



[2020] UKFTT 0100 (TC)

TC07594

Income tax – intermediaries legislation – IR35 – personal services company – hypothetical contract – whether contract of employment –yes -appeal dismissed

**Appeal
number:
TC/2017/05596**

TC/2019/00335

FIRST-TIER TRIBUNAL

TAX CHAMBER

BETWEEN

NORTHERN LIGHTS SOLUTIONS LTD

Appellant

-and-

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE IAN HYDE

Sitting in public at Birmingham on 15 January 2019 and 10 and 11 June 2019

Michael Collins, counsel, for the Appellant

Mr Mason, presenting officer, for the Respondents

DECISION

INTRODUCTION

1. This appeal is concerned with whether the appellant's contractual arrangements with Nationwide Building Society ("Nationwide") are such that Mr Robert Lee, the appellant's employee, should be treated as an employee of Nationwide for the purposes of Chapter 8 of Part 2 of Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") and Part 1 of the Social Security Contributions (Intermediaries) Regulations 2000 ("the Social Security Regulations" both "the Intermediaries Legislation"), commonly known as "IR35".

THE APPEAL

2. Following an investigation into the appellant's tax returns, on 2 February HMRC issued a determination under Regulation 80 Income Tax (Pay As You Earn) Regulations 2003 (a "Regulation 80 determination") and a notice under Section 8 Social Security Contributions (Transfer of Functions, Etc) Act 1999 (a "Section 8 notice") in respect of the period from 6 April 2012 to 5 April 2013 being £6,078 of income tax and £8,803 of National Insurance contributions ("NICs").

3. On 20 February 2017 the appellant appealed to HMRC in respect of the 2012-13 Regulation 80 determination and Section 8 notice.

4. Following an internal review which concluded by a letter dated 7 June 2017, the appellant appealed the 2012-13 Regulation 80 determination and Section 8 notice on 5 July 2017.

5. On 18 October 2017 HMRC issued further Regulation 80 determinations and Section 8 notices in respect of the periods from 6 April 2013 to 5 April 2015 being in £19,613 of income tax and £13,664 of National Insurance contributions in respect of tax year 2013-14 and £14,637 of income tax and £11,728 of National Insurance contributions in respect of tax year 2014-15.

6. The appellant's contract with Lloyds Banking Group in this period, referred to below, was not the subject of the determinations and notices and so not within this appeal.

7. On 1 November 2017 the appellant appealed to HMRC in respect of the 18 October 2017 Regulation 80 determinations and section 8 notices.

8. At the outset of the hearing on 15 January it became apparent that the appellant had not appealed to the Tribunal the 18 October 2017 Regulation 80 determinations and Section 8 notices. The hearing was therefore adjourned and a late appeal with HMRC consent in respect of these years was made on 22 January 2019. Both appeals have now been heard together and this decision is in respect of both appeals.

9. It was accepted in the course of the hearing that this appeal concerned only the principle as to whether the Intermediaries Legislation applied. If the Tribunal determined that it did then it would be for the parties to try and agree the amount of tax due or otherwise revert to this Tribunal.

10. The issue in this appeal is therefore whether the conditions for the application of the Intermediaries legislation are met, the burden of proof being on the appellant to demonstrate, on the balance of probabilities that this is not the case.

THE INTERMEDIARIES LEGISLATION

11. There are two statutory tests within the Intermediaries Legislation, one in ITEPA for income tax purposes and one in the Social Security Contributions Regulations for national

insurance purposes. Both parties accept and have proceeded on the basis that for the purposes of this appeal the test for income tax purposes and that for NICs are for all intents and purposes the same and only the legislation in ITEPA need be considered.

12. The purpose of the IR35 legislation was set out by Robert Walker LJ as he then was in *R (Professional Contractors Group & Others) v IRC* [2001] EWCA Civ 1945 at [51]:

“...the aim of both the tax and the NIC provisions (an aim which they may be expected to achieve) is to ensure that individuals who ought to pay tax and NIC as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom’s system of personal taxation.”

13. Where the legislation applies then the intermediary or personal services company is taxed broadly in line with the income tax and NICs regime for employees with credit given for tax actually paid through the personal services company arrangements.

14. Sections 49 to 51 of ITEPA provides in so far as is relevant to this appeal;

“49(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”),

(aa) the client is not a public authority,

(b) the services are provided not under a contract directly between the client and the worker 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 client, or

(ii) the worker is an office-holder who holds that office under the client and the services relate to the office

(2)

(3)

(4) the circumstances referred to in subsection (1)(c) include the terms upon which the services are provided, having to the terms of the contract forming part of the arrangement under which the services are provided.

(4A)....

(5) in this Chapter “engagement to which this Chapter applies” means any such provision of services as is mentioned in subsection (1).

50 (1) If, in the case of an engagement to which this Chapter applies, in any tax year-

(a) the conditions specified in section, 51, 52 or 53 are met in relation to the intermediary, and

(b) the worker or an associate of the worker-

(i) receives from the intermediary, directly or indirectly, a payment or benefit that is not employment income, or

(ii) has rights which entitle, or which in any circumstances would entitle, the worker or an associate to receive from the intermediary, directly or indirectly any such payment or benefit,

the intermediary is treated as making to the worker, and the worker is treated as receiving, in that year a payment which is to be treated as earnings from employment (“the deemed employment payment”)

50(2)

50(3)

50(4)....

51(1) where the intermediary is a company the conditions are that the intermediary is not an associated company of the client that falls within subsection (2) and either-

(a) the worker has a material interest in the intermediary, or

(b) the payment or benefit mentioned in section 50(1(b)-

(i) is received or receivable by the worker directly from the intermediary, and

(ii) can reasonably be taken to represent remuneration for services provided by the worker to the client

51(2)...

51(3) a worker is treated as having a material interest in a company if-

(a) the worker, alone or with one or more associates of the worker, or

(b) an associate of the worker, with or without other such associates,

has a material interest in the company

(4) for this purpose, the material interest means-

(a) beneficial ownership of, or the ability to control, directly or through the medium of other companies or by any other indirect means, more than 5% of the ordinary share capital of the company; or

(b) possession of, or entitlement to acquire, rights entitling the holder to receive more than 5% of any distributions that may be made by the company; or

(c) where the company is a close company, possession of, or entitlement to acquire, rights that would in the event of the winding up of the company, in any other circumstances, entitle the holder to receive more than 5% of the assets that would then be available for distribution among the participants”

THE ISSUES

15. There is no disagreement between the parties as to whether the conditions in section 51 are met. The issues in this appeal are therefore whether the conditions in section 49 are satisfied, that is to say;

(1) Mr Lee “personally performs, or is under an obligation personally to perform, services for” Nationwide (section 49(1)(a)) and

(2) if those services were provided under a contract directly between the Nationwide and Mr Lee, Mr Lee “would be regarded for income tax purposes as an employee” of Nationwide (section 49(1)(c)(i)).

16. In constructing the hypothetical contract between Mr Lee and Nationwide the terms of the contract upon which the appellant was engaged must be taken into account (section 49(4)).

17. The Intermediaries Legislation therefore requires a finding to be made as to the terms of a hypothetical contract between Mr Lee and Nationwide and then determine whether that hypothetical contract is one of employment for tax purposes.

18. There is no statutory definition of employment for tax purposes and so the principles established in case law apply. A useful starting point is the longstanding employment test as set out by MacKenna J in *Ready Mixed Concrete (Southeast) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497;

“A contract of service exists if these three conditions are fulfilled (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master (ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the others control in a sufficient degree to make that other master (iii) the other provisions of the contract are consistent with it being a contract of service”

19. In *Hall v Lorimer* [1994] 1 All ER 250, an appeal from a decision of the Special Commissioners on the question of the hypothetical contract for the purposes of the Intermediaries Legislation, Nolan LJ in giving the judgment of the Court of Appeal rejected a prescriptive list of factors to take into account and said:

“in cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments in one case maybe unhelpful in another. I agree with the view expressed by Mummery J in the present case, at page 944D of the report where he says;

“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 checklist to see whether they present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of the evaluation of the overall effect of the detail, which is not necessarily the same as a sum total of the individual details. Not all details are equal weight or important in any given situation. The details may also vary in importance from one situation to another.”

Nonetheless, in deference to the submissions of Mr Goldsmith, I am prepared to follow his suggested path and see where it takes us.”

