Analysis

The Court of Appeal's guidance on IR35 employment status

Speed read

The Court of Appeal's recent decisions in the IR35 cases of *Atholl House and Kickabout Productions* give authoritative guidance on the application of the *Ready Mixed Concrete* and business on own account tests. Although HMRC won both cases, the decisions contain much of benefit for taxpayers in the fight for a sensible approach to the employment status test. In respect of the business on own account test, the court dismissed HMRC's efforts to relegate the business on own account test as inferior to the *RMC* test and confirmed that relevant factors should not be limited to the four corners of the contract. In respect of the *RMC* test, the Court likewise rejected HMRC's arguments that (a) there should be a prima facie conclusion of employment if mutuality of obligation and control are found to exist; (b) these tests are binary; and (c) mutuality of obligation and control should not be taken into account at the evaluative stage.

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On 26 April 2022, the Court of Appeal handed down decisions in two IR35 cases concerning the employment status of TV and radio presenters: *HMRC v Atholl House Productions Ltd* and *Kickabout Productions Ltd v HMRC*. Heard by the same panel in consecutive weeks, they seek to give authoritative guidance on the application of the *RMC* (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497) and business on own account tests. This article unpacks what was decided and considers the implications for taxpayers.

Atholl House

Atholl House concerned the employment status of Kaye Adams, a well-known journalist and presenter. The First-tier Tribunal ([2019] UKFTT 415 (TC)) found that she was in business on her own account as a freelance journalist. In so doing, it took into account the fact that she had a 20-year career pre-dating the contracts in question, had worked for various different media organisations, had written two books, and had built up a public profile (FTT at paras 106–107). It also found that both the first call provisions (FTT at para 93) and the substitution clause (FTT at para 94) did not reflect the true agreement between the parties and thus would not have formed part of the hypothetical contract under the IR35 provisions.

The Upper Tribunal ([2021] UKUT 37 (TCC)) found that the FTT had erred in law in its approach to *Autoclenz Ltd v Belcher* [2011] UKSC 41 by departing 'materially from normal principles of contractual interpretation without a sufficiently secure basis in a "realistic and worldly wise" examination of the Written Agreement and the surrounding circumstances (including the post-contractual) to make such a departure permissible' (UT at para 50). The UT therefore remade the decision (UT at para 71) and found that the services provided under the contracts in question was part of her long-standing business as a journalist / presenter and thus not contracts of employment (UT at paras 111–116).

HMRC appealed to the Court of Appeal on the grounds that the UT erred in law: (1) in its interpretation and/or application of the third stage of the *RMC* test; and (2) in its approach to the question whether Ms Adams was 'in business on her own account'.

The Court of Appeal ([2022] EWCA Civ 501) found that the UT had erred both in its application of *Autoclenz* and in its approach to the business on own account test, allowed HMRC's appeal, and remitted the case to the UT.

Kickabout

Kickabout concerned the employment status of a well-known comedy writer and radio host, Paul Hawksbee of TalkSPORT Ltd ('Talksport'). Mr Hawksbee had a successful 20-year career with the radio station but also saw success as the writer for various TV shows, including *Fantasy World Cup* (the Skinner and Baddiel show) in the 1990s and *Harry Hill's TV Burp* between 2002 and 2012. The case concerned his employment status under two contracts with Talksport Ltd between 2012 and 2015, pursuant to which Mr Hawksbee agreed to present 222 episodes a year of the 'Hawksbee and Jacobs show', a daily sports show (broadcasting 1pm to 4pm, Monday to Friday) with a comic twist ('the show'). He was only paid for shows performed but there were restrictions on him outside the show: Talksport had first – or reasonable – call on his services at all other times and he was not permitted to provide similar services to any other radio or television broadcaster without the prior written consent of Talksport. He was also subject to suspension and notice provisions pursuant to which Talksport has the right to suspend or terminate Mr Hawksbee's services on certain grounds, during which period the fee would not be payable.

At the FTT ([2019] UKFTT 242 (TC)), Judge Thomas Scott found that there was no obligation on Talksport to offer shows in the actual contracts, such that when he weighed mutuality of obligation in the balance at the evaluative stage, he found that there was mutuality of obligation but it was 'not strongly indicative of employment because of the absence of obligation on Talksport to provide work' (FTT at para 230(1)). The wing member, in a dissenting judgment, found that there was no need to place an obligation on Talksport to offer shows as Talksport had contracted with him to perform a repetitive task (namely, present the show) and 'Talksport did not need to make any further decision to provide work to Mr Hawksbee or about the nature of that work' (at dissent para 11). Stepping back and looking at the complete picture, Judge Scott found that (taking into account both the extent of the mutual obligations and control) the contract was one for services, such that IR35 did not apply (FTT at paras 236–237).

