CEST Questions

	Personal Service	
1	Has the worker's business arranged for someone else (a substitute) to do the work instead of them during this engagement?	(a) Yes - and the client agreed (b) Yes - but the client didn't agree (c) No - it hasn't happened
2	Did the worker's business pay the person who did the work instead of them?	(a) Yes (b) No
3	If the worker's business sent someone else to do the work (a substitute) and they met all the necessary criteria, would the end client ever reject them?	(a) Yes - the end client has the right to reject a substitute for any reason, including if it would negatively impact the work (b) No - the end client would always accept a substitute who met these criteria
4	Would the worker's business have to pay the person who did the work instead of them?	(a) Yes (b) No
5	Has the worker's business needed to pay a helper to do a significant amount of the work for this engagement?	(a) Yes (b) No
	Control	
6	Can the end client move the worker to a different task than they originally agreed	(a) Yes - but only with the worker's agreement
7	Once the worker starts the engagement, does the end client have the right to	(a) Yes - the end client decides how the work needs to be done without input from the
8	Can the end client decide the schedule of working hours?	(a) Yes - the end client decides the worker's schedule
9	Can the worker choose where they work?	(a*) Yes - the worker decides
	Financial Risk	
10	What does the worker have to provide for this engagement that they can't claim as an expense from the end client or an agency?	(a) Materials - items that form a lasting part of the work, or an item bought for the work and left behind when the worker leaves (not including stationery, and most likely to be relevant to substantial purchases in the construction industry) (b) Equipment - including heavy machinery, industrial vehicles or high-cost specialist equipment, but not including phones, tablets or laptops (c*) Vehicle – including purchase, fuel and all running costs (used for work tasks, not commuting) (d*) Other expenses – including significant travel or accommodation costs (for work, not commuting) or paying for a business premises outside of the worker's home (e) Not relevant
11	What's the main way the worker is paid for this engagement?	(a*) An hourly, daily or weekly rate (b) A fixed price for a specific piece of work (c) An amount based on how much work is completed (d) A percentage of the sales the worker makes (e) A percentage of the end client's profits or savings
12	If the end client isn't satisfied with the work, does the worker need to put it right at	(a*) Yes - the worker would have to put it right without an additional charge, and would
	Part and Parcel	
13	Is the worker entitled to any of these benefits from the end client? - Sick pay - Holiday pay - A workplace pension - Maternity/paternity pay - Other benefits (such as gym membership, health insurance, etc.)	(a) Yes (b) No
14	Is the worker responsible for any of these duties for the end client? - Hiring workers - Dismissing workers - Delivering appraisals - Deciding how much to pay someone	(a) Yes (b) No
15	Does the worker interact with the end client's customers, clients, audience or users?	(a) Yes
16	When the worker interacts with the end client's customers, clients, audience or users, how do they identify themselves?	(a) They work for the end client (b) They're an independent worker acting on behalf of the end client (c) They work for their own business

Check Employment Status for Tax (CEST) Formal Independent Testing

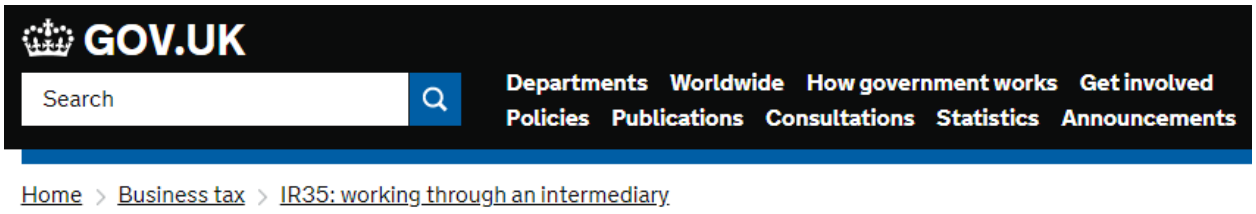
Test number: 001
Case name: Novasoft
Case date: 9 December 2009
Case reference: TC/2009/10828

Legal decision:
http://www.bailii.org/uk/cases/UKFTT/TC/2010/TC00456.html

TEST CONCLUSION

Court judgment:	Self-employed (IR35 does not apply)
Independent CEST testing of court judgment:	Employed (IR35 Applies)
IS CEST ACCURATE?	**NO**

CEST:
https://www.gov.uk/guidance/check-employment-status-for-tax



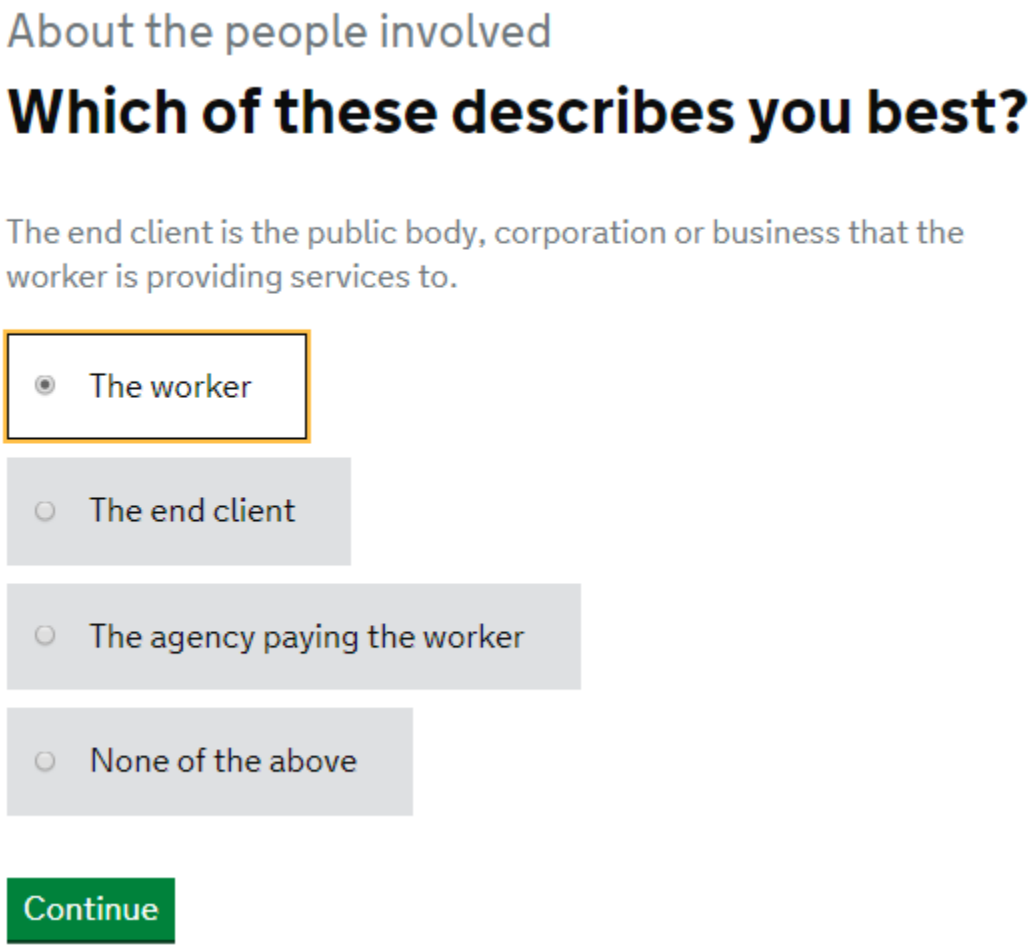
Guidance

Check employment status for tax

Use this service to find out if you, or a worker on a specific engagement, should be classed as employed or self-employed for tax purposes.

