Appeal number: FTC/57-59/2010

PAYE - National insurance contributions – liability to primary and secondary Class 1 National Insurance contributions – whether leaders taking Weight Watchers classes are employed earners, and Weight Watchers UK Ltd their employer

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

WEIGHT WATCHERS (UK) LTD and ORS **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: MR JUSTICE BRIGGS

Sitting in public at the Royal Courts of Justice, London WC1 on 4,5 October 2011

Mr Jonathan Peacock QC and Mr Stuart Ritchie, instructed by Hogan Lovells LLP, for the Appellants

Mr Adam Tolley, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal from the Decision of the First Tier Tribunal (Tax Chamber) (Judge David Williams and Judge Malachy Cornwell-Kelly) issued on 2 February 2010, whereby the FTT dismissed appeals against determinations by HMRC under Regulation 80 of the Income Tax (Pay as You Earn) Regulations 2003 and Section 8 of the Social Security Contributions (Transfer of Functions) Act 1999, relating respectively to the income tax ('PAYE') and employer's national insurance contributions ('NIC') alleged to be payable by Weight Watchers (UK) Limited ('WWUK') in respect of the activities of persons engaged (to use a neutral term) primarily to arrange and conduct meetings of consumers of WWUK's well-known programme for the assistance of those wishing to lose weight ('the Weight Watchers Programme'). Those determinations related to the period between April 2001 and April 2007. At the beginning of that period those persons were known as Lecturers, but from mid 2003 they were re-named Leaders. I shall refer to them as such.

2. Departing from many years' prior practice to the contrary, in connection with the tax affairs of WWUK and its Leaders, the Regulation 80 and Section 8 determinations proceeded upon an assumption that the remuneration paid by WWUK to its Leaders arose from the Leaders' work as WWUK's employees. Previously, WWUK and the Leaders had, by their conduct in relation to their tax affairs, presented the Leaders as self-employed or, in legal terminology, independent contractors.

3. The main issue before the FTT was whether the Leaders did indeed derive their remuneration from employment rather than the provision of services as independent contractors. Both WWUK and a number of individual Leaders challenged that assumption. Additionally, WWUK contended on its appeal to the FTT that the Regulation 80 determinations in the period from April 2001 until April 2003 were invalid because they were out of time. I will refer to the two issues raised before the FTT as the Main Issue and the Time Issue respectively.

4. In a detailed and closely reasoned decision ("the Decision") the FTT found for HMRC on both issues, and accordingly dismissed the appeals. WWUK has therefore pursued both issues by this appeal to the Upper Tribunal. It has been supported in this appeal by a smaller number of the original appellant Leaders, who have been content throughout to adopt WWUK's grounds of appeal, written and oral argument.

The Scope of this Appeal

5. This appeal is, of course, strictly limited to points of law. The Main Issue is, as was common ground, a mixed question of fact and law. The Time Issue turns on a purely legal question of statutory interpretation.

6. I was treated to an extended citation from authority on the scope of the Upper Tribunal's appellate jurisdiction in relation to mixed questions of fact and law, in particular from *Edwards v Bairstow* [1956] AC 14, *O'Kelly* v *Trusthouse Forte plc* [1983] ICR 728, *Brent London Borough Council v Fuller* [2011] ICR 806, *Grant v HM Land Registry* [2011] IRLR 748 and a useful extract from Harvey on Industrial Relations and Employment Law, paragraphs 1649 – 1651.

7. The principles for which *Edwards v Bairstow* is the leading authority are too well-known to call for detailed description, and counsel's competing submissions disclosed only differences of emphasis rather than any sharp dispute of principle. For present purposes it is sufficient to identify the following aspects of the limitation of appellate jurisdiction to points of law. First, the legal classification, as between contract of service and contract for services (and as between employee and independent contractor) is, once all the relevant facts have been established, ultimately a matter of law, just as is the question whether a relationship between a landowner and an occupant is one of landlord and tenant or licensor and licensee. Nonetheless, between the extreme examples of contract of service and contract for services inevitably lies an intermediate range, about which reasonable minds, all properly directed as to the relevant legal principles, may reach different conclusions on balance. This is apparent from the approval by Fox LJ in *O'Kelly v Trusthouse Forte* (supra), at page 758 B to E of the following passage in the judgment of Fletcher Moulton LJ in *Simmons v Heath Laundry Co.* [1910] 1 KB 543 at 549:

> "Some cases present no difficulty. For example, where the proprietor of a private boarding school engages ushers to teach the boys and to maintain discipline, it does not, in my opinion, admit of reasonable doubt that the contracts into which those ushers enter are 'contracts of service' within the Act. On the other hand it is in my mind equally clear that where a person goes to a music or singing master to take lessons it would be absurd to hold that the person giving the lessons is the servant of the person taking them in any sense of the word.
>
> The contract between them is a contract for services, but it is not a contract of service. Between these two extreme cases lie an infinite number of intermediate cases where the special circumstances point with greater or less force towards the one conclusion or the other, and in my opinion it is impossible to lay down any rule of law distinguishing the one from the other. It is a question of fact to be decided by all the circumstances of the case."

More recently a broadly equivalent approach has been developed, pursuant to which the balancing of competing factual considerations by an experienced tribunal for the purpose of deciding a question of classification should be afforded a proper degree of respect on appeal.

8. Secondly, where a tribunal assists the appellate body by expressly directing itself as to the applicable legal principles, and those directions disclose no error of law, then the appellant will have a difficult task in engaging the jurisdiction of an appellate body limited to considering points of law. Nonetheless, the appellate body must check whether the tribunal has in fact applied those stated principles in the process of analysis leading to its decision, looking at the decision in the round and without being fussy or pernickety: see per Mummery LJ in *Brent v Fuller* (supra) at paragraph 30:

> "Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the tribunal, but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."

9. Thirdly and finally, the appellate body must bear in mind that the tribunal's function in expressing its decision in writing is not "to refer to each and every matter in dispute before it but only such matters as are necessary to tell the parties why they have won or lost" see Elias LJ, citing from *Meek v City of Birmingham District Council* [1987] IRLR 250, in *Grant v HM Land Registry* (supra) at para 32.

The Time Issue

10. Regulation 80 applies, (pursuant to its paragraph (1)) if it appears to HMRC that there may be tax payable for a tax year under Regulation 68 (i.e. under the PAYE regime) by an employer which has neither (a) been paid to the Inland Revenue, nor (b) been certified by the Inland Revenue under Regulations 76 to 79. By paragraph (2), HMRC may in such circumstances determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.

11. By paragraph (5) it is provided that a determination under Regulation 80 is subject (inter alia) to Part 4 of the Taxes Management Act 1970 as if

> "(a) the determination were an assessment,
>
> (b)…
>
> and those Parts of that Act apply accordingly with any necessary modifications."

