Neutral Citation: [2023] UKUT 83 (TCC)

Case Number: UT/2020/0089

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
Fetter Lane
London
EC4A 1NL

INCOME TAX AND NATIONAL INSURANCE – intermediaries legislation – IR35 – sections 48-61 ITEPA 2003 – personal service company – contract of service or contract for services – appeal dismissed

Heard on: 18 and 19 January 2023
Judgment date: 29 March 2023

Before

Mr Justice Mellor
Judge Jonathan Cannan

Between

RED WHITE AND GREEN LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Keith Gordon and Ximena Montes Manzano, Counsel, instructed by Alliotts LLP Chartered Accountants

For the Respondents: Adam Tolley KC and Christopher Stone, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against a decision of the FTT released on 21 February 2020 ("the Decision") in which it dismissed an appeal by the appellant, Red White and Green Limited. The appellant is a personal service company which contracts to provide the services of Mr Eamonn Holmes, a well-known television and radio presenter. The issues on the appeal concern what is known as the "intermediaries legislation", also known as IR35, contained in sections 48-61 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") and equivalent provisions in the Social Security Contributions (Intermediaries) Regulations 2000.

2. The Decision concerns tax years 2011-12 to 2014-15 during which the appellant supplied the services of Mr Holmes to ITV as a presenter of This Morning. HMRC issued determinations and notices to the appellant for those tax years on the basis that the intermediaries legislation was engaged. In broad terms, the intermediaries legislation applies where an individual ("the worker") personally performs services for another person ("the client"), pursuant to arrangements involving a third party ("the intermediary"). However, the provisions are only engaged where the circumstances are such that if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax and national insurance purposes as an employee of the client. This is what is generally known as "the hypothetical contract" or "the assumed contract".

3. In this case, Mr Holmes is the worker, ITV is the client and the appellant is the intermediary. The appellant provided the services of Mr Holmes to ITV pursuant to a series of contracts between the appellant and ITV.

4. The appellant appealed against the determinations and notices on the basis that the intermediaries legislation was not engaged. It contended that the circumstances were not such that if there had been a contract directly between ITV and Mr Holmes, Mr Holmes would have been regarded for income tax and national insurance purposes as an employee of the client. He would have been regarded as self-employed.

5. Following a detailed analysis, the FTT held on the basis of the facts as found that the intermediaries legislation was engaged because under the hypothetical contract Mr Holmes would have been an employee of ITV. The appellant appeals with permission of the FTT. It does not challenge any of the underlying findings of fact. However, it says that the FTT erred in law in determining that Mr Holmes would have been an employee of ITV pursuant to the hypothetical contract.

6. The issues on this appeal concern the FTT's approach to the question of whether Mr Holmes would have been an employee of ITV, under a contract of service, or whether he would have been providing his services as a self-employed person under a contract for services. The distinction between employment and self-employment arises in many contexts and it has been considered in a long line of authoritative decisions. In the context of the intermediaries legislation, there have been a number of recent decisions of the Upper Tribunal and the Court of Appeal in which the distinction has been considered in relation to television and radio presenters.

LEGISLATIVE FRAMEWORK

7. We need not set out the background to the intermediaries legislation which is well-rehearsed elsewhere. The parties agree that it is not necessary to distinguish the income tax provisions and the national insurance provisions, and like the FTT we shall focus on the income tax provisions. The key provision for present purposes is s 49 ITEPA 2003:

> (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"),
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that 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.
>
> ...
>
> (4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.

8. It has not been disputed that the conditions in s 49(1)(a) and (b) are both satisfied. The appeal is concerned with the FTT's conclusion pursuant to s 49(1)(c) that Mr Holmes would have been an employee of ITV. It is common ground that s 49(1)(c) should be approached by reference to a three-stage process recently described by the Court of Appeal in *HM Revenue & Customs v Atholl House Productions Limited* [2022] EWCA Civ 501 at [7]. That case concerned the television presenter Ms Kaye Adams and her personal service company, Atholl House Limited. The three stages were described as follows:

> (1) *Stage 1.* Find the terms of the actual contractual arrangements (between Atholl House and the BBC on the one hand and between Ms Adams and Atholl House on the other) and relevant circumstances within which Ms Adams worked.
>
> (2) *Stage 2.* Ascertain the terms of the "hypothetical contract" (between Ms Adams and the BBC) postulated by section 49(1)(c)(i) and the counterpart legislation as applicable for the purposes of NICs.
>
> (3) *Stage 3.* Consider whether the hypothetical contract would be a contract of employment.

9. The appellant on this appeal does not challenge the FTT's findings at stage 1 or stage 2.

10. It is also common ground that Stage 3 is to be determined by reference to the well-known three-stage approach outlined by MacKenna J in *Ready Mixed Concrete (South East) 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 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.

11. The first and second elements are generally described in the authorities as "mutuality of obligation" and "sufficiency of control". We shall refer to the third element as "the overall analysis".

THE DECISION

12. The FTT set out its approach to s 49(1)(c) and the issue of whether the assumed contract was a contract of service or a contract for services at [7] – [14] and [90] – [92]. There is no challenge on this appeal to the FTT's general approach to the issues. The FTT sets out what

appear to be its primary findings of fact at [17] – [89]. We say that, because in large parts the Decision simply recites the evidence of Mr Holmes. However, it does not appear that there was any real challenge to much of that evidence and no challenge is made to the FTT's findings of fact on this appeal. The evidence available to the FTT included the contracts themselves, the written and oral witness evidence of Mr Holmes, and minutes of a meeting between HMRC and various personnel at ITV at which Mr Holmes was not present.

13. The FTT went on to discuss the case law on mutuality, control and the overall analysis at [128] – [194] and the parties' submissions at [195] – [222]. The FTT stated its conclusions at [223] to the effect that there was sufficient mutuality of obligation and sufficient framework of control for a contract of employment. It then continued:

> 223. … On that basis and, having regard to all other relevant factors, my view is that overall, throughout all relevant tax years, the assumed relationship between ITV and Mr Holmes was one of an employment rather than self-employment.

14. The FTT set out reasons for its conclusions in relation to mutuality at [224] – [227], control at [228] – [255] and its overall analysis at [256] – [270].

15. What follows is our summary of what we take to be the FTT's findings of fact at [17] – [89] of the Decision.

16. The appellant was incorporated on 26 April 2001. Mr Holmes is the sole director and majority shareholder, his children owning the remaining shares.

17. Mr Holmes is a journalist and broadcaster. He is available to work for all print and broadcast outlets. He obtains engagements through his agent, or sometimes he is approached directly. His agent negotiates the terms of an engagement. In the period 2011 to 2015, Mr Holmes worked as a presenter on many projects including as a presenter on weekday editions of "Sunrise", a morning show from 6am to 9am on Sky News.

18. Mr Holmes started presenting This Morning from at least 2006 onwards. This Morning is a live, daily light entertainment programme broadcast mid-morning on ITV, with each programme lasting approximately 120 minutes. It features a mix of celebrity interviews, showbusiness news and topical discussions. There is more entertainment and less news on the Friday edition than on other weekdays.

19. During the relevant tax years, the appellant entered into four contracts with ITV for the provision of Mr Holmes' services as a presenter of This Morning. Each contract was for a period of approximately 1 year, with short gaps in between. The FTT found that the terms of the assumed contracts would be equivalent to the terms of the actual contracts, with any necessary adjustments to reflect the fact that under the assumed contract Mr Holmes would be the contracting party. The terms and effect of each assumed contract were broadly the same as follows:

> (1) Mr Holmes "shall render his Services… on an exclusive basis" during the specified period "or such other dates as may be agreed with the executive producer of the Programme..". The contract was for personal service by Mr Holmes and there was no provision for him to provide a substitute presenter. He was to provide his services as a first class presenter in full and willing cooperation with requests made by ITV in accordance with the agreement.
>
> (2) In the first agreement, Mr Holmes would provide his services on (a) every Friday during the term but excluding four specified Fridays and such Fridays in July as ITV may confirm, (b) every Monday to Thursday in the relevant weeks when he was not required to work on Friday, (c) subject to written confirmation by ITV, five dates in December

2011 and January 2012, and (d) such other dates and locations as notified to the appellant in advance by ITV "at our sole discretion".

(3) In the second, third and fourth contracts, Mr Holmes would provide his services (a) on a certain number of Fridays (except in weeks where he provided his services on Monday to Thursday in the relevant week), (b) where requested by ITV, at ITV's sole discretion, Monday to Thursday (inclusive) of certain weeks during the term, and (c) such other dates and locations as notified to the appellant in advance by ITV at ITV's sole discretion.