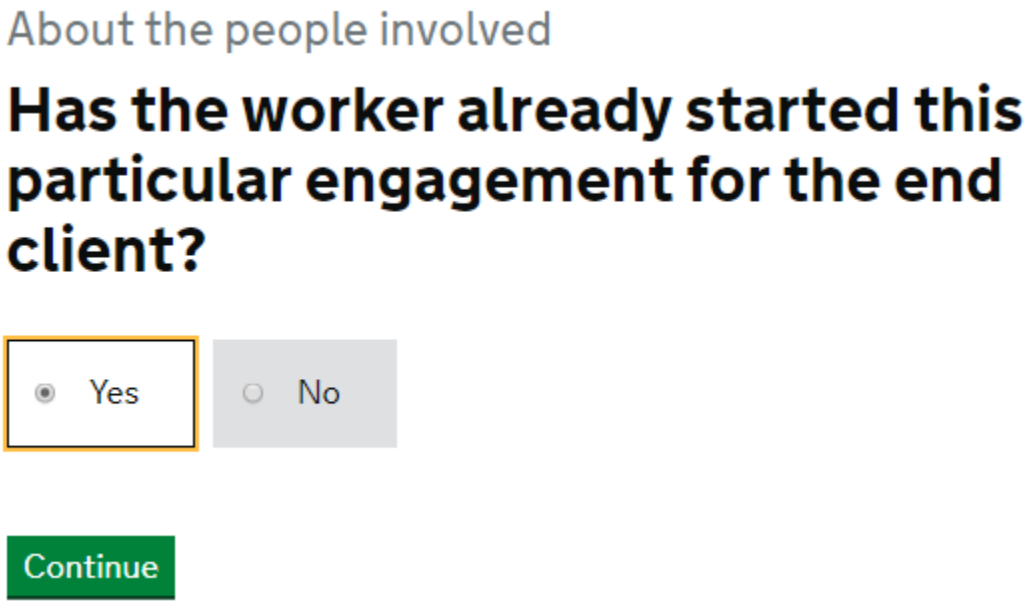
https://www.tax.service.gov.uk/check-employment-status-for-tax/setup

Question: Preliminary – P1



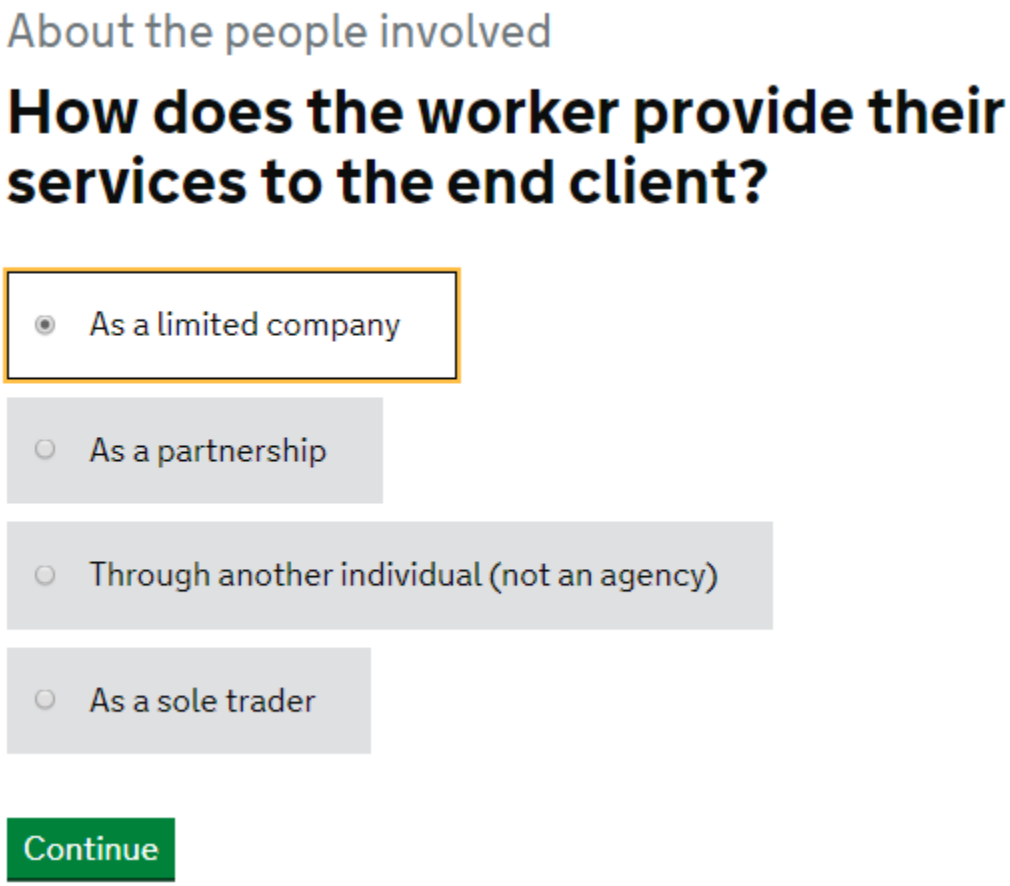
We chose “The Worker”. We are running this as if the contractor is trying to assess their position for tax purposes.

Question: Preliminary – P2



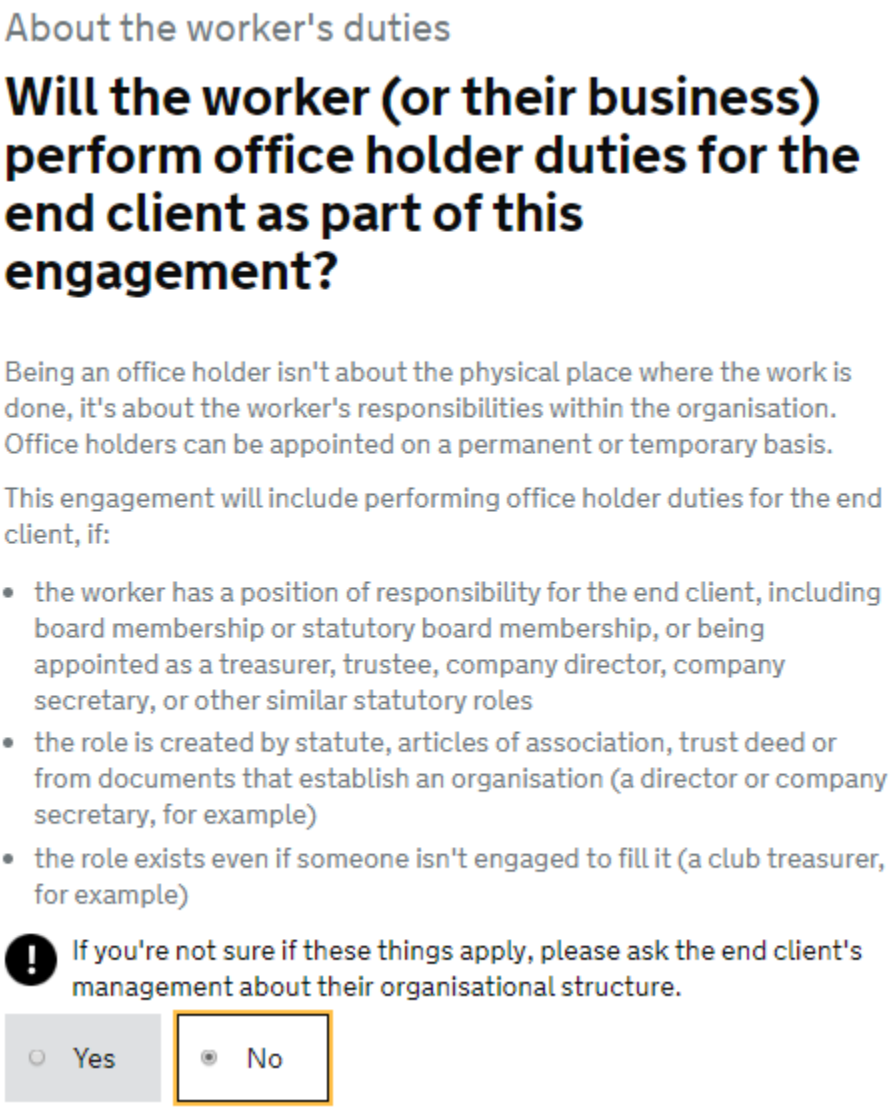
The contract is finished, but so we can use the tool we will say Yes.