12. For present purposes the relevant parts of Part IV of the TMA are ss. 29 and 34. Section 34 (1) provides (subject to certain irrelevant exceptions) for a six

year time-limit for the making of an assessment. It was common ground before me that the effect of Regulation 80 (5) (a) is that this six year period applies to a Regulation 80 determination, because it is, for the purposes of the application of Part IV of the TMA, deemed to be an assessment.

13. Mr Jonathan Peacock QC submitted for WWUK both before the FTT and on this appeal that, in addition to the time limit imposed by s.34, Regulation 80 determinations were also subject to the satisfaction by HMRC of one or other of the two conditions referred to in s. 29(3) to (5) of the TMA, which provide as follows:

> "(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above-
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) … in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board-
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A] of this Act in respect of the relevant year of assessment; or
>
> (b) informed the taxpayer that he had completed his enquiries into that return,
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above."

It was common ground that the "time when an officer of the Board ceased to be entitled to give notice of his intention to inquire into the taxpayer's return" (referred to in sub-section (5)(a)) was one year from the submission of the self-assessment return under s.8 or 8A of the TMA.

14. Mr Peacock's submission was that, for the purposes of applying Part IV of the TMA as required by Regulation 80(5), it was necessary to treat the employer's

PAYE return as if it were a taxpayer's self-assessment return under s.8 or 8A of the TMA, so as to make the s.29(3) to (5) conditions intelligible in the parallel universe contemplated by Regulation 80, and so as to start the one year period running.

15. The FTT dismissed this submission. At para 38 of the Decision it concluded that Mr Peacock's argument involved treating the Regulation 80 determination as if it had been made pursuant to the particular power under s.29 to make what is generally known as a discovery assessment after the delivery of a self-assessment return by a taxpayer.

16. I also consider that Mr Peacock's submission should be rejected. I would prefer to express my reasoning a little differently from that of the FTT, as follows. Section 29(3) of the TMA only imposes the two conditions to an assessment where there has been delivered a self-assessment tax return under s.8 or 8A. As Mr Adam Tolley for HMRC submitted, those conditions are tailored to self-assessment returns so as to provide a qualified degree of comfort to honest taxpayers that their own assessment will not be disturbed after one year in circumstances where the information supplied by the taxpayer was reasonably sufficient to provide disclosure of the relevant facts to HMRC. To apply those conditions to a Regulation 80 assessment would as Mr Peacock conceded involve reading into Regulation 80 a requirement that the employer's PAYE return should be deemed to be a self-assessment tax return for the purposes of Part IV of the TMA.

17. I can see no basis for implying such a deeming provision into Regulation 80. It would have the effect of imposing conditions for a Regulation 80 determination of a type which were not designed for that purpose, in addition to the general six year time limit which, as counsel both accepted, clearly was to be applied from s.34. In my judgment Regulation 80(5) contains a specific, carefully drafted deeming provision in sub-para (a) which is only that the determination itself is to be treated as if it were an assessment. Mr Peacock attempted to squeeze the necessary additional implied deeming provision within the general language in Regulation 80(5) "and those Parts of that Act apply accordingly with any necessary modifications." I do not consider that language to be appropriate for the purpose. It invites appropriate modification of Part IV of the TMA, rather than the implication of an additional deeming provision into Regulation 80 itself.

18. The result is that, on the Time Issue, this appeal fails.

The Main Issue

19. HMRC's determinations under Regulation 80 proceeded on the basis that, within the meaning of the provision now to be found in s.4(1)(a) of the Income Tax (Earnings and Pensions) Act 2003, Leaders engaged by WWUK to conduct meetings for the purposes of presenting the Weight Watchers Programme were being paid to do so pursuant to "employment under a contract of service". The act affords no further definition of that phrase, and it is common ground that recourse must be had to the common law's understanding of the meaning of employment, and of contract of service, and

in particular, the well established distinction between those concepts and self-employment, independent contractor and contract for services. It is convenient first to address the parties' submissions as to the applicable law, as to which there were again no sharp points of dispute, but a number of important differences of emphasis.

20. The essential tools for identifying an employment relationship are, and have for many years been, well settled. The tribunal must apply the three conditions set out by MacKenna J in *Ready Mixed Concrete (SE) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, at 515:

> "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 other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service"

The continuing authority of this succinct passage was re-confirmed as recently as this year by the Supreme Court in *Autoclenz Ltd v Belcher & ors* [2011] IRLR 820, after the issue of the Decision by the FTT.

This appeal requires me to say a little more about each of MacKenna J's three conditions but, before leaving *Autoclenz Ltd v Belcher*, it is necessary to note that the Supreme Court also resolved an issue which had emerged in previous decisions about whether in the employment context the court was constrained by an apparently complete written contract to conclude that its terms represented the true agreement, unless the application of the traditional doctrine of sham (which required proof that both parties intended the written contract to paint a false picture) permitted a different conclusion. The Supreme Court held that no such constraint is rigidly to be implied in the employment context because of the normally superior bargaining position of the employer, and its consequential ability to dictate the terms to be included in the written contract: see per Lord Clarke at paras 20 – 35. In passing, he approved the following passage in the judgment of Elias J in *Consistent Group Ltd v Kalwak* [2007] IRLR 560, at paras 57 – 59:

> "57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p.697)
>
> "Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so."

> 58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.
>
> 59. … Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance …"

21. Lord Clarke concluded, at para 35 as follows:

> "So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."

Mutuality of Obligation

22. The first of MacKenna J's three conditions is commonly labelled mutuality of obligation. In any particular case it may serve one or both of two distinct purposes. The first is to determine whether there is a contractual relationship at all between the relevant parties. This is of particular importance in three cornered or triangular cases, for example where the work of the alleged employee is provided by an employment agency to one of its corporate customers: see for example *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471, where, in the context of such a triangular example, Elias J said, at para 11 that:

> "The significance of mutuality is that it demonstrates whether there is a contract in existence at all."

23. There are however numerous cases (and the present is one of them) where there is no doubt that the relevant parties had a contractual relationship with each other, but the question is whether the mutual obligations are sufficiently work-related. That is a central issue in the present appeal.

24. MacKenna J's original formulation of the mutuality of obligation condition was that it was necessary to show that the worker agreed to "provide his own work and skill in the performance of some service for his master". He added that:

> "Freedom to do a job either by one's own hands or by another's is inconsistent with the contract of service, although a limited or occasional power of delegation may not be".

25. In *Cable & Wireless plc v Muscat* [2006] IRLR 354, at para 32 Smith LJ said that:

> "In the context of statutory employment rights, such as those now granted by the Employment Rights Act 1996, it has been said on more than one occasion that 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."