HMRC appealed to the UT on eight grounds, including: the FTT's interpretation of the mutual obligations under the contracts; whether the FTT had

found a sufficient framework of control; and whether the FTT was correct to take mutuality of obligation and control into account at the evaluative stage of the *RMC* test (see [2020] UKUT 216 (TCC), para 22). The first ground was the only one that the UT considered as it found that, properly understood and when read against the other contractual provisions, there was 'binding commitment' on Talksport to provide at least some work under the actual contracts (UT at para 35). Given this was a material consideration that weighed heavily in the balance, the UT considered that: (1) it should use its powers under s 12 of the Tribunal, Courts and Enforcement Act (TCEA) 2007 to set aside the decision; and (2) it was equipped to remake that decision, even though it did not have the evidence before it, as the FTT had made detailed findings of fact on which there had been no challenge (UT at para 66). Remaking the decision, the UT found that the contracts were contracts of service, such that IR35 applied.

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Kickabout appealed to the Court of Appeal. On the principal ground of appeal, the CA held that the UT had correctly found that there was a binding commitment on the part of Talksport, based on a correct interpretation of the written terms ([2022] EWCA Civ 502, paras 55, 66). That interpretation was supported by the effect of other terms of the contract; namely, the first call and exclusivity provisions, pursuant to which 'Mr Hawksbee could not work full time, or anything approaching full time, for other clients or employers', as well as the suspension and notice provisions (CA at paras 64–65). A reading of the contract pursuant to which there been no obligation to offer shows was 'contrary to business common sense', such that there was a 'solid basis for interpreting the engagement of [Kickabout] as carrying with it an obligation to offer 222 programmes per year' (CA at para 59). It did not seem to matter that it was known to both parties that Mr Hawksbee was in business on his own account as a comedy writer, which is how he earned his other income (see FTT at paras 53, 54, 202, 235).

On the issue of jurisdiction, the CA held that the UT was equipped to remake the entire decision (at para 74) and that *Newey (t/a Ocean Finance) v HMRC* [2018] EWCA Civ 791 (which decided that cases should only be remade where the court could be sure of how the tribunal below would have decided the case with the benefit of guidance (at paras 110–111)), applied only to the Court of Appeal as a second appellate court. This decision is perhaps surprising given the scope of the CA's jurisdiction in TCEA 2007 s 14 is in identical terms to that of the UT in TCEA 2007 s 12. In any event, the taxpayer's appeal was dismissed.

Lost the battle but won the war?

That HMRC won before the Court of Appeal in each case does not tell the whole story. There were two important areas in which HMRC's arguments were expressly rejected: the relevance and application of the business on own account test and the application of the *RMC* test.

To recap, and as explored in my previous article in this journal ('Business on own account?', *Tax Journal*, 17 March 2022), before the Court of Appeal in *Atholl House*, HMRC sought to argue that the business on own account test should be limited to the four corners of the contract (namely, the terms and their effect), such that tribunals should not be allowed to take a person's career history or current pattern into account. This would have been hugely damaging for a whole host of broadcasters, journalists and actors who (had the argument been accepted) would have seen any lucrative contracts opened to scrutiny by HMRC.

Thankfully, the Court of Appeal rejected this argument and, in spite of HMRC's efforts to relegate the business on own account test as inferior to the *RMC* test, confirmed that both tests are legitimate: they are just different pathways to a decision on employment status (CA at paras 61, 122). Whilst the business on own account test will be more useful on certain facts than others, there is no dichotomy between the approaches of the two tests (CA at para 61). Importantly, in applying the test, the tribunal is entitled to look beyond the four corners of the contract. For the extent to which they are entitled to do so, the court must go back to basic principles: if the factors are known to both parties at the time of contracting, they may be taken into account in interpreting the contract (CA at paras 123–124). On the facts of *Atholl House*, it no doubt would have been well-known to the BBC that Ms Adams had a public profile with many strings to her bow, including presenting ITV's *Loose Women* and writing engagements.

Second, the Court of Appeal in *Atholl House* clarified the application of the *RMC* test and made the following key findings:

1. The *RMC* test should not be applied rigidly or interpreted like a statute (CA at para 71);
2. Briggs J's suggestion (in *Weight Watchers (UK) Ltd v HMRC* [2011] UKUT 433 (TCC), at paras 42 and 111) that there should be a *prima facie* conclusion of employment if mutuality of obligation and control are found is an unhelpful gloss (CA at paras 75 and 113). All the terms should be analysed before coming to a conclusion.
3. The decisions on mutuality of obligation and control are *not* binary: there may be sufficient control to move to third stage (i.e. not decisively absent to preclude a finding of employment) but this, when weighed in the balance at the evaluative stage, may point away from employment (CA at para 76). Specifically, Sir David Richards, giving the leading judgment, said (CA at para 76): '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.'