Question: Preliminary – P3



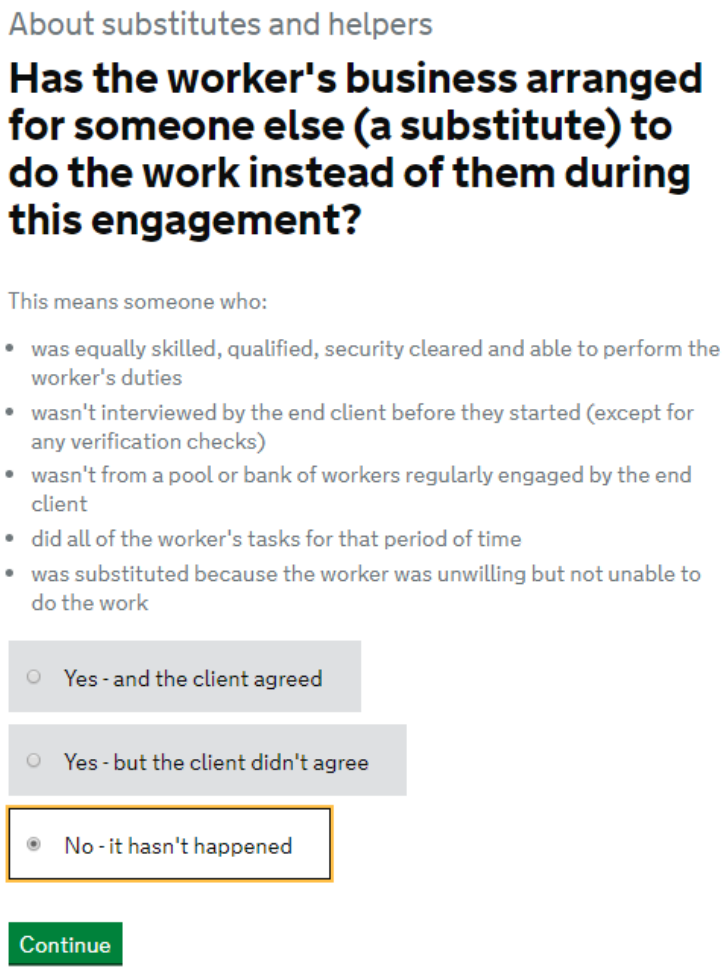
This is an IR35 case, so limited company.

Question: Preliminary – P4



The contractor is not an office holder. Point 9 in judgement:
9. The Lower Contract named Zeneca Specialities as "Client" and gave the site location as Blackley. The Lower Contract stated "[Novasoft] hereby agrees to provide the services to Lorien's client as set out in the Schedule below and agrees to provide the personnel shown in the Schedule to work on the client's premises as mentioned below under the client's supervision." The Schedule named Mr Brajkovic; gave his position as "contract analyst programmer"; gave the initial contact period as 4 August 1998 to 29 January 1999; standard hours as 36 per week; and standard rate as £34.00 per hour.

Question 1:

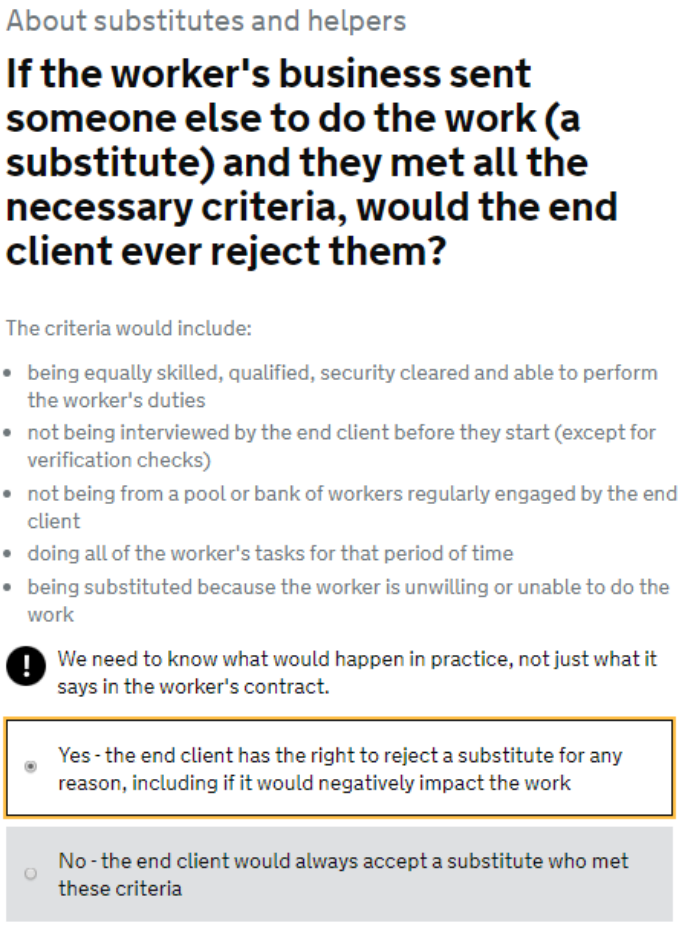


Point 31X in judgement:

31. Clause 8 of the Lower Contract (quoted at paragraph 9 above) provides that only Mr Brajkovic may be provided and no substitution is allowed.

34. We conclude that the notional contract between Avecia and Mr Brajkovic would not have permitted substitution.

Question 3:

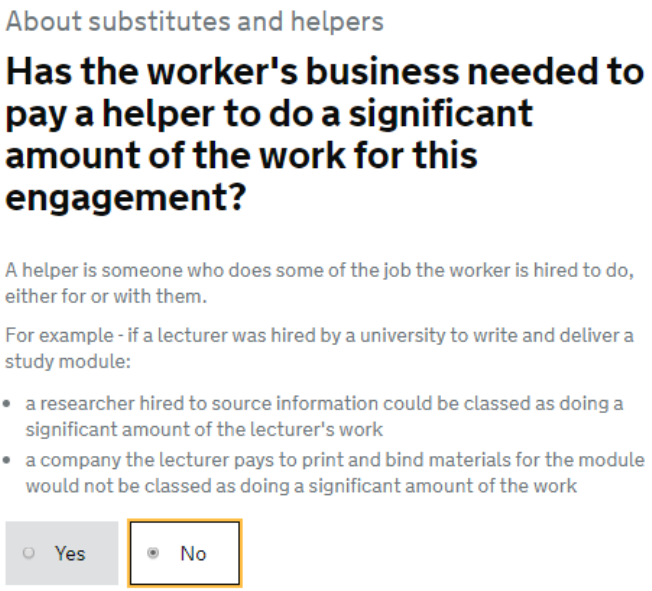


Point 31X in judgement:

31. Clause 8 of the Lower Contract (quoted at paragraph 9 above) provides that only Mr Brajkovic may be provided and no substitution is allowed.

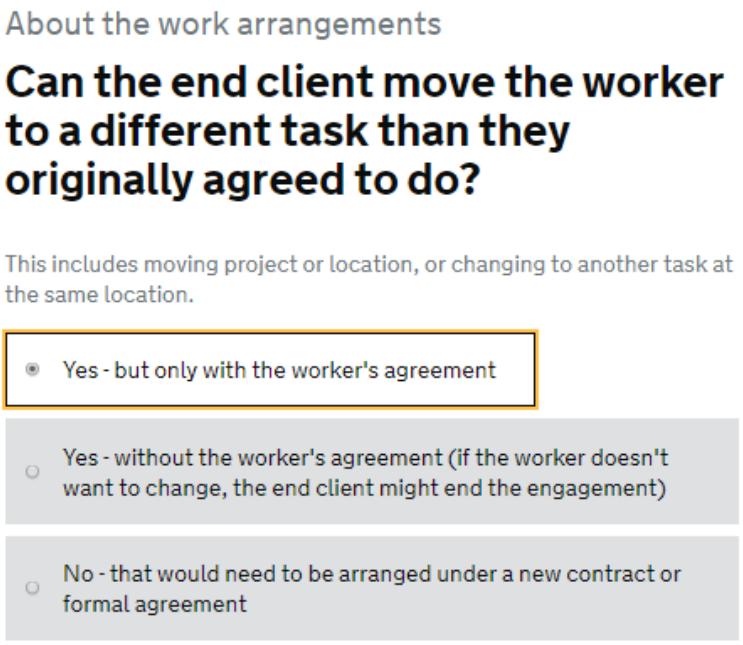
34. We conclude that the notional contract between Avecia and Mr Brajkovic would not have permitted substitution.