But in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, Langstaff J said, at para 55 (in the Employment Appeal Tribunal), referring to the mutuality of obligation condition, that:

> "It does not deprive an over-riding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it."

26. In *James v Greenwich London Borough Council* [2008] ICR 545, at para 45 (in the Court of Appeal) Mummery LJ said that:

> "The mutuality point is important in deciding whether a contract, which has been concluded between the parties, is a contract of employment or some other kind of employment."

27. I have thus far been referring to authorities defining the type of mutual obligations necessary to constitute the irreducible minimum for the purposes of this first condition. In *Clark v Oxfordshire Health Authority* [1998] IRLR 125, in the Court of Appeal, it was held that the requisite mutuality of obligation must subsist "over the entire duration of the relevant period": see per Sir Christopher Slade at para 22. In its context, the reference in the passage quoted above to 'the relevant period' meant the period of the existence of the contract alleged to amount to a contract of employment. In that case the respondent worked for the appellant health authority as a staff nurse in its 'nurse bank' which was a list of nurses who had no fixed or regular hours of work but to whom the authority offered work from time to time when an appropriate temporary vacancy occurred at one of its hospitals. Under the global contract between the authority and its nurse bank nurses the authority was under no obligation to provide, and the nurses under no obligation to accept, work. There was not therefore the requisite minimum mutuality of obligation during the entirety of the global contract: see per Sir Christopher Slade at para 41.

28. Nevertheless the Court of Appeal ordered to be remitted to the Industrial Tribunal the question whether there might nonetheless have been qualifying contracts of employment during periods when the respondent nurse was actually working in one of the authority's hospitals pursuant to which there was the requisite minimum mutuality of work-related obligation.

29. *Clark v Oxfordshire Health Authority* is by no means the only case in which difficult problems of analysis may be thrown up by contractual arrangements for the provision of work on a casual or other discontinuous basis. Sometimes, as in *Carmichael v National Power plc* [1999] ICR 1226, the question is whether a contract of employment subsists during the gaps between periods of casual work. Sometimes, as in the present case, the question is whether a contract of employment or series of event-specific contracts of employment subsist during periods when casual work is being carried out, in which the absence of continuing employment in the gaps between periods of work is or may be irrelevant.

30. Contractual arrangements for discontinuous work may, at least in theory, fall into at least three categories. The first consists of a single over-arching or umbrella contract containing all the necessary provisions, with no separate contracts for each period (or piece) of work. The second consists of a series of discrete contracts, one for each period of work, but no over-arching or umbrella contract. The third, hybrid, class consists of an over-arching contract in relation to certain matters, supplemented by discrete contracts for each period of work. In this hybrid class, it may be (and is, in the present case) sufficient if either the over-arching contract or the discrete contracts are contracts of employment, provided that any contract or contracts of employment thus identified sufficiently resolve the question in dispute. Where, as here, the question is whether the PAYE regime and the applicable national insurance regime apply to the work done by the Leaders, it is clearly sufficient if there is identified either a single over-arching contract of employment or a series of discrete contracts of employment which, together, cover all the periods during which the Leader's work is carried out.

31. In cases where reliance is placed on discrete contracts for periods of work it is in my judgment still necessary to show that the requisite irreducible minimum of mutual work-related obligation subsists throughout each relevant discrete contract, not merely during the potentially shorter period when the contracted work is actually being done. I consider that requirement as clearly arising from the analysis in *Clark v Oxfordshire Health Authority* (supra). In a case where the discrete contract is made on the day when (say) a month's work starts and ends when the work ends, this causes no difficulty. But in other cases, including the present, the discrete contract may itself be made for a series of separate events, such as a series of one hour monthly or weekly meetings. The discrete contract may itself last for the whole period of the series, which may be for as long as a year. In such cases I consider that Sir Christopher Slade's 'relevant period' during which the mutuality of obligation must subsist is the whole of the period of the discrete contract.

32. The analysis of mutuality of obligation not infrequently focuses upon the presence of what have come to be known as substitution clauses. In the

present appeal, as will appear, the existence of such a clause underlies a main issue between the parties. Substitution clauses may affect the question whether there is a contract of employment in two ways. First, the right to substitute may be so framed as to enable the person promising to provide the work to fulfil that promise wholly or substantially by arranging for another person to do it on his behalf. If so, that is fatal to the requirement that the worker's obligation is one of personal service: see for example *Express & Echo Publications v Tanton* [1999] IRLR 367, in which the contracting driver was, if unable or unwilling to drive himself, entitled on any occasion, if he wished, to provide another suitably qualified person to do the work at his expense. He was, plainly, delivering the promised work by another person, and being paid for it himself.

33. At the other end of the spectrum, contracts for work frequently provide that if the worker is for some good reason unable to work, he or she may arrange for a person approved by the employer to do it, not as a delegate but under a replacement contract for that particular work assignment made directly between the employer and the substituted person. In *MacFarlane v Glasgow City Council* [2001] IRLR 7, a qualified gymnastic instructor was entitled, if unable to take a particular class, to arrange for a replacement from a register of coaches retained by the Council, upon the basis that the replacement would be paid for taking the class directly by the Council, rather than by the originally appointed instructor. The Employment Appeal Tribunal had no difficulty in concluding, distinguishing *Tanton*, that this provision was not necessarily inconsistent with a contract of employment between the Council and the instructor.

34. The true distinction between the two types of case is that in the former the contracting party is performing his obligation by providing another person to do the work whereas in the latter the contracting party is relying upon a qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he finds a substitute to contract directly with the employer to do the work instead.

35. The second possible relevance of substitution clauses is that, even if the clause is of the latter type, so that the substitute is not performing the contractor's obligation, his right to avoid doing any particular piece of work may be so broadly stated as to be destructive of any recognisable obligation to work. Mr Peacock submitted that the relevant distinction was between clauses providing for substitution only where the contractor was unable to work, and clauses permitting substitution wherever the contractor was unwilling to work, relying upon *Tanton* and *MacFarlane* as illustrative of that distinction.

36. I am not persuaded that that is the relevant distinction. It is, in the real world, unrealistically rigid. Take the example of a teacher who is, otherwise, obviously an employee, but whose contract permits her to absent herself, and find a replacement to be engaged for that purpose by her school where, although able to work, she would for understandable reasons rather attend a wedding, or funeral, of a close relative. It would be absurd to treat that sensible provision as incompatible with a contract of employment.

37. In such cases the real question is in my judgment whether the ambit of the substitution clause, purposively 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. That was indeed held to be the true construction of the relevant clause in *Tanton.*

Control

38. The only legal issue argued at any length on this appeal under this heading was the extent to which the presence or absence of the requisite control over the worker was decisive of the question whether he or she was an employee rather than an independent contractor. In *Narich pty Ltd v The Commissioner of Pay-Roll Tax* [1984] ICR 286 the Privy Council held, on appeal, from the Supreme Court of New South Wales at page 291 C – D:

> "While all relevant terms of the contract must be regarded, the most important, and in most cases the decisive, criterion for determining the relationship between the parties is the extent to which the person, whose status as employee or independent contractor is an issue, is under the direction and control of the other party to the contract with regard to the manner in which he does his work under it".