This guidance matters because HMRC's approach to the *RMC* test has sought to lower the threshold for each element, such that most contracts – certainly those in the presenting, broadcast, acting, and journalist worlds – would be caught. Specifically, HMRC has repeatedly argued that to satisfy the mutuality of obligation limb of the test, all that needs to be shown is that there is payment for work done. The most recent example of this is *PGMOL*

v HMRC [2021] EWCA Civ 1370. Any mutual obligations over and above that bare minimum (necessary in any contract in the field) are, according to HMRC, not to be taken into account at all. Following the Court of Appeal's decision in *Atholl House*, that there is payment for work done is not the end of the analysis: the nature and extent of those mutual obligations beneath are relevant.

As regards the control test, HMRC has repeatedly argued that when engaging the services of a professional, such as a presenter, that the media organisation has no right to control *how* they perform their services is immaterial. All that the engager needs is the implied right to 'pull rank' in matters of dispute. (There would be very few contracts to which this did not apply, especially where the presenter is hoping to be engaged again in the future.) On this point, taxpayers' attempts to distinguish between control over the person in performance of their services and control over the show has, unfortunately, repeatedly been dismissed. (See, for example, *Christa Ackroyd Media v HMRC* [2019] UKUT 326 (TCC) at paras 60–64.) But in finding that the control test is not binary, the Court of Appeal has prevented HMRC from latching on to one form of control (such as control over the show) as sufficient to meet the *RMC* test.

Therefore, whilst the engager's right to control the content of the show (either expressly or by implication) has been called 'highly material' (for which see the CA's judgment in *Kickabout* [2022] EWCA Civ 502 at para 87), the degree of control may nonetheless point away from employment: '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' (CA in *Kickabout* at para 89).

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Finally, as regards the third stage, HMRC has sought to argue that if hurdles one (mutuality of obligation) and two (control) are cleared then (a) the contract will prima facie be one of employment and (b) the tribunal may only look at the *other* contractual terms to see if they point away from this finding. In a presenter's contract, those other contractual terms tend to concern ancillary matters such as confidentiality, a duty to comply with health and safety, exclusivity, and post-termination restrictions – on any view, not weighty enough to detract from a prima facie presumption of employment. But the Court of Appeal has said that this approach is wrong: there is no prima facie presumption amounting to a gloss on the *RMC* test, neither is there any fetter on the tribunal's ability to take into account the quality of the mutual obligations and the extent of control at the evaluative stage. These arguments, which HMRC have been running in a number of appeals, including before the Court of Appeal in *PGMOL* and before the UT in *Kickabout*, have finally been dismissed.

What else was decided?

A third important point to take from *Athol House* is the Court of Appeal's ruling that *Autoclenz Ltd v Belcher* [2011] UKSC 41 and *Uber BV v Aslam* [2021] UKSC 5 do not apply in the IR35 *employment* (as opposed to worker) status context (CA in *Atholl House* at para 156). To recap, in *Autoclenz* the Supreme Court (endorsing the Court of Appeal's decision) found that in contracts between parties of unequal bargaining power (such as workers), the court should be alive to the fact that 'armies of lawyers' may seek to deny workers' rights by inserting clauses (such as substitution clauses) to prevent them from being classified as such and availing themselves of the statutory protections contingent on that status (such as holiday pay). The court's role in such situations is to ascertain the true agreement between the parties (*Autoclenz* at para 35). This approach has been applied in the worker and employment context in both the employment and tax jurisdictions, by both (relevantly) taxpayers and HMRC.

Recently, the Supreme Court in *Uber* appeared to go further than the Supreme Court in *Autoclenz* in holding that the contract is just one aspect of the factual matrix to be considered – and not necessarily even the starting point (*Uber* at para 76). Lord Leggatt explained that the 'theoretical justification' (*Uber* at para 68) for the *Autoclenz* approach was to protect vulnerable workers from being paid too little for what they do or otherwise subjected to unfair treatment (*Uber* at para 71). The rights asserted by the claimants in *Autoclenz* were therefore not contractual rights but those created by legislation, such that: (1) 'the primary question was one of statutory interpretation, not contractual interpretation' (at para 69); and (2) 'the ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically' (per Lord Leggatt in *Uber* at para 70, citing Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454 at para 35).

The Court of Appeal in *Atholl House* considered that this approach did not extend to the IR35 context in which ITEPA 2003 s 49 enlists the common law test for employment status, such that it does not raise 'any issues of statutory construction' such as with 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' (*Atholl House* at para 156). As such, it is not legitimate to apply *Autoclenz* in the IR35 context.

This finding is remarkable for four reasons. First, whilst the definition of employment does not raise any issues of statutory construction, there is still a purpose behind the legislation: to ensure that individuals who ought to pay tax and NICs as employees cannot avoid those liabilities by the assumption of a corporate structure (*R (oao Professional Contractors Group & Others v IRC* [2001] EWCA Civ 1945, per Robert Walker LJ at para 51). Second, employment status may still be defeated in the way the relevant contract is drafted: the contract could expressly exclude obligations and control, for example. In that sense, they are no different to other employment contracts. Third, the worker status test itself incorporates the common law test for employment status: see s 230(3)(a) of the Employment Rights Act 1996. Fourth, *Autoclenz* and *Uber* both apply to employment status cases in the employment tribunals (which adopt the common law test). There is no solid basis for having a different approach in the tax tribunals. Having different approaches between the two jurisdictions could create yet more confusion: if a person is found by an employment tribunal to be employee by virtue of a contract under which certain clauses are disregarded as not representing

the true agreement between the parties, there is scope for that same contract to be interpreted differently in a tax tribunal.

Finally – it is a short point – the Court of Appeal found that it was not equipped to remake the decision as it did not feel confident about the conclusion the FTT would have come to (at para 165). It therefore remitted it to the UT to re-hear the case. Across the two decisions, the court has therefore clearly distinguished its appellate jurisdiction from that of the UT, even though s 12 and s 14 of TCEA 2007 are in materially identical terms.

What can we take from these decisions?

Arguably, what might seem like a loss to the taxpayers is actually a gain in the fight for a sensible approach to the employment status test. What's more, as HMRC ostensibly won these appeals, they cannot seek to overturn these principles at Supreme Court level. These decisions are therefore the most authoritative recent guidance on the employment status tests.

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What, therefore, can taxpayers take from these decisions? Looking to the future, here are six things to consider when advising clients at the contract drafting stage. They are couched in terms of television and radio but could apply across a range of industries.

1. Consider the effect of the obligation clauses as a whole. Following *Kickabout*, if a broadcaster wants to engage the services of a presenter, it should carefully consider the obligations placed on that presenter against the other terms of the contract restricting his/her ability to provide services elsewhere in the marketplace. If there is an obligation on a presenter to provide their services for a set number of shows, coupled with a first call on their services outside the show and a requirement that he or she seek permission to do other work, this could amount to a strong indication of employment as, in practice, the individual is hindered from seeking a living elsewhere. If the presenter is not well-known, there should in principle be no reason why he or she could not provide different services to other entities.
2. Question whether it is necessary for the broadcaster to retain control. There are many reasons why an individual would ultimately defer to the broadcaster, without parties needing to rely on a contractual clause: he or she will want a good reputation and to ensure their contract is renewed. They may already be regulated externally (for example, by OFCOM). Consider whether a clause bestowing control on the broadcaster is necessary. Further, if the presenter is presenting in a live environment and delivering their eponymous show, the broadcaster should question whether it needs to retain a right to control the presenter or the material. A clause excluding the broadcaster's right to control might in fact represent the reality.
3. Think about whether suspension and notice provisions are necessary. Obligations are to be read in conjunction with the other clauses in the contract (see *Kickabout* in CA at paras 64–65). Suspension and notice provisions might be included to enable the broadcaster to distance itself from an individual on grounds of misconduct, but their effect is to imply an obligation to offer work when not engaged. If there is no obligation to offer work, consider whether they are necessary. If they are included for reputational reasons, make this clear.
4. Determine whether you are buying services or a product. If the broadcaster is, in effect, buying a show from a presenter, the contract should reflect that fact, rather than focusing on the services provided by the individual.
5. Record the extent of the broadcaster's freelance work. Following *Atholl House*, when applying the business on own account test, the tribunal may take into account the individual's career history and other work insofar as those facts were known to both parties at the time of contracting. Consider recording these facts, either in the form of evidence (for example, as part of the negotiations) or even as a recital to the contract.
6. Continue to evidence any substitution or exclusion clauses. The significance of the *Atholl House* decision on *Autoclenz* should not be understated but, as ever, taxpayers should (a) be careful to draft contracts that reflect the true agreement between the parties and (b) retain evidence that any clauses relied upon (such as substitution and exclusion clauses) are operated in practice. Better safe than sorry ■

Note: The author was junior counsel for the taxpayer in Kickabout Productions Ltd v HMRC.

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