20. In *Usetech Ltd v Young* [2002] STC 1671 Park J said at [53];

“As it seems to me the present state of the law is that whether a relationship is unemployment or not required an evaluation of all the circumstances”

21. In *Jensal Software v HMRC* [2018] UK FTT 454 at paragraph 61 Judge Dean helpfully summarised the factors that might usefully be considered;

“From the authorities I derive the following as relevant factors:

(i) Mutuality of obligation to perform personally work offered and to pay remuneration is the “irreducible minimum ... necessary to create a contract of service” (see *Carmichael v National Power Plc* [1999] 1 WLR 2042);

(ii) Whether the worker is subject to “a sufficient degree” of control in terms of what is to be done, and where, when and how it is to be done as a contractual right (see *White v Troutbeck* [2013] IRLR 286);

(iii) The existence of a right to substitute, irrespective of whether or not that right was exercised in practice (see *Autoclenz Ltd v Belcher* [2011] ICR 1157);

(iv) Whether the worker was in business on his own account, including consideration of factors such as whether the worker had to provide at his own expense the necessary equipment, hires his own helpers, whether the worker bears a financial risk, whether the worker has the opportunity to profit and whether the worker engaged himself to perform services in the course of an already established business of his own; and

(v) The duration of the contract, degree of continuity and whether the worker was “part and parcel” of the organisation (see *Hall v Lorimer*).”

22. MacKenna J’s first test in *Ready Mixed Concrete*, namely that;

“...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...”

requires a contractual relationship between the putative employer and employee, a mutuality of obligation.

23. In *Carmichael v National Power plc* [1999] 1WLR 2042 at 2047 Lord Irvine giving the judgment of the House of Lords said that the mutuality of obligation to personally perform work offered and pay remuneration is the “irreducible minimum ...necessary to create a contract of service”. In *Cable & Wireless plc v Muscat* [2006] IRLR 354 Smith LJ at [32] said;

“...the irreducible minimum of mutuality of obligation necessary to support a contract of employment is the obligation on the “employer” to provide work and the obligation on the worker to perform it”

24. The importance of mutuality of obligation is to determine whether there is a contract at all before determining whether it was one of service or for services. However, it is not determinative of whether it is a contract of service or for services. Lord Widgery in *Global Plant Ltd v Secretary of State for Health and Social Security* [1971] 3 AER 385 at 389 considered mutuality of obligation to be;

“not conclusive in itself or in any sense of overwhelming importance”

25. MacKenna J's second criteria in *Ready Mixed Concrete* for there to be a contract of service is that the potential employee accepts control by the employer;

“...agrees, expressly or impliedly, that in the performance of that service he will be subject to the others control in a sufficient degree to make that other master...”

26. MacKenna J went on to say;

“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 rights need not be unrestricted.”

27. When the relevant potential employee is a highly skilled worker or professional, control is less important. Lord Parker CJ in *Morren v Swinton and Pendlebury BC* [1965]2 All ER 349 at A-C:

“... [C]ontrol cannot be the decisive test when one is dealing with a professional man, or of some particular skill and experience. Instances of that have been given in the form of the master of ship, an engine driver, a professional architect, or, as in this case, a consulting engineer. In such cases there can be no question of the employer telling him how to do work; therefore, the absence of control and direction in that sense can be of little, if any, use as a test”

28. It is inherent in MacKenna J's test *Ready Mixed Concrete* first criteria that for there to be an employment contract it is the potential employee who must provide the services personally;

“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...” (emphasis added)

29. Put negatively if the contractor has a right to provide a substitute it is a contrary indicator of a contract of employment.

30. It is not fatal that the right is not exercised: Lord Clarke in *Autoclenz v Belcher* [2011] ICR 1157 at 1163;

“If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement...”

31. MacKenna J's third test requires an evaluation as to whether “the other provisions of the contract are consistent with it being a contract of service”. This includes whether the contractor is in business on his own account and whether he is part and parcel of the organisation of the potential employer.

32. As to whether the contractor is in business on his own account, if the worker has to provide equipment, hire staff or bears a financial risk, has the opportunity to make a profit then he is likely to be in business on his own account and not in employment.

THE FACTS

33. The appellant is a company incorporated in January 2008 wholly owned by Mr Robert Lee. Mr Lee and, from April 2013, his wife Tanya Lee, are the appellant's directors. The appellant's business consists of supplying Mr Lee's services.

34. Mr Lee provided a witness statement and gave oral evidence. I find Mr Lee a credible witness.

35. HMRC did not produce any witnesses but relied upon documents produced, including two notes of meetings held on 21 October 2014 and 13 October 2016 with representatives of Nationwide and AxPO, with Mr Lee and his accountant present at the 2014 meeting as observers. The notes of meetings were signed by representatives of Nationwide. At these meetings HMRC discussed with Nationwide and AxPO the appellant's engagement and the nature of the relationship between Mr Lee and Nationwide. Mr Mason for HMRC noted that Mr Lee and his accountant failed to dispute the contents of the notes. Mr Lee in evidence said he was only there in an observational capacity and did not feel able to challenge at the time. However, in giving evidence Mr Lee disagreed with aspects of the content of the note.

36. The points made in those notes and referred to by HMRC in this appeal are considered below. However, I will make two general points at this stage. First, I do not find that Mr Lee remaining silent during the 2014 meeting amounts to agreement with Nationwide's comments. Mr Lee understood he was there as an observer and I accept he may not have felt it his place to intervene. Second, I would agree with Mr Collins that it is unfortunate that no witnesses from Nationwide attended the Tribunal to allow the appellant to test the evidence in cross examination. Mr Mason informed the Tribunal that they were invited to attend but refused.

37. Where Mr Lee has given evidence, which is at odds with the Nationwide meeting notes and he has been cross examined on it, I take into account in my weighing of the evidence the lack of equivalent testing applied to HMRC's evidence.

38. I find the facts in this appeal as set out below.

Nationwide projects

39. For approximately 10 years before setting up the appellant, Mr Lee worked across a number of industries as a project manager. In the six months immediately prior to incorporating the appellant Mr Lee was engaged by Nationwide through an umbrella company, that is to say a company owned by a third party which acted as Mr Lee's employer, deducting PAYE and NICs through payroll systems and providing Mr Lee's services to Nationwide. According to Mr Lee the purpose of doing so was to "test the waters" as to whether he could start a business as a contractor.

40. Since its incorporation in 2008, with the exception of the Lloyds contract in 2012/13 described below, the appellant has engaged with Nationwide providing project management services through the work of Mr Lee. These projects tended to be of a regulatory nature or relate to a new product, although one related to functional transformation which included property relocation, changes to business processes, procedures and organisational change. Different projects involved different areas of the business and different stakeholders.

41. From 1 February 2012 to 31 October 2012 the appellant contracted on three occasions with an agency, Clarity Resourcing (UK) LLP ("Clarity"), which contracted with another agency, Advantage xPO ("AxPO") which in turn contracted with Nationwide ("the Clarity Contracts"). The periods covered by these contracts were;

- (1) 1 February 2012 to 12 February 2012
- (2) 13 February 2012 to 30 April 2012
- (3) 1 May 2012 to 31 October 2012, but terminated early on 14 September 2012

42. From 1 November 2012 to 21 April 2013 the appellant provided Mr Lee's services to Lloyds Bank Group.

43. From 22 April 2013 to 19 December 2014 the appellant contracted on four occasions directly with AxPO which in turn contracted with Nationwide ("the AxPO Contracts"). The periods covered by these contracts were;

- (1) 22 April 2013 to 31 March 2014
- (2) 14 May 2014 to 30 October 2014
- (3) 1 November 2014 to 28 November 2014
- (4) 1 December 2014 to 19 December 2014

44. It is agreed between the parties that the Clarity Contracts for the relevant periods are materially the same and I set out in Part 1 of the Appendix the terms of the Clarity Contract relevant to this appeal, with Clarity being defined in these terms as the Employment Business, the appellant as the Consultancy and Nationwide as the Client.

45. It is also agreed between the parties that the AxPO Contracts for the relevant periods have slight differences but are materially the same and I set out in Part 2 of the Appendix the terms of the AxPO Contract and associated documents relevant to this appeal, the appellant being defined as the Supplier and Nationwide as the Client.

46. Nationwide's evidence, which I accept, was that if it wished to recruit for a project they would first consider if existing employees had the requisite skills. If not, they would try to use an existing contractor but if none suitable were available they would seek a new external contractor through agencies. For existing or new potential contractors Nationwide would produce a detailed proposal called a Resource Request Form setting out the nature of the project. This was forwarded to the agencies who forwarded it on to potential candidates such as the appellant. The appellant then decided whether it wished to contract.

47. Mr Lee in oral evidence said that in practice as he was on Nationwide premises almost continuously, if Nationwide were considering offering him a new contract they would ask him first if he was interested. If he was interested then the formal process would be followed through.

the work being done: the Derbyshire Aggregator Loan Project

48. Mr Lee described in detail how he worked on the Derbyshire Aggregator Loan Project in 2011 and 2012. This project was under Clarity terms but both parties agreed that it was typical of the projects Mr Lee worked on for Nationwide during the period covered by this appeal whether under Clarity or AxPO terms. Neither party took issue with the project at least in part predating the period under appeal.