39. More recently in *Stephenson v Delphi Diesel* (supra), at para 11, Elias J said that:

> "The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract."

By way of apparent contrast, MacKenna J summarised his observations about control, at page 516G to 517B as follows:

> "An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control."

The judge had, earlier, given examples of this point by reference to a building contract and a contract for the carriage of goods, both of which placed the contractor to a large extent under the control of the other party to the contract, but without making either contract a contract of employment.

40. Mr Peacock submitted that both the Privy Council in *Narich*, Elias J in *Stephenson* and the FTT in placing heavy reliance upon those two authorities, went astray in over-emphasising the role played by the control test in the

classification of a contract as one of employment. In particular, he submitted that the FTT was thereby led into a failure properly to conduct the third of MacKenna J's tests, namely to decide whether, having regard to all its terms, the contract was truly one of employment. I shall address that submission in due course, but it is convenient at this stage to address the question as one of legal principle.

41. There is in my judgment no real tension, let alone incompatibility, between *Ready Mixed Concrete* on the one hand, and *Narich* and *Stephenson* on the other. MacKenna J described the third condition at [1968] 2QB 497, 516 as a negative condition. At page 515 he had summarised it as a condition that:

> "the other provisions of the contract are consistent with its being a contract of service."

Taken together, those two parts of his description mean that the substance of the third condition is that the terms of the contract, taken as a whole, should not be inconsistent with it being a contract of service. The first, second and fifth examples of the application of the third condition which he gives on page 516, and the passage on page 517 which I have already cited fortify that conclusion.

42. Putting it more broadly, where it is shown in relation to a particular contract that there exists both the requisite mutuality of work-related obligation and the requisite degree of control, then it will prima facie be a contract of employment unless, viewed as a whole, there is something about its terms which places it in some different category. The judge does not, after finding that the first two conditions are satisfied, approach the remaining condition from an evenly balanced starting point, looking to weigh the provisions of the contract to find which predominate, but rather for a review of the whole of the terms for the purpose of ensuring that there is nothing which points away from the prima facie affirmative conclusion reached as the result of satisfaction of the first two conditions.

43. Viewed in that light, I consider that the observations in *Narich* and *Stephenson* to which I have referred about the importance of the control test are not so much statements of legal principle, but common-sense observations about what is usually, although of course not invariably, decisive.

The Facts

44. WWUK is a wholly-owned subsidiary of Weight Watchers International Inc., a corporation based in the USA carrying on the Weight Watchers' Programme both there and, through subsidiaries and franchisees, in many countries throughout the world. Although the Programme is also delivered via the internet, the present appeal is only concerned with the circumstances of its delivery by Leaders at meetings within the UK.

45. Apart from its headquarters staff, WWUK administers its business in the UK through regional and area sales managers ("RSMs" and "ASMs"). ASMs are WWUK's main point of regular contact with its Leaders. Its customers are

(perhaps not entirely accurately) called members. I will for convenience refer to them as such. WWUK imposes certain age and health limits upon membership.

46. A central feature of WWUK's business method is that it seeks to encourage and assist its members to lose weight not merely by advocating a dietary and/or exercise regime to be followed by members privately, but also by encouraging them regularly to attend periodic meetings led by a Leader and attended also by other members. Those meetings consist of three principal elements:

> (1) A formal and confidential weighing of each member on a specially calibrated set of scales with the recording of a formal record of the member's weight.
>
> (2) A plenary session led by a Leader after completion of the individual weighing that may be or include a presentation, lecture, demonstration, discussion or seminar.
>
> (3) The provision of free leaflets and specialist weight-loss leaflets and literature together with the sale of merchandise including both literature and food products at prices determined by WWUK.

47. All Leaders are recruited by WWUK from among its successful members. By 'successful' I mean members who have both achieved their target weight and maintained it for the requisite period. They are then trained in the presentation of the Weight Watchers Programme pursuant to a standard form written agreement entitled Memorandum Of Agreement For Student Leaders ("the MOA"). It is set out in full in para 77 of the Decision.

48. Clause 1 of the MOA sets out WWUK's training obligations. Clause 2 consists of a confidentiality undertaking by the student Leader together with a promise to pay (then) £50 towards the cost of training. Clause 3 consists of a mixture of confidentiality and non-solicitation provisions. Clause 4 consists of a restrictive covenant prohibiting the Leader from holding lectures, seminars or group meetings concerned with weight reduction or weight control within a two mile radius of the last meeting conducted by the Leader for WWUK, and for six months thereafter.

49. Clause 5 makes further provision as to WWUK's continuing property in all documents and other materials supplied to the Leader, and in any underlying intellectual property.

50. Clause 6 provides as follows:

> "If the Student shall, following his/her course of instruction and training, qualify as a Weight Watchers Leader, and shall thereafter practice as such, he/she will at all times abide by the conditions for the time being in force governing such practice.

In such event, his/her Area Service Manager shall hold regular meetings at which he/she will: -

(i) be informed of any improvements to the Weight Watchers Programme

(ii) receive further training relating to the Weight Watchers Programme, and

(iii) be assisted with the maintenance of his/her Goal Weight and he/she shall use his/her best endeavours to attend such meetings."

51. The 'conditions for the time being in force governing such practice' referred to in Clause 6 of the MOA were, at least after mid-2003, in the form entitled 'Conditions Relating To Weight Watchers Leaders' which, again, the Tribunal set out, not quite in full, at para 78 of the Decision. I shall refer to them as "the Conditions". Prior to mid-2003 there was in force an earlier version of the Conditions, referring to Leaders as Lecturers, which did not otherwise differ from the Conditions in any material respect.

52. The Conditions are expressed to govern the relationship between WWUK and any Leader engaged to conduct Weight Watchers meetings. Clause 1 provides that:

> "Weight Watchers shall retain the Leader for the purpose of presenting the Weight Watchers Programme."

53. Clause 2 provides for the agreement between WWUK and any Leader to be terminable by either party on notice. Clause 3 provides that:

> "During the continuance of this Agreement the Leader shall devote such of his/her attention and abilities to the business of Weight Watchers as is necessary for the proper performance of his/her services hereunder. Save as aforesaid, the Leader is free at his/her discretion to devote as much or as little time to Weight Watchers as he/she chooses."

54. Clause 4 makes provision for the Leader to be paid for taking meetings a commission calculated in accordance with a fees scale in force from time to time and to receive reimbursement of agreed expenses. The evidence showed that the commission was proportionate to the number of members attending any given meeting.