(4) It was understood and acknowledged that ITV may be required to change or reschedule the dates specified and Mr Holmes was to be "as flexible as possible" in this regard.

(5) Mr Holmes was to be available not only to carry out presenting in the studio, but also to attend a reasonable amount of filming sessions, production meetings and rehearsals, to provide creative input and to undertake certain promotional and public relations work from time to time. The promotional and public relations work was to be carried out as and when ITV might reasonably require and without any further payment.

(6) Mr Holmes would be entitled to a fixed fee for each show performed. Fees were payable on completion of each engagement, and ITV agreed to produce invoices on his behalf for payments due.

(7) Mr Holmes was entitled to certain additional benefits such as a car for travel to and from the studio, a selection of clothing, travel and hotel expenses when he was required to render services outside a 50-mile radius from Charing Cross, and any other expenses incurred in connection with the services subject to prior approval by ITV.

(8) Mr Holmes acknowledged that "[ITV] shall have absolute discretion and control over the editorial content of the Programme and to the Products of [Mr Holmes'] Services".

(9) Mr Holmes acknowledged and warranted that he would not enter into any professional or other commitment with any third party which might conflict with his obligations under the contracts.

(10) Mr Holmes would comply with ITV's health and safety guidelines and all rules and regulations of Ofcom.

(11) Mr Holmes was not to wear any branded clothing or accessories.

(12) Mr Holmes warranted that he had disclosed all commercial activities he was involved in at the time of signing the agreement, and would continue to disclose commercial activities entered into after the date of the contracts. He would not enter into any new commercial activities without the prior written consent of ITV, such approval not to be unreasonably withheld. The purpose of this term was for ITV to avoid conflict with their own commercial activities and possible reputational damage.

(13) There was an express statement that nothing in the agreement constituted Mr Holmes an employee of ITV.

(14) The contract could be terminated by ITV where Mr Holmes was in breach of any obligation, was unable personally to render the services and on giving four weeks written notice without having to specify any reason. In each case, Mr Holmes was entitled to payment of his fixed fees only in respect of services rendered prior to the date of termination.

20. Mr Holmes' role as a presenter is that of the "anchor", bringing his own stamp and interpretation to the programme. He co-presents with his wife, Ruth Langsford. He had "considerable autonomy" over the way in which he presented the programme, using his own presenting style and words. Due to his considerable experience and expertise, his views as to content often prevailed.

21. About two thirds of the Friday programme is prepared in advance, at a meeting held on a Wednesday. A brief is prepared, which is given to Mr Holmes on Thursday night. Mr Holmes is expected to have read the morning newspapers and to be up to date on breaking news. He brings his own expertise to bear as regards the brief, for example, he may ask for specific items to be checked or suggest clips. He may choose to ignore the research information provided. He does a lot of his own preparation.

22. Ultimately, ITV has the right to decide what guests will be interviewed on the programme and what topics to cover. It would be "career suicide" for Mr Holmes to disagree with ITV's decision about who should be interviewed. Mr Holmes might refuse to interview a guest, in which case the guest would be interviewed by his co-presenter. Matters such as this were dealt with collaboratively. ITV had the ultimate right of editorial control. It was necessary for ITV to have that control in order to comply with its obligations under the Ofcom code.

23. During the relevant period, Mr Holmes did not attend production meetings or rehearsals. He generally arrived at the studio half an hour before the show to be made up for the television lighting. He would travel between Sky News and ITV studios by car, and work in the car. The editor generally came into make-up for a brief discussion, and then he went on air at 11am. The editor would prefer Mr Holmes to get in 30 minutes earlier but he could not impose specific times. Mr Holmes was regarded as "self-sufficient" in his role, and more than any other presenter he would "do his own thing". During a show, the editor might intervene if Mr Holmes strayed into anything that might have legal repercussions.

24. After the show there is a "de-brief" with the producer and editor. The team discuss what could have been done better and give ideas for future programmes. Mr Holmes sometimes attended these meetings, and by and large wanted to be there.

25. In practice, Mr Holmes did not seek permission from ITV in relation to his other commercial activities. He would let ITV know what he was doing, but ITV did not regard him as requiring their permission. Their concern was commercial conflict, for example conflicts with programme sponsors and reputational damage.

26. Mr Holmes had other engagements apart from This Morning and Sunrise. He appeared on or presented BBC Songs of Praise, programmes on TalkSport Radio, numerous series on Channel 5, ITV's Good Morning Britain and Loose Women, various panel shows, Manchester United Television and a game show series for Fox TV in the USA. He also wrote columns for Best Magazine and the Daily Mirror.

27. Mr Holmes received significant income during the relevant period from endorsing and advertising the "Deed Poll" service.

28. The FTT found that it was not clear how Mr Holmes was engaged in relation to his work on Sunrise. In particular, whether he carried it out as a sole trader or through the appellant. It did however accept that Mr Holmes provided his services to Sky News through the appellant in 2013-14 and 2014-15. In 2011-12 and 2012-13 there was some suggestion that he provided his services directly to Sky News and was treated as a self-employed presenter. However, the FTT did not make any finding to that effect.

29. In relation to at least some of his work other than for ITV on This Morning, Mr Holmes declared significant income from self-employment on his tax returns for tax years 2011-12 to

2014-15. The profits from self-employment included on his tax returns in those tax years were between £169,371 and £348,286.

30. The FTT also made findings as to the proportion of the appellant's income represented by This Morning, Sunrise and other income. It produced a table at [45] with percentages as follows:

	This Morning	**Sunrise**	**Other Income**
2012	71.8	-	28.2
2013	72.8	-	27.2
2014	31.8	54.1	14.7
2015	18.6	80.0	1.6

31. The FTT noted that the Sunrise income may not have been income of the appellant in 2011-12 and 2012-13. It concluded as follows:

> 46. … If the income from Sunrise did not arise to RWG, its income from This Morning was never less than 68% of its total income from all sources. If the income from Sunrise is correctly included for the later two years, the income from This Morning was never less than 19% of RWG's total income.

32. Mr Holmes presented This Morning on between 45 and 92 weekdays per year over the relevant period, with 21 or 22 "weekend links" in 2011-12. He mainly presented the show on Fridays, but also on other weekdays on numerous occasions. The FTT also noted that Mr Holmes had been unable to work for a period in 2016, when he had a hip replacement operation, although this was after the relevant period.

THE GROUNDS OF APPEAL

33. There is no challenge on this appeal to the FTT's conclusion on mutuality. There is a challenge to the FTT's conclusion on control and its overall analysis. We can summarise the grounds on which the FTT granted permission to appeal as follows:

(1) The FTT erred in law in relation to control by failing to distinguish "editorial control", which is "how" a worker does the work, from other more important forms of control, in particular "what" work should be done by the worker.

(2) The FTT erred in law in its overall analysis because:

(a) It wrongly considered that its finding of sufficient mutuality of obligation and sufficient framework of control led to a presumption that there was a contract of employment.

(b) It wrongly disregarded certain factors in its overall consideration at this stage and failed to consider the whole picture.

34. The grounds of appeal also identify what are described as "specific mis-directions" in the Decision which the appellant says reinforce the other grounds. In so far as those alleged mis-directions were pursued before us, Mr Gordon addressed them as part of Grounds 1 and 2 and we shall do the same.

35. In an application dated 7 October 2022, the appellant applied to clarify the scope of its grounds of appeal, and in so far as necessary sought permission to amend the grounds. HMRC says that the appellant is seeking to raise new grounds of appeal which do not fall within the scope of the existing grounds and that permission to amend the grounds of appeal should be

refused. The appellant also seeks to adduce further evidence in support of its grounds of appeal. We shall deal with the application and the additional evidence when we address the separate grounds of appeal.

36. In approaching the grounds of appeal we acknowledge that we must not over-analyse the FTT's reasoning process; be hypercritical of the way in which the Decision is written; or focus too much on particular passages or turns of phrase to the neglect of the Decision read in the round (see Mummery LJ in *Brent LBC v Fuller* [2011] EWCA Civ 267).

37. We also take into account that there is limited scope to interfere with an evaluative judgment of the FTT. In *Quashie v Stringfellow Restaurants Limited [2012] EWCA Civ 1735* at [9], the Court of Appeal endorsed the following statement of principle:

> …The responsibility of determining and evaluating all the relevant admissible evidence (both documentary and otherwise) is that of the tribunal in the first instance; an appellate tribunal is entitled to interfere with the decision of that tribunal, that a contract of employment does or does not exist, only if it is satisfied that in its opinion no reasonable tribunal, properly directing itself on the relevant question of law, could have reached the conclusion under appeal, within the principles of *Edwards v Bairstow* [1956] AC 14.