Question 5:



No evidence of helpers in the judgment.

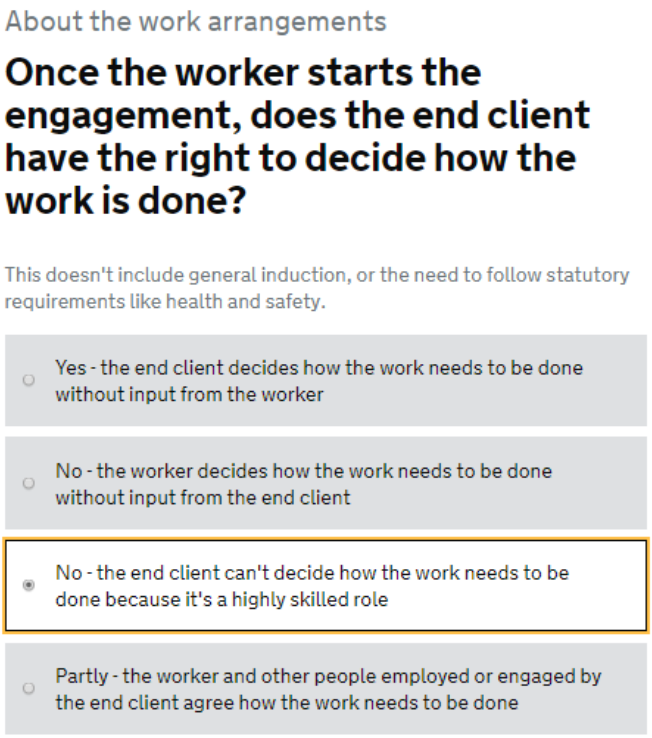
Question 6:



Judgement. Point 27:

27. Mr Brajkovic for Novasoft submitted:
(1) Mr Brajkovic was working on specified projects and he was not obliged to comply with any requests to assist outside those projects. He would try to accommodate reasonable requests, if possible, out of courtesy, but there was no obligation.

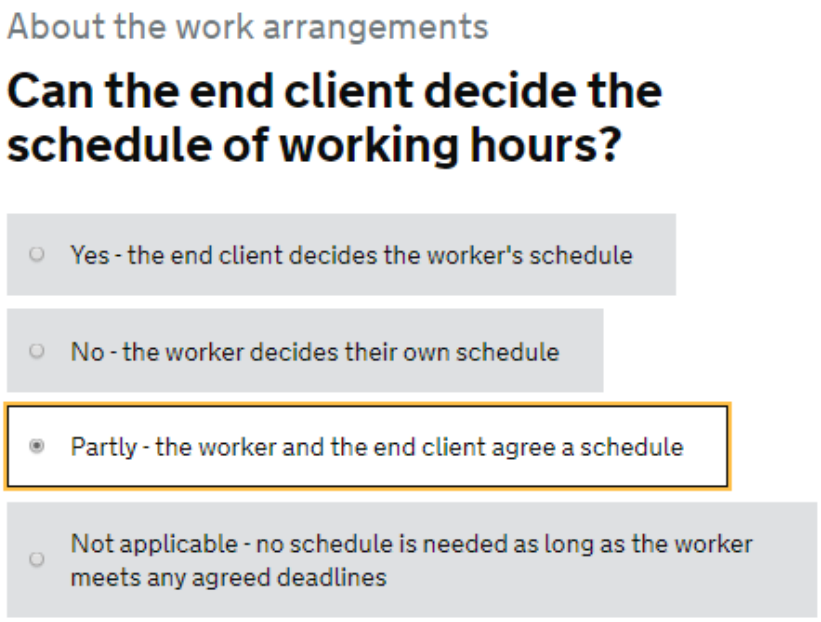
Question 7:



Judgement. Point X:
27. Mr Brajkovic for Novasoft submitted:
(1) Mr Brajkovic was working on specified projects and he was not obliged to comply with any requests to assist outside those projects. He would try to accommodate reasonable requests, if possible, out of courtesy, but there was no obligation. In order that the IT programming was intelligible to persons outside the immediate project team (for example, for later correction or updating) all work was performed according to industry-wide Microsoft standards governing naming conventions and formatting. Beyond that, Mr Brajkovic was expected to use his specialist skills and Avecia exercised no control over how he implemented his skill and knowledge to arrive at the delivered solutions.

75.
(1) would have required Mr Brajkovic to undertake his work in accordance with standards and protocols necessary to make the project work-product fit for purpose and maintainable in the future by other IT experts; also to commit sufficient time to that work in order for deadlines and budgets to be met; also to ensure any significant absences fitted with the staffing of the projects overall. Otherwise, the notional contract would not have been prescriptive as to exact hours of attendance, or the exact manner in which Mr Brajkovic implemented the skilled tasks assigned to him.

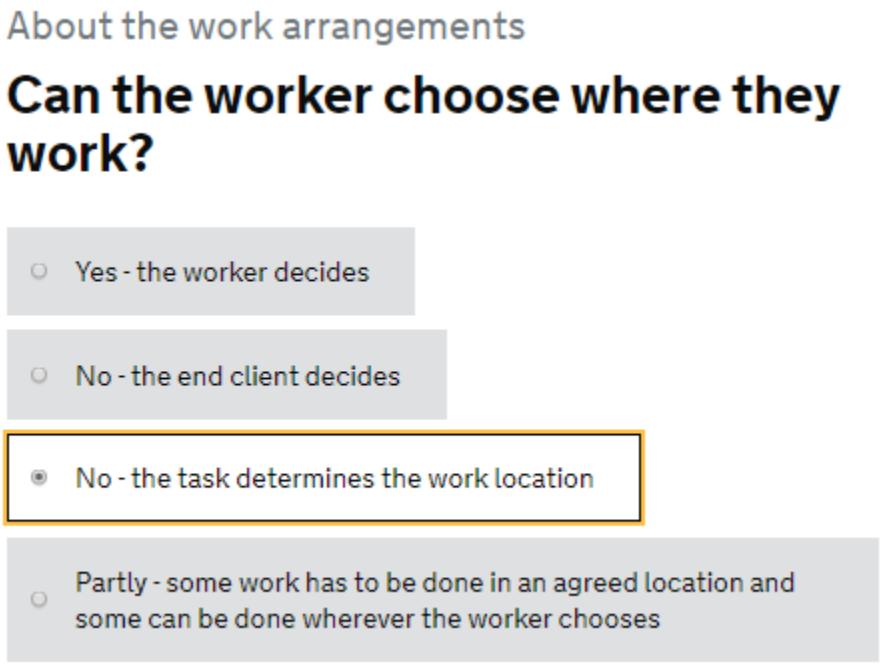
Question 8:



Judgement.
26. In a letter to HMRC dated 30 June 2003 Ms Dugdale replied to a set of standard questions used by HMRC in IR35 enquiries, and wrote:
"The contract with Mr Brajkovic was based on a 36 hour week. Core hours of 10.00 – 16.00 are mandatory. Start/end times flexible from 7.00 – 10.00 & 16.00 – 19.00. Manual timesheets were completed at start and end of day to track start/end times and hours worked on a daily basis. It is possible to collate up to + or – 10 hours in any given month."
On this last point, there was a system of flexitime that allowed carry forward or back between months of up to 10 hours.