55. Clause 5 described the Leader, during the subsistence of the agreement, as an independent contractor and not the servant of Weight Watchers and required her to discharge national insurance and income tax liabilities herself.

56. Clause 6 provides that:

> "The Leader shall, in his/her discretion fix the time, date and place of any Weight Watchers meetings as he/she agrees to

> take. All arrangements for the hire of halls or other meeting places require specific approval from the Area Service Manager. Such arrangements will be in the name of Weight Watchers who will be responsible for paying all hiring charges."

57. Clause 7 made provision for Leaders to retain and pay (from money otherwise belonging to Weight Watchers rather than the Leader) clerks and weighers, who are required to be members of Weight Watchers. Clause 8 provides that:

> "Subject to Clause 1 the Leader has an absolute discretion as to how any particular class is to be conducted."

58. Clause 9 makes provision for Weight Watchers to provide classroom and advertising material, retaining ownership of it unless appropriately given to members.

59. Clause 10 is of central importance and provides as follows:

> "If the Leader does not propose to take any particular meetings on any particular occasion and is unable to find a suitably qualified replacement, Weight Watchers will if so requested by the Leader, attempt to find such replacement and for this purpose the Leader will give the Area Service Manager as much prior notice as possible."

This is the substitution clause to which I have already referred.

60. Clause 11 makes provision for the Leader to collect membership and other fees from members in accordance with applicable fee scales and to remit them to Weight Watchers subject to deduction of the Leader's commission and expenses. Clauses 12 and 13 contain, respectively, restricted covenant (persisting while the Leader continues to be a Leader), and a confidentiality agreement broadly similar to that in the MOA.

61. Clause 14 requires both parties to act at all times with each other in the utmost good faith so as to promote each other's best interests. It includes an obligation on Weight Watchers to assist the Leader in advertising and promoting meetings and, where appropriate, to refer all enquiries received by Weight Watchers from potential attendees of the Leader's meetings to the Leader.

62. Clause 15 requires the Leader to maintain his/her appropriate weight at all times, as determined in accordance with Weight Watchers. Clause 16 makes provision for the ASM to attend classes conducted by the Leader to assist in the maintenance of the quality of the presentation of the Weight Watchers Programme, and to assist and advise the Leader on the conduct of classes.

63. Clause 17 provides that:

> "These conditions shall be capable of being varied only by supplemental agreement or memorandum in writing signed by or on behalf of Weight Watchers and the Leader."

64. Finally, Clause 18 preserves the continuing effect of the confidentiality obligations in the MOA.

65. The FTT identified one other source of written terms of the contract or contracts between WWUK and its Leaders. This consisted of periodically updated Policy Booklets, which contained some provisions which the FTT described as mandatory rather than merely aspirational, in particular in connection with the promotion, sale and storage of WWUK products at meetings and (in relation to storage) between meetings. In substance, Leaders held such stock on sale or return and were entitled to retain a 10% commission on any sales of stock to members.

66. In addition, the Policy Booklets contained other mandatory rather than aspirational provisions, for example about the qualifying age and other restrictions on membership which the Leaders were required to enforce which, without being set out in full in the Decision, the FTT clearly regarded as part of the contractual relationship between WWUK and its Leaders, notwithstanding the literal meaning of Condition 17.

67. The FTT heard a substantial body of witness evidence about the way in which, in practice, WWUK and its Leaders conducted their mutual relationship. The FTT were satisfied both as to the general reliability of all that witness evidence, and as to the genuineness of the belief of those witnesses who were themselves Leaders that they were independent contractors rather than employees. Nonetheless, the FTT noted (and this is not challenged on appeal) that documentary evidence suggested that some other Leaders held the opposite view.

68. The FTT concluded (and this is also not challenged) that the terms of the contractual relationship between WWUK and each of its Leaders were for the most part, but not entirely, set out in the documents to which I have referred, and that none of the provisions of those documents could properly be described as sham in the conventional sense.

69. They found that meetings were, in practice, branded and advertised as Weight Watchers meetings, that, typically, they took place in locations such as village or church halls or rooms rented for the occasion, rather than in any dedicated accommodation provided by Weight Watchers, and that meetings were, in general, advertised locally and programmed for a maximum of one hour.

70. The evidence showed that Leaders typically conducted between one and twelve meetings per week with an average of about 3.6, and that they were encouraged, albeit not obliged, to take not less than two meetings per week. The FTT found that, typically, a series of meetings would be arranged between a Leader and Weight Watchers to take place on a weekly basis at a particular venue for a year, pursuant to arrangements for the hire by Weight Watchers of

appropriate space in halls and rooms pursuant to Condition 6, as a result of arrangements agreed between a Leader and her ASM.

The FTT's Analysis

71. The FTT concluded that although there was a continuous contractual relationship between WWUK and each Leader under an over-arching or umbrella contract, each meeting or series of meetings was conducted pursuant to a specific contract which incorporated, to the extent applicable, the terms of the umbrella contract: see paras 102 and 118 of the Decision.

72. The FTT concluded that the umbrella contract dealt with matters additional to the taking of meetings, such as the sale of WWUK merchandise, and included some obligations (confidentiality, restrictive covenants and storage of merchandise between meetings) which affected Leaders between meetings rather than merely during them. The FTT found that the terms of the umbrella contract and of the meeting-specific contracts were to be found not merely in the MOA and Conditions, but also in the mandatory provisions of the Policy Booklets to which I have referred: see para 119 of the Decision.

73. It was common ground before the FTT that the relationship between WWUK and its Leaders was contractual. The FTT found, in addition, that there was sufficient mutuality of obligation between WWUK and each Leader in the meeting-specific contracts to satisfy the first of the *Ready Mixed Concrete* conditions. In relation to Clause 10 of the Conditions the FTT concluded that where a Leader found a substitute to take a particular meeting, the contract for that meeting was between the substitute and WWUK, and that it entirely replaced any contract between the original Leader and WWUK in relation to that meeting. It did not therefore permit the Leader to discharge her contractual obligations in relation to any meeting by the provision of another person's services: see in particular paras 101 and 102 of the Decision.

74. The FTT concluded that notwithstanding the discretion apparently conferred on Leaders both in relation to fixing meetings and in the conduct of meetings, by Conditions 6 and 8, the combined effect of the Conditions taken as a whole and the mandatory provisions of the Policy Booklets was that WWUK had sufficient control over the Leader's performance of her obligations to satisfy the second of the *Ready Mixed Concrete* contract conditions: see paras 120 to 121 of the Decision. This sufficient degree of control was manifested by the following factors:

    (a) WWUK's ability to prevent a Leader from taking part in any rival weight control meetings, or from treating her work for WWUK as part of a more general business of her own, pursuant to Condition 12.