GROUND 1 – THE FTT'S APPROACH TO CONTROL

38. The FTT summarised what it considered to be relevant in relation to control in the provisions of the hypothetical contracts at [225] and [228] as follows:

> 225. Under the assumed agreements (as based on the actual agreements (as set out at [23])), Mr Holmes was to provide his services to ITV on the specified days and, in the later agreements, such Mondays to Thursdays as ITV requested at its sole discretion and, in all agreements on "such other dates and locations as notified…. in advance by [ITV] at [its] sole discretion", in each case for a fixed fee per programme (and, in the case of the first agreement, a fixed fee per weekend recording link). It was stated that Mr Holmes understood and acknowledged that the necessities of production may require ITV to change and/or reschedule the dates specified and that he "shall be as flexible as possible in this regard". Where ITV cancelled any dates and were unable to reschedule for reasons other than Mr Holmes' unavailability (or for reasons set out in the termination provisions), he was entitled to payment in full for any cancelled dates. Mr Holmes said that insisting on payment in those circumstances would be disruptive. However, the fact that in practice, for the sake of maintaining a good working relationship, Mr Holmes may have decided not to enforce his contractual rights, does not detract from the existence of that right.
>
> 228. As regards control, to recap, the relevant provisions of the assumed agreements (in addition to those set out at [225]), as based on the actual agreements, are as follows:
>
> > (1) As set out in full at [23], [29] and [30], Mr Holmes services "as a first class presenter" were to be provided in full and willing cooperation with requests made…from time to time by the executive producer" including not only (a) appearing as a presenter in live or pre-recorded episodes of This Morning based in the studio (and, in respect of the first agreement, recording additional links for the weekend episodes of This Morning) but also (b) in attending production meetings and rehearsals, providing creative input into the programme's production and participating in a number of promotional and other activities and (c) in providing such other services as are usually rendered by a first class television presenter. He was required to provide all such services "conscientiously and in a competent manner as a first class presenter as and where required and in full willing co-operation with such persons as [ITV] may require".
> >
> > (2) Mr Holmes was required to comply with health and safety guidelines and to obtain knowledge of and comply with all rules and regulations for the time being in force where Mr Holmes provided his services, and of the television programme guidelines laid down by Ofcom including without limitation regarding undue prominence (see [29(3)]). He

agreed not to wear branded items and not to advertise or endorse any products, services or refer to any charity during the show. Mr Holmes expressly acknowledged that ITV had absolute discretion and control over the editorial content of This Morning and to the product of his services (see [27]).

(3) As set out in full at [28] and [29], Mr Holmes was subject to a number of restrictions in respect of his other activities including that (a) he would not enter into any professional or other commitments or undertake work for any third party which would or might conflict with the full and due rendering of his services and observance of his obligations under the relevant agreement, (b) he would disclose to ITV all his Commercial Activities, and (c) he would not "enter into any new contract or arrangement for his participation in or authorisation of any Commercial Activities unless it is approved by [ITV] in advance in writing" (as set out in further detail in [29]). There were also restrictions on his leisure activities and provisions relating to the state of his health.

(4) The circumstances in which the agreement could be terminated included where Mr Holmes acted in breach of his obligations under the agreement and where he did or omitted to do anything which brought or was intended to bring Mr Holmes, the programme, ITV, any of its group companies or the broadcaster into public disregard or involved ITV or the broadcaster in conflict with Ofcom (see [33]).

39. The FTT went on to consider at [229] to [231] how the contractual provisions worked in practice, in the context of ITV's ability to control what, how, when and where Mr Holmes provided his services. It concluded at [232]:

> 232. ITV had overall control over deciding the thing to be done and, in a broad sense, over the manner in which it was done in that (a) ITV determined the nature of This Morning and its format and (b) ITV had ultimate editorial responsibility for the content of the programme (as Mr Holmes expressly acknowledged in the assumed contracts) and (c) Mr Holmes was required to comply with the guidelines set out by Ofcom. Within that framework, in practice, Mr Holmes had considerable autonomy in how he prepared for and presented the programme due it seems to ITV's high regard for his skills and to the nature of the live environment in which he had to present the show.

40. The FTT then discussed various other aspects of how the contractual provisions operated in practice at [233] to [245]. It found that the way the relationship worked in practice did not negate the binding effect of the contractual provisions.

41. The FTT then considered the significance of the control which it had identified, and concluded at [249]:

> 249. …having regard to the particular context in which Mr Holmes was working and the nature of his skilled specialist presenting work, as a result of the combination of contractual rights set out above, ITV had a sufficient framework of control over him to place their assumed relationship with him in the employment field.

42. We have set out above the FTT's conclusion at [232] on the question of control. Mr Gordon criticised the FTT's finding of overall control as wrongly focusing on editorial control, which he said relates to "how" the task is to be performed and not "what" tasks are performed:

(1) As to [232(a)], he submitted that the nature of This Morning and its format was concerned with editorial control. It was control over 'how' and not 'what' was to be done. To the extent control went beyond editorial control, it simply identified the engagement itself, namely presenting This Morning, which is what the parties had contracted to be performed. Performance of the very task which an individual undertakes to perform cannot constitute sufficient control to establish a master-servant relationship.

(2) As to [232(b)], editorial responsibility for the content of the programme was clearly control over 'how' the task of presenting was to be done.

(3) As to [232(c)], Mr Gordon submitted that compliance with an industry regulator is not an indicator of control.

43. It has been well established since *Ready Mixed Concrete* that control in this context involves control over what services are to be provided, how they are to be provided and where and when they are to be provided.

44. The question of control in the context of a radio presenter was recently considered by the Court of Appeal in *Kickabout Productions Limited v HM Revenue & Customs* [2022] EWCA Civ 502, with the decision being given at the same time and by the same panel of judges as *Atholl House*. In *Kickabout*, the Upper Tribunal had found errors of law in the FTT decision and re-made the decision. It found that there was a sufficient framework of control. On appeal, Sir David Richards as he then was stated:

> 87. …The right to control the content of the programmes is highly material to the question of control. Indeed, as it seems to me, it may be said that the right to control the content of the programmes gave Talksport appreciably more control over the provision of Mr Hawksbee's services than, for example, a hospital trust has over the provision of the services of its surgeons.
>
> 88. KPL also submitted that, as regards control over 'what' services were performed by Mr Hawksbee, the UT did not take account, or even went against the FTT's unchallenged finding, that it was 'relatively narrow' in comparison to the BBC's control over what services were provided by a different presenter in Christa Ackroyd Media Ltd v Revenue and Customs Comrs [2019] UKUT 326 (TCC), [2019] STC 2222. The UT did not ignore the narrow range of Talksport's control in this respect, but it is clearly not decisive against an employment relationship, and it was for the UT to decide the weight to be given to it.
>
> 89. It must be borne in mind that control is a necessary, but not necessarily a sufficient, condition for the existence of an employment relationship. There may well be a framework of control which, by a greater or lesser margin, is sufficient for these purposes but will not, when all other relevant factors are assessed, be sufficient to establish employment.

45. In *Christa Ackroyd Media v HM Revenue & Customs* [2019] UKUT 326 (TCC), the Upper Tribunal had held that "regulatory control", in that case the BBC's right to ensure compliance with the BBC's editorial guidelines, was a relevant factor in considering the sufficiency of control. At [59], the Upper Tribunal held that it would have been wrong to leave such control out of account simply because the guidelines applied to employees and non-employees alike. The Upper Tribunal also rejected an argument at [60] – [64] that what was important for the purposes of control was control over Ms Ackroyd's input (her performance of the contracted services) as opposed to her output (the eventual work product).

46. Mr Gordon maintained that the most important factor in assessing sufficiency of control is control over what is to be done. Indeed, he went so far as to say that if there was no control over what was to be done, there could not be a sufficient framework of control for employment. He relied on what was said by Lord Phillips in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 at [36]:

> 36. In days gone by, when the relationship of employer and employee was correctly portrayed by the phrase 'master and servant', the employer was often entitled to direct not merely what the employee should do but the manner in which he should do it. Indeed, this right was taken as the test for differentiating between a contract of employment and a contract for the services of an independent contractor. 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 a 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 he does it.

