IR35: a divergence between 'employment' for tax purposes and for employment purposes?

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On the same day, the Court of Appeal handed down judgment in two IR35 appeals: Kickabout and Atholl House. This is the first time that the court has considered statutory appeals against IR35 assessments.

Of interest to all employment practitioners is not what the judgments say about IR35; rather it is what they say about the determination of employments status generally, and what may be a material difference in the way in which employment misclassification issues should be approached as regards employment rights versus tax status.

The Court of Appeal has reaffirmed that the structure of *Ready Mixed Concrete* remains the starting point for determining employment status, but provided clarification around how to approach the three stages: mutuality of obligation; control; and most importantly, the 'third stage'. Interestingly, it has also said that both *Autoclenz* and *Uber* are of limited relevance to the determination of employment status for tax purposes, given the focus of those decisions on statutory protections specific to employment law.

Background

Both appeals concerned arrangements for radio presenters to provide their services to broadcasters via a personal service company (PSC). The presence of the PSC (typically) prevents a direct employment relationship. IR35 requires a hypothetical direct contract between the presenter and broadcaster to be imagined (ie, ignoring the presence of the PSC) and imposes income tax and NICs if that hypothetical contract would have been a contract of employment.

In *Kickabout*, the First-tier Tribunal (Tax Chamber) (FTT) found that the arrangements would not have met that test, in part because it found that under the two-year contracts between the presenter and Talk Sport Radio there was no obligation on Talk Sport to provide work to the presenter, only to pay him for the work done. The Upper Tribunal (UT) allowed HMRC's appeal, concluding that when read as a whole, the contractual obligation on the presenter to work for 222 days per year for a two-year fixed term brought with it an obligation on Talk Sport to make the work available. It remade the decision for itself and found that the *Ready Mixed Concrete* test was satisfied in respect of the hypothetical contract such that IR35 applied.

In *Atholl House*, both the FTT and UT concluded that IR35 did not apply to the arrangements. The FTT found that certain terms contained in the written contract between the PSC and the BBC did not reflect the true agreement between the parties, applying *Autoclenz*. The UT found that the FTT had erred in its application of *Autoclenz*, but concluded that the presenter, Kaye Adams, was generally in business on her own account (taking account of her evidence regarding how she had contracted to provide her services to other clients over a 20-year period), and that there was no distinction between the work that she did for the BBC and those other clients.

Court of Appeal's Judgments

Kickabout

The Court of Appeal upheld the UT's interpretation of the contract on the basis that it would be contrary to business common sense to interpret the contracts as requiring the PSC to make the presenter available for 222 shows per year, severely restricting his ability to earn a living with another engager, while permitting the broadcaster to offer no shows for him to work on. The UT had been entitled to take account of suspension and termination provisions, which would have been otiose if the broadcaster had been able, as a matter of contract, to simply offer the PSC no work at its sole discretion.

The court's interpretation of the contract to find an obligation on the broadcaster to provide work that was not stated in clear terms in the written document is a timely reminder that courts and tribunals will not adopt a purely literalist approach to interpretation – a point of some importance given the Court of Appeal's treatment of *Autoclenz* in *Atholl House*, addressed

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below. Engagers and PSCs alike may wish to take particular note of its reliance on the existence of suspension and notice provisions as being inexplicable unless there is an ongoing obligation to provide work.

Sir David Richards, who gave the leading judgments in both *Kickabout* and *Atholl House*, would have also upheld the UT's decision on the alternative basis that an obligation to provide work was to be implied into the contract, in reliance on *Devonald*.

Clearly, the Court of Appeal's reasoning both on the issue of contractual interpretation and its *obiter* comments regarding implied terms may be of significance in many cases where the contract with the PSC provides that the individual has an obligation to perform some minimum amount of work, paid on a piecework basis, without any obvious obligation on the part of the engager to offer work. The court considered in detail why the UT was entitled to find that there was a contractual obligation on Talk Sport to offer work to Kickabout. It did so without expressly addressing whether such an obligation is a necessary requirement for a fixed term, piecework contract to be a contract of employment.

In upholding the UT's decision that there would have been a sufficient framework of control in the hypothetical contract to satisfy the second stage of the *Ready Mixed Concrete* test, the Court of Appeal said that the broadcaster's right to control the content of its own programmes was 'highly material'. While the determination of whether sufficient control exists to satisfy the second stage of the *Ready Mixed Concrete* test remains, by necessity, a highly fact-specific one, the decision is nonetheless a clear example of the degree of latitude that may be afforded to highly skilled workers without it taking them outside the level of control required under that stage.

Regarding the third stage of the *Ready Mixed Concrete* test, the Court of Appeal concluded that there was no error by the UT on the facts of that case. However, it did not accept HMRC's submission that, in the context of an IR35 appeal, certain factors should always be giving minimal or no weight in the evaluation of employment status: for example, whether the individual was 'part and parcel' of the organisation; and a statement of the parties' intentions that the contract was not intended to give rise to a contract of employment.

The Court of Appeal did accept that the two-year duration of the individual contracts and the length of the overall relationship between the broadcaster and individual were relevant factors. It also accepted that the UT was entitled to find that the absence from the hypothetical contracts of express clauses providing worker rights (for example, holiday pay) did not count greatly because such rights would not have been provided for in the actual contracts as the parties were endeavouring to contract on a freelance basis. This hopefully settles a point that has been raised in almost all IR35 appeals.