    (b) The utmost good faith requirement in Condition 14.

    (c) The requirement that a Leader maintain the weight prescribed by WWUK pursuant to Condition 15.

(d) The obligation in Condition 1 to deliver the Weight Watchers Programme and nothing else.

(e) The mandatory provisions of the Policy Booklet.

(f) The power of WWUK to stop a Leader acting as a Leader at all in the future, without having to show cause, coupled with the effect of the confidentiality provisions and restrictive covenants in preventing the Leader gaining any enduring business advantage thereafter from her efforts as such.

(g) The power of WWUK to prevent a Leader from taking any particular meeting.

(h) The control exercised by WWUK over the identity of persons capable of qualifying as members and therefore attending meetings.

Finally, in relation to the third of the *Ready Mixed Concrete* conditions the FTT concluded as follows, at para 122 of the Decision:

> "Taking all these factors together, but putting particular weight on its analysis that a Leader must provide her personal service in running a meeting to gain any contractual advantage from WW, on the requirement that she deliver the WW Programme and only the WW Programme at a meeting, and on the control WW has over the existence of any meeting and who may be a member of that meeting, the tribunal finds that on balance the terms and conditions of the contractual relationship between WW and its Leaders are characteristic of contracts of service."

The Grounds of Appeal

75. By its Notice of Appeal WWUK advanced a wide range of challenges to the FTT's Decision. In their helpful and detailed skeleton argument, Mr Peacock and Mr Stuart Ritchie sought to distil them under six headings. In the light of Mr Peacock's oral submissions, they may be conveniently addressed under four headings, with each of which I shall deal in turn.

Defective Contractual Analysis

76. Mr Peacock submitted that the FTT failed to get to the heart of the precise analysis of the contractual relationship between WWUK and its Leaders, failed to express any sufficiently clear or firm conclusions about it, and, to the extent that it did do so, got its conclusions wrong in law.

77. Mr Peacock drew my attention at the outset to what may be fairly described as a slightly tentative form of language used by the FTT in its conclusions about the contractual structure. At para 24 the FTT said:

> "This suggests most naturally that the Conditions are, or are part of, an umbrella framework agreement applied to specific meetings by a specific contract for that meeting or that series of meetings."

In para 118 the FTT said:

> "This suggests that the relationship is one that might be best approached as that of specific contracts for acting as a Leader for a particular meeting or meetings…"

78. Mr Peacock criticised the FTT for failing to spell out in full what were the precise terms of the typical meeting-specific contract, and for failing to decide whether there was, in addition, an over-arching or umbrella contract, and if so, to define its precise terms.

79. I am not persuaded by either of these submissions. They strike me as excessively concerned with pernickety linguistic criticism, rather than with the substance of the Decision. Reading the Decision as a whole, I consider it clear that the FTT concluded that, in relation to any specific meeting or series of meetings, Leaders conducted them pursuant to specific contracts for the taking of those meetings, rather than pursuant to any general umbrella agreement. Further, I am equally satisfied that the FTT concluded that, in addition to meeting-specific contracts, there was indeed an over-arching or umbrella contract between WWUK and each Leader, dealing in particular with obligations of Leaders affecting them otherwise than when taking meetings.

80. Recognising that I might so conclude, Mr Peacock submitted that any such findings were wrong in law as a matter of contractual analysis, inviting me to conclude that the facts as found pointed to the conclusion that, between WWUK and each Leader, there was only a single over-arching or umbrella contract, with no separate process of contracting for each meeting or series of meetings.

81. I reject that submission as well. In my judgment the FTT were not merely entitled but correct to conclude that there were meeting-specific contracts between WWUK and its Leaders. I consider that the key to that conclusion lies in Condition 6, which requires the Leader to obtain WWUK's specific approval (through her appropriate ASM) in relation to the fixing of the time, date and place of any meetings or series of meetings. Furthermore, the first sentence of Condition 6 refers expressly to that process being one which requires the Leader to agree to take any such meetings. It follows in my judgment that in relation to any particular meetings or series of meetings, the umbrella agreement constituted by the Conditions, the MOA and the Policy Booklets is no more than an agreement to agree, requiring a further and distinct contract-making process for the conduct of any particular meeting or (more usually) series of meetings. Condition 6 plainly places the initiative for concluding such meeting-specific contracts upon the Leader, who must propose the relevant timing, dating and venue of any meeting or series of meetings for WWUK's agreement.

82. I am equally un-persuaded by the submission that the FTT disabled itself from applying the *Ready Mixed Concrete* tests to the contracts thus identified by any lack of specificity as to their detailed terms. The FTT went to the trouble of setting out substantially the whole of the MOA and the Conditions as constituting the main terms of the meeting-specific agreements, incorporated on each occasion from the umbrella agreement, and sufficiently identified the applicable terms to be found in the Policy Booklets, both by reference to their subject matter and by reference to the general distinction between mandatory and aspirational provisions in those documents. It was in my view un-necessary for the FTT to go into further detail about terms for the purpose of explaining its conclusion that the meeting-specific contracts were contracts of employment.

Mutuality of Obligation

83. Mr Peacock's first submission under this heading was that the FTT simply under-rated the importance of this requirement, misdirecting itself by over-reliance upon *Narich Pty Ltd v The Commissioner of Payroll Tax* (supra), and its emphasis on the decisive nature of the control criterion.

84. The FTT certainly place considerable reliance upon the Privy Council's analysis in *Narich*, describing it in para 75 of the Decision as the closest guide to the relevant law drawn to its attention by the parties. *Narich* was, coincidentally, a case about the nature of the contractual relationship between an Australian franchisee of Weight Watchers Inc and its (then) Lecturers, and it is understandable in the circumstances why the FTT found it a useful analysis, relating as it did to comparable, albeit by no means identical, facts. At para 73 the FTT reminded itself of the need to avoid treating *Narich* as in any way indicative of the relevant facts of the present appeals.

85. I am not however persuaded that this understandable reliance upon *Narich* led the FTT into any error of law. First, it directed itself by reference to a detailed setting out of the three stage *Ready Mixed Concrete* conditions, at paras 64 – 67 of the Decision, noting at para 69 that counsel for both parties were agreed that MacKenna J's analysis was the starting point for the relevant law.

86. Secondly the FTT dealt at length with the implications upon mutuality of obligation arising from Condition 10, thereby addressing WWUK's main ground for submitting that the requisite mutuality of obligation was lacking. It is in my view clear from the Decision, read as a whole, that the FTT did not think that the mutuality of obligation condition could be by-passed in the light of the parties' common ground that the relationship between WWUK and its Leaders was contractual. It did not therefore misdirect itself by over-literal interpretation of Elias J's observation in *Stephenson v Delphi Diesel* (supra) in para 11 that "the significance of mutuality is that it determines whether there is a contract in existence at all."