47. Mr Gordon described such control as a power of deployment. He referred us to Lord Donaldson MR in *O'Kelly v Trusthouse Forte Plc* [1984] 1 QB 90, who said at p126H:

> I could as well point out that what distinguishes the applicants' contracts from those of waiters who admittedly work under contracts of employment is that the applicants were employed to wait at a given function and were not available to the company for general deployment as waiters during their hours of work.

48. The Upper Tribunal in *Atholl House* ([2021] UKUT 37 (TCC)) records Mr Gordon making the same submission at [93]:

> 93. In his submissions on behalf of the Company, Mr Gordon argued, in reliance on the decision of the Supreme Court in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 1 All ER 670, [2013] 2 AC 1 that these days, control over the 'what' is the most significant aspect of the test. We accept that submission, at least in the context of people, like Ms Adams, who possess, as the Supreme Court put it, in the *Catholic Child Welfare* case at [36] 'a skill or expertise that is not susceptible to direction by anyone else in the company that employs them.' However, we do not consider that this means that the 'where' or 'when' are of no importance. In his skeleton argument, Mr Gordon canvassed the examples of a self-employed taxi driver on one hand and an employed chauffeur on the other, arguing that control over the 'what' was the same in both cases and consisted of a right to require the driver to deliver a passenger to a particular location. That is true, but it seems to us to overlook the importance of control over the 'where' and 'when' in such a case. The self-employed taxi driver could choose when to seek fares, by contrast with the employed chauffeur. Similarly, the employer could compel the chauffeur to drive to Manchester, whereas a self-employed taxi driver might choose only to seek fares in London. Accordingly, in appropriate cases, control over 'where' and 'when' remain useful indicators of control.

49. We respectfully agree with the approach of the Upper Tribunal in *Atholl House*. This aspect of its decision was not before the Court of Appeal. In short, control over what is to be done is an important factor but control over how, where and when services are to be performed remains relevant.

50. Mr Gordon also submitted that control of "what" is to be done in the context of presenters must represent a right on the part of the broadcaster to deploy the presenter as it chooses. For example, in *Christa Ackroyd Media* there was a right to require Ms Ackroyd to present other programmes. That is to be contrasted with the hypothetical contract between Mr Holmes and ITV where he is contracted only to present This Morning. Mr Gordon argued that even control over what was to be done in those circumstances is not sufficient control for employment in the absence of a right of deployment.

51. The Upper Tribunal in *Atholl House* rejected that submission at [95] and [96], concluding at [97]:

> 97. It follows that we do not accept Mr Gordon's submission that the absence from the hypothetical contract with Ms Adams of any clause allowing the BBC to deploy on tasks other than the Kaye Adams Programme is fatal to the argument that the BBC had sufficient control at the second *Ready Mixed Concrete* stage. We do, however, accept that the presence or absence of such a provision would be of some relevance in determining whether there is 'some sufficient framework of control'.

52. Again, we respectfully agree with that conclusion. Further, in the present case, whilst there was no right of deployment as such, as the FTT noted there were rights to require Mr Holmes to carry out promotional work as and when reasonably required and without further payment. There was also a contractual right for ITV to require Mr Holmes to present This

Morning on such dates and locations that it notified to Mr Holmes at its sole discretion. Those were relevant rights of control.

53. In the context of radio and television presenters, the authorities establish that editorial control is a relevant factor. Indeed, in *Kickabout* the Court of Appeal described it as being "highly relevant". Further, it was acknowledged by the Upper Tribunal in that case that Talksport only had relatively narrow rights of control over what tasks the broadcaster performed. The Court of Appeal did not consider that the Upper Tribunal had given undue weight to control over the 'where and when'.

54. In the circumstances, we do not consider that Mr Gordon's criticisms of the FTT's conclusion in relation to control as set out at [232] of the Decision are well-founded.

55. Mr Gordon also pointed to what he said were other errors of law made by the FTT in its consideration of control. He submitted that at [228(2)] where the FTT relies on the fact that Mr Holmes was required to comply with ITV's health and safety guidelines and Ofcom regulations, it took into account irrelevant considerations. Such controls apply to all individuals and are not sufficient to make ITV the master. We do not accept this criticism. We agree with the Upper Tribunal in *Christa Ackroyd Media* that regulatory control is a relevant factor, whether or not it applies to all individuals whether employed or self-employed.

56. Mr Gordon pointed to the FTT's finding that Mr Holmes had "considerable autonomy" over the way in which he provided his services. For example, in when and where he would prepare for the programmes and when he arrived at and left the studios. He submitted that this was a very significant factor in terms of control. In addition, Mr Gordon pointed to Mr Holmes' other engagements and that ITV could not require him to present any other programmes or attend training sessions or performance appraisals. He could choose to ignore research material provided to him for a particular programme and could exercise a veto over the guests he might be asked to interview. He frequently departed from what ITV wanted him to do. Indeed, at [76(2)] the FTT noted that ITV had said that "it would be great if Mr Holmes did as he was told".

57. Mr Gordon submitted that it is clear from the facts as found that ITV did not exercise sufficient control over Mr Holmes. The FTT focused too much on editorial control and overlooked or gave little weight to factors where ITV did not and could not exercise control. He submitted that those other factors are key to determining the issue of control.

58. We do not accept these criticisms. The FTT made an evaluative judgment that there was a sufficient framework of control. We can only interfere with the FTT's conclusion if we are satisfied that no reasonable tribunal, properly directing itself on the relevant question of law, could have reached that conclusion. We are satisfied that the FTT did properly direct itself as to the question of control. It reached a conclusion which was available to it on the evidence and there is no ground for us to interfere with that conclusion.

59. Overall, we do not detect any error of law in the approach of the FTT to the question of control.

GROUND 2 – THE FTT'S APPROACH TO OTHER FACTORS

60. There are two aspects to Ground 2.

(a) Presumption of a contract of employment

61. Ground 2(a) is that the FTT wrongly considered that its findings of mutuality of obligation and sufficient framework of control led to a presumption that there was a contract of employment.

62. In reviewing the caselaw on the overall analysis, the FTT said the following at [193]:

> 193. As HMRC noted [t]he third condition in MacKenna J's test is a negative condition, such that if the first two are satisfied, the contract will be a contract of employment unless there are other provisions of the contract which are inconsistent with that conclusion and of sufficient importance that the tribunal can conclude that the contract is not one of service: *Ready Mixed Concrete* at 516 to 517; *Weightwatchers (UK) Ltd v HMRC* [2012] STC 265 per Briggs J (as he was) at [41] to [42] and [111].

63. In *Weightwatchers*, Briggs J as he then was described at [42] and [111] what he considered to be the correct approach:

> 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.
>
> 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 overridden by some other relevant aspect of the relationship.

64. The decision of Briggs J in *Weightwatchers* was considered by the Court of Appeal in *Atholl House*. HMRC had relied on that decision in support of their submissions that the overall analysis is concerned with an exclusive focus on the terms of the contract, and that once mutuality of obligation and sufficient control were established there is a prima facie conclusion that the contract is a contract of employment. Those submissions were rejected by the Court of Appeal at [113]:

> 113. ...For the reasons I have earlier given, I am unable to accept the approach in these respects adopted by Briggs J. It is clear from *Market Investigations* and many subsequent cases, including but by no means restricted to *Hall v Lorimer*, that the court or tribunal is not restricted in its analysis to the terms of the contract. Briggs J does not refer to any of those cases in his judgment nor is there any indication that he was referred to them. Nor do I think it appropriate to add a gloss of a "prima facie affirmative conclusion" of a contract of employment if the pre-conditions of mutuality and control are satisfied. I again agree with Kerr J who in *Augustine v Econnect Cars Ltd* said at [61]:
>
>> 'I do not think the judgment of Briggs J (as he then was) in the *Weight Watchers* case should be treated as creating something like a legal presumption of an employment relationship in cases where the first two stages of the three stage test are met. The obligation of the tribunal is to "paint a picture from an accumulation of detail" (as Mummery J (P) put it in *Hall v. Lorimer (Inspector of Taxes)* [1992] ICR 739, at 744F-H). An "informed, considered, qualitative appreciation of the whole" may be gained by standing back from the picture, he said.'

65. The Court of Appeal had previously rejected HMRC's submission that once mutuality of obligation and control were established, there had to be a clear inconsistency in the other terms of the contract to displace the conclusion of employment. Sir David Richards stated at [75]:

> 75. Whether the third condition is one of consistency or inconsistency with a conclusion of employment strikes me as a largely arid debate. The court or tribunal will in any event have to analyse the terms of the contract and reach a conclusion whether they are consistent or inconsistent with a relationship of employment. Given that mutuality of obligation and control are necessary elements of employment, there will inevitably have to be factors pointing in the opposite direction, but it is, in my view, no more than that.