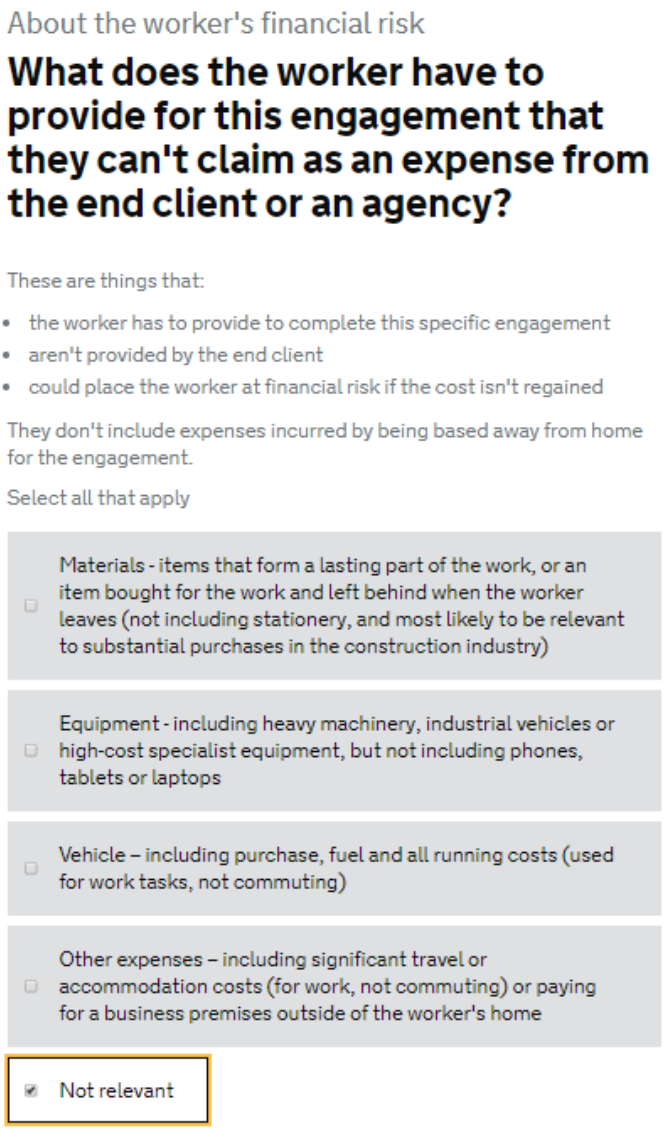
75. (1) would have required Mr Brajkovic to undertake his work in accordance with standards and protocols necessary to make the project work-product fit for purpose and maintainable in the future by other IT experts; also to commit sufficient time to that work in order for deadlines and budgets to be met; also to ensure any significant absences fitted with the staffing of the projects overall. Otherwise, the notional contract would not have been prescriptive as to exact hours of attendance, or the exact manner in which Mr Brajkovic implemented the skilled tasks assigned to him.

Question 9:



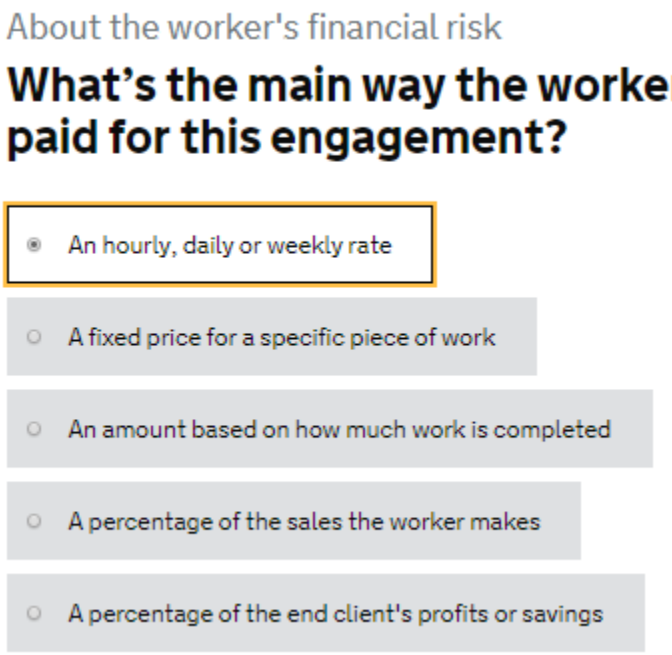
Judgement. Point X:
27
(4) All Mr Brajkovic's work on the Avecia projects was undertaken at Avecia's premises. This was because of security issues and to facilitate access to IT infrastructure, servers and corporate databases. Access was governed by Avecia's business operation and building access hours.

Question 10:



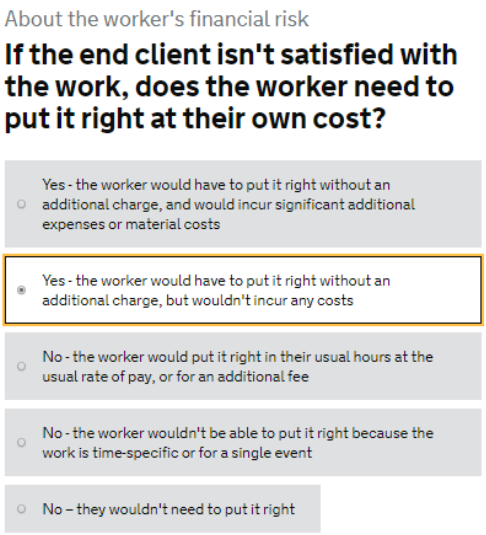
Judgement.
75.
(5) would not have required Mr Brajkovic to provide any IT equipment or software of his own – and indeed may have required him to use only that provided by Avecia, because of security concerns. It would have been an implied term that Mr Brajkovic would have access to the buildings to the extent necessary to perform his work.

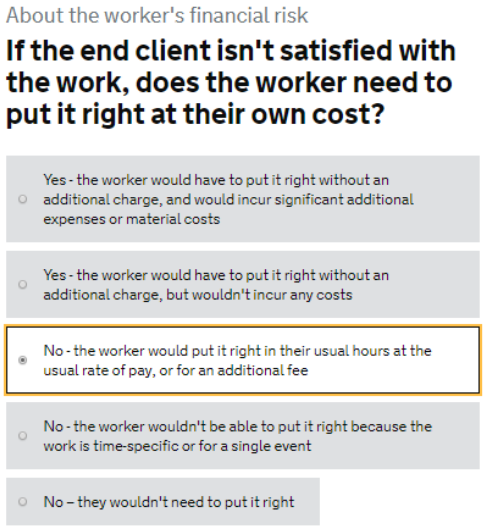
Question 11:



Judgement:
9. The Lower Contract named Zeneca Specialities as "Client" and gave the site location as Blackley. The Lower Contract stated "[Novasoft] hereby agrees to provide the services to Lorien's client as set out in the Schedule below and agrees to provide the personnel shown in the Schedule to work on the client's premises as mentioned below under the client's supervision." The Schedule named Mr Brajkovic; gave his position as "contract analyst programmer"; gave the initial contact period as 4 August 1998 to 29 January 1999; standard hours as 36 per week; and standard rate as £34.00 per hour.