87. The more serious question is whether the FTT's conclusion that the mutuality of obligation condition was satisfied involved an error of law. Mr Peacock submitted that even if, contrary to WWUK's primary case (which I have rejected) that there was only a single over-arching or umbrella contract, there

were specific contracts for each series of meetings, there was nonetheless an insufficiency of mutual obligation in them. The sheet anchor of his submission was Condition 10 which, he said, entitled a Leader simply not to turn up and take one or more in meetings which, pursuant to Condition 6 she had already agreed to take in a contractual discussion about dates, times and places with her ASM. Even after agreeing a series of meetings, Mr Peacock said that the Leader could simply decide not to conduct one or more or all of them, if she did not wish to do so. There was therefore no contractual obligation on the Leader to work, even after making an agreement relating to a series of meetings.

88. If the purposive interpretation called for by *Autoclenz v Belcher* (supra) is applied to the interpretation of Condition 10, viewed in the light of the whole of the contractual relationship between WWUK and its Leaders, I regard Mr Peacock's submission as a misinterpretation of that Condition. The language of Condition 10 does not set out expressly the circumstances in which a Leader is at liberty not to take a particular meeting. Rather, it assumes that there are or may be such circumstances so that, without breach of contract, the Leader may propose not to take a particular meeting. Since those circumstances are not confined to cases of inability to take the meeting, it may reasonably be inferred that a Leader may propose not to take a particular meeting due to circumstances falling short of inability, such as a family wedding or funeral, in which the Leader is for good reason unwilling to take that particular meeting. But such a proposal by no means leaves the Leader free of any work-related obligation to WWUK, either in relation to that meeting or the series of meetings which she has agreed to take.

89. First, in relation to the particular meeting, the Leader is by implication obliged first to try and find a suitably qualified replacement and secondly, if that fails, to request Weight Watchers' assistance by giving her ASM as much prior notice as possible. It is only when the replacement Leader has been found (by the original Leader or Weight Watchers) or in default, the particular meeting cancelled, that the original Leader's work-related obligations in relation to that meeting entirely cease.

90. Secondly, it is plain from the language of Condition 10 that where, as usual, a series of meetings has been agreed, a proposal by a Leader not to take a particular meeting leaves her obligation to take the remainder of the series intact. It is in my judgment absurd to suppose that a Leader could, because of Condition 10, first agree to conduct a series of meetings and then, without notice to Weight Watchers, simply fail to attend to take any of them, without a breach of contract.

91. The FTT did not conduct the analysis of Condition 10 which I have just described, and focused its own attention on the question whether a replacement Leader found either by the original Leader or WWUK would be the original Leader's delegate for the purposes of that meeting, so as to detract from the prima facie obligation of Leaders to provide personal service. The tribunal concluded, correctly in my judgment, that Clause 10 did not make the replacement Leader the original Leader's delegate, but gave rise to an entirely

new contract in relation to that particular meeting between WWUK and the replacement Leader.

92. Mr Peacock's essential point on Condition 10 was that the Leader's right to propose not to take a particular meeting was unfettered. For the reasons which I have given, it was not. It was fettered as a matter of implication by the need to show some good reason for proposing not to take a meeting, albeit a reason which might fall short of inability. It was further fettered by the continuing obligations to seek to find a suitably qualified replacement, to notify the ASM if unable to do so, so as to seek Weight Watchers' assistance, and to conduct all subsequent meetings in the series which had been agreed.

93. Accordingly, I have been able to detect no error of law in the FTT's analysis of the question whether the meeting-specific agreements between WWUK and its Leaders satisfied the mutuality of obligation condition. It is true that the FTT did not separately address the submission (made by HMRC and pursued on this appeal) that, in any event, the umbrella contract satisfied that condition. Since, as is common ground, the tax and national insurance consequences contended for by HMRC inevitably follow if the meeting-specific agreements constituted contracts of employment, it was unnecessary for the FTT, and is unnecessary for me, to decide that additional question.

Control

94. There were three strands to WWUK's challenge to the FTT's conclusion that the control condition was satisfied. The first was that the FTT misconstrued the combined effect of Conditions 1, 6 and 8, and thereby understated the degree of discretion afforded to Leaders, both in choosing the dates, times and places of meetings, and in the conduct of each meeting.

95. As to date, time and place, the FTT's analysis is at para 87 of the Decision. It begins by describing the discretion as to date, time and place as given, and then taken away again, by the requirement that all such arrangements require the approval of the ASM. It describes this as giving WWUK a "complete practical veto" on the Leader's proposals, but concludes that Leaders retain liberty to make provisional arrangements albeit without power to confirm them.

96. In my judgment the FTT's analysis is expressed in, perhaps, rather negative terms but it involves no material misconstruction of Condition 6. The obligation on a Leader to obtain specific approval from her ASM in relation to arrangements for the hire of halls or meeting places does in practice give WWUK the last word in relation to arrangements for the date, time and place of meetings. While it would have been more balanced for the FTT to have noted that one effect of Condition 6 was that, throughout, the Leader retains the initiative in making arrangements for the time, date and place of meetings, it was not a misinterpretation to conclude that ultimate control nonetheless lay with WWUK.

97. As for the conduct of meetings, the FTT's conclusions are to be found in paras 88 – 91 of the Decision, supplemented by the findings about the mandatory

effect of parts of the Policy Booklets in paras 111 – 115 and the observation in para 109 that, viewed as a whole, the scope for a Leader to personalise her style of conduct of meetings was broadly similar to that afforded to a schoolteacher when teaching to a set syllabus.

98. The FTT's conclusion on the question of interpretation of Condition 8 was that, viewed in the context of the contractual relationship as a whole, including the facts about the way it was habitually conducted, the reference in Condition 8 to and an "absolute discretion" as to the Leader's conduct of any particular meeting was not to be taken literally: see para 91 of the Decision. The Leader was contractually required to deliver the Weight Watchers Programme, to conduct individual weighing at each meeting and to comply with the mandatory provisions in the Policy Booklets. These imposed practical constraints on the Leader's discretion and WWUK's power to terminate the Leader's retainer at any time conferred a sufficient means for the assertion of ultimate control.

99. In my judgment this analysis involved no misconstruction of the Conditions. For the reasons which I have already given, the interpretation of contracts of this kind is to be conducted in a purposive manner which pays due regard to the practical realities of the relationship. I consider that the FTT's interpretation of the phrase "absolute discretion" in Condition 8 was correct. It was a label probably designed by lawyers to fortify the impression that Leaders were independent contractors which did not reflect the practical reality of the relationship, to be gathered from an appreciation of the contractual provisions as a whole, and the evidence about their typical implementation.