66. Arnold LJ stated in similar terms at [169]:

> 169. … if mutuality of obligation and a right of control are present, then there will inevitably have to be one or more factors pointing the other way if the court or tribunal is to conclude that the contract is not one of employment; but that does not mean that the court or tribunal should divorce its evaluation of the other factors from its assessment of the first two conditions. In particular, it may well be relevant to take into account the extent of the control exercisable by the alleged employer.

67. Mr Gordon submits that in light of *Atholl House*, the FTT misdirected itself at [193] and then wrongly applied the misdirection when it came to apply the caselaw to the facts under a heading "Application of employment/self-employment test". The FTT has an introductory paragraph under that heading at [223]. At this stage it is helpful to quote the whole of that paragraph:

> 223. On the basis of the caselaw set out above, I have concluded that there was sufficient mutuality and at least a sufficient framework of control to place the assumed relationship between ITV and Mr Holmes in the employment field. On that basis and, having regard to all other relevant factors, my view is that overall, throughout all relevant tax years, the assumed relationship between ITV and Mr Holmes was one of an employment rather than self-employment.

68. Having set out its conclusion, the FTT went on to consider mutuality of obligation, control, significance of control and overall conclusion under separate sub-headings.

69. Mr Gordon submits that at [193] the FTT clearly misdirected itself as to the correct approach in the overall analysis. It had made reference to the passages from the decision of Briggs J in *Weightwatchers* which were expressly overruled by the Court of Appeal in *Atholl House*. He submitted that we should not over-analyse the reasoning of the FTT in order to conclude that it did not in fact apply any presumption of an employment contract arising from the existence of mutuality of obligation and a sufficient framework of control. It must be clear that the FTT did not in fact apply such a presumption, and the Decision does not make that clear.

70. Mr Gordon focused on the words "On that basis" in [223] which he submitted refer to the existence of mutuality and control and indicate that in its overall analysis the FTT was looking to see whether there was sufficient material to displace the presumption of a contract of employment.

71. The FTT went on to consider mutuality of obligation and control, and came to look at other factors under the heading "overall conclusion". It opened that section at [256] as follows:

> 256. In conclusion, bearing in mind this is not a mechanistic exercise but one of looking at all factors in the context of the provision of Mr Holmes' highly skilled presenting services in the live broadcasting of This Morning, I consider that the overall picture is that the assumed relationships between him and ITV were ones of employment for the reasons set out below and on the basis of the conclusions on mutuality and control set out above.

72. Mr Gordon submitted that in referring to its conclusions on mutuality and control, the FTT clearly had one eye on the first two stages of the test and did not start with the clean slate that *Atholl House* requires.

73. We bear in mind the approach advocated by the Court of Appeal in *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672:

> 58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision.

74. We accept Mr Gordon's submission that a similar approach should apply in this case. Where the FTT has referred to an erroneous legal principle, we should be slow to conclude that it did not then apply that principle.

75. It is important to consider how the FTT approached its overall analysis. In our judgment it is clear that the FTT took an approach which involved balancing all factors which it considered to be relevant. We consider that the FTT had very clearly in mind the notion of undertaking a multi-factorial assessment and painting a picture from an accumulation of detail.

76. At the beginning of the Decision, the FTT gave an overview of the statutory provisions and the approach it was required to adopt in resolving the issues. At [14] it referred to the 3-stage test in *Ready Mixed Concrete* and to the "multi-factorial analysis" required by *Hall v Lorimer*:

> 14. As regards the classification of the hypothetical relationship, it was common ground that there are three cases of particular importance, which form the basis of the subsequent case law:
>
> (1) In *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497 MacKenna J set out the often quoted three stage test for there to be contract for services …
>
> (2) In *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173, Cooke J approached the question of whether there was an employment contract by examining whether the individual in question was "in business on his own account".
>
> (3) In *Hall v Lorimer* [1994] 1 WLR 209, STC 23 the court interpreted the approach in *Market Investigations Ltd* essentially as requiring a multi-factorial exercise.

77. When the FTT came to discuss the issues, having made its findings of fact, it stated that it must first identify the terms of the assumed contracts, noting in parentheses at [92]:

> I must, of course, take into account all relevant circumstances at the second stage of the analysis, in determining the nature of the assumed contracts, in accordance with and as permitted under the relevant case law.

78. In referring to the second stage, the FTT was referring to determining the nature of the assumed contracts, and whether they established a contract of employment or self-employment. The FTT considered the authorities in relation to that stage at [128] – [194]. There is no suggestion that it omitted any relevant authorities or that its analysis indicates any other error of law, apart from its reference to *Weightwatchers*. In particular, the FTT referred in detail to *Hall v Lorimer* and at [148] specifically identified that the exercise was "not a mechanical exercise but requires the painting of a picture from the accumulation of detail". It quoted the

following passage from Mummery J in *Hall v Lorimer* which had been endorsed by the Court of Appeal:

> In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. 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 evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case. As Vinelott J. said in *Walls v. Sinnett (*1986) 60 T.C. 150, 164:
>
> > 'It is in my judgment, quite impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by another tribunal to the common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case.'

79. The FTT recorded the parties' submissions at [195] – [222]. It records Mr Tolley's submission at [222] that "the final test set out in *Ready Mixed Concrete* is a negative one (as acknowledged in that case and *Weight Watchers*). It is a case of examining whether there are any terms which are inconsistent with employment status".

80. As noted above the FTT begins its consideration of the issues by stating its overall conclusion at [223]. It is clear from that paragraph and succeeding paragraphs that the FTT adopted a multi-factorial approach and had regard to all the factors it considered relevant. It certainly did not restrict its analysis to the terms of the assumed contracts, despite its previous reference to *Weightwatchers*.

81. The FTT comes to consider its overall analysis at [256] – [270] under a heading "overall conclusion". It notes at [258] and [259] that Mr Holmes was subject to ITV's ultimate right of control and that he was obliged to provide the services personally. Essentially the FTT is there recognising that mutuality of obligation and a sufficient framework of control are both present. The FTT then says this at [260]:

> 260. I do not consider that the significance of the above factors is affected materially by the fact that, whilst ITV had an option to renew the agreement Mr Holmes had no guarantee that ITV would exercise the option, that he considered each renewal negotiation was painful and that there was in each year (except the first) a gap in the contracting arrangements with RWG…

82. The FTT then went on to consider at [260(1) – (4)] various factors relating to the risk of non-renewal and the length of the contracts. At [261] it states:

> 261. It seems to me that overall this pattern of engagement on the terms highlighted above has the quality and characteristics of a part time employment rather than, as Mr Maas argued, an engagement carried out as part of or as an incident of a broader self-employed business.

83. The FTT then considered at [262] – [266] whether Mr Holmes entered into the assumed contracts as an incident of business on his own account. In doing so, it stated at [263]:

> 263. My view is that, in applying that approach in the context of assessing the nature of the assumed relationships, the tribunal must take account of all other activities which Mr Holmes

> carried out, whether he did so through RWG (or another PSC) or in his own name as though he provided all such services himself direct to the client.

84. Mr Gordon pointed to what the FTT said in relation to the appellant's use of an agent at [265] where having considered the relevance of various factors it said as follows:

> 265. …[Mr Holmes/the appellant] no doubt incurred fees charged by his agent but presumably that would be the case whether he was engaged on a part time self-employed or employed basis. Mr Maas did not point to any other expenditure attributable to Mr Holmes' work for ITV.

85. Mr Gordon submitted that the FTT did not take the use of agents into account because at this stage it was only looking for things which were inconsistent with a contract of employment. We do not accept that submission. The FTT clearly viewed this as a neutral factor, not pointing either way. Further, we are satisfied that on the evidence before it the FTT was entitled to find that the use of an agent was a neutral factor.

86. The FTT considered the terms of the assumed contracts in relation to termination and the absence of provision for benefits such as holiday pay or pension benefits at [267] – [269]. At [270] it addressed submissions on behalf of the appellant that certain other provisions of the hypothetical contract were inconsistent with a contract of employment, concluding that they were not inconsistent with an employment relationship.

87. Looking at the decision as a whole, we are satisfied that the FTT's error in referring to the approach in *Weightwatchers* was not a material error. We reach that conclusion because on a fair analysis the FTT clearly weighed in the balance all the factors which it considered to be relevant, applying *Hall v Lorimer*. We also take into account the nature of the alleged error. The approach derived from *Weightwatchers* involved the application of a presumption, but it was always a rebuttable presumption. It is not suggested that the FTT gave special weight to the fact that mutuality of obligation and a sufficient framework of control existed when it came to its overall analysis, and there is no suggestion in the Decision that it did so. In our view the FTT conducted the balancing exercise anticipated by the Court of Appeal in *Atholl House* and reached a conclusion looking in the round at all the factors it considered to be relevant.

88. It is notable that the Upper Tribunal in *Atholl House* had also adopted the approach in *Weightwatchers* when it came to re-make the decision of the FTT. However, the Court of Appeal did not give this as a reason for setting aside the Upper Tribunal's decision. In *Kickabout*, the same Court of Appeal expressly considered the point at [104]:

> 104. … In the present case, the UT approached assessment at stage three by reference to *Weight Watchers*. This was not challenged by KPL on this appeal but, in any event, I am entirely satisfied that the validity of its conclusion in favour of employment is not affected by its reference to *Weight Watchers*.

89. We do not consider that the appellant has established any error of law under Ground 2(a) of this appeal.

(b) Alleged errors in the overall analysis

90. Ground 2(b) is that the FTT wrongly disregarded certain factors in its overall consideration and failed to consider the whole picture. Mr Gordon levelled eight criticisms against the FTT's overall analysis. We shall consider those criticisms in the order taken by Mr Gordon in his oral submissions.

91. The first criticism arises from HMRC's submission to the FTT that the question of whether Mr Holmes was part and parcel of ITV as an organisation provided little meaningful guidance. Mr Gordon says that the FTT wrongly disregarded this factor.

92. The Court of Appeal in *Atholl House* at [93] cited the judgment of Mummery J in *Hall v Lorimer* in which he identified factors relevant to the consideration of whether a person carries on business on their own account, including:

> [93] … It may also be relevant to ask whether the person performing the services is accessory to the business of the person to whom the services are provided or is "part and parcel" of the latter's organisation.

93. The FTT referred to the question of whether Mr Holmes was part and parcel of ITV's organisation at [262]:

> 262. … It is not the case, as Mr Maas seemed to suggest, that a person who carries on a profession such as, in *Davies v Braithwaite* as an actress or here, as a presenter and journalist, at least some of which are accepted to be carried out on a self-employed basis necessarily carries out all engagements as an incident of that business. Whether a particular engagement falls to be regarded as part of such a business is to be determined by an analysis of its precise nature. In that context, I agree with Mr Tolley's view that whether Mr Holmes was "part and parcel" of ITV is of no real assistance when assessing whether he had a part time employment or self-employment with ITV (see [221]).

94. Mr Gordon submitted that where an individual has multiple engagements with rival organisations, that is precisely the case where it would be useful to ask whether the individual is part and parcel of the particular organisation.

95. However, the Privy Council in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 doubted the usefulness of this as a test given that an individual could work concurrently for two or more employers. It said at p 388 C:

> But to apply the test of whether a person is "part and parcel of the organization" is likely to be misleading in the context of a statute which expressly contemplates that casual workers and workers working for two or more employers concurrently may be employed under a contract of service. In the building and construction industry the test may lead to the error of only considering those on the permanent staff as employed under a contract of service and thus excluding all those from the protection of the Ordinance who are taken on for a particular project because, not being on the permanent staff, they are not "part and parcel of the organization."

96. Whilst the question of whether a person is part and parcel of the organisation is not a test in itself, the answer to the question can be a relevant factor in the overall analysis. The Court of Appeal considered this factor in *Kickabout* and said at [99]:

> 99. As KPL accepts, the 'part and parcel' test has attracted criticism for many years, including from MacKenna J in RMC [1968] 1 All ER 433 at 445, [1968] 2 QB 497 at 524. On the particular facts of some cases, a decision-making court or tribunal may reasonably consider that it is a useful question to ask as part of the overall assessment. In other cases, it may consider that it will not assist. In this case, given the particular nature of Mr Hawksbee's services, the UT was entitled to say (at [95]) that it did not think that 'in the circumstances of this case, an impressionistic analysis of whether Mr Hawksbee was "part and parcel" of Talksport's organisation would weigh heavily in the balance' and that 'it adds little in this case', while accepting that 'in other cases, analysis whether someone is "part and parcel" of an organisation will be illuminating'.

97. It is clear from [262] of the Decision that the FTT considered this factor but concluded that it was of no real assistance. We are satisfied that it was entitled to form that view as part of its evaluative judgment.

98. The second and most substantial criticism is that the FTT gave no weight to Mr Holmes' other activities, in particular the fact that he was in business on his own account.

99. The significance of whether the individual is in business on his own account was considered by the Court of Appeal in *Atholl House* where Sir David Richards stated his conclusions at [61]:

> 61. I will below review some of the authorities and the way they have developed. From this review, I have reached a number of conclusions relevant to this appeal. First, there is not a dichotomy between the *RMC* test on the one hand and the approach in *Hall v Lorimer* and the line of authorities of which it is part on the other. They do not represent significantly different tests for determining employment. Second, the question posed in *Hall v Lorimer* and other authorities as to whether a person is in business on their own account is, for the most part, simply another way of asking whether they are an independent contractor. If the evidence establishes that they do in fact conduct a business on their own account, quite apart from the engagement in dispute, that may be a relevant factor in the determination of the issue – a point to which I will return. But, as used in the authorities, that is not the situation to which this phrase is generally applied. See in this respect the observation of Dillon LJ in *Nethermere* (*St Neots*) *Ltd v Gardiner* [1984] IRLR 240, [1984] ICR 612, which I set out below when referring to that case. Third, the factors to which a court or tribunal can have regard when assessing whether a contract is a contract of employment or a contract for services are not confined only to the terms of the contract and the effects of those terms.

100. He returned to the issue at [88] and [124]:

> 88. In *Nethermere*, Dillon LJ made the important observation on the meaning of 'carrying on business on his or her own account', to which I have earlier referred ([1984] IRLR 240 at 249, [1984] ICR 612 at 633):
>
> > 'In some cases, as for instance, with a jobbing gardener or a carpenter or a music teacher, who is found to be carrying on the activities in question for several customers or clients as part of his or her own business, the test may be very helpful indeed, but in many other cases the answer to the question whether the person concerned is carrying on business on his or her own account can only come as the corollary of the answer to the question whether he or she was employed under a contract of service.'
>
> 124. If the person providing the services is known to carry on a business, profession or vocation on their own account as a self-employed person, it would in my judgment be myopic to ignore it, when considering whether or not the parties intended to create a relationship of employment. In many of the cases, it has been taken into account for that purpose. The weight to be attached to it is a matter for the decision-making court or tribunal. If the contract provides, as did Ms Adams' contracts with the BBC, that she was a freelance contributor, the relevance of this fact arises directly from the contract's express terms.

101. In *Atholl House*, the Upper Tribunal held that when entering into the hypothetical contracts, the broadcaster would have been entering into business on her own account. In doing so, it considered whether there was some relevant difference between her activities under the hypothetical contracts and those she performed as an independent contractor. The Court of Appeal found that this approach was flawed in a number of respects, in particular:

> 128. First, … it is not the activities which matter, but the capacity in which, and the conditions under which, they are performed. For that purpose, it is a relevant fact, if known or reasonably available to the putative employer, that the individual performs similar services as an independent contractor, but it goes no further than that.
>
> 129. Second, … it is not the terms and circumstances of her other engagements which are in issue, but the terms and circumstances of her hypothetical contracts with the BBC. The terms and circumstances of her other engagements may well themselves have been varied and it cannot be assumed that, if analysed, all or indeed any of them would be found to be

> engagements as an independent contractor. They cannot be held up as a gold standard against which the contracts with the BBC were to be judged. Even if the FTT had received evidence of these other engagements and the circumstances in which they were made, the approach of the UT is misguided.
>
> 130. Third, … there is no consideration at all by the UT of the terms of the hypothetical contracts. While I have rejected the notion that it is only those terms that may be considered, the terms of the contracts remain central to the enquiry. The UT failed to have regard to any other terms, including those that pointed in the direction of employment.