Question 12:



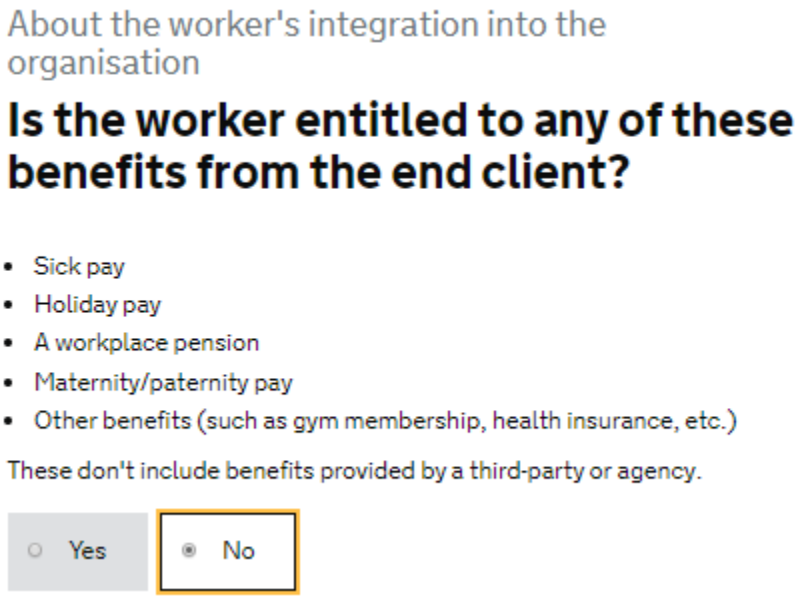


Judgement. Conflicting evidence indicates it's one of the above.

41. The evidence of both Mr Black and Ms Dugdale was that if some of Mr Brajkovic's work had been unsatisfactory then the time spent by Mr Brajkovic in correcting that work would have been remunerated, so that Novasoft would have received fees for that extra work. Mr Brajkovic stated that there had not been any such occasions (this was confirmed by Mr Black) but if there had then he would have felt professionally obliged to remedy matters without putting the time on his timesheet, even if Avecia would have been willing to pay.

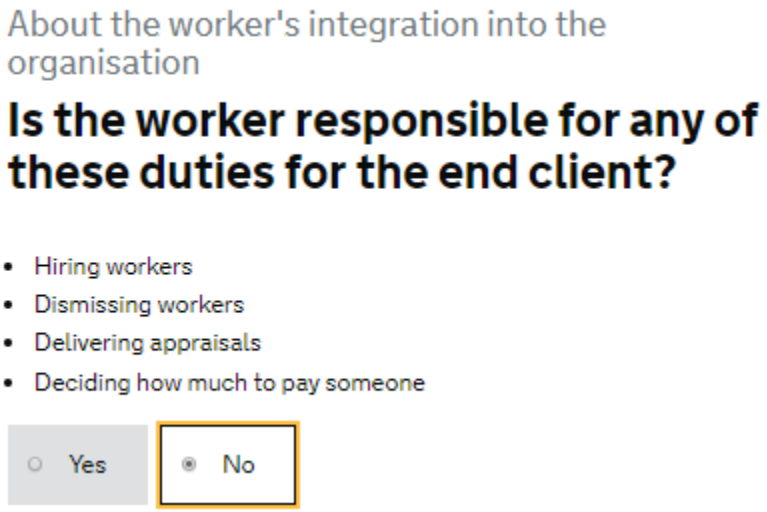
Comment: Which one is chosen makes no difference to the CEST result.

Question 13:



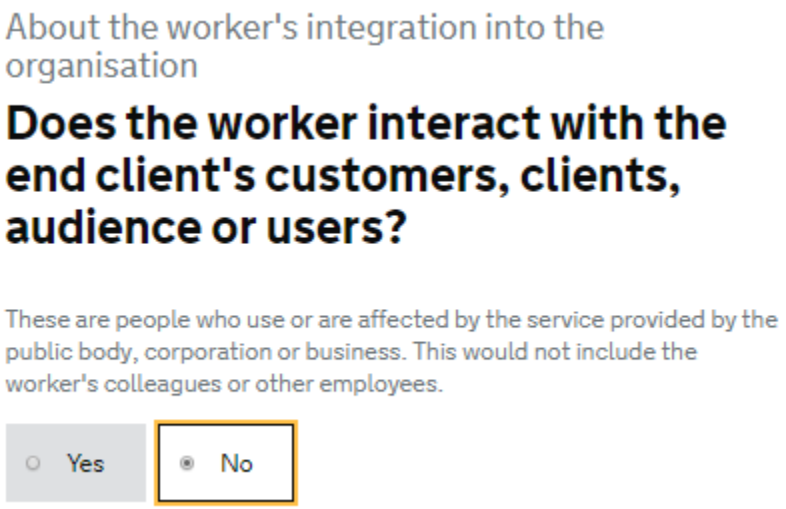
Judgement.
75.
(7) would not have provided for any typical employee benefits or statutory protections.

Question 14:



Judgement in inconclusive on this point. But, had any of these responsibilities been present then one would expect the judgment to mention it. So, we infer the answer of No. He is part of a project team, not HR.

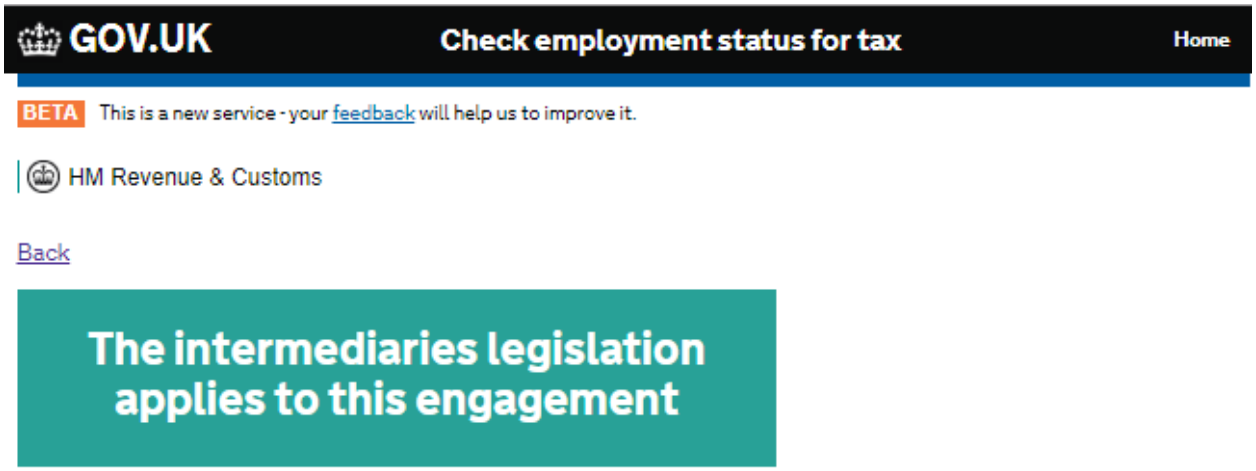
Question 15:



Judgement.
9. The Lower Contract named Zeneca Specialities as "Client" and gave the site location as Blackley. The Lower Contract stated "[Novasoft] hereby agrees to provide the services to Lorien's client as set out in the Schedule below and agrees to provide the personnel shown in the Schedule to work on the client's premises as mentioned below under the client's supervision." The Schedule named Mr Brajkovic; gave his position as "contract analyst programmer";

There is also no mention in the judgment of him liaising with the clients customers.

RESULT:


GOV.UK
Check employment status for tax
Home
BETA
This is a new service - your feedback will help us to improve it.
HM Revenue & Customs
Back
The intermediaries legislation applies to this engagement

Name of the person that completed this check	David Chaplin
End client's name	Novasoft
Engagement job title	Novasoft
Reference (worker's name or contract number, for example)	001

The intermediaries legislation applies to this engagement

Why are you getting this result

The answers you've given suggest that the working practices of this engagement mean the worker is employed for tax purposes.

About the people involved

Which of these describes you best?

The end client is the public body, corporation or business that the worker is providing services to.

> The worker

Has the worker already started this particular engagement for the end client?

> Yes

How does the worker provide their services to the end client?

> As a limited company

About the worker's duties

Workers that perform office holder duties for the end client are classed as employed for tax purposes. You've told us that the worker will not perform office

holder duties during this engagement.

Will the worker (or their business) perform office holder duties for the end client as part of this engagement?

Being an office holder isn't about the physical place where the work is done, it's about the worker's responsibilities within the organisation. Office holders can be appointed on a permanent or temporary basis.

This engagement will include performing office holder duties for the end client, if:

- the worker has a position of responsibility for the end client, including board membership or statutory board membership, or being appointed as a treasurer, trustee, company director, company secretary, or other similar statutory roles
- the role is created by statute, articles of association, trust deed or from documents that establish an organisation (a director or company secretary, for example)
- the role exists even if someone isn't engaged to fill it (a club treasurer, for example)

  If you're not sure if these things apply, please ask the end client's management about their organisational structure.

> No

About substitutes and helpers

We ask these questions to find out if the worker is being engaged as a business or on a personal service basis. If the end client hasn't or wouldn't agree to the worker's business arranging for a paid substitute to work instead of them, it suggests that they're being engaged on a personal service basis.

Has the worker's business arranged for someone else (a substitute) to do the work instead of them during this engagement?

This means someone who:

- was equally skilled, qualified, security cleared and able to perform the worker's duties
- wasn't interviewed by the end client before they started (except for any verification checks)
- wasn't from a pool or bank of workers regularly engaged by the end client
- did all of the worker's tasks for that period of time
- was substituted because the worker was unwilling but not unable to do the work

> No - it hasn't happened

If the worker's business sent someone else to do the work (a substitute) and they met all the necessary criteria, would the end client ever reject them?

The criteria would include:

- being equally skilled, qualified, security cleared and able to perform the worker's duties
- not being interviewed by the end client before they start (except for verification checks)
- not being from a pool or bank of workers regularly engaged by the end client
- doing all of the worker's tasks for that period of time
- being substituted because the worker is unwilling or unable to do the work

> We need to know what would happen in practice, not just what it says in the worker's contract.

> Yes - the end client has the right to reject a substitute for any reason, including if it would negatively impact the work

Has the worker's business needed to pay a helper to do a significant amount of the work for this engagement?

A helper is someone who does some of the job the worker is hired to do, either for or with them.

For example - if a lecturer was hired by a university to write and deliver a study module:

- a researcher hired to source information could be classed as doing a significant amount of the lecturer's work
- a company the lecturer pays to print and bind materials for the module would not be classed as doing a significant amount of the work

> No

About the work arrangements

We ask these questions to find out how much right of control the end client has over what the worker does during this engagement. If the end client has a right of control, this would suggest the working practices are similar to those of an employee.

Can the end client move the worker to a different task than they originally agreed to do?

This includes moving project or location, or changing to another task at the same

location.

> Yes - but only with the worker's agreement

Once the worker starts the engagement, does the end client have the right to decide how the work is done?

This doesn't include general induction, or the need to follow statutory requirements like health and safety.

> No - the end client can't decide how the work needs to be done because it's a highly skilled role

Can the end client decide the schedule of working hours?

> Partly - the worker and the end client agree a schedule

Can the worker choose where they work?

> No - the task determines the work location

About the worker's financial risk

We ask these questions to identify the level of financial risk the worker must take during this engagement. Workers who don't risk their own money by, for example, buying assets, or paying for overheads and materials are more likely to be employed for tax purposes.

What does the worker have to provide for this engagement that they can't claim as an expense from the end client or an agency?

> Not relevant

What's the main way the worker is paid for this engagement?

> An hourly, daily or weekly rate

If the end client isn't satisfied with the work, does the worker need to put it right at their own cost?

> Yes - the worker would have to put it right without an additional charge, but wouldn't incur any costs

About the worker’s integration into the organisation

We ask these questions to find out how integrated the worker is into the end client’s organisation. Workers who receive benefits, have line management responsibilities for other people and represent themselves as working for the end client are more likely to be employed for tax purposes.

Is the worker entitled to any of these benefits from the end client?

- Sick pay
- Holiday pay
- A workplace pension
- Maternity/paternity pay
- Other benefits (such as gym membership, health insurance, etc.)

These don't include benefits provided by a third-party or agency.

> No

Is the worker responsible for any of these duties for the end client?

- Hiring workers
- Dismissing workers
- Delivering appraisals
- Deciding how much to pay someone

> No

Does the worker interact with the end client's customers, clients, audience or users?

These are people who use or are affected by the service provided by the public body, corporation or business. This would not include the worker's colleagues or other employees.

> No

You should now do the following:

Public sector

If you're the worker you should tell the organisation that pays your fees (the fee payer) to deduct tax and National Insurance from your payment.

If you're the fee payer you need to deduct tax and National Insurance from the worker's deemed employment payment(s) (https://www.gov.uk/government/publications/off-payroll-working-in-the-public-sector-reform-of-the-intermediaries-legislation-technical-note/off-payroll-working-in-the-public-sector-reform-of-the-intermediaries-legislation-technical-note#fee-payer-accounts-for-tax-nics-apprenticeship-levy) during this engagement.

If you're the end client, and not the organisation paying the worker (fee payer). You should tell the fee paying agency to deduct tax and National Insurance from the worker's deemed employment payment(s) (https://www.gov.uk/government/publications/off-payroll-working-in-the-public-sector-reform-of-the-intermediaries-legislation-technical-note/off-payroll-working-in-the-public-sector-reform-of-the-intermediaries-legislation-technical-note#fee-payer-accounts-for-tax-nics-apprenticeship-levy) during this engagement.

Private sector

If you're the worker you need to follow this guidance (https://www.gov.uk/guidance/ir35-what-to-do-if-it-applies) about your taxes.

About this result

The intermediaries legislation will apply to this engagement where the worker's business (the intermediary) satisfies these specific conditions of liability (https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm3100) .

HMRC will stand by the result given unless a compliance check finds the information provided isn't accurate.

HMRC won't stand by results achieved through contrived arrangements designed to get a particular outcome from the service. This would be treated as evidence of deliberate non-compliance with associated higher penalties.

HMRC can review your taxes for up to 20 years.

> HMRC won’t keep a record of this result.

Decision Service Version: 1.5.0-final

This version number is used for HMRC internal purposes only. HMRC will stand by your result unless working practices have changed, in which case you should use this service again to reflect those changes

Novasoft Ltd v Revenue & Customs [2010] UKFTT 150 (TC) (06 April 2010)
INCOME TAX/CORPORATION TAX
Personal service companies (IR 35)

[2010] UKFTT 150 (TC)

TC00456

Appeal number TC/2009/10828

Income tax and NIC – Intermediaries legislation - IR35 – appeal allowed

FIRST-TIER TRIBUNAL

TAX

NOVASOFT LIMITED Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS Respondents

TRIBUNAL: Tribunal Judge Peter Kempster
Mr Stuart Martin

Sitting in public in Manchester on 8 & 9 December 2009

Mr Novak Brajkovic (Director) for the Appellant

Mr Alan Hall (HMRC) for the Respondents

DECISION

1. This appeal concerned the applicability of the intermediaries legislation – commonly referred to as the IR35 legislation – to the affairs of the Appellant ("Novasoft") during the tax years in dispute.

Assessments and appeals

2. On 13 June 2005 the Respondents ("HMRC") served on Novasoft formal notices under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 and formal decisions under section 8 of the Social Security (Transfer of Functions etc) Act 1999, covering the period 6 April 2000 to 13 December 2002. 6 April 2000 was the commencement of the operation of the IR35 legislation (described below).

3. On 27 June 2005 Novasoft's representatives appealed against all the items described in paragraph 2 above. Further grounds of appeal were later added and there was case management of the proceedings by both the former General Commissioners and this Tribunal before the appeals were listed for hearing.

4. Mr Hall for HMRC confirmed that, because of the manner of operation of the IR35 legislation, this Tribunal was being asked to make a decision in principle on the appeals. Unless the appeals were all allowed in full then it would be necessary for actual figures to be agreed between the parties or brought back to the Tribunal for further consideration.

5. Mr Hall confirmed that, if successful, HMRC would seek to recover interest as well as the PAYE and NIC, but would not seek to impose any penalty.