49. The Derbyshire Aggregator Loan Project involved the launch of a loan offering under the brand name "The Derbyshire" which built on the previous e contracting project managed by Mr Lee, enabling applicants for loans to receive their loan application and sign documentation electronically. The Derbyshire loans were available only through aggregator sites such as Money Supermarket.

50. An early task would be the establishment of the project governance. A project board made up of the project sponsor and other key stakeholders from the impacted business areas

and group transformation, for example business heads from legal, personal loans, marketing and compliance. Day to day management and allocation of project tasks was Mr Lee's responsibility but it was also his responsibility to ensure this group was kept up to date on progress, any challenges and what Mr Lee was doing to resolve any issues.

51. The agreed business requirements established by Nationwide was the source from which the detailed plan of all the changes and work that the project would deliver. Necessarily the longer term aspects of the plan would be at a high level. From Mr Lee's memory of this task the overall timeframe between 6 and 10 months with an approximate budget of £700,000 which was typical of such projects.

52. Mr Lee described it as his responsibility to determine the cost of delivering the project and when it could be delivered by. He would draw up a detailed plan of activity and then manage that plan until delivery. The plan would be reviewed by the Nationwide project board and, if thought appropriate, amended, for example as to cost, scope or timing.

53. Once the plan had been approved he would first establish the core members of the project team, being normally business analysts, solution architects, IT developers, testers and business readiness resources. The team would be a mixture of employees and contractors. The project would be started by Mr Lee running a series of workshops involving the core team and subject matter experts from the relevant business area to put together a plan of actions and tasks. An output of the workshops would be a series of detailed business requirements which would be reviewed and approved by all the parties.

54. Mr Lee would initiate and chair weekly meetings of the core team to review that week's tasks and forecasted tasks. A central risk register would be established to manage risks, issues, assumptions and decisions. Mr Lee was also responsible for planning and monitoring the project finances on a weekly basis.

55. All work was subject to governance standards. Specifically, the Nationwide Change Framework ("NCF"), to which Mr Lee was required to adhere, was a set of governance standards that applied to all projects directing how the project was to be managed, setting required levels of visibility and accountability.

56. In accordance with the NCF Mr Lee would complete a weekly report for the head of group programmes to give a view on project progress and meet with them to discuss. A report was also sent to the monthly project board.

57. There was a disagreement between the parties as to whether the NCF was specific to Nationwide or was an industry standard for project management in financial services. In my view nothing turns on the point in this appeal but I find that NCF was specific to Nationwide but that similar project management standards would have applied in other similar organisations.

Mr Lee's working patterns

58. When Mr Lee started a contract with Nationwide, there was no induction training on commencement of any of the contracts with Nationwide other than in relation to health and safety and no ongoing training.

59. On joining Mr Lee would be provided with a contractor pass. Laptops were also provided by Nationwide for security purposes but no other equipment. Mr Lee would use a desk at Nationwide's offices on a flexible basis. The appellant did not provide any equipment beyond a home office and his own vehicle.

60. The appellant was contracted to work what has been described as a professional day at a fixed day rate, five days a week subject to the usual statutory holidays. In the Clarity Contracts a day was defined as 7.5 hours a day. The term was undefined in the AxPO Contracts but there was no disagreement between the parties and I find that it would have been of equivalent length. In the schedule to the Clarity Contract provide any additional days or hours would need to be agreed in advance and charged on a pro rata basis.

61. However, it was Mr Lee's evidence which I accept, that he would work extra hours beyond what was in the contract to keep on top of the project but would not be paid for them.

62. More generally, Mr Lee would work beyond the contracted hours during the week to enable him to finish earlier on a Friday, normally at lunchtime. He was officially based in Swindon, which is where the project team was based, Mr Lee would normally work there but he would occasionally work from another Nationwide office in Macclesfield on a Friday or Monday to suit weekly travelling from his home nearby.

63. Whilst under the terms of the contracts Mr Lee was required to seek consent to any absences in practice he did not do so and Nationwide did not insist but Mr Lee instead notified the head of group programmes out of courtesy. If there was a need for a meeting when he was not in the Swindon office, for example on a Friday afternoon, Mr Lee would dial in. In cross-examination Mr Lee observed that if the project was failing he would not disappear on a Friday afternoon.

64. Mr Lee was not subject to any appraisal and no line management responsibilities for any staff beyond managing the relevant task.

pay and benefits

65. The appellant was paid on a day rate and there was no entitlement to employee benefits such as holiday, sickness, pensions or any benefit in kind.

66. Each year the agency would be notified by Nationwide that as a contractor Mr Lee would be unable to provide services during a furlough period of between 2 and 3 weeks covering mid December to early January. If he did work during this period the appellant would not be paid. The agreement of a director of Nationwide would be required for an exception to be made but Mr Lee never made such a request. No such furlough period applied to employees. This arrangement was not in either of the Clarity or AxPO Contracts but Mr Lee accepted that it applied. I note that as regards the period under appeal this issue affected 2013 but was not relevant to 2012 as during that period Mr Lee was working at Lloyds and 2014 the contract terminated early so it was not a relevant issue. Nevertheless, I find that this arrangement formed part of the terms of any contract which spanned this period of mid December to early January and so Mr Lee was put in effect on a mandatory unpaid holiday and would not be paid for any work he did during this period.

67. The appellant was required under the Clarity Contract to take out employer's liability insurance, public liability insurance and other suitable policies such as professional indemnity insurance. Under the AxPO Contract the appellant was required to take out employer's liability insurance of between £5m and £10m and professional indemnity insurance of £1m.

the contract terms

68. The term of each contract was for a fixed period. Mr Lee has been working at Nationwide continuously from 2007 to December 2014 with the exception of the following periods;

- (1) 14 September 2012 to 31 October 2012 being the period from the early termination of the Nationwide contract on 14 September until commencement of the Lloyds contract;
- (2) 1 November 2012 to 21 April 2013 being the period of the five month contract with Lloyds; and
- (3) 1 April 2014 to 13 May 2014

69. There was no suggestion by either party that there was an overarching single contract. Further, both parties accept and I find that, as set out in the Clarity and AxPO Contracts (clauses 15.2 and 4.2 respectively), outside of any subsisting contract, there was no obligation on Nationwide to engage the appellant or for the appellant to accept any proposal from Nationwide.

70. Whilst each contract was for a fixed term there were termination rights. Under the Clarity Contract Nationwide could terminate the contract;

- (1) Under Clause 9.1 and the Schedule with one weeks notice in the first month and four weeks notice thereafter.
- (2) Under Clause 9.1 if the consultancy work has finished to the reasonable satisfaction of Nationwide the agreement expired automatically. The Clarity contract commencing 1 May 2012 was due to end on 31 October 2012, but Nationwide terminated the appellant's contract early on 14 September 2012, because the project was cancelled following a change in the regulations that were the subject of the project.
- (3) Under Clause 9.2 immediately if the consultant failed to perform the consultancy services promptly, efficiently, with all due skill and in a professional manner

71. Under the assignment schedule to the AxPO Contract Nationwide could terminate the contract;

- (1) Immediately until the criminality checks had been completed.
- (2) Otherwise the notice period was one week for the first 4 weeks and thereafter 4 weeks.

72. Under Clause 9.1.1.7 of the AxPO Contract, the contract could be terminated immediately upon Nationwide terminating its contract with AxPO. No evidence was adduced as to the terms of the Nationwide/AxPO contract and so I make no findings as to the effect of Clause 9.1.1.7 and specifically do not find it entitles Nationwide effectively to terminate Mr Lee's engagement without notice. Accordingly I find, there was no right in the AxPO Contract to terminate the contract on the consultancy work finishing.

right of substitution

73. The parties disagreed as to the nature and extent of the right of the appellant to provide a substitute for Mr Lee.

74. Mr Collins for the appellant submitted that, subject to conditions, there was a right of substitution under the terms of clause 2.1 of the Clarity and clause 10.2 of the AxPO contracts;

- (1) Under 2.1 of the Clarity Contract the appellant could provide any of its employees, officers or representatives subject to Nationwide agreeing, such agreement not to be unreasonably withheld. Further, the appellant could assign or sub-contract the

contract provided that Nationwide are reasonably satisfied that the assignee or subcontractor has the required skills, qualifications, resources and personnel.

(2) Under clause 10.2 of the AxPO Contract a substitute could be offered but Nationwide could reject the substitute if in its reasonable opinion such replacement is not wholly suitable (whether by reason of skills, experience, training, qualifications, authorisations or otherwise)

75. Mr Lee's evidence was that provided they had the right qualifications he would have expected Nationwide to accept a substitute.

76. Mr Mason for HMRC argued that these rights were fettered and could not be exercised in practice and pointed to a number of other provisions on the contracts.

77. Mr Mason submitted that in the Clarity Contract the following provisions are relevant;

(1) The schedule to the agreement specifically names the contractor as Mr Lee.

(2) The schedule provides that until such time as all security checks concluded the contract can be terminated by Nationwide with immediate effect

(3) Clause 2.1 provides that the services had to be performed by such members of the appellant employees etc as the appellant may consider appropriate, subject to the agreement of Nationwide, such approval not be unreasonably withheld.

(4) Clause 4.2 provides that the appellant warrants that its consultants have the necessary skills qualifications to perform the services

(5) Clause 9.5 provides that Nationwide have the right to refuse admittance or order the removal of any representative of the appellant who in the reasonable opinion of Nationwide is not a fit person to be on the client's property

78. Mr Mason submitted that in the AxPO Contract;

(1) Clause 9.1.1.6 provides that AxPO may terminate the contract of the replacement consultant is not accepted by AxPO

(2) A number of documents specify Mr Lee by name, including the acceptance letter from AxPO, the Deed of Obligation and the Assignment Schedule.

79. HMRC in particular relied upon clause 10.2 in the AxPO contract:

“The Supplier may from time to time and shall as soon as possible after being requested by AxPO (acting reasonably) so to do, without prejudice to the other provisions of this Agreement, offer a suitable replacement consultant (and a requirement by AxPO shall be deemed reasonable if made pursuant to notice by the Client of unsatisfactory performance of the Consultant) provided that;

10.2.1 AxPO shall be under no obligation to accept such replacement consultant if in its or the Client's reasonable opinion such replacement is not wholly suitable (whether by reason of skills, experience, training, qualifications, authorisations or otherwise)...”

80. HMRC argued first that clause 10.2 of the AxPO Contract did not provide the appellant with a right to provide a substitute, only if requested by AxPO or Nationwide. Second, that the use of the phrase “or otherwise” in Clause 10.2.1 meant that to the extent the appellant did have a right to provide a substitute, AxPO or Nationwide could refuse for any reason.

81. Further, Mr Pilkington of Nationwide is recorded in the notes of the meetings with HMRC that in practice it would be impractical for Nationwide to accept substitutes due to the necessary restrictions on access to Nationwide's systems and restricted site access. Any substitute would need to go through vetting checks and an interview and get up to speed on the project.

82. In my view, properly construed, the appellant offering a substitute ("The Supplier may from time to time...") and AxPO requesting one ("...and shall as soon as possible after being requested by AxPO (acting reasonably) so to do...") are alternatives within Clause 10.2. Accordingly, in my view under the AxPO terms the appellant may offer a substitute independently of AxPO, or in the hypothetical contract Nationwide, requesting one.

83. Further, I do not agree with HMRC's reading of Clause 10.2. The words "or otherwise" qualify the reasons why Nationwide might refuse but their opinion must still be reasonable. As to whether the supplier (being the appellant or in the hypothetical contract, Mr Lee) can propose a substitute, again I cannot agree with HMRC. Clause 10.2 provides;

"The Supplier may from time to time and shall as soon as possible after being requested by AxPO (acting reasonably) so to do, without prejudice to the other provisions of this Agreement, **offer a suitable replacement consultant...**" (emphasis added)

84. I therefore find that in both contracts the appellant could propose a substitute but Nationwide acting reasonably could, subject to the terms set out in each of the relevant hypothetical contracts, refuse.

85. However, I accept HMRC's argument as to the practical limitations to the right of substitution. I find Mr Lee was a specialist project manager very familiar with Nationwide's business and its process and indeed was recruited for these reasons. Accordingly, in practice providing a substitute that met the requirements for the right experience, security clearance and familiarity with the project meant that it was difficult for Mr Lee to offer a substitute that Nationwide acting reasonably would accept.

right to move Mr Lee

86. Mr Pilkington of Nationwide claimed in one of the meetings with HMRC in 2016 that Nationwide had the right to move contractors such as Mr Lee to another project during the term of a contract if a project was cancelled or deferred.

87. Each contract was entered into for a named project which the appellant worked on. The exception was the contract dated 22 April 2013 which started as a specific project in the usual way, scheduled to end on 31 March 2014 but in September 2014, the assignment schedule changed as Mr Lee moved to a new project within Nationwide.

88. I find that that Nationwide did not have the right to move Mr Lee to another project during the term of a contract. I find that Mr Lee agreed to the variation in the 22 April 2013 contract and was not required to do so by Nationwide.

THE APPELLANT'S SUBMISSIONS

89. Mr Collins for the appellant argued that all the factors pointed towards the hypothetical contract between Mr Lee and Nationwide being one for the provision of services of an independent contractor and not of employment.

90. Mr Collins made the following detailed arguments.

mutuality of obligations

91. Mr Collins argued that any hypothetical contract between Mr Lee and Nationwide would lack the minimum mutuality of obligation for the contract to be one of employment as there was no continuing obligation on Nationwide to offer Mr Lee work and no obligation on Mr Lee to provide his services if required by Nationwide.

92. Mr Collins drew comparison with the finding of the Tax Tribunal in *Primary Path* [2011] UKFTT 454 at paragraph 65;

“... the essence of the arrangement was that Mr Winfield was paid only for the hours he worked, and should his strand of work within the overall project have suffered a hiatus for any reason. We cannot see that he had a contractual basis for demanding other work or payment whilst he waited for his work to resume. Nor is there anything to suggest that GSK had it in mind off work beyond the specific project for which Mr Winfield’s services were engaged. This feature of his hypothetical contract we see as calling into question whether it is an employment contract – it is a feature which is more indicative of a contract for services”

93. The process by which the appellant entered into a new contract with the agency was that Nationwide provided the agency with information on the project they wanted managed and the agency forwarded this to the appellant. On consideration of the information the appellant decided whether to contract to provide services to Nationwide.

94. Further, there was no obligation on Nationwide to provide other work should a project be cancelled or finish early, as with *Primary Path*, the appellant was only engaged for a specific project. Clause 9.1 of the Clarity Contract provides for any existing contract to terminate automatically on completion of the consultancy services and this is illustrated by the events of September and October 2012. The project governed by the Clarity contract commencing 1 May 2012 and due to expire 31 October 2012 was cancelled early by Nationwide on 14 September. Nationwide did not pay or provide any work to the appellant and the appellant provide his services after that date notwithstanding that the contract had an end date of 31 October.

95. Finally, unlike employees, Mr Lee could not provide his services over Christmas during the furlough period and if he did he would not be paid for it.

right of substitution

96. Under the terms of the contract between the appellant and the agency the appellant was entitled to provide a substitute, subject to agreement by Nationwide, such agreement not to be unreasonably withheld (clauses 2.1 of the Clarity Contract and 10.2 of the AxPO Contract).

97. Mr Collins sought to distinguish the decision of *Synaptek v Young* [2003] STC 543 where Hart J observed at [28];

“In *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367 it was held that clause in a driver’s contract providing that;

“in the event that the contractor is unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services”

was incompatible with the contracts being one of employment.... In the present case the provision in question.... does not give Synaptek any right to perform the services by anyone other than Mr Stutchbury, unless and until agreed otherwise, the services do have to be performed personally by Mr Stutchbury”

98. In *Synaptek* the right to provide a substitute was entirely at the discretion of the client. In the current appeal the appellant's right was not fettered and so could be exercised for any reason, so for example if the appellant found a more profitable contract. The only limitation was that the substitute had to be reasonably skilled and qualified and provided that was the case Nationwide could not reasonably withhold its agreement.

99. For periods after those under appeal Nationwide no longer allowed the appellant the right to provide a substitute but did so during the periods under appeal.

control

100. Mr Collins argued that the hypothetical contract lacked the sufficient degree of control in terms of deciding what is to be done, and where and how it is to be done to make Mr Lee an employee of Nationwide.

101. In terms of what was to be done, when Nationwide wished to appoint the appellant it would provide the agency with information about the project and the appellant would decide whether to enter into a contract to provide Mr Lee's services. Nationwide decided what project it wanted to be managed but the appellant (or Mr Lee under the hypothetical contract) decided whether to do so. Once working for Nationwide, Mr Lee could not be moved to a different project without his consent whereas an employee could be moved.

102. As to how it is to be done, as illustrated by the Derbyshire Aggregator Project, Mr Lee drew up the implementation plan determining the size of the project team, the timescale for the project. This had to be approved by Nationwide but this did not amount to control. Nationwide needed Mr Lee's skills to determine how to implement the project because they were not available from Nationwide's employees. Once the project plan had been approved Mr Lee would manage it. Mr Lee had to keep Nationwide informed precisely because Mr Lee was in control of implementation. Clause 5.3 of the Clarity Contract in particular provided Mr Lee with "reasonable autonomy" in performing the contract.