100. The second strand in WWUK's challenge on the issue of control was a submission by Mr Peacock that the FTT simply failed to address the evidence about control in sufficient detail. He referred me to the materials set out in paras 33–40 of WWUK's submission to the FTT on 'the Key Facts'. Mr Tolley for HMRC in his turn referred me to paras 41-79 of HMRC's written closing submissions. Each of those documents delved deeper into the factual material than did the FTT in its Decision, but my analysis of them did not begin to suggest that, in its Decision, the FTT had made any error of law in focusing its reasoning about the control condition on a substantially narrower body of relevant factual items.

101. It is the task of every judicial body to identify from among the materials presented to it those which warrant specific mention in the reasons for its decision. Its function is sufficiently to explain its reasoning rather than to deal expressly with every point at issue between the parties. In my judgment the FTT's analysis of the control issue was adequately detailed for the purposes of explaining its decision, and it by no means follows from its decision not expressly to mention matters referred to in submissions that it did not properly take them into account.

102. More particularly, nothing in the wider analysis of the 'Key Facts' by Mr Peacock on this appeal suggested that the FTT's analysis of the control condition, requiring as it did a balancing of factors pointing towards and away

from the vesting of substantial control in WWUK, was vitiated by any error of law.

103. The final strand in the appeal on the control issue consisted of certain specific criticisms of parts of the FTT's express analysis. The first was that it was wrong for the FTT to conclude that the requirement in Condition 15 for Leaders at all times to maintain their appropriate weight as determined by Weight Watchers was to be regarded as an aspect of control, but rather a qualification requirement of a type commonly to be found imposed on independent contractors. Furthermore, it was submitted that the evidence suggested that this Condition was not in fact enforced, and left by WWUK to the discretion of individual ASMs.

104. I reject this submission. In my judgment the FTT were entitled to include the weight maintenance requirement in Condition 15 as an aspect of WWUK's maintenance of control over its Leaders. The fact that the degree and method of implementation of this requirement may have been delegated by WWUK to individual ASMs (who were plainly WWUK's employees) does not detract from a conclusion that the enforcement of this Condition by ASMs was in substance a form of control by WWUK itself.

105. Mr Peacock also submitted that it was wrong for the FTT to regard the powers of termination of a Leader's retainer without showing cause as an aspect of its control over Leaders. His point was that control had to be analysed during the conduct of the relationship, rather than by reference to the circumstances in which the relationship might be brought to an end.

106. While I would accept the validity of this point as a general matter, it was not in my judgment an error of law for the FTT to pay regard to WWUK's ability to terminate the retainer without showing cause, as demonstrating that its apparent imposition of controls over the manner in which a Leader was to perform her duties was backed up, in the last resort, by a sufficiently effective sanction.

107. In the final analysis, the question whether any particular contractual relationship satisfies the control condition in *Ready Mixed Concrete* is a question of fact and degree which, save in relation to the risk of misinterpretation of particular contractual terms, is infertile ground for the identification of errors of law. The application of the control test is in my judgment a typical example of a multi-factorial analysis in the conduct of which an experienced tribunal is to be given substantial albeit not slavish respect on appeal. I am satisfied that the FTT's conclusion on the control issue involved no error of law, so that this aspect of WWUK's appeal is to be rejected.

The Third Condition

108. Mr Peacock's criticism under this heading was that, although reminding itself of the need to address the third condition, at para 67 of the Decision, and of the assistance to be gained from *Harvey on Industrial Relations and Employment Law* in addressing it, the FTT in fact failed to get to grips with it

at all. He submitted that there is not to be found in the Decision any, let alone any sufficient, weighing of the aspects of the meeting-specific contractual relationship between WWUK and its Leaders sufficient to constitute an assessment of the third condition.

109. It is fair comment that, if the FTT did in fact address the third condition, it expressed its conclusions about that exercise in very abbreviated terms. The only place in which the summary of that exercise may be found is in para 122 of the Decision, as cited above.

110. Mr Peacock submitted that this short paragraph could not possibly constitute the balancing of all relevant pros and cons which he described as being a requirement of the third condition. Para 122 merely identifies the main factors supportive of a conclusion that the third condition was satisfied, namely the requirement to provide personal service in running a meeting, the requirement to deliver the Weight Watchers Programme and nothing else, and WWUK's control over the existence and attendance by its members at meetings. There follows only a conclusion that "on balance" the relationship constituted a contract of employment.

111. If a detailed balancing exercise was what the third Condition invariably required, there would be considerable force in Mr Peacock's submissions. But, as I have already stated, the third condition is, as MacKenna J said, a negative condition, rather than necessarily a detailed balancing exercise. The essence of it is to check, no doubt from a full review of the contractual relationship as a whole, whether the prima facie indicators of employment constituted by mutuality of work-related obligation and control are over-ridden by some other relevant aspect of the relationship. In a case where there are no such overriding contra-indications it may frequently be sufficient for a tribunal simply to say that, and no more. There is no point in setting out all the other contractual provisions merely as the preface to a conclusion that none of them constitute a sufficient contra-indication to the existence of an employment contract.

112. In the present case, I consider it fair to conclude that the FTT did in fact carry out an overall review of the relationship, because of its statement in para 122 of the Decision that the conclusion had been reached "on balance". More importantly, Mr Peacock could not, despite my invitation, point to any other aspects of the relationship which came near to providing any sufficient contra-indication. He identified only two potential candidates.

113. The first was that, by comparison with RSMs and ASMs, Leaders were not integrated into WWUK's work force by career structures, the provision of benefits or arrangements for performance review, so that they looked less like employees than WWUK's other staff. In my judgment the fact that one group of a company's employees are less integrated into a typical modern employment structure than another group is of no significant weight towards a conclusion that the first group are not employees at all. It is, again, a matter of fact and degree.

114. His second specific point was that Leaders were exposed to the risk of financial loss in their conduct of meetings in a manner inconsistent with employment. This risk arose, he submitted, because although Leaders were entitled to reimbursement for some of the expenses incident to the conduct of a meeting, they might expend time, effort and even money in preparing for a particular meeting (for example by buying the ingredients necessary for the conduct of a cooking demonstration) for which the commission payable out of membership fees at that meeting, if very poorly attended, would be insufficient to recoup their expenditure. In response, Mr Tolley submitted that the risk of loss in such circumstances was never more than de minimis, and that Leaders were, in any event, under no contractual obligation to spend their own money in preparation for a meeting. In my judgment, for the reasons given by Mr Tolley, this point comes nowhere near being sufficient to disturb an 'on balance' conclusion that, taken as a whole, the Leaders were employees of WWUK rather than independent contractors.

Conclusion

115. Having thus rejected each aspect of WWUK's grounds of appeal against the FTT's Decision, it follows that the appeal must itself be dismissed.

Mr Justice Briggs

Upper Tribunal Judge

Release Date: