the UT failed to appreciate that control over "where and when" was given little weight by the FTT, and should have been given little weight by the UT, because Mr Hawksbee could only provide his services if he was in the studio, and at the time, specified by Talksport. It may be noted that under the contracts Talksport was entitled to change the times and dates of the programmes but, in any event, I can detect no sign in the UT's decision that it was unaware of the FTT's approach or that the UT itself gave undue weight to control over the "where and when".

87. KPL further submitted that the UT misinterpreted the importance of "the ultimate right to decide" in *RMC*. Talksport had control over the content of a programme but not control over Mr Hawksbee in the performance of his services. The UT accepted that Talksport had little practical control over "how" Mr Hawksbee performed his services, by which must be meant how he presented programmes but, as the UT remarked, this is no different from other highly skilled people performing services. The right to control the content of the programmes is highly material to the question of control. Indeed, as it seems to me, it may be said that the right to control the content of the programmes gave Talksport appreciably more control over the provision of Mr Hawksbee's services than, for example, a hospital trust has over the provision of the services of its surgeons.

88. KPL also submitted that, as regards control over "what" services were performed by Mr Hawksbee, the UT did not take account, or even went against the FTT's unchallenged finding, that it was "relatively narrow" in comparison to the BBC's control over what services were provided by a different presenter in *Christa Ackroyd Media Ltd v HMRC* [2019] UKUT 326 (TCC); [2019] STC 2222. The UT did not ignore the narrow range of Talksport's control in this respect, but it is clearly not decisive against an employment relationship, and it was for the UT to decide the weight to be given to it.

89. It must be borne in mind that control is a necessary, but not necessarily a sufficient, condition for the existence of an employment relationship. There may well be a framework of control which, by a greater or lesser margin, is sufficient for these purposes but will not, when all other relevant factors are assessed, be sufficient to establish employment.

90. In my judgment, KPL's submissions disclose no error of principle or approach by the UT and are in substance no more than an attempt to re-argue the issue. I would accordingly reject this ground of appeal.

The multi-factorial assessment

91. Ground 4 challenges the UT's conclusion on the multi-factorial assessment to be carried out after mutuality of obligation and control have been established, on grounds that the UT took account of irrelevant factors and disregarded relevant factors. I will take each of these challenges in turn, save for those that were in substance dependent on acceptance of KPL's case that Talksport owed no obligation to offer any programmes.

92. First, KPL submitted that the UT erred in giving little, if any, weight to the narrowness of Talksport's control over Mr Hawksbee. I will address below HMRC's submission that, having found sufficient control at stage two, the extent or quality of control is not a relevant factor at stage three. It cannot be said that the UT did not take this factor into account. It said at [90]:

> "…even if, contrary to HMRC's submissions, it were legitimate for the FTT to take into account the extent of Talksport's "control" under hypothetical contracts at the third *Ready Mixed Contract* stage we regard the perceived "narrowness" of Mr Hawksbee's services…as being of little, if any, weight. As we have already observed, skilled employees are routinely engaged to provide a narrow and specialist set of services."

93. The question of weight was for the UT and it gave its reason in the last sentence for attaching little, if any, weight to this factor. There is nothing perverse about the reason given. KPL also suggests that the UT was wrong to make comparisons with surgeons or footballers without evidence, but these were just examples of skilled personnel whose essential patterns of work are sufficiently well known not to require evidence.

94. Second, in finding that contracts with a duration of two years was an indicator of employment, the UT (i) erred in relying on the 18-year relationship with the benefit of hindsight and (ii) failed to take account of the evidence as to the lack of security this provided Mr Hawksbee, having regard to the need to renegotiate the contract every two

years and the lack of security as to the future of the programme. Such insecurity is, it is said, wholly inconsistent with a contract of employment under which continuity of employment is secured. I find this a surprising submission. In modern employment conditions, many employees would regard a two-year engagement, terminable during the term on not less than four months' notice, as providing significant security, all the more so when combined with an obligation on the parties to negotiate in good faith for an extension. The UT was also entitled to have regard to the length of the relationship before the commencement of each contract. The period of 18 years ended with the date of the FTT hearing and was therefore too long a period to take, but not to a material extent.

95. Third, KPL challenged the UT's view that the statements in the contracts that they were not contracts of employment were "broadly neutral". KPL accept that such statements will generally be of little, if any, assistance, although "in a borderline case a statement of the parties' intention may be taken into account and may help to tip the balance one way or the other": *Dragonfly Consultancy Ltd v HMRC* [2008] EWHC 2113 (Ch); [2009] STC 3030 at [53] per Henderson J, citing *RMC* ([1968] 2 QB 497 at 513) and *Massey v Crown Life Insurance Co* [1978] 1 WLR 676 (CA). There is no indication that the UT considered this to be a borderline case in which recourse to these statements would assist.

96. I should mention that on this point HMRC relied on a passage from Lord Leggatt's judgment in *Uber BV v Aslam* [2021] UKSC 5; [2021] ICR 657 at [85] to submit that such statements were of no effect and should be ignored. As Lord Leggatt's judgment makes clear, it is concerned with the statutory definition of "worker" in legislation conferring rights on persons falling within the definition. The legislation also contains prohibitions against contracting out. Contractual statements that a person is not an employee or worker are to be disregarded in that context because they are provisions which purport to exclude or limit the operation of the legislation: see [85] read with [79]-[82]. HMRC's reliance on *Uber* is misplaced in the different context of the present case.

97. Fourth, the UT erred in considering that the absence of any contractual rights to holiday or sick pay or other benefits for employees or workers (workers' rights) from the hypothetical contracts (as per the majority decision of the FTT) did not "count greatly in this case" ([92]). KPL did not challenge the UT's view, which is plainly correct, that the actual contracts were expressly intended not to create an employment relationship and so would not contain provisions for workers' rights. It focused on the FTT's majority finding that they would not have been contained in the hypothetical contracts. However, the same point arises as with the actual contracts. The FTT found that the hypothetical contracts would also have contained express provision that Mr Hawksbee was engaged on a freelance basis and was not an employee of Talksport. The intended effect of those provisions would be significantly undermined if the hypothetical contracts had at the same time conferred workers' rights. The UT was, in my judgment, entitled to conclude that the absence of provision for workers' rights did not count greatly. The same approach was adopted by the UT in *Atholl House Productions Ltd v HMRC* [2021] UKUT 37 (TCC); [2021] STC 588 at [74]. It must, of course, be remembered that, if the hypothetical contracts were held to create an employment relationship, Mr Hawksbee would enjoy the rights conferred by statute on employees.

98. Fifth, KPL submitted that the UT erred in law in dismissing, as a relevant test, whether Mr Hawksbee was part and parcel of Talksport's organisation and dismissing the evidence that he was not part and parcel of its organisation. The FTT concluded on the evidence that he was not part and parcel of Talksport's organisation and treated that as a relevant factor because being part and parcel of an organisation is "a status normally associated with employment". The UT commented at [95] that it seemed clear that "the FTT itself did not regard this issue of great weight". Mr Peacock submitted that the UT was wrong about that. My reading of the FTT decision is that it regarded this as of some weight, but not of "great weight". However, this is beside the point. This appeal concerns the UT's own evaluation of the overall position at stage three.

99. As KPL accepts, the "part and parcel" test has attracted criticism for many years, including from MacKenna J in *RMC* at 524. On the particular facts of some cases, a decision-making court or tribunal may reasonably consider that it is a useful question to ask as part of the overall assessment. In other cases, it may consider that it will not assist. In this case, given the particular nature of Mr Hawksbee's services, the UT was entitled to say that it did not think that "in the circumstances of this case, an impressionistic analysis of whether Mr Hawksbee was 'part and parcel' of Talksport's organisation would weigh heavily in the balance" and that "it adds little in this case", while accepting that "in other cases, analysis whether someone is 'part and parcel' of an organisation will be illuminating".

100. Given the wide range of factors that may be relevant in determining whether an employment relationship has been created, it is right that the relevance of any particular factor should be tested against the individual circumstances of the case. Factors which are relevant, even highly relevant, in some cases may well be of little or no relevance in other cases: see, for example, the judgment of Nolan LJ in *Hall v Lorimer* [1994] 1 WLR 209 at 218 where he observed that questions relevant to a person carrying on a business "may be of little assistance in the case of one carrying on a profession or vocation", such as an author working from home or an actor or singer "without any of the normal trappings of a business".

101. In the present case, the UT considered the relevance of the "part and parcel" test and, having regard to the circumstances of this particular case, concluded that it added little. There is no criticism that can properly be made of this analysis.

102. For these reasons, I do not accept as well-founded any of the challenges made by KPL to the UT's decision under ground 4.

103. Before leaving ground 4, I should mention that the same constitution of this court heard an appeal in *Atholl House Productions Ltd v HMRC*, with judgment given on the same day as this judgment: see [2022] EWCA Civ 501. In that judgment, the court examined in some detail the principles applicable to the assessment as to whether an employment relationship has been created. There is little in that which impinges on this case, but two points should be noted.

104. First, this court did not accept that the existence of the necessary pre-conditions of mutuality of obligation and control creates a prima facie presumption that a contract of employment exists. The court's task at that stage is to examine all relevant factors, both consistent and inconsistent with employment, and determine, as a matter of overall assessment, whether an employment relationship exists. In the present case, the UT

approached assessment at stage three by reference to *Weight Watchers*. This was not challenged by KPL on this appeal but, in any event, I am entirely satisfied that the validity of its conclusion in favour of employment is not affected by its reference to *Weight Watchers*.

105. Second, this court held in *Atholl House*, contrary to HMRC's submission, that once a sufficient framework of control is established at stage two, the extent and quality of that control can form part of the overall assessment at stage three, if the decision-making court or tribunal considers it relevant in the circumstances of the particular case. In the present case, the UT considered the narrow scope of Talksport's control in the passage quoted above and, as I have said, I see no basis for interfering with the weight given to it by the UT. This means that HMRC need not rely on their alternative submission, that as a matter of inflexible principle no account should be taken of control at the third stage. If it had been necessary to do so, I would have rejected this alternative submission for the reasons given in *Atholl House*.

Conclusion

106. For the reasons given in this judgment, I would dismiss this appeal.

Lord Justice Arnold:

107. I agree that the appeal should be dismissed for the reasons given by Sir David Richards.

108. Although it does not affect the appeal, I wish to point out that, in my opinion, the dispute over the period covered by Contract One proceeded upon a false basis.

109. Contract One consists of a written agreement taking the form of a letter from Moz Dee of talkSPORT Ltd ("TSL") to Paul Hawksbee dated 1 January 2012, together with TSL's "Standard Terms and Conditions Presenters" referred to in, and enclosed with, the letter, countersigned by Mr Hawksbee. The letter defines Mr Hawksbee as "the 'Presenter', or 'you'" and TSL as "the 'Company', 'we', or 'us'".

110. The opening paragraph of the letter states:

> "I am pleased to confirm the terms upon which the Company would like to engage you on a freelance basis as a presenter. The specific terms of your engagement with the Company are set out in this letter ('Letter of Engagement'). This Letter of Engagement, together with the Company's Terms and Conditions for Presenters …, attached to this letter, constitute our agreement on the terms and conditions of your engagement with us (the 'Agreement'). As part of our internal administration, I should be grateful if you would sign and return this Letter of Engagement' once you have read it to signify your acceptance of its terms."

111. With one exception, all of the substantive obligations contained in the letter are expressed as being ones between Mr Hawksbee and TSL. Thus paragraph 1 states:

> "**Engagement**

> We engage you and you agree to provide to us the services referred to in Clause 3 on an exclusive basis on the terms and conditions set out in this Agreement."

112. The exception is that paragraph 5.1 states (among other things) that TSL shall pay Kickabout Productions Ltd ("KPL") the Fee monthly upon production of an invoice by KPL.

113. Furthermore, some of the obligations are expressed in terms which can only apply to Mr Hawksbee personally. For example, paragraph 3.3 states:

> "You will make yourself exclusively available for a schedule of preparation and rehearsal as we shall reasonably specify from time to time and for such promotional and publicity engagements as we may reasonably require from time to time".

114. Mr Hawksbee's signature appears below the following statement:

> "I acknowledge that I have read and understood the terms and conditions of this Agreement and accept them as governing my engagement with the Company which supersedes any previous agreements, whether written or oral."

115. The Standard Terms and Conditions state that "[t]he Presenter is Paul Hawksbee" and all of the substantive obligations contained in them are again expressed as being ones between the Presenter, i.e. Mr Hawksbee, and TSL.

116. The FTT stated at [92]:

> "The signatory to Contract One was not KPL, but Mr Hawksbee. The parties were agreed that this an administrative error, and the evidence from Mr Hawksbee and Mr Fisher [of TSL] confirmed this. We find as a fact that the contract was made between [TSL] and KPL."

117. It appears from this that HMRC did not challenge KPL's contention that KPL was the contracting party and not Mr Hawksbee. Certainly no such challenge was made by HMRC on appeal to the UT. As a result, it was not pointed out to either Tribunal that the FTT's finding was not open to it as a matter of law.

118. *Chitty on Contracts* (34th ed) states at 5-042: "Where the contract is in writing … only the persons named in the writing can be parties to the contract …". As the editor of Chapter 5, Professor Hugh Beale, goes to explain in 5-043, in *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 219:

> "the majority [of the House of Lords] held that … certainly when the contract is reduced to a writing, the identification of the parties to the agreement is a question of the construction of the … contract. If an individual is unequivocally identified by the description in the writing, that precludes any finding that the party to the agreement is anyone other than person so described. … where the party is specifically identified in the document, oral

> or other extrinsic evidence is not admissible to show that the party is someone else."

119. The terms of Contract One are crystal clear that the contracting parties are Mr Hawksbee and TSL, and the evidence relied upon by the FTT as showing that the true contracting parties were KPL and TSL was inadmissible (at least in the absence of a claim for rectification of the contract).

120. It would not have made any significant difference to the dispute if the FTT had proceeded on the correct basis that the contracting party was Mr Hawksbee rather than KPL. Although that would have avoided the need to consider the applicability of the IR35 legislation to Contract One, it is plain that Mr Hawksbee would have contended that Contract One was a contract for the provision of services rather than an employment contract whereas HMRC would have contended that it was a contract of employment. Thus the FTT would still have had to apply the *RMC* test in order to resolve that issue. Its task would have been a little simpler, however, since it could have applied the test directly to the actual contract rather than to a hypothetical contract. This would also have avoided the oddity of the FTT postulating the terms of a hypothetical contract between Mr Hawksbee and TSL when the terms of the actual contract did not require any rewriting to make them applicable to Mr Hawksbee (whereas the terms of Contract Two did require such rewriting since Contract Two was expressed to be between KPL and TSL).

Lord Justice Peter Jackson:

121. I also agree that the appeal should be dismissed for the reasons given by Sir David Richards.