103. Finally, as to where it was done; Mr Lee had control of his working hours and where he worked, provided he managed the project. Mr Lee occasionally worked from a local nationwide branch or from home if it was convenient and Nationwide did not object.

business on own account

104. Mr Collins argued that the appellant was in business and exposed to financial risk if Nationwide chose to cancel a project or the appellant was not able to provide his services, for example if he was on holiday or ill.

105. The appellant was required to remedy any defect on his work at his own expense, which was not an obligation imposed on employees. If the project was not running to schedule Mr Lee would be required to work additional unpaid hours.

part and parcel of the organisation and other provisions of the contract

106. Mr Collins pointed to a number of differences between the treatment of Nationwide's permanent employees and Mr Lee being;

- (1) no entitlement to the usual employee type benefits such as holiday, sickness, pensions, benefits on kind
- (2) Mr Lee was issued a contractor pass rather than an employee pass
- (3) There was no induction other than health and safety and no initial or ongoing training
- (4) There were no staff appraisals

(5) Mr Lee had no line management responsibilities for staff

107. All these factors pointed to Mr Lee not being part of Nationwide.

HMRC'S SUBMISSIONS

108. Mr Mason for HMRC argued that taking into account all relevant details Mr Lee should be treated as the employee of Nationwide and the appeals dismissed

109. HMRC made the following submissions.

mutuality of obligations

110. Mr Mason for HMRC accepted that there had to be some mutuality of obligation between an individual and the putative employer before there could be a contract of employment.

111. Specifically, HMRC argued that where there is a series of contracts it was not a necessary condition for mutuality of obligation to exist for the employer on termination of a contract to be obliged to provide further work, for example Mummery LJ in *Cornwall County Council v Prater* [2006] ICR 731 at [4];

“The important point is that, once a contract was entered into and while that contract continued, [the worker] was under an obligation to teach the pupil and the council was under an obligation to pay her for teaching the pupil made available to her by the council under that contract”

112. HMRC argued that there was a mutuality of obligation in the current circumstances including an expectation that the work would be available during the relevant contract periods. It was irrelevant that there was no expectation of further work beyond completion of a contract, the situation being no different to an employee on a fixed term contract. Indeed, even if the contract was terminable on either side at will there is mutuality of obligation, for example Elias LJ in *Quashie v Stringfellows Restaurant Ltd* [2012] EWCA Civ 1735 at para 10;

“An issue that arises in this case is the significance of mutuality of obligation in the employment contract. Every bilateral contract requires mutual obligations; they constitute the consideration from each party necessary to create the contract. Typically, an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to keep the relationship in place until it is lawfully severed, usually by termination on notice. But there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed: see the decisions of the Court of Appeal in *Meechan v Secretary of State for Employment* [1997] IRLR 353 and *Cornwall County Council v Prater* [2006] IRLR 362”

113. In this appeal Nationwide always paid for services provided by Mr Lee and so, mutuality of obligation being present, there was a contract which could be determined to be one of service or for services. The fact that a contract was terminated early did not affect the position.

right of substitution

114. HMRC argued that there was an obligation of personal service on Mr Lee.

115. As to the right of substitution, HMRC initially argued that there was no right to propose a substitute under the AxPO Contract but I have found that not to be the case.

116. HMRC argued in the alternative that a far reaching genuine right of substitution may negate the contract of employment but this will only be the case where a substitution clause;

“purposefully construed in the context of the contract as a whole, is so wide as to permit, without breach of contract, the contractor to decide never personally to turn up for work at all” (*Weightwatchers (UK) Ltd v HMRC* [2011] UKUT 433)

117. In contrast a limited contractual right to provide cover, for example if the worker is unwell, is not inconsistent with a contract of employment.

118. Where there is a contractual requirement to obtain approval from the end client to any proposed replacement then such a clause does not permit the personal service company to provide the services by anyone other than the person specified in the contract (*Synaptek Ltd v Young* [2003] BTC 8044).

119. A fettered right to provide a substitute does not negate the personal service requirement and it is not inconsistent with employment (*MacFarlane v Glasgow City Council* [2001] IRLR 7).

120. Here the right to substitution was fettered with Nationwide having the final decision and effectively a right to veto. Nationwide wanted Mr Lee and in reality, would not accept a replacement. The contract was therefore one of personal service.

control

121. HMRC accept that the right to control a work in respect of how, what, where or when work is conducted is an important indicator of employment but is not of itself decisive, especially when dealing with a highly skilled worker or professional, as pointed out by Lord Parker CJ in *Morren v Swinton and Pendlebury BC*.

122. However, it was well established that an absence of control as to the detailed way work was performed is not inconsistent with the employment of a skilled person. The key question is not whether in practice there was day-to-day control over the work but whether there was a sufficient degree of contractual right to control. Whether the control is sufficient must take into account the practical realities of particular industry, so the surgeon undertaking an operation cannot be controlled by hospital managers but is an employee.

123. HMC relied upon *White v Troutbeck* [2013] IRLR 286 at 290 per Richardson J upheld in the Court of Appeal ([2013] IRLR 949);

“Firstly, the key question is whether there is still a sufficient degree a contractual right to control over the worker. The key question is not whether in practice the worker has day-to-day control of his own work”

124. Thus, relying also on *Autoclenz v Belcher* [2011] ICR 1157 per Lord Clarke at 1163 (paragraph 30 above), if the genuine contractual right to control to a sufficient degree does exist, it does not matter whether that right is actually exercised.

125. Further, for professional workers it is more important to examine the right the engager has to direct what work the worker needs to do, see Lord Philips in *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 at [36];

“Today it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between

employer and employee. Many employees apply the skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus, the significance of control today is that the employer can direct what the employee does, not how we does it.”

126. On the Clarity Contract HMRC referred to a number of provisions in the contract to support their argument that there was control, including;

- (1) the requirement to work a professional day (the Schedule to the contract)
- (2) Nationwide’s right to require Mr Lee to work in locations other than Nationwide’s Swindon sites (the Schedule to the contract)
- (3) restrictions on Mr Lee’s ability to take on other work that would be to Nationwide’s detriment (clauses 2.3 and 5.1.1)
- (4) the obligation to comply with statutory or other reasonable obligations (clause 5.1.2)
- (5) the obligation to furnish Nationwide with progress reports (clause 5.1.3)
- (6) the obligation to inform Nationwide if the consultancy services cannot be performed (5 clause.2)
- (7) the consultant having “reasonable autonomy” (clause 5.3)
- (8) the obligation to provide a breakdown of services provided as verified by a representative of Nationwide (clause 6.1.1)
- (9) the agreement is to continue until the contracted end date or the completion of the consultancy services to the reasonable satisfaction of Nationwide (clause 9.1)
- (10) the right for Nationwide to terminate if Mr Lee fails to perform the services promptly, efficiently and with all skill and in a professional manner (clause 9.2.3)
- (11) the prohibition on supplying services to Nationwide for 12 months (clause 12.1)
- (12) Mr Lee to sign Nationwide’s policy agreement on e mail and internet facilities (clause 14.1)

127. As regards the AxPO Contract HMRC made reference to a number of clauses being principally;

- (1) the requirement to work in the Swindon office
- (2) the obligation to use reasonable care and skill, act in a professional manner and comply with Nationwide’s IT security policies (clause 2)
- (3) the obligation not to engage in conduct detrimental to Nationwide’s interests (clause 2.8)
- (4) the obligation to give reasonable notice of absence (clause 2.9)
- (5) at the request of AxPO to do all things necessary to obtain protection for any intellectual property resulting from the project (clause 6.1.4 and 6.1.6)
- (6) a declaration that neither the supplier nor the consultant is prevented by any agreement or arrangement from fulfilling its obligations under the agreement (clause 10.1.5)
- (7) in the deed of obligation Mr Lee agreed to carry out his duties with reasonable care, comply with the reasonable requirements of Nationwide and be bound by the Assignment Schedule

128. HMRC made detailed submissions on these provisions to the effect that they demonstrated that Nationwide had the right to control where Mr Lee worked, when he worked and how Mr Lee was to perform the services.

129. As to when and where Mr Lee worked, HMRC submitted that the flexibility Mr Lee enjoyed about his hours and place of work were no different to other employees. He was required to work a professional day and if the project was not completed by a particular deadline he would be expected to work the additional hours to complete the work.