102. The FTT considered this issue at [262] – [266]. It referred to *Fall v Hitchen* [1973] 1 WLR 286 and *Davies v Braithwaite* [1931] 2 KB 628 at [262]. In *Fall v Hitchin* the special commissioners found that the taxpayer's engagement as a professional dancer with Sadler's Wells was "an incident in the carrying on of his profession as a theatrical artist". The taxpayer had relied on the judgment of Rowlatt J in *Davies v Braithwaite*, where it was held that engagements entered into by an actress were "incidents in the conduct of her professional career". Pennycuick VC overturned the decision of the special commissioners. He stated at p296 C and 298 C:

> The fact that an actor normally undertakes a succession of engagements in the course of carrying on that profession in no way involves the result that if an actor enters an acting employment in the nature of a post, then he is not assessable under Schedule E in respect of the income arising from that employment.
>
> … a person carrying on a profession may perfectly well hold an office and also, plainly, an employment in the same sphere as that in which he carries on his profession.

103. Paragraph [263] is important, where the FTT set out its approach to the question of whether the hypothetical contracts were part of the business Mr Holmes conducted on his own account:

> 263. My view is that, in applying that approach in the context of assessing the nature of the assumed relationships, the tribunal must take account of all other activities which Mr Holmes carried out, whether he did so through RWG (or another PSC) or in his own name as though he provided all such services himself direct to the client. Otherwise assessing whether a person is in business on his own account is unworkable in this context. However, even taking account of the full range of other activities Mr Holmes carried out, including his work on Sunrise, there are a number of problems with viewing his work on This Morning as part of a wider self-employed business activity:
>
> (1) Whilst HMRC appear to accept that income from limited or one-off engagements which Mr Holmes undertook were properly to be taxed as income from a self-employment, they did not accept that it was established that the income from Sunrise was of that nature. The tribunal was not presented with sufficient information to make any assessment as to the true nature of that relationship for tax purposes.
>
> (2) As acknowledged in *Hall v Lorimer*, it is difficult to apply the test as to whether a person is in business on his/her own account in the context of a person providing professional skilled services. For that reason Nolan LJ said that, "there is much to be said" in such cases, for bearing in mind "the traditional contrast between a servant and an independent contractor" and that the "extent to which the individual is dependent upon or independent of a particular pay master for the financial exploitation of his talents may well be significant". In that context, whilst Mr Holmes was not entirely dependent on ITV for his income it is relevant that RWG/Mr Holmes received a substantial proportion of its/his income from Mr Holmes work from This Morning on a consistent basis throughout the relevant period.
>
> (3) In any event, for the reasons set out below, Mr Holmes did not display any of the characteristics of being in business on his own account as regards his work for ITV.

104. Mr Gordon submitted that the FTT made plain that it gave no weight to Mr Holmes' other activities and whether the assumed contracts were part of his carrying on a business on his own account. He says that the FTT was wrong to take that approach and the three reasons it gave for doing so are flawed.

105. We do not consider that the FTT gave no weight to Mr Holmes' other activities. It expressly stated that it was 'taking account of the full range of other activities Mr Holmes carried out'. Our reading of [263] is that the FTT considered there were three factors which suggested that the ITV contract was not part of Mr Holmes' business on his own account.

106. The first factor identified by the FTT is that whilst Mr Holmes had income from self-employment, it did not have sufficient evidence to determine the true nature of his work from Sunrise. Clearly, Sunrise was a significant proportion of Mr Holmes' income in the relevant period. Mr Gordon submits that the FTT did not have to have conclusive evidence as to the nature of Mr Holmes' work on Sunrise for Sky News. It was impractical to expect the appellant to adduce evidence to establish that Mr Holmes' work on Sunrise, whether it was contracted for in his own name or through the appellant, was or would be in a self-employed capacity. The FTT should have taken an "impressionistic view" as to whether there was a single business of which Mr Holmes' work on This Morning and Sunrise were a part. Further, there was a finding that Mr Holmes was self-employed in respect of his work on Sunrise for two of the years under consideration.

107. Mr Tolley submitted that it was for the appellant to establish the nature of Mr Holmes' work on Sunrise by way of evidence. He referred to the passage at [129] of *Atholl House* where the Court of Appeal stated that it cannot be assumed that other engagements would be found to be engagements as an independent contractor.

108. The FTT had already stated in its findings of fact that it was not clear how Mr Holmes had been engaged in relation to his work on Sunrise, save that it accepted that services were provided through the appellant in 2013-14 and 2014-15. It made no finding that Mr Holmes was a self-employed presenter in relation to his work on Sunrise in 2011-12 and 2013-14.

109. It is not clear whether the FTT was invited to form an impressionistic analysis. In any event, there is no challenge to the FTT's findings of fact on this appeal and there are no material findings of fact in relation to Sunrise, other than the fact that Mr Holmes presented Sunrise, and did so through the appellant in two tax years. In those circumstances, we cannot say that the FTT was wrong to find that it could not make any assessment as to the nature of Mr Holmes' relationship with Sky News. That was an evaluative judgment of the FTT with which we cannot interfere.

110. The second factor identified by the FTT is that it is difficult to apply the test of whether a person is in business on their own account when providing professional services. In those circumstances the extent to which the individual is reliant on a particular paymaster may well be significant. Mr Holmes received a significant proportion of his income through This Morning in the relevant period. Mr Gordon submits that this was the wrong approach and the FTT wrongly focused on its conclusion that Mr Holmes received a substantial proportion of his income from the ITV contracts.

111. We do not accept those submissions. In *Atholl House* at [96] the Court of Appeal explained the dicta of Nolan LJ in *Hall v Lorimer*:

> Clearly, Nolan LJ was not suggesting that an author or actor was less likely to be self-employed than a person carrying on a commercial business on their own account, only that the indicia applicable to a commercial business ('the trappings of a business') might well be inapplicable to a person carrying on a profession or vocation.

112. In our view, at [263(2)] the FTT was simply acknowledging the difficulties of considering this factor in the context of professional services. It was not suggesting that presenters are inherently less likely to be self-employed than persons providing commercial services. Indeed, the FTT went on to consider whether Mr Holmes' work for ITV had the characteristics of being in business on his own account. It was plainly entitled to take into account the extent to which Mr Holmes was dependent on ITV for a significant proportion of his income.

113. The third factor identified by the FTT is that Mr Holmes did not display any of the characteristics of being in business on his own account as regards his work for ITV. The FTT considered the characteristics of Mr Holmes' work for ITV at [264] to [269]. Mr Gordon submits that the FTT wrongly focused on the individual contract and not on whether the performance of that contract was part of a wider business. Further, it failed to take into account relevant factors because it ignored Mr Holmes' commercial approach to his wider business. In particular his use of an agent to obtain work and negotiate contracts; the fact that work on the ITV contract was carried out in Mr Holmes' home office, outside the control of ITV; the way in which Mr Holmes used his time outside the studio to best effect; and his travel between the Sunrise studios and ITV's studios. It also failed to consider the overall picture.

114. We do not accept that the FTT failed to consider whether the ITV contract was part of a wider business activity. The difficulties identified by the FTT were all described at [262] as "problems with viewing his work on This Morning as part of a wider self-employed business activity". The very issue the FTT was considering was whether the ITV contract could be viewed as part of Mr Holmes' wider business activities.

115. The FTT correctly directed itself at [264] that "the hallmarks of self-employment as regards a professional person's activities may not accord entirely with those applicable to tradesmen. A professional's ability to profit from his work may be restricted to the ability to earn more by working better or faster or enhancing his reputation". It went on to refer to the factors which were found to be relevant in *Hall v Lorimer* and then considered factors which it considered to be relevant to Mr Holmes at [265] to [269].

116. The FTT noted at [265] that in relation to the assumed contracts Mr Holmes received a fixed fee for each appearance; he had no real ability to increase his profits from his work, save by doing a good job and having his contract renewed; he did not have any real economic risk or risk of bad debts; he was paid consistently on invoices produced by ITV; he did not incur significant expenditure; he purchased no equipment other than an earpiece; travel, clothing expenses and insurance were covered by ITV; ITV provided a car for him to travel to and from the studios; he incurred fees to his agent, but the FTT assumed that would be the case whether he was employed or self-employed.

117. Mr Gordon took issue with the way the FTT formed its view as to Mr Holmes' inability to increase profits. He was able to use his preparation time outside the studios more efficiently so as to increase the profits of his other activities. He did so in his own time and in his home office outside the control of ITV. He also took issue with the FTT's view that there was no risk of bad debts, in the absence of any evidence as to ITV's financial status.

