

THE TURBULENT STATE OF THE DISGUISED EMPLOYMENT REGIME

By Laura K Inglis

The disguised employment regime (colloquially known as IR35) was introduced in 2000 to counter a perceived form of tax avoidance, where, instead of supplying services directly, individuals contract through an intermediary (usually a personal services company or “PSC”) and then pay themselves in dividends, thereby avoiding employment income tax and national insurance contributions. Of course, contracting through a PSC can be perfectly innocent and indeed a very sensible way of limiting personal liability, but there were reports of such structures being abused. The stated goal of the legislation was to create a level playing field between employees and contractors, or, as one consultation expressed it, “to ensure that individuals who work like employees pay broadly the same employment taxes as employees, regardless of the structures they work through”.¹ Broadly, where it applies, IR35 treats the fees paid to the personal services company as deemed employment income of the worker in question, with the result that such fees become subject to income tax and NICs.

Although these rules have appeared in the statute books for a long time, they have been raising headlines over the last two to three years like never before. There are two main reasons for this:

- Firstly, HMRC appear to be enforcing these rules much more aggressively than they did in the past. This has resulting in large numbers of contractors who previously thought themselves to be plainly self-employed being subjected to IR35 challenges. Many

well-known journalists have recently found themselves in this uncomfortable position, and this has drawn public attention to the issue.

- The second reason why IR35 has been much in the news of late is the large-scale expansion of the regime – to public authorities in 2017, and from April 2020, to large and medium private enterprises – dramatically increasing the number of taxpayers affected.

This article summarizes the current regime, the forthcoming changes, and the relevant judicial principles, before surveying the most recent IR35 case law and highlighting the apparent confusion within the First Tier Tribunal as to how these rules should be applied. In light of the forthcoming extension of the regime to the private sector, intervention by the higher courts seems to be urgently required.

The Legislation

The income tax provisions of IR35 appear in Chapter 8 of Part 2 of ITEPA 2003. The applicability conditions for the regime are set out in s.49, as follows:

- (1) *An individual (“the worker”) personally performs, or is under an obligation personally to perform, services for another person (“the client”);*
- (2) *The client is not a public authority;*
- (3) *The services are provided not under a contract directly between the client and the worker, but under arrangements involving a third party (“the intermediary”);*
- (4) *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; or*
 - ii. the worker is an office-holder who holds that office under the client and the services relate to the office.*

It should be noted that the first three of these conditions focus on the actual facts and circumstances of the particular case. The fourth condition, on the other hand, asks whether a *hypothetical* direct contract between the worker and the end client would be an employment contract or not.

The National Insurance provisions of IR35 appear in the Social Security Contributions (Intermediaries) Regulations 2000 (SI 2000/727) (“the Intermediaries Regs”). The Intermediaries Regs are usually treated as applying in the same circumstances as the income tax provisions. However, although the first three applicability conditions are effectively the same, the fourth condition is slightly more widely drafted than its income tax counterpart. The fourth applicability condition for NICs purposes is set out in Regulation 6(1)(c) of the Intermediaries Regs as follows: “the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner’s employment by the client.”

The Social Security (Categorisation of Earners) Regulations 1978 (SI 1978/1689) (“the Categorisation Regs”) deem certain types of non-employed workers to be treated as in employed earner’s employment for NICs purposes, in order to preserve their entitlement to social security benefits. This means that the Categorisation Regs can cause a worker to be caught by the Intermediaries Regs, even if their self-employed status is undisputed. This happened in the case of *Big Bad Wolff Ltd v HMRC* [2019] UKUT 121 (TCC), where an actor, who was acknowledged to be self-employed for tax purposes, was deemed under the Categorisation Regs to be in employed earner’s employment. The Upper Tribunal held that the word “regarded” in Regulation 6(1)(c) was broad enough to catch the deemed treatment mandated by the Categorisation Regs.

Thus, it is possible for a person to fall outside the tax provisions of IR35, but still to be caught by the NICs provisions.²

Expansion of the Regime

With effect from April 2017, IR35 has been expanded, shifting the responsibility for compliance from intermediaries themselves to public authorities that engage them. The new rules are set out in Chapter 10 of Part 2 ITEPA 2003. Save for the public authority condition, which is reversed, the applicability conditions for Chapter 10 are the same as those for Chapter 8 (see s.61M ITEPA 2003). Where these conditions are met, Chapter 10 requires a public authority end client to determine whether the worker would have been employed if the public authority had engaged them directly (see s.61T ITEPA 2003). Chapter 10 also makes the party that pays the intermediary (the “fee payer”) responsible for accounting for and paying income tax on the worker’s behalf via PAYE (see ss.61N and 61R ITEPA 2003).³ These changes were intended to enable HMRC to recover the tax from a single entity (likely one with deeper pockets), whilst minimising its recovery costs (particularly in cases where a public authority has engaged multiple PSCs).