Of further note is a short reference, at para 96, to the recent decision of the Supreme Court in *Uber*. The Court of Appeal made clear that the determination in *Uber* that statements in the contract as to the nature of the contract are largely to be ignored (per Lord Leggatt in *Uber* at para 76) has no application in IR35 cases. This is because the decision in *Uber* related to the legislative framework of worker rights from which contracting out is prohibited. That is not the case for the IR35 regime.

Atholl House

At para 56 in *Atholl House*, Sir David Richards said: '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.' Although the correct overall structure of the *Ready Mixed Concrete* test is now clear, the Court of Appeal has left it to first-instance tribunals to determine, on the facts of each specific case, what factors are relevant and what weight to give, subject only to the restriction that they must fall within the factual matrix.

One important point of principle raised by the appeal was the potential breadth of factors that can be taken into account at the third stage of *Ready Mixed Concrete*. Using Mummery J's metaphor from *Lorimer* of 'painting a picture', HMRC's submission to the Court of Appeal was that the only facts that could be brought within the 'frame' of the picture were the terms of the contract between the worker and engager and the consequences that flow from them. For *Atholl House*, it was submitted that there was no limit to the potentially relevant facts; indeed, it was said, there is no frame for the picture.

The Court of Appeal's answer lies in traditional principles of contractual interpretation. As employment status is ultimately a question of whether the contracting parties intend to create a contract of employment, it is only the terms of the contract and the background facts that fall within the factual matrix known to both parties that can be considered. Therefore, the

'tribunals will continue to take a realistic approach to interpreting contracts … applying a dose of commercial reality in interpreting their meaning'

UT erred by taking into account Ms Adams' evidence about her employment status over the 20-year span of her career, when there was no evidence that that was known to the BBC.

This conclusion is likely to assist practitioners advising engagers and individuals about status, by limiting the factors that they must worry about to what was known to both of them at the date of contracting.

The difficulty when advising will be to distinguish between the relevance of a factor and its weight. For example, the fact that an individual generally carries on business on his own account or was engaged in a certain way in prior years may be relevant as part of the factual matrix, but the focus of the enquiry is nevertheless upon a particular engagement – 'the terms of the contract remain central to the enquiry … [T]he critical periods remain the years in dispute.'

The third stage of the *Ready Mixed Concrete* test has been described as a negative test. In *Weight Watchers*, Briggs J said that if mutuality and control were satisfied, the engagement will be a contract of employment unless there are sufficient contra-indications in the other terms of the contract. That approach is now firmly rejected. The Court of Appeal has accepted that, as a matter of logic, if the first and second stages are satisfied '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'. However, the third stage is now an overall evaluation of facts consistent or inconsistent with the conclusion of employment status and the Court of Appeal has accepted that the *extent* of mutuality of obligation and, particularly, control may be part of that assessment.

Importantly, the Court of Appeal agreed with the UT that the FTT had erred in its application of *Autoclenz*. However, it went further than the UT in finding that because the theoretical justification for *Autoclenz* was the statutory purpose of applying protections to vulnerable workers, which purpose was missing from IR35, it was not legitimate to apply *Autoclenz* in the IR35 context. Put another way, while an employment tribunal assessing whether someone is an employee or a worker for the purpose of employment rights should not necessarily start its analysis with the terms of the contract and should readily disregard terms which do not represent the 'true agreement' between the parties, per *Uber*, a tax tribunal should not do so, since it is bound by the established approach to contractual interpretation which was specifically departed from in the employment context in *Autoclenz* and *Uber*.

Where next?

Does the judgment provide *carte blanche* for engagers to instruct the 'armies of lawyers' to insert unrealistic substitution and 'no obligation' clauses into their contracts? We do not believe so. Tribunals are bound (by the Supreme Court in *UBS*, cited with approval by Lord Leggatt in *Uber*) to apply tax statutes to the facts 'viewed realistically', and in the authors' view, tribunals will continue to take a realistic approach to interpreting contracts, not restricted solely to the words used by the parties, but applying a dose of commercial reality in interpreting their meaning, as well as considering matters other than the terms of the contract. The Court of Appeal's judgment should not be taken to mean that form trumps substance.

That said, there is now clearly a divergence between the theoretical approach to determining the terms of a contract when considering the application of employment rights, and the approach when determining tax status. It remains to be seen whether, in practice, this will lead to employment tribunals and tax tribunals giving different answers to the question of employment status.

The opinions stated in this article are the personal views of the authors.

KEY:

Kickabout	*Kickabout Productions Ltd v HMRC* [2022] EWCA Civ 502
Atholl House	*HMRC v Atholl House Productions Ltd* [2022] EWCA Civ 501
Ready Mixed Concrete	*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497
Autoclenz	*Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] 4 All ER 745
Uber	*Uber BV v Aslam* [2021] UKSC 5; [2021] 4 All ER 209
Devonald	*Devonald v Rosser & Sons* [1906] 2 KB 728
Lorimer	*Hall (HM Inspector of Taxes) v Lorimer* [1994] 1 WLR 209
Weight Watchers	*Weight Watchers v HMRC* [2011] UKUT 433; [2012] STC 265
UBS	*UBS AG v Revenue and Customs Commissioners* [2016] UKSC 13; [2016] 1 WLR 1005