118. There is no reference in the findings of fact to Mr Holmes using a home office, but in any event there is no reason to think that the FTT did not have in mind all its findings of fact even if they were not referred to at [265]. Again, the FTT was making an evaluative judgment and had the benefit of hearing all the evidence. We are not satisfied that the FTT erred in its consideration of the characteristics which might have indicated that the ITV contracts were part of Mr Holmes' self-employed business activities.

119. In subsequent paragraphs the FTT went on to consider the termination provisions and the absence of any provision for sick pay, holiday pay or pension benefits. It considered the parties' stated intentions that nothing in the agreement should constitute Mr Holmes an employee of ITV, but considered that no weight should be attached to that provision of the assumed contracts. These were the subject of separate criticisms by Mr Gordon and we deal with them below.

120. Finally in this section, we are also satisfied that the FTT considered the overall picture. That is what is said it would do at [256] and it seems to us that is what it did.

121. The third criticism is that the FTT ought to have taken into account that the actual contracts between the appellant and ITV included express "no employment" clauses. Mr Gordon also relied on the fact that Mr Holmes' evidence made clear his intention and expectation was that he would be treated as a freelance presenter.

122. This is a new ground of appeal. The respondents opposed the appellant's application to rely on it on the basis that it had no prospect of success. We grant permission for the appellant to raise this ground of appeal but we do not consider that it establishes any error of law by the FTT.

123. In relation to the intention of the parties, the FTT referred at [194] to what was said by Henderson J as he then was in *Dragonfly Consultancy Limited v HM Revenue & Customs* [2008] EWHC 2113 (Ch) in the context of the parties' intention:

> If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even then, however, the weight to be attached to such a hypothetical statement would in my view normally be minimal, although I do not rule out the possibility that there may be borderline cases where it could be of real assistance.

124. There is no indication that the FTT viewed this as a borderline case. The FTT was entitled to give that term of the assumed contracts no weight. A similar challenge in *Kickabout* was rejected by the Court of Appeal at [95]. As to Mr Holmes' evidence, it is clear that the parties' subjective intentions are irrelevant to the task of the FTT in this case. This was confirmed by the Court of Appeal in *Atholl House* at [123]:

> 123. The more difficult question, in my view, is not whether other factors can be taken into consideration but what limit there is on the choice of such factors. For this, there must be a return to first principles. The relationship of employment is created by the employer and employee through the contract made by them. The question for the court or tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could reasonably be supposed to be known, to both parties. Those circumstances are the same as those comprising the factual matrix admissible for the interpretation of contracts: the 'facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties' (*Arnold v Britton* [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619 (at [21])).

125. The fourth criticism is that the FTT failed to take into account that the assumed contracts did not make provision for sick pay, holiday pay or pension benefits. It also failed to take into account that Mr Holmes had been unable to work and was thus unpaid for a period after his hip operation in 2016.

126. The FTT expressly referred to the absence of any contractual provision for sick pay, holiday pay and pension benefits at [268] and [269]. HMRC had submitted that this was of no relevance because such provision would be a matter between the appellant and Mr Holmes. The FTT rejected that submission. However, it did not consider that the absence of such provisions was a "material consideration" pointing away from employment. In our view it was entitled to give that factor little weight. The fact Mr Holmes was unable to work and went unpaid following his hip operation is simply an illustration of the consequences of the absence of any provision for sick pay.

127. The fifth criticism arises from the billing arrangements between the appellant and ITV, and the fact that fees were due to Mr Holmes on the basis of a fixed fee per programme without any retainer. Mr Gordon described this factor as pointing very clearly to a conclusion that Mr Holmes and ITV were working "at arm's length" and not in an employment relationship. As noted above, the FTT referred to the billing arrangements as part of its overall assessment. The weight, if any, that it gave to them was a matter for the FTT. In any event, the question of whether the arrangements were at arm's length is irrelevant.

128. The sixth criticism is that the FTT wrongly focused at [259] on the fact that the assumed contract required Mr Holmes to provide his services personally to ITV. We do not accept that criticism. Personal service is clearly a requirement for mutuality of obligation. It is part of the "irreducible minimum" for a contract of employment. It is clear from *Atholl House* that in the overall analysis it is necessary to take into account the fact that there is mutuality of obligation and a sufficient framework of control. The FTT was therefore right to take into account the fact that the assumed contracts required Mr Holmes to provide his services personally.

129. The seventh criticism is that the FTT wrongly held that the fact the appellant and Mr Holmes used the services of an agent was not relevant in the overall analysis. We have already referred to this factor above. The FTT was entitled to find that the use of an agent by Mr Holmes was a neutral factor.

130. The eighth and final criticism is that the FTT ought to have had regard in its overall analysis to the limited control which ITV had over Mr Holmes in the performance of his services. There were two aspects to this. First, he submitted that the control which ITV actually exerted over Mr Holmes was very limited. Second, the right of editorial control under the contracts gave only a very limited right of control.

131. This is another new ground of appeal. Again, the respondents say that it has no prospect of success. We are satisfied that the appellant should have permission to argue this ground of appeal but for the reasons which follow we do not consider that it establishes any error of law by the FTT.

132. It is clear from *Atholl House* that the extent of the right of control which has been found to be sufficient for a contract of employment must also be taken into account in the overall analysis. At [76], the Court of Appeal rejected a submission of HMRC in that case that mutuality and control played no part in the overall analysis:

> 76. What is said is that no account should be taken of the strength or weakness of the finding of control. I am unable to accept this. In some cases, the control may be so pervasive as to make it very difficult, if not impossible, to conclude that it is not a contract of employment. In others, the decision on whether the right of control is sufficient may be borderline. I can think of no good reason why account should not be taken of these differences in what all agree is a multi-factorial process addressing all the relevant factors. I agree with Kerr J in *Augustine v Econnect Cars Ltd* (2019) UKEAT/0231/18 (20 December 2019) at [66]:
>
> > 'I see no reason why it was not open to the tribunal to decide that, while the degree of the employer's control was sufficient for a contract of service at stage two of the enquiry, the

worker's degree of autonomy in deciding whether to subject himself to that degree of control, how often and when, was a factor pointing away from a contract of service at stage three of the enquiry.'

133. Mr Gordon submitted that it was implicit in the decision of Kerr J in *Augustine* that what is relevant is the practical way in which control is exercised "on the ground".

134. We do not accept that submission. It is clear from [76] and [169] of *Atholl House* (cited above) that the Court of Appeal was addressing the relevance of the "right of control" that had been found to be sufficient for a contract of employment. Further, as appears from *Atholl House* at [123] (cited above), the FTT was entitled to take into account only matters which were known to the parties or reasonably available to the parties at the date of the contract. Mr Gordon suggested that there was some internal inconsistency in this respect in the decision of the Court of Appeal in *Atholl House*. We do not accept that there is any such inconsistency. What happened in practice on a day to day basis may evidence the terms of the contracts, but not in a case where the hypothetical contract is based on the terms of detailed written contracts which define the rights and obligations of the parties. At various paragraphs in the Decision (see for example [225]), the FTT rightly notes that what happened in practice did not detract from or negate the existence of contractual rights. There was no challenge by the appellant to the terms of the hypothetical contract found by the FTT.

135. As to the extent of ITV's rights under the hypothetical contracts, we accept that the right of editorial control under the contracts gave ITV only a limited right of control. Mr Gordon submitted that the control which did exist was consistent with a person in business on his own account. That may be true, but it was also sufficient for there to be a contract of employment. The FTT clearly took this into account in its multi-factorial analysis. At [256] the FTT stated its conclusion based on the overall picture and on the basis of its conclusions on mutuality and control. Those conclusions can fairly be taken to include the extent of ITV's control over Mr Holmes in the performance of his services.

136. In conclusion, we do not consider that the appellant has established any error of law under Ground 2(b) of this appeal.

137. For the sake of completeness, we add two points:

(1) First, that in the event that we had found an error of law in the Decision and determined to set it aside, Mr Gordon indicated that the appellant wished to rely on the custom and practice of the broadcasting industry in using freelancers. He sought to adduce further documentary evidence to establish that custom and practice. In the event we have found no error of law and it is not necessary for us to say anything further in this regard.

(2) Second, to those unfamiliar with the legal principles applicable in the context of the intermediaries legislation, it may seem that Mr Holmes' work for several organisations points to him being in business on his own account i.e. self-employed in all of his work. However, the case law clearly establishes that an individual may be considered to be engaged under several contracts of employment, each contract accounting for a different period of his or her working week, *and* be self-employed for other engagements.

DISPOSITION

138. For all the reasons given above we dismiss the appeal.

Mr Justice Mellor
Judge Jonathan Cannan

Release date: 29 March 2023