As highlighted in a 2019 parliamentary debate on IR35, however, this extension of the rules has not been smooth.⁴ Some public authorities have been overly cautious in interpreting the rules (as they are incentivized to do to protect their own position) with the result that that many self-employed contractors are being inappropriately taxed as employees, without receiving any of the associated employment rights. Additionally, a public authority’s determination as to whether IR35 applies might be wrong. After all, many public authorities may not have the requisite legal expertise to make such determinations correctly. But the statute currently provides no avenue for appeal. This effectively gives public authorities the power to make tax

judgments that significantly affect someone else's welfare, whilst denying the affected person access to the courts. There is also evidence that the uncertainty and complexity generated by the new rules has been causing some contractors and freelancers to leave the public sector all together.⁵

It was announced in the Autumn Budget 2018 that, from April 2020, responsibility for IR35 compliance will shift to large and medium private enterprises that contract with PSCs. Thus, in the future, such enterprises will not only have to decide whether the rules apply in relation to their contractors, but also (potentially) to account for income tax and NICs on those contractors' behalf. Draft legislation was published in July 2019, with a stated goal of bringing the private sector into line with what has already occurred in the public sector.

The rule extension will apply to all private-sector organisations that do not qualify as "small", where "small" is defined in accordance with the Companies Act 2006. Broadly, a company (or relevant undertaking) is considered small if at least two of the following three conditions are met: its annual turnover is not more than £10.2 million; its balance sheet total is not more than £5.1 million; and it has no more than 50 employees (see s.382(3) Companies Act 2006). There are special rules for joint ventures and subsidiaries (see draft ss.60B and 60C ITEPA 2003 as set out in paragraph 5 of the IR35 Schedule to the Finance Bill 2019-20). For non-incorporated bodies such as partnerships, only the turnover test will apply (see draft ss.60E and 60F ITEPA 2003). It should be noted that a company's smallness is assessed by reference to the last financial year, the accounts and reports filing date for which ended before the start of the tax year in question (see draft s.60A(3)-(4)), and also that it takes two consecutive financial years to lose or re-gain "small" status (see s.382(2) Companies Act 2006). The existing IR35 rules under Chapter 8 of Part 2 of ITEPA 2003 will continue to apply to small

enterprises, with the result that, where the engaging enterprise qualifies as small, the PSC, rather than the engaging enterprise, will remain responsible for determining if IR35 applies and accounting for any appropriate tax.

The draft Finance Bill makes three primary changes to the new IR35 rules (which, accordingly, will apply to public sector end clients also). First, the Bill contains a requirement for the client to give the worker a “status determination statement” setting out the client’s conclusion as to whether the final IR35 applicability condition is met, with reasons for the decision. The client is under a duty to take reasonable care in reaching this conclusion (see draft s.61NA ITEPA 2003, as set out in paragraph 12 of the IR35 Schedule to the Finance Bill 2019-20). Unless and until the client gives the worker a status determination statement that complies with the statutory requirements, the client (rather than the fee payer) must ordinarily account for the appropriate tax (see paragraph 12(3) of the IR35 Schedule to the Finance Bill 2019-20).⁶ This process seems likely substantially to increase the cost and compliance burden for businesses. Second, the draft Finance Bill introduces a process whereby the worker (or the fee-payer) can disagree with the client’s determination as to whether the final applicability condition is met (see draft s.61T ITEPA 2003, as set out in paragraph 13 of the IR35 Schedule to the Finance Bill 2019-20). The process is triggered by the worker (or the fee payer) making representations to the client. Then, within 45 days, the client must either inform the party making the representations that it has considered the representations and is standing by its original decision (with reasons), or else issue a new status determination statement both to the worker and to the person who would be treated as making the deemed payment of employment income under s.61N(3) ITEPA 2003. If the client fails to comply with these duties, then from the end of the 45 days, it becomes the obligation of the client (rather than the

fee-payer) to account for any appropriate tax. However, the draft provisions still provide no access to the courts or any other official channel for dispute resolution. Finally, the draft Finance Bill allows HMRC to recover unpaid tax from any “relevant person”, meaning anyone in the payment chain above the fee-payer (see draft s.688AA ITEPA 2003, as set out in paragraph 15 to the IR35 Schedule to the Finance Bill 2019-20).

The Autumn Budget 2018 listed the private sector expansion of IR35 as the single greatest source of increased public revenue for tax years 2020-2023⁷, with the result that aggressive enforcement action from HMRC should be expected.

The Judicial Approach to IR35

It is almost always the final applicability condition that is disputed in IR35 cases. In evaluating whether or not a hypothetical direct contract between the client and the worker would be an employment contract, the judicial methodology may be summarized in two steps.

- The first step is to construct the hypothetical contract. This should ordinarily be done by identifying the terms of the actual agreement between the client and the PSC (bearing in mind that the terms of the actual agreement may differ from any written agreement between the parties). The terms of that actual agreement then form the basis of the hypothetical contract (see *Usetech v Young* [2004] STC 1671 at [36]).
- Having identified its terms, the next step is to evaluate the nature of the hypothetical contract to determine whether or not it is an employment contract. This involves applying the criteria from *Ready Mixed Concrete v Minister of Pensions* [1967] 2 Q.B. 497 and other case law, bearing in mind that it is important to look at the whole picture, rather than mechanically apply a checklist.

With regard to the first of these steps, in a two-contract case, where there is a contract between the worker and the intermediary on the one hand, and a contract between the intermediary and the client on the other, the contents of the hypothetical contract will be based (as near as may be) on the terms of the actual agreement between the intermediary and the client (see *Usetech v Young* at [36]). Where there is a chain of contracts involving one or more agencies between the intermediary and the end client, the agency contracts should also be taken into account in constructing the hypothetical contract, even if the worker was unaware of the contents of those contracts (see *Usetech v Young* at [47]). In IR35 cases, the parties often disagree over the terms of the actual agreement (and particularly over the extent to which any written agreement(s) reflect reality).

In *Autoclenz v Belcher* [2011] ICR 1157, the Supreme Court gave some helpful guidance on how to identify the terms of a contract involving work and service. The Supreme Court acknowledged previous authorities affirming that the written agreement may not reflect the reality of the relationship (see [22]). This is especially true for contracts relating to work and service, because unlike commercial contracts, the bargaining power between the parties is often unequal (see [34]). The question that a court or tribunal must ask is “what was the true agreement between the parties?” (see [21], [29]). In order to answer that question, the court or tribunal must consider all the relevant evidence – including the written terms, but also evidence as to the parties’ conduct and expectations (see [31]-[32]). The fact that rights conferred by a written agreement may not have been exercised does not prevent them from being genuine contractual rights (see [19]). The important question when evaluating the genuineness of such an unused term is whether it reflects what the parties might realistically have expected to occur (see [25], [29]).

The House of Lords also affirmed in *Carmichael v National Power plc* [1999] 1 WLR 2042 that where the parties do not intend the written record to constitute “an exclusive memorial of their relationship”, it is permissible to take into account the surrounding circumstances and conduct of the parties, as revealed in oral evidence (see 2047). Thus, in IR35 cases, a lot of time is often spent hearing evidence as to how the contractual arrangements actually worked out in practice. This is to enable the judge to identify the terms of the actual agreement, which then form the basis for the hypothetical contract.

Having identified the terms of the hypothetical contract, the next step is to evaluate the nature of that contract: in particular, to determine whether it is a contract of service (indicating employment) or a contract for services (indicating self-employment). The starting point here is the *Ready Mixed Concrete* decision, where McKenna J held at 515 that an employment contract exists if three conditions are met: (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master (this has become known as “mutuality of obligation”); (ii) the servant agrees that the performance of the service will be subject to the other’s control to a sufficient degree to make that other master; and (iii) the other conditions of the contract are consistent with it being an employment contract. In *Montgomery v Johnson Underwood* [2001] I.C.R. 819, the Court of Appeal affirmed that the first two of these conditions (mutuality of obligation and a sufficient degree of control) form an “irreducible minimum” for the existence of an employment contract, and should always be considered first (see [46], [23]). Similarly, in *Weightwatchers (UK) Ltd v HMRC* [2011] UKUT 433 (TCC), the Upper Tribunal held that where mutuality of obligation and the requisite degree of control exist, the contract is *prima facie* an employment contract, “unless, viewed as a whole, there is

something about its terms that places it in a different category” (see [42]).

Mutuality of obligation can be confusing, because the phrase is used in the case law in two very different ways. On the one hand, mutuality of obligation can mean simply an obligation to pay for work actually performed. However, this type of mutuality exists in every contract involving services, whether the relationship is one of employment or self-employment. Importantly, this is not the type of mutuality that distinguishes employment contracts. As Park J stated in *Usetech v Young* at [60]: “Mutuality of some kind exists in every situation where someone provides a personal service for payment, but that cannot by itself automatically mean that the relationship is a contract of employment; it could perfectly well be a contract for free lance services.” On the other hand, mutuality of obligation can also extend through time – in this sense, the phrase usually involves an obligation on the worker to work (at least if work is available) and an obligation on the employer to pay (regardless of whether work is offered). It is the second type of mutuality, typically involving some continuing obligation between the parties, that distinguishes employment contracts⁸. Moreover, mutuality of obligation encompasses a requirement on the worker to perform the work personally. Accordingly, an unrestricted substitution clause has been held to be fatal to the existence of the requisite mutuality (see *Weightwatchers (UK) Ltd v HMRC* at [32]-[37]).

The second criterion, a sufficient degree of control, was described in *Ready Mixed Concrete* at 515 as follows: “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 master and the other his servant...” However, as Lord Parker CJ

affirmed in *Morren v Swinton and Pendlebury Borough Council* [1965] 1 W.L.R. 576 at 582, control cannot be the decisive test when one is dealing with a professional or expert. This is because many experts (e.g. surgeons, pilots, and research scientists) are commonly employed, but are not really susceptible to direction as to how they do their work. The Supreme Court affirmed in *Various Claimants v Catholic Child Welfare Society* [2013] 2 A.C. 1 at [36] that: “the significance of control today is that the employer can direct what the employee does, not how he does it”. Similarly, in *Montgomery v Johnson Underwood* at [19], the Court of Appeal held that for an employment relationship to exist, there must be a sufficient “framework of control”. In *White v Troutbeck* [2013] IRLR 949, the Court of Appeal explained that the key question is not whether the putative employer actually exercises day-to-day control over the worker, but whether he has a contractual right of control over the worker (see [16]-[19] and [38]-[39]).

The final element of the *Ready Mixed Concrete* test considers whether the other conditions of the contract are consistent with it being an employment contract. Thus, even where mutuality of obligation and the requisite degree of control are established, there may be other features of the relationship which will entitle a tribunal to conclude that there is no contract of employment in place, even during an individual engagement (see *Quashie v Stringfellow Restaurants Ltd* [2013] IRLR 99 (CA) at [14]). It is always important to stand back and consider the whole picture.

There is also a wealth of other case law on how to distinguish employment from self-employment. Another authority often cited in IR35 cases is *Market Investigations v Minister for Social Security* [1969] 2 QB 173 where Cooke J stated at 184-185 that the fundamental test to be applied is this: is the person who has engaged himself to perform the services performing them as a person in business on his own account? Whilst there is

not and can never be an exhaustive list of relevant considerations for answering this question, Cook J identified the following factors as potentially significant: whether the worker provides his own equipment; whether he hires his own helpers; the degree of financial risk he takes and the degree of responsibility he has for investment and management; whether he can profit from sound management in the performance of the services; and whether he engages himself in the course of an already-established business. Whilst it might be tempting to treat these factors as a checklist, numerous decisions have confirmed that that is not the correct approach. Rather, it is necessary to stand back and consider the whole picture.⁹ In *Hall v Lorimer* [1994] 1 W.L.R. 209 at 218, the Court of Appeal acknowledged that the factors identified in *Market Investigations* may be of little assistance in determining the status of someone carrying on a profession or vocation, but added that the extent to which the individual is dependent on a particular paymaster may be significant. Yet another way of formulating the employment test is to ask whether the worker is integrated into the client's business or only an accessory to it (see *Beloff v Pressdram Ltd* [1973] F.S.R. 33 (Ch) at 42).

Where a person's work involves a series of engagements, as is often the case in IR35 disputes, the starting point is that a series of engagements in the course of carrying on a profession is indicative of self-employment (see *Davies v Braithwaite* [1931] 2 K.B. 628 at 635-636, quoted in *Hall v Lorimer* (CA) at 219). However, the Court of Appeal recognized in *McMeechan v Secretary of State for Employment* [1997] ICR 549 at 555-557 that an employment can arise either from a specific engagement or from an "umbrella" arrangement covering multiple engagements. For example, in *O'Kelly v Trusthouse Forte* [1984] 1 Q.B. 90, which involved wine waiters who were on a list to be called when a London hotel was short-staffed, neither the umbrella arrangement of being on the list nor the specific

engagements of being called upon to serve constituted employments. Conversely, in *Cornwall County Council v Prater* [2006] ICR 731, which involved a teacher who taught pupils on behalf of a local authority when they were unable to attend school, each engagement to teach a particular pupil (but not the umbrella arrangement with the local authority) was held to constitute an employment. As the Court of Appeal affirmed in *Quashie* at [12], it all depends on the facts and circumstances of the particular case.

Chaos in the First Tier Tribunal (2018-2019)

This section surveys the IR35 decisions of 2018 and 2019, in order to highlight the lack of a consistent approach on the part of the First Tier Tribunal as to how these rules should be applied. It should be noted that all of the decisions considered here were decided under the old IR35 rules in Chapter 8 of Part 2 ITEPA 2003. In so far as the author is aware, no decision involving the 2017 rule expansion has yet been published.

Christa Ackroyd Media Ltd v HMRC [2018] UKFTT 69 (TC) was the first of several recent IR35 cases involving well-known television presenters to come before the Tribunal. From the taxpayer's standpoint, the factual situation was quite damaging: There was a written contract giving the BBC "first call" over Ms Ackroyd's services for up to 225 days per year, although in practice the days worked were mutually agreed (see [40]). Whilst the BBC was not obliged under the contract to call on Ms Ackroyd's services, if they did not, they were still obliged to pay (see [51], [56]). The contract also prohibited Ms Ackroyd from providing her services for other broadcasts or publications without first obtaining the BBC's consent (see [30], [47]). Moreover, Ms Ackroyd could be told whom she was interviewing (see [35]) and it was for the BBC's editor to decide what stories were covered and in what order (see [38]). Also, the vast majority of Ms Ackroyd's income (more than 95% during the years in

question) came from the BBC (see [81]). On the other hand, though, there were various other factors pointing towards self-employment: Ms Ackroyd did not have a desk at the BBC and used her own computer and mobile phone to perform the services; she also kept her own diaries and the BBC did not log the days she worked (see [42]). Unlike regular BBC employees, Ms Ackroyd did not have a line manager and was not subject to appraisals; she had no set hours and no entitlement to sick pay, holiday pay, maternity leave, or pension benefits (see [53]). She also received a “success fee” for every 6-month period in which her ratings exceeded those of a rival programme (see [57]). Whilst her scripts were “greened” by a producer, Ms Ackroyd could and did modify them right up to final delivery on air (see [66]-[68]). Moreover, she did in fact undertake some additional work without seeking the BBC’s permission, and, prior to 2013, was never prevented from doing so (see [76]-[80], [86]). The Tribunal accepted that Ms Ackroyd had a high degree of autonomy in carrying out her work, as well as in identifying the stories she wished to follow (see [88]). The Tribunal then applied the *Ready Mixed Concrete* criteria:

- Mutuality of obligation was not disputed here, as both sides agreed that Ms Ackroyd was required to work at least 225 days per year and the BBC was obliged to pay her annual fee in monthly installments (see [157]).
- As regards control, the Tribunal found that the BBC could direct which services it required Ms Ackroyd to perform (see [160]) and, although she had no line manager, the BBC could direct both what she did and how she did it (see [165]). This was held to be necessary for “business efficacy” to ensure compliance with the BBC’s editorial guideline (see [167]).
- As regards the other conditions of the contract, the Tribunal noted that this was “a highly stable, regular, and continuous arrangement” (see [170]). The lack

of provision for holiday, sick pay and pension benefits was held not to be significant, since the actual contract between the BBC and Ms Ackroyd's PSC was plainly not an employment contract and so would not be expected to include such benefits (see [171]).

The Tribunal concluded that Ms Ackroyd was not in business on her own account – she was economically dependent on the BBC and devoted most, if not all, of her working time to them (see [176]). An appeal against this decision was heard by the Upper Tribunal in July 2019 and dismissed in late October.¹⁰ However, this appeal is unlikely to carry significant precedent value, as it was limited to the narrow issue of whether the FTT had erred in law in concluding that, under the hypothetical contract, the BBC would have had sufficient control over Ms Ackroyd to establish an employment relationship. Apart from some minor differences as to reasoning, the UT accepted the FTT's conclusions on that point.

The next IR35 decision published was *MDCM Ltd v HMRC* [2018] UKFTT 147 (TC), which involved a contractor who was engaged by a construction company as a night shift manager. The main point of interest in this case is the sheer number of factors that pointed towards employment, but the Tribunal nevertheless found for the taxpayer. HMRC argued that control was the most important factor here, since the contractor was required to work specific shift patterns, to report to the client's project manager to receive instructions for in each shift, to ensure the safe operation of the site, and to serve as point of contact for the workers (see [44]-[47]). The Tribunal also identified various other factors pointing towards employment: the client directed what the contractor had to do during each shift (see [49]); the contractor did not take any financial risks (see [53]-[57]); the client provided all the equipment (see [58]); and the contract was open-ended as to duration (see [62]). However, evaluating the overall effect, Tribunal found for

taxpayer. In particular, there was no evidence that the contractor was controlled any more than any other contractor would be, and he could refuse to work on another site (see [74]). Further, the contractor received a flat daily rate, with no notice period and no benefits, and was not integrated into the client's business (see [74]-[75]). As regards the lack of employee benefits (dismissed as insignificant in *Christa Ackroyd*), this differently-constituted Tribunal said that what mattered was what would have been in the hypothetical contract between the client and the contractor. The fact that the contractor was in fact employed by the PSC (and not by the end client) was therefore irrelevant. The availability of statutory rights was also considered to be irrelevant because the hypothetical contract is only concerned with contractual rights (see [65]).

Jensal Software v HMRC [2018] UKFTT 271 (TC) involved an IT consultant, Ian Wells, who provided his services through a PSC, via an agency, to the Department of Work and Pensions. He was engaged to provide expert advice in relation to the operational readiness of certain parts of the Universal Credit Programme. As regards mutuality of obligation, the Tribunal found that, outside of each short-term contract, there was no continuing obligation on the DWP to provide work or on Mr Wells to work. Additionally, a genuine right of substitution (albeit never exercised) was found to exist. Thus, whilst there was mutuality of obligation, it was no more than the irreducible minimum for any engagement (see [132]). As regards control, the Tribunal found that Mr Wells was subject to minimal oversight or supervision; he was brought in for his specific expertise to complete a task, but it was for him to assess what needed to be done, how it could be done, and the timescale in which it could be done (see [127]). Moreover, the level of oversight Mr Wells received was much lower than that of DWP employees, and did not go beyond what might be expected for any independent contractor (see [131]), with the result

that the requisite degree of control was not present (see [132]). As regards other factors, the Tribunal found that the absence of holiday pay, sick pay, and pension benefits pointed away from a contract of employment (see [133]). Also, whilst Mr Wells had no opportunity for additional profit from the arrangement, he was exposed to more financial risk than an employee would have been, in that he had to remedy any defects in the work at his own expense (see [136]). He was also required to take out his own public liability and professional indemnity insurance (see [138]). Looking at everything in the round, the Tribunal found that the hypothetical contract was a contract for services (see [139]).

In March 2019, the FTT decided another television presenter case, *Albatel Ltd v HMRC* [2019] UKFTT 195 (TC), this time involving Lorraine Kelly, host of the eponymous *Lorraine* programme for ITV and a former presenter on *Daybreak*. The Tribunal held that mutuality of obligation did exist, but that it only amounted to the irreducible minimum and therefore was not determinative (see [164]). As regards control, the Tribunal found that control of Ms Kelly's work pursuant to the hypothetical contract lay with Ms Kelly, and was far below the sufficient degree required to evidence a contract of service (see [175]). In particular: Ms Kelly received minimal or no supervision (see [168]); she determined the running order of her programme, the items to feature, and the angle to take in interviews (see [169]-[170]); she was hired not to be part of a team but to lead a team (see [171]), and was free to carry out other work without any real restriction (see [173]). The fact that Ms Kelly was bound by the OFCOM rules was held not to assist HMRC, since those rules apply across the industry, whether an individual is employed or self-employed (see [175]). As regards other factors, the Tribunal found that ITV was not employing a servant, but purchasing a product, namely the brand and individual personality of Lorraine Kelly, and this

was found to support the conclusion that Ms Kelly was in business on her own account (see [180]). Additionally, a host of other factors pointed towards self-employment, including: the lack of employment benefits; the lack of training and appraisals; the intentions of the parties; and Ms Kelly bearing the risk of having her programme dropped if ratings fell or if she suffered a long-term illness (see [176]-[178]).

Atholl House Productions Ltd v HMRC [2019] UKFTT 0242 (TC) (published in April 2019) involved television presenter Kaye Adams, in her work for the BBC. The Tribunal found that mutuality of obligation and some degree of control were present (see [117] and [123]), and noted that these two conditions are necessary but not always sufficient to establish an employment relationship. However, the FTT also found a number of other factors to be inconsistent with employment: Ms Adams used her own equipment (laptop, iPad, and mobile phone) in providing the services and had no access to the BBC's system outside the studio (see [125(a)]). The lack of holiday or sick pay, maternity leave or pension entitlement also pointed away from the relationship being one of employment (this is in contrast to *Christa Ackroyd* where the lack of such benefits was dismissed as insignificant) (see [125(b)]).¹¹ Additionally, Ms Adams was treated differently from the BBC's employees in a number of respects – she received no performance reviews, was not subject to the same formal processes in relation to changes in the nature of her work, and did not have the right to apply for BBC vacancies in the way that employees did (see [125(c)]). The intentions of the parties (see [128]) and the fact that the BBC did not regard Ms Adams as “part of the organisation” (see [126]) were also found to point away from the relationship being one of employment. Standing back from the detail and considering the whole picture, the Tribunal concluded that the hypothetical

contract between the BBC and Ms Adams was a contract for services and not an employment contract (see [129]).

The next case, *George Mantides Ltd v HMRC* [2019] UKFTT 0387 (TC), involved a urologist who provided services via a PSC to two NHS hospitals. The Tribunal found that IR35 applied in relation to the arrangements with one hospital but not in relation to the other. In the case where IR35 did *not* apply, the following factors were found to be decisive (see [121]): Mr Mantides had a right (albeit never exercised) to send a suitably qualified substitute; the contract could be terminated with one day's notice by either party (in the other case, a week's notice was required); and finally, the hospital had no obligation to provide Mr Mantides with a minimum number of hours of work (in the other case, the Tribunal inferred that the hospital would "endeavour" to provide 30-40 hours of work per week). These were the only material differences that the Tribunal identified between the arrangements with the two hospitals (see [122]), illustrating the fine distinctions on which IR35 outcomes can turn.

Kickabout Productions Ltd v HMRC [2019] UKFTT 0415 (TC) involved a radio presenter, Paul Hawksbee, in his work for Talksport. Although this was a taxpayer victory, there were a number of factors that seemed to point towards employment: The Tribunal found that Mr Hawksbee was obliged to provide his services for a minimum of 222 days per year (although Talksport was not obliged to provide him with work, and was only obliged to pay for services actually performed) (see [180]-[183]). Mr Hawksbee was also required to perform the services personally, and there was no provision for substitution (see [206]). Moreover, Mr Hawksbee had presented the show for 18 years under successive two-year contracts (although the IR35 challenge related to only three of those years, and there was no guarantee of renewal when each short-term contract expired) (see [228]-[229]). Mr Hawksbee was also restricted

from providing similar services to other broadcasters without prior consent from Talksport (see [198]-[199]). Additionally, Talksport had ultimate editorial control over the broadcasts (see [191]). Finally, more than 90% of Mr Hawksbee's income for the years in question came from Talksport (see [227]). The Tribunal gave limited attention to mutuality of obligation and control, finding them not decisive in this case (see [234]). Of much greater significance were the following factors, pointing towards self-employment: Talksport was not obliged to provide work for Mr Hawksbee (see [236]). There was no provision for holiday, sick pay, pension benefits, or paternity leave (the Tribunal expressly rejected the conclusions of the *Christa Ackroyd* Tribunal on this point) (see [209]-[210]). Mr Hawksbee had no rights relating to medicals, training, appraisals, or grievance or disciplinary procedures (see [212], [230]). He was also exposed to financial risk in the form of opportunity cost (he had turned down an opportunity to work as a writer on another show as it would have clashed with his presenting responsibilities) (see [216]). Finally, Mr Hawksbee was not "part and parcel" of the Talksport organisation (see [225]). The Tribunal itself was divided in this case, with the outcome being determined by the casting vote of Judge Thomas Scott (see [93]).

Paya Limited, Tim Willcox Limited, and Allday Media Limited v HMRC [2019] UKFTT 0583 (TC), which involved BBC presenters Joanna Gosling, Tim Willcox and David Eades ("the Presenters"), was another victory for HMRC. The Presenters had all worked for the BBC for many years. They gave evidence that, around 2004, the BBC had required them to set up and begin working through personal services companies as a condition of continuing to work for the organisation. The Tribunal acknowledged that there was a "substantial disparity of bargaining power" between the BBC and those it engaged as presenters (see [435]). However, in relation to the *Ready Mixed*

Concrete criteria, the Tribunal concluded that “in each of these cases, in each relevant tax year, there was sufficient mutuality and at least a sufficient framework of control to place the assumed relationships between the BBC and the Presenters in the employment field” (see [557]). As regards mutuality of obligation: the Presenters (via their PSCs) worked under a series of short-term contracts, which incorporated certain standard terms, and gave the BBC “first call” on each Presenter’s services for a minimum number of days per year in exchange for an annual fee. The parties disputed what these provisions meant. HMRC argued that the BBC was obliged provide work for the Presenter for the minimum number of days or (assuming the Presenter made him/herself available) to pay the specified fee, regardless of whether the Presenter was actually called upon to work (see [439]). The taxpayers argued that there was no obligation on the BBC to offer the Presenters any work at all; the PSCs merely agreed to give the BBC “first call” over a minimum days which the BBC could take up or not at its discretion; there was no obligation on the Presenter to accept an individual assignment when offered (there was evidence of specific assignments being refused); and the BBC was only obliged to pay for the programmes which the Presenters actually presented on (see [439]). The Tribunal sided with HMRC on mutuality, holding that the BBC was obliged to provide work or to pay if it did not, and the PSCs were required to make the Producers available for at least the minimum number of days (see [445], [451]). The Tribunal also held that, since the Presenters continued to work and be paid during the “gaps” between contracts, the terms of the previous contracts should be taken still to apply until new terms were put in place, creating continuous mutual obligations throughout the relevant period (see [463]). As regards control, the Tribunal concluded that the BBC had the contractual right to decide when and where the work was to be done, and via its editorial controls, how it

was to be done (see [583]-[598]). The BBC also had a contractual right to prevent the Presenters from working for others without its consent (see [599]). As regards other provisions, the Tribunal held that the presenters were economically dependent on the BBC (see [623]-[624]), and faced limited opportunities for either profit or loss under the contracts (see [627]-[631]). Moreover, the Presenters did not have sufficient outside activities to qualify as providing the services as part of broader self-employment businesses (see [632]). The Tribunal also had regard to the overall duration of arrangements (see [615]) and did not consider the lack of employment benefits to be a material indicator against employment (see [640]). It should be noted that, as in *Kickabout Productions*, the Tribunal was divided in this case, with the outcome being decided by the casting vote of Judge Harriet Morgan. The dissenting member, Mr Andrew Perrin, would have held the Presenters to be self-employed for the following reasons (see [647]):

- They had no guarantee of renewal when each short-term contract expired.
- They had flexibility in their patterns of work and could refuse particular slots or swap with other presenters.
- They had considerable autonomy in conducting their work, and the BBC's editorial guidelines applied equally to employed or self-employed presenters.
- The Presenters had only limited insurance cover, and received no holiday pay, sick pay, maternity/paternity benefits, pensions, premium rates for overtime, or mobile phones or company cars (which staff had). Further, their passes to access the BBC building were only valid during each short-term contract.
- The Presenters could seek to use their journalistic talents elsewhere and in practice the BBC's consent for outside work was usually forthcoming.

- Finally, the imbalance of bargaining power should be taken into account, as the BBC effectively used their position to force the Presenters to contract via PSCs.

Canal Street Productions Ltd v HMRC [2019] UKFTT 647 (TC), another taxpayer victory, involved Helen Fospero, a television presenter who worked for ITV as an occasional substitute on the *Daybreak* and *Lorraine* programmes. There were three successive contracts governing the relationship between ITV and Ms Fospero's PSC. One of these contracts anticipated that Ms Fospero's services would be required for 20 days per year (although in fact Ms Fospero worked more days than that), and she was paid a fixed fee for each engagement actually performed. The contracts required Ms Fospero to disclose all her commercial activities to ITV, and imposed some ongoing restrictions on her personal conduct and on her ability to work for other broadcasters (see [91]). During the two tax years in question, Ms Fospero worked for between 10 and 20 other clients, but ITV accounted for approximately 61% and 72% of her income, respectively (see [107]). As regards mutuality of obligation, the Tribunal found that there was no contractual obligation on ITV to offer Ms Fospero any work or on Ms Fospero to accept any work that was offered. However, once a particular engagement was offered by ITV and accepted by Ms Fospero, there was sufficient mutuality of obligation to place the arrangements "in the employment field" (see [169]-[170]). As regards control, the Tribunal found that, despite Ms Fospero's considerable autonomy during live broadcasts, ITV could determine the nature of the services they required her to perform and also retained ultimate editorial control over the programmes. This was held to constitute a sufficient degree of control to evidence employment (see [176]-[181]). However, as in many other IR35 taxpayer victories, it was the third of the *Ready Mixed Concrete* criteria that proved decisive in this case. The Tribunal identified a number of factors that

it considered to be inconsistent with employment and which instead pointed towards Ms Fospero being in business on her own account. First, although there were some contractual obligations that continued between engagements (such as obligations on Ms Fospero to maintain her health and not to engage in dangerous activities without ITV's consent), there were no continuing *work-related* obligations; when Ms Fospero finished a particular engagement, there was no obligation on ITV to offer her work again, and she was under no obligation to accept work that was offered (see [187]-[189]). Additionally, although there was a sufficient right of control to establish an employment relationship, the control that ITV actually exercised over the production and content of Ms Fospero's programmes was the same as would have been exercised over any presenter, whether employed or self-employed (see [190]). Further, although Ms Fospero in fact only did broadcasting work for ITV during the years in question, she tried to find such work for other clients during those years, and actually worked as a broadcaster for others both before and after the period in question (see [193(1)]. Ms Fospero also incurred costs in relation to her business (such as employing an agent) that an employee would not have needed to incur (see [193(2)]. Further, the parties did not intend that Ms Fospero would be an employee (see [193(3)]. Finally, Ms Fospero was treated very differently from ITV staff: she had no laptop, no ITV email address, no workstation, and did not receive an expense allowance comparable to that of employees (see [193(3)]. For all of these reasons, the judge concluded that if Ms Fospero had contracted directly with ITV, the relationship would have been one of self-employment (see [194]).