130. Mr Mason focused particularly on the control that derives from Nationwide's policies and the heavily regulated nature of its business. Mr Lee's project plan needed approval by the project board and project sponsor. Further, the Nationwide Change Framework directed how Mr Lee ran the project. Mr Lee had to complete a weekly report for the head of group programmes and a monthly report for the project board and Mr Lee's work was checked to ensure it complied with the NCF. If the project was substandard Mr Lee would be required to work late to correct it. Clause 5.3 of the Clarity contract was not inconsistent with employment as skilled employees had autonomy, and in any event, it was only "reasonable" autonomy.

business on own account

131. HMRC submitted that Mr Lee was not in business on his own account and took no financial risk.

132. Financial risk involved the ability to make a loss of profit from how the work is performed (*Global Plant Ltd v Secretary of State for Social Security* [1972] 1 QB 139 per Lord Widgery at 152).

133. Mr Lee did not take any financial risk. Mr Lee was paid a daily rate and not on completion of the project. He had no opportunity to make a profit by increasing his rate of production or cutting his costs. His only risk was that he would not find alternative employment.

134. Mr Lee was expected to work a professional day which in reality left no room for him to work on other projects. He was economically dependent on Nationwide during the contract period.

135. Although there is a requirement for the contractor to provide equipment in reality Nationwide provided the major pieces of equipment that is to say a Nationwide laptop, desk and desk phone. Mr Lee provided his own mobile phone but that is not essential to the role. Mr Lee was not permitted to use his own equipment for the work required.

136. The reimbursement of expenses demonstrates a lack of financial risk and it is more akin to an employment contract.

137. The requirement to take out employer's liability, public liability and professional indemnity insurance is of no significance as employees can be required to carry insurance (*Lime-IT v Justin* [2003] STC (SCD)15. In any event the financial outlay is limited to the cost of the premium.

138. HMRC accepted that if Mr Lee's work was substandard he would be required to work additional hours without pay to rectify it. However, working additional hours was not a financial risk.

part and parcel of the organisation and other provisions of the contract

139. HMRC argued that for all intents and purposes Mr Lee was part of the projects team at Nationwide some of whom were employees who did a similar role to Mr Lee. He reported to a Nationwide manager and Nationwide believed his role to be akin to employment.

140. The fact that Mr Lee was not entitled to employee style benefits such as holiday, sick pay or pension entitlement simply followed from the nature of the contract the parties have chosen and should not be used as an indicator.

141. Any statement within the actual contracts between the worker, intermediary and client as to whether the parties intended their relationship to be one of the employment will be given minimal, if any, weight in construing the hypothetical contract between the worker and the client (*Dragonfly Consulting Limited* [2008] STC 3030 at [54] to [55]).

142. The appellant's argument that Mr Lee was not prevented from working elsewhere, but the reality was that working a 37 to 40 hour week meant there was no scope for doing so.

THE HYPOTHETICAL CONTRACT

143. The Intermediaries Legislation requires a finding to be made as to the terms of a hypothetical contract between Mr Lee and Nationwide. In constructing the hypothetical contract between Mr Lee and Nationwide the terms of the contract upon which the appellant was engaged must be taken into account (section 49(4)).

144. The terms of the contracts differ as between those under the Clarity and AxPO terms and for convenience below I shall still use the terms "Clarity Contracts" for the hypothetical contracts in the period 1 February 2012 to 31 October 2012 and "AxPO Contracts" for the hypothetical contracts in the period 22 April 2013 to 19 December 2014.

145. Having considered the above facts, I find the principal terms of the hypothetical contracts between Mr Lee and Nationwide to be as follows;

- (1) Mr Lee and Nationwide each have discretion as to whether to contract with each other and did so on seven occasions during the period subject to this appeal
- (2) There are three Clarity Contracts are for the following fixed periods;
 - (a) 1 February 2012 to 12 February 2012
 - (b) 13 February 2012 to 30 April 2012
 - (c) 1 May 2012 to 31 October 2012 (terminated early on 14 September 2012)
- (3) There are four AxPO Contracts for the following fixed periods;
 - (a) 22 April 2013 to 31 March 2014
 - (b) 14 May 2014 to 30 October 2014
 - (c) 1 November 2014 to 28 November 2014
 - (d) 1 December 2014 to 19 December 2014
- (4) Mr Lee is paid a day rate applicable to the original contract being in the region of £450 during the term of the contract and required to work a professional week, which for the Clarity Contracts is specified to be 7.5 hours a day. He is entitled to additional pay for additional hours worked.
- (5) Mr Lee is required to work at Nationwide's Swindon offices and can be required to work in other Nationwide offices with travel expenses reimbursed by Nationwide.

- (6) The contract is terminable on one week's notice for the first 4 weeks and thereafter 4 weeks, subject to;
- (a) In respect of the Clarity Contracts, the contract was also terminable immediately upon completion of the services, that is to say the project for which Mr Lee is hired, to Nationwide's reasonable satisfaction
 - (b) In respect of the AxPO Contracts, the contract was also terminable on no notice until such time as criminality checks were carried out
- (7) For a two or three week period over Christmas notified by Nationwide in advance Mr Lee cannot work for Nationwide and he is not paid for any work he does during that period
- (8) Mr Lee would be required to comply with Nationwide's processes and policies including the Nationwide Change Framework
- (9) During the currency of any contract Mr Lee cannot be required by Nationwide to work on any project other than the one described in the current contract.
- (10) Mr Lee can provide a substitute;
- (a) In the Clarity Contracts, subject to Nationwide's consent, such agreement not to be unreasonably withheld as set out in Clause 2.1 of the Clarity terms.
 - (b) In the AxPO Contracts, in accordance with clause 10.2 of the AxPO terms, a substitute could be offered but Nationwide could reject the substitute if in its reasonable opinion such replacement is not wholly suitable (whether by reason of skills, experience, training, qualifications, authorisations or otherwise)
- (11) Mr Lee is not entitled to any holiday, sickness, pensions benefits or other benefits in kind
- (12) There was no induction other than health and safety and no initial or ongoing training
- (13) Mr Lee is not subject to appraisals
- (14) Mr Lee had no line management responsibilities for staff
- (15) Mr Lee is issued a contractor pass rather than an employee pass
- (16) Mr Lee is required to take out suitable contractor insurance for a minimum cover of £1m

146. Having determined the hypothetical contract the Intermediaries legislation requires the Tribunal to determine whether that contract is one of employment for tax purposes.

DISCUSSION

147. The Tribunal's task is to determine the terms of the hypothetical contract between Mr Lee and Nationwide and then, as outlined by Mummery J in *Hall v Lorimer*, "it is a matter of the evaluation of the overall effect of the detail".

mutuality of obligation

148. As set out at paragraph 145 above, I have found that the nature of the hypothetical contract, reflecting the relationship between the appellant and Nationwide, is one of a series of limited fixed term contracts, each with notice provisions, being generally between 1 and 4 weeks. However, in the AxPO Contracts Nationwide can terminate without notice until the criminal checks have been carried out. In the Clarity Contracts, Nationwide is entitled to

terminate the Clarity Contract early on completion of the project. Outside of these fixed term contracts I have found that Nationwide is not obliged to offer work and Mr Lee is not required to provide his services.

149. The mutuality of obligation test is a very low threshold. I find that there is a mutuality of obligation in the limited sense as set out in *Cornwall County Council* and *Quashie* of there being mutuality within the contract once entered into for Mr Lee to provide services and for Nationwide to pay Mr Lee, unless the relevant notice is given under the contract. That mutuality is not affected by the furlough period but for completeness I find that there is still a continuing contract between the parties albeit the obligation to work and the obligation to pay are suspended for a fixed and period. For example, if either party wanted to give notice during the furlough period the contractual notice provisions would still apply.

150. I find that the mutuality did not extend to any expectation that further work would be provided by Nationwide or any commitment by Mr Lee that services would be provided after the expiry of the contract.

right of substitution

151. In both contracts I have found that there is a right to provide a substitute but it is qualified. For the Clarity Contracts the principal limitation is under Clause 2.1 under which Nationwide must agree, such approval not to be unreasonably withheld. For AxPO Contracts it is under Clause 10.2 where (ignoring AxPO in the hypothetical contract) Nationwide shall be under no obligation to accept such a replacement if in Nationwide's reasonable opinion such replacement is not wholly suitable.

152. No substitute was ever proposed by the appellant during the period under appeal. I note in this context the comments of Lord Clarke in *Autoclenz v Belcher* that what matters is whether a right exists even if it is not exercised. However, I have found it was difficult for Mr Lee to offer a substitute that Nationwide acting reasonably would accept. I agree with HMRC that, whilst a right that is not enforced may well still exist, in the current circumstances it is difficult to see this happening to the point where it might be seen as almost theoretical.

control

153. The issue here is whether, in accordance with MacKenna J's second criteria in *Ready Mixed Concrete*, Nationwide controls or is entitled to control Mr Lee to such a degree that he should be treated as an employee.

154. As to when Mr Lee worked the hypothetical contract requires Mr Lee to work a professional day, being 7.5 hours. Mr Lee did not in practice keep each day to a standard professional day as required by the Clarity contract nor did Nationwide insist but satisfied his obligation over the working week. He worked as long as required, did not claim overtime, and worked longer during most of the week sufficient to enable him to finish early on a Friday. The needs of the project dictated his hours but subject to that he could decide his working patterns without in practice needing the consent of Nationwide.

155. As to where Mr Lee worked, Nationwide was entitled under the hypothetical contract to require Mr Lee to work at the Swindon offices. In practice Mr Lee he tended to work in the Swindon office but, consistent with the needs of managing the relevant project, chose other Nationwide offices or working from home if it suited him and did not affect the project. Nationwide was entitled to require Mr Lee to work in specific locations other than Nationwide's Swindon sites but never did so.

156. As to what Mr Lee did, I have found that he could not be moved from one project to another. The scope of his work was therefore necessarily predetermined in general terms at

the outset of the contract. Nationwide did not seek to tell Mr Lee what to do on a given day or how to organise his time. However, within the scope of the contract, Mr Lee was required to work within the constraints of the NCF and other Nationwide policies which set out required processes, reporting obligations and so on. He was also required to obtain approval for his project plan and performance was monitored.

157. He was required under the hypothetical contract to work a professional day at Nationwide's offices (or such other offices as Nationwide directed) but in practice he was able to vary that as to time and location without asking for permission, but not significantly differently than might be expected of a similarly senior employee. In this respect I accept HMRC's argument, relying on Richardson J in *White v Troutbeck*, that the right to control Mr Lee as to when and where he worked existed even if it was not exercised by Nationwide.

158. Mr Lee had more freedom as to how he carried out his role. Mr Lee could not be moved to another project and had considerable scope to manage the contracted project. However, apart from not being able to move him to another project, the level of control exercised over Mr Lee in how he did his job was not inconsistent with him being a highly skilled professional employee. Mr Lee was in a similar position to the master of a ship or professional architect described by Lord Parker CJ in *Morren v Swinton and Pendlebury BC*.

the other provisions of the contract

159. In my view Mr Lee is taking very little financial risk and incurring little expense. He worked full time for Nationwide with a financial exposure very similar to a full time employee on a fixed term contract.

160. As I have set out above, each contract was separate and there was no obligation on Nationwide to offer further work nor any commitment by Mr Lee that services would be provided after the expiry of any contract. However, I do note the longstanding relationship between Mr Lee and Nationwide. With the exception of the contract with Lloyds and some short gaps Mr Lee has continuously worked for Nationwide for some 7 years. Mr Lee knew Nationwide extremely well and they knew him. He did not have to be interviewed or trained and so could instantly start on any project.

DECISION

161. I have found the hypothetical contract to be as set out at paragraph 145 above.

162. Looking at the nature of the relationship in the round, in my view Mr Lee's relationship with Nationwide is one of employment.

163. There was a mutuality of obligation between the parties but only within each contract. Mr Lee was engaged under separate contracts with no obligation on either party to extend or renew. However, with few gaps Mr Lee has worked for Nationwide for number of years full time in substantially the same project management role.

164. During the course of a contract Nationwide had the right, albeit not exercised, to direct where Mr Lee worked and to require him to work a professional day. Mr Lee had in practice a considerable degree of operational and personal autonomy but was subject to overarching controls primarily concerned with Nationwide's need as a highly regulated business to monitor the progress of the relevant project consistent with Mr Lee being a highly skilled employee. However, Mr Lee could not be moved to a different project without his consent.

165. During the time of Mr Lee's series of contracts with Nationwide, aside from the risk of not being engaged on a new contract (which happened rarely), he was not subject to any financial risk beyond that of an employee and in many respects, was part and parcel of

Nationwide's operations. Finally, I have found that there was no substantive prospect of Mr Lee asking for or Nationwide, acting reasonably, agreeing to a substitute.

166. On balance, I find that the hypothetical contracts required by the Intermediaries Legislation between Mr Lee and Nationwide would be ones of employment. Accordingly, this appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

167. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

IAN HYDE

TRIBUNAL JUDGE

RELEASE DATE: 18 FEBRUARY 2020

Appendix

Part1: The Clarity Contracts

1. Recitals;

“(A) the Consultancy carries on the business of the provision of consultancy services relating to all aspects of the services specified in the attached schedule (“the Consultancy Services”)

(B) the Employment Business has requested the Consultancy and the Consultancy has agreed with the Employment Business to provide the Consultancy Services on terms and subject to the conditions of this agreement”

2. Clause 2.1;

“The Consultancy’s obligation to provide the Consultancy Services shall be performed by such member or members of the Consultancy’s employees, officers or representatives (Consultants) as the consultancy may consider appropriate, subject to the agreement of the Client. Such approval should not be unreasonably withheld. The Consultancy shall be entitled to assign or sub-contract the performance of the Consultancy Services provided that the Employment Business and the Client are reasonably satisfied that the assignee or subcontractor has the required skills, qualifications, resources and personnel to provide Consultancy Services to the required standard and that the terms of any such assignment or sub-contract contain the same obligations imposed by this agreement and further that any person to whom the performance of the consultancy services has been assigned or subcontracted has opted out of the Conduct Regulations 2003”

3. Clause 2.3;

“save as otherwise stated in this Agreement the Consultancy shall be entitled to supply its services to any third-party during the term of this agreement provided that this is in no way compromise [sic]... to the detriment of the supply of it services to the client”

4. Clause 4.2;

“the Consultancy warrants that its Consultants have the necessary skills and qualifications to perform the Consultancy Services and that it will only supply Consultants to perform the Consultancy Services who have opted out of the Conduct Regulations 2003”

5. Clause 5.1;

“The Consultancy agrees on its own part and on behalf of the Consultants as follows;

5.1.1 Not to engage in any conduct detrimental to the interests of the Employment Business or the Client which includes any conduct tending to bring the Employment Business or the Client into disrepute or which results in the loss of custom or business

5.1.2 To comply with any statutory or other reasonable rules or obligations including but not limited to those relating to health and safety during the Assignment to the extent that they are reasonably applicable to them while performing the services...

5.1.3 to furnish the Client and/or the Employment Business with any progress report as may be requested from time to time

5.1.4 Not to sub-contract or assign to any third party any of the Consultancy Services which it is required to perform under the Assignment except in accordance with clause 2.1”

6. Clause 5.2;

“If the Consultancy is unable for any reason to perform the Consultancy Services during the course of the Assignment the Consultancy should immediately inform the Employment Business of this fact”

7. Clause 5.3;

[the appellant] “reasonable autonomy in relation to determining the method of performance of the Consultancy Services but in doing so it shall cooperate with the Client and comply with all reasonable requests within the scope of the Assignment made by the Client”

8. Clause 6.1.1;

“The Consultancy shall deliver accompanying each invoice the verification of execution of Consultancy Services comprising a detailed breakdown of work performed and the period to which it relates and duly signed by an authorised representative of the Client as a verification of execution of the Assignment”

9. Clause 9.1;

“The Client may terminate the Assignment by giving the Employment Business the notice specified in the Schedule attached. This agreement shall commence on the start date specified in the Schedule attached and shall continue for the duration of the Agreement as specified in the Schedule attached or until completion of the Consultancy Services to the reasonable satisfaction of the Client at which time this Agreement shall expire automatically unless terminated by the Employment Business or the Consultancy giving the other party the period of notice specified in the Schedule attached”

10. Clause 9.2;

“notwithstanding sub-clause 9.1 of this Agreement, the Employment Business may without notice and without liability instruct the Consultancy to cease work on the assignment at any time, where:

...

9.2.3 For any reason the Consultancy proved unsatisfactory to the Client for example if the consultancy fails to perform the consultancy services promptly, efficiently, with all due skill and in a professional manner...”

11. Clause 9.5;

“The Client shall have the right to refuse admittance to, or order the removal from, its property of any representative of the Consultancy engaged in providing the Consultancy Services who, in the reasonable opinion of Client (which shall be final), is not a fit person to be on the Client’s property. Action being taken under this clause 9.6 shall be notified in writing to the Consultancy by Clarity Resourcing, together with the reasons and therefore.”

12. Clause 11.1;

“Not at any time whether during or after the Assignment (unless expressly so authorised by the Client or the Employment Business as a necessary part of the performance of its duties) to disclose to any person or to make use of any of the trade secret or confidential information of the Client”

13. Clause 14.1;

“before allowing access to email & internet facilities from the Client’s computer equipment systems, the Consultancy’s representative engaged in providing the Consultancy Services shall be required to sign the Client’s relevant Policy Agreement. The Consultancy shall inform its representatives of these requirements”

14. Clause 15.2;

“It is not intended for there to be any mutuality of obligations between the Employment Business or the Client and the Contractor either during the Assignment or upon the termination of the same. The Employment Business is under no obligation to offer work outside the scope of this contract or offer future contracts to the Contractor and if it does make any such offer the Contractor is not obliged to accept it.”

15. Clause 17.2;

“The Consultancy shall ensure the provision of adequate Employer’s Liability Insurance, Public Liability Insurance and in any other suitable policies of insurance such as Professional Indemnity Insurance in respect of the Consultancy and its Consultants during an Assignment and shall provide a copy of the policy to the Employment Business”

16. Schedule:

“contractor/consultant name: Robert Lee

notice period: The notice period that the client may give during the first calendar month of the contract will be 1 week and thereafter the notice period will be four weeks. If the Consultant moves on to a new assignment, the notice period will revert to 1 week for the first calendar month and then four weeks thereafter.

At any point during the contract the Consultancy must give four weeks written notice to terminate the contract early.

However, until such time as all the Clients security checks are concluded the Consultancy agrees that this contract can be terminated by the Client with immediate effect and no compensation

Day rate: £ [] per DAY excluding VAT

minimum effort: This contract is for a minimum effort of consultancy of 7.5 hours a day (professional day), 5 days per week, with any additional hours or days being agreed and authorised between the Client and the Consultancy Company as and when required and chargeable on a pro-rata basis

special terms: authorisation of expenses must be sought from the Client in advance and in writing all by email or fax. When the consultancy is required to work in locations other than at the Client’s Swindon sites, the client will authorise expenses for travel, accommodation and any reasonable out-of-pocket expenses incurred as a consequence of the assignment, in accordance with the Client’s rules.

The consultancy agrees that its contractors will sign and abide by the clients Non-Disclosure Agreement and Security & Internet Usage Policies”

Part 2: The AxPO Contracts

17. Acceptance letter from AxPO to Nationwide dated 12 April 2013 was headed;
“Re: Robert Lee. We attach a copy of the Assignment Schedule which details the provision of your company staff to client”
18. Clause 1.1 Interpretation and definitions
“**Location(s):** the location(s) at which the client requires the services to be supplied, as set out in particulars 11 of the Assignment Schedule
Work Results: any item of work carried out and delivered pursuant to this Agreement as part of four arising out of the Services, such as any hardware, software, data schema or other technology any design or recommendation for the foregoing and when you prepared materials such as reports, spreadsheets and similar documents and any updates, additions or modifications to the same”
19. Clause 2;
“the Supplier shall:
2.1 Use reasonable care and skill in supplying the Services...
2.4 Procure that the Consultant at all time acts in a professional manner...
2.6 Comply with the Client’s IT Security policies and protocols when accessing all using the Client’s Systems (which it may only do with the consent of the Client) ...
2.8 not engage in any conduct detrimental to the interests of AxPO or the Client, including, without limitation, any conduct likely to bring taxpayer or the client into disrepute
2.9 give reasonable notice to AxPO and the Client of any period of Absence Entitlement (if applicable) during which the Supplier Will not be providing the Services
2.10 to be covered by appropriate professional indemnity insurance (with the minimum level of cover as may be specified in the Assignment Schedule) in connection with the Services and supply AxPO with evidence of cover on request...
2.12 Where necessary, provide at his own cost all such equipment and training for the Consultant as is reasonable for the adequate performance of the Services
20. Clause 3.1;
“Subject to the provisions of this Clause 3 and the Supplier performing the services in accordance with this agreement, Advantage xPO shall pay the supplier within seven calendar days upon receipt of authorised timesheets”
21. Clause 4.2;
“AxPO is not obliged to put the Supplier or the Consultant forward for consideration by the Client for the purposes of services nor is the Supplier or

the Consultant obliged to provide services to the Client beyond the termination or expiry of this Agreement”

22. Clause 6.1;

“The Supplier shall: ...

6.1.4 at the request of AxPO, execute and do all acts and things reasonably necessary to enable AxPO (or AxPO’s nominee) to apply for and obtain protection for the Work Results in any and all countries and vest title to the Work Results in AxPO (or AxPO’s nominee) absolutely...

6.1.6 At the direction of AxPO render all assistance within its/ his power to obtain and maintain such protection application or any extension of it

23. Clause 9.1;

“This agreement shall automatically expire at close of business on the End Date and maybe terminated prior to the End Date;

9.1.1 By AxPO by notice with immediate effect if (or, for the purpose of clause 9.1.1.7 only, by the same period of notice as AxPO receives from the client, less one day)....

9.1.1.6 in accordance with clause 10.2, a replacement consultant is not accepted by AxPO , or a replacement consultant is not available

9.1.1.7 For any reason the client terminates its corresponding agreement with AxPO in relation to the provision of the Services by the Supplier or requests that the Consultant be removed or replaced as consultant, and, for the avoidance of doubt, AxPO shall incur no liability for Losses in connection with any such termination one

24. Clause 10.1;

“The Supplier warrants...

10.1.5 that neither the Supplier nor the Consultant is prevented by any other agreement or arrangement or any restriction (including, without limitation a restriction in favour of any employment agency, employment business, or clients at either of them) from fulfilling in full their respective obligations under this Agreement...

25. Clause 10.2;

“The Supplier may from time to time and shall as soon as possible after being requested by AxPO (acting reasonably) so to do, without prejudice to the other provisions of this Agreement, offer a suitable replacement consultant (and a requirement by AxPO shall be deemed reasonable if made pursuant to notice by the Client of unsatisfactory performance of the Consultant) provided that;

10.2.1 AxPO shall be under no obligation to accept such replacement consultant it in its or the Client’s reasonable opinion such replacement is not wholly suitable (whether by reason of skills, experience, training, qualifications, authorisations or otherwise) ...”

10.2.2 if replacement consultant is accepted, the Supplier shall use all due diligence to ensure that handover arrangements are made...”

26. Clause 11;

“Where the Services are, at the request of AxPO, or the client, performed wholly or in material part at the premises and/or for the benefit of persons

other than the Client... then all references... to “the Client” shall be deemed to refer to such other person....”

27. Clause 14.4;

“This agreement is personal to the Supplier and it shall not be entitled to assign also contract is obligations or rights under this Agreement to any third party or (saved in accordance with clause 10.2) to procure that the services are performed by any person other than the Consultant....”

28. Appendix A to the AxPO contract, “confidentiality and intellectual property rights and undertaking” and signed by Mr Lee for the benefit of Nationwide provides;

“1. Any information in relation to your business which I obtain or acquire in any form during time spent in your business shall be kept strictly confidential and not disclosed to any person (including (if applicable) the agency arranging the engagement and members of my own staff) without your prior written consent...

3. I will not disclose the confidential information to third-party (including the agency) unless they are bound by similar non-disclosure obligations with you as these, or you have already given permission in writing for the disclosure....”

29. The Assignment Schedule [signed by Mr Lee on behalf of the appellant on each appointment] provides;

“....

4. Contractor’s staff: Robert Lee

5. Services: Project Manager

6. Rate: GBP []/Day...

11. Location/Client Contact: AA17 – Nationwide House/Charles Pilkington

12. Special conditions: no notice is applicable while the Criminality Checks are still outstanding. Once completed notice thereafter will be 4 weeks...

14. Termination provisions: 1 week in first 4 weeks thereafter 4 weeks...

30. The foot of the Assignment Schedule signed by Mr Lee on behalf of the Contractor (i.e. the appellant) provides;

“...On behalf of the Contractor referred to above, I hereby confirm that

Acceptance of the terms and conditions of this Assignment Schedule

Each member of staff supplied by the Contractor has agreed to abide by the terms and conditions of this agreement and has signed indeed in the same form as the attached document, copies of which are attached and

Each member of staff supplied by the Contractor is entitled to work at such location specified above and the Contractor has been supplied with evidence that such members of staff are supplied in accordance with the terms of this Assignment schedule at the right to work lawfully in UK”

31. The Deed of Obligation signed by Mr Lee for each contract, is headed;

“Contractor Staff - Deed of Obligation

Name of Contractor’s Staff: Robert Lee”

32. The Deed of Obligation then provides;

“For the benefit of the ...Client... I confirm that I have read the terms and conditions of the Assignment Schedule.... and I expressly agree to;

- carry out my duties with reasonable care and skill and the best of my ability and to comply with such reasonable requirements as may be notified to me from time to time by the Company or the Client;
- in all other respects to comply with all other lawful instructions issued to me by the Client
- to be bound by the terms of the Assignment Schedule as if for references to the Contractor my own name were substituted therefore”