The final IR35 decision of 2019, *RALC Consulting Ltd v HMRC* [2019] UKFTT 0702 (TC), involved an IT consultant, Richard Alcock, who provided services through a PSC via an agency to Accenture and to the Department of Work and

Pensions under a series of short-term contracts. As regards mutuality of obligation, the Tribunal found that there was no obligation on either end client to provide Mr Alcock with work or to renew the contracts. Further, Mr Alcock was only paid for work actually offered and accepted; the work itself was project-based rather than role-based, and the contracts could be cancelled at any time. Thus, there was insufficient mutuality of obligation to establish an employment relationship (see [342]-[345]). Mr Alcock also had a contractual right (albeit never exercised) to send a substitute, but because this right was fettered by a requirement for the end client's approval, the Tribunal found that it was insufficient to negate a requirement for personal service (see [362]-[370]). As regards control, the Tribunal held that, whilst the end clients did have some control over *what* Mr Alcock did, the degree of control, by right or in practice, was not such as to indicate an employment relationship (see [390]). The Tribunal also found that the end clients had some control over *how* Mr Alcock did his work, but this was only such as was necessary to secure a good outcome his clients and so did not indicate an employment relationship (see [402]). The end clients had full control over *when* and *where* Mr Alcock worked (see [417]), but this was outweighed by Mr Alcock's substantial control over what he did and how he worked (see [419]). As regards other factors, the Tribunal found that Mr Alcock's contractual right to work for others (which he exercised to a limited extent, and which pointed towards self-employment) was offset by his significant degree of economic dependency on Accenture and the DWP (see [429]). However, there were numerous other indicators of self-employment, including the fact that neither Mr Alcock nor the end clients considered him to be "part and parcel" of those organisations (see [437]); the fact that the PSC leased and paid for the premises from which Mr Alcock worked (see [438]); the fact that Mr Alcock was required to bear the cost

of his own professional indemnity insurance (see [439]); and the fact that the contracts could be terminated at any time (see [443]-[450]). The Tribunal considered the lack of sick pay, holiday pay, and pension benefits to be a neutral factor (see [442]).

These recent cases illustrate the ongoing lack of consistency within the First Tier Tribunal as to how the IR35 rules should be applied in practice. This appears to be an area ripe for intervention by the higher courts. In *Kickabout Productions* at [20], the FTT itself highlighted the forthcoming extension of IR35 to the private sector, as well as the anachronistic nature of the existing case law on employment status, stating “In our view, increased clarity is badly needed.”

Endnotes

1. See “Off Payroll Working Rules from April 2020”, HMRC policy paper and consultation document (published 5 March 2019) at page 4: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822388/Consultation_document_off-payroll_working_rules_from_April_2020.pdf
2. In *Big Bad Wolff* at [40]-[46], the Upper Tribunal specifically rejected the argument that IR35 was intended to function as a “unitary code” where the tax and NICs parts would always apply in the same way. The tribunal pointed out that, before IR35 was brought in, income tax and NICs treatment did not always align (by virtue of the Categorisation Regs), with the result that there was “no compelling reason” to assume that the IR35 provisions should operate identically.
3. Where the fee-payer is not the client and not a qualifying person (broadly, a person resident or having a place of business in the UK and which the worker does not control and in which he does not have a material interest), then the next lowest link in the chain that is a qualifying person is treated as making this payment.
4. See *Ged Killian MP (Lab, Rutherglen and Hamilton West)* and others,

House of Commons debate on IR35, 4th April 2019: <https://hansard.parliament.uk/Commons/2019-04-04/debates/2B3F5406-7F82-447C-99D6-382F41E57E2B/IR35TaxReforms>

5. See Ged Killian MP (Lab, Rutherglen and Hamilton West), House of Commons debate on IR35, 4th April 2019, Column 477WH: <https://hansard.parliament.uk/Commons/2019-04-04/debates/2B3F5406-7F82-447C-99D6-382F41E57E2B/IR35TaxReforms>
6. A private-sector client must withdraw the status determination statement before the beginning of a tax year if it ceases to be medium or large for that tax year (see draft s.61TA ITEPA 2003, as set out in paragraph 13 of the IR35 Schedule to the Finance Bill 2019-20).
7. See Table 2.1: Budget 2018 policy decisions, available here: <https://www.gov.uk/government/publications/budget-2018-documents>
8. See *Dragonfly Consulting Ltd v HMRC* [2008] EWHC 2113 (Ch) at [59] where Henderson J affirmed that an obligation on the employer to provide work or in the absence of work to pay is a “touchstone” of an employment contract, the absence of which would call into question the existence of an employment relationship.
9. See, for example, *Hall v Lorimer* [1992] STC 599 (Ch) at 612 per Mummery J: “In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person’s work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail.”
10. [2019] UKUT 0326 (TCC).
11. In *Atholl House* at [125], Judge Beare disagreed with the FTT’s reasoning in *Ackroyd* on this issue, pointing out that it would have been perfectly possible to achieve the substance of these benefits through the actual contract between the BBC and the intermediary – e.g. by providing that if Ms Adams was unable to present due to illness, the BBC would pay the intermediary anyway.