Background and contracts

6. Novasoft was incorporated in February 1997 and is owned 75% by Mr Novak Brajkovic ("Mr Brajkovic") and 25% by Mr Brajkovic's wife. During the period covered by the maters in dispute in this appeal Mr Brajkovic was the sole director of Novasoft. Mr Brajkovic is an IT analyst and programmer.

7. Novasoft provided the services of Mr Brajkovic to Post Office IT (March 1997 to June 1997) and to Halifax Building Society (June 1997 to July 1998).

8. In July 1998 Novasoft entered into a contract ("the Lower Contact") with Lorien Holdings Limited ("Lorien") (an unconnected company). This contract was extended on several occasions up to December 2002. The business of Lorien was to act as an agency providing IT contractors to companies engaged in IT projects.

9. The Lower Contract named Zeneca Specialities as "Client" and gave the site location as Blackley. The Lower Contract stated "[Novasoft] hereby agrees to provide the services to Lorien's client as set out in the Schedule below and agrees to provide the personnel shown in the Schedule to work on the client's premises as mentioned below under the client's supervision." The Schedule named Mr Brajkovic; gave his position as "contract analyst programmer"; gave the initial contact period as 4 August 1998 to 29 January 1999; standard hours as 36 per week; and standard rate as £34.00 per hour. Appended to the contract were "general terms and conditions", which included the following:

(1) Clause 6 required 28 days notice of termination by Lorien, with four exceptions. First, under clause 6 "Lorien shall be entitled to terminate this agreement by 7 days notice in the event that Lorien's client shall default in payment or be in arrears of Lorien's charges". Secondly, under clause 11 "In the event of Lorien's client proving to Lorien's satisfaction that the services of [Novasoft] provided hereunder are unsatisfactory during the term of this contract then Lorien reserves the right to terminate this agreement forthwith without any compensation whatsoever." Thirdly, clause 14 allowed Lorien to terminate after failure to remedy a notified breach within seven days. Lastly, also under clause 14, Lorien could terminate in the event that Novasoft contracted direct with the client.

(2) Clause 8 stated "The personnel shown in the schedule hereto shall be the only persons whose services may be supplied by [Novasoft] to the client otherwise [*sic*] agreed by Lorien in writing." Clause 12 stated "[Novasoft] and personnel supplied hereunder shall be under the direct supervision of Lorien's client and shall perform their duties hereunder subject to the client's reasonable requests."

(3) Clause 20 stated "For the duration of this agreement [Novasoft] hereby agrees that the personnel supplied hereunder shall not undertake any other work of a similar nature except with the express consent in writing of Lorien." Clause 10 was a covenant by Novasoft not to contract direct with the client for six months after the expiry of the contract.

(4) Clauses 15 & 17 made provision for payment 4-weekly against invoices "supported by timesheets for the invoice period and duly signed and authorised by the client."

10. In October 1998 Lorien (or strictly, Lorien Resourcing Solutions) entered into a contact ("the Upper Contract") with Zeneca Limited. Zeneca Specialities was a division of Zeneca Limited. The Upper Contract recited that "[Lorien] has developed certain expertise in the provision of IT contractors and is in the business of providing such expertise. Zeneca desires to obtain the expertise of [Lorien] and apply it to Zeneca businesses. [Lorien] has agreed to provide to Zeneca the Services as described in this agreement and Zeneca has agreed to appoint [Lorien] as a supplier of the said Services." The Services were defined as meaning "the services relating to the provision of Contractors by [Lorien] in accordance with the provisions of this agreement." Contractor was defined as meaning "a person engaged by [Lorien] and supplied or likely to be supplied to Zeneca to perform contractor services subject to a contract." Clause 22.2 allowed Zeneca to terminate the Upper Contract for any reason on one month's written notice.

11. On 8 July 1998 Mr Brajkovic commenced working at Zeneca on IT projects which are described later in this decision notice. As Mr Brajkovic commenced working before the date of the Upper Contract it may be that there was an earlier contract that was superseded or else the parties to the Upper Contract delayed in formalising their arrangements; the Tribunal took it that the Upper Contract correctly reflected the arrangements at the relevant times.

12. Mr Brajkovic had been interviewed by Mr Black (who gave evidence at the hearing). Mr Brajkovic worked on three IT projects being undertaken by Avecia, primarily a chemical compounds and formulations application called HENRE6.

13. In June 1999 Avecia Limited was spun out of Zeneca and it was common ground that for the purposes of the IR35 legislation (see below as to terminology) the "client" was Avecia Limited ("Avecia").

14. During the early years of operation of the IR35 legislation there was a procedure whereby a taxpayer could seek the views of HMRC as to whether the IR35 legislation might apply to its circumstances. Novasoft did that in January 2002. HMRC undertook various enquiries including interviews of managers at Avecia. The parties could not agree the position and this led eventually to the issue of the assessments described in paragraph 2 above.

The IR35 Legislation

15. The legislative background and approach may be given by quoting a passage from the judgment of Henderson J in *Dragonfly Consultancy Ltd v Revenue and Customs Commissioners* [2008] STC 3030 (at 3053 onwards).

> "**[8]** The background to the IR35 legislation (so called because that was the number of the Inland Revenue press release in March 1999 which heralded its introduction) is fully set out in the judgment of Robert Walker LJ (as he then was) in *R* (*on the application of Professional Contractors Group*) *v IRC* [2002] STC 165. At [51] of his judgment, with which Auld and Dyson LJJ agreed, he described the aim of both the tax and the NIC provisions as being:
>
> '[51] … to ensure that individuals who ought to pay tax and NIC as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation …'
>
> **[9]** The method adopted by the legislation to achieve this aim, broadly stated, is to tax an individual worker [in the present appeal, Mr Brajkovic] whose services are provided to a client [in the present appeal, Avecia] through an intermediary [in the present appeal, Novasoft] on the same basis as would apply if the worker were performing those services as an employee, provided that (in terms of the income tax test set out in para 1(1) of Sch 12 to the Finance Act 2000):
>
> '… (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.'
>
> In other words, the legislation enacts a statutory hypothesis and asks one to suppose that the services in question were provided under a contract made directly between the client … and the worker …. If that hypothetical contract would be regarded for income tax purposes as a contract of employment (or service), the legislation will apply. Conversely, if the hypothetical contract would not be so regarded, the legislation will not apply.
>
> **[10]** It is important to notice that the effect of the statutory hypothesis is not automatically to transform all workers whose services are supplied through a service company into deemed Sch E taxpayers. On the contrary, as Robert Walker LJ stressed in his judgment in *R* (*on the application of Professional Contractors Group*) *v IRC* [2002] STC 165 at [12]:
>
> '[12] … The legislation does not strike at every self-employed individual who chooses to offer his services through a corporate vehicle. Indeed it does not apply to such an individual at all, unless his self-employed status is near the borderline and so open to question or debate. The whole of the IR35 regime is restricted to a situation in which the worker, if directly contracted by and to the client "would be regarded for income tax purposes as an employee of the client". That question has to be determined on the ordinary principles established by case law …'
>
> **[11]** For NIC purposes, the statutory hypothesis is framed in slightly different language. Regulation 6(1) of the Social Security Contributions (Intermediaries)

> Regulations 2000, SI 2000/727 ('the 2000 Regulations') says that they apply where the services of the worker are supplied 'under arrangements involving an intermediary', and:
>
> '… (c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client.'
>
> **[12]** The nature of the exercise which the court has to perform under reg 6(1) was helpfully described by Hart J in *Synaptek Ltd v Young* (*Inspector of Taxes* [2003] STC 543, in a passage which merits quotation in full. It is helpful not only for Hart J's analysis of the statutory language, but also for his rejection of the submission made by counsel for the taxpayer that the question was necessarily one of law because it involved the characterisation of a hypothetical contract. Hart J said (see [2003] STC 543 at [11] …):
>
> '[11] I do not accept that submission. The inquiry which reg 6(1) directs is in the first instance an essentially factual one. It involves identifying, first, what are the "arrangements involving an intermediary" under which the services are performed, and, secondly, what are the "circumstances" in the context of which the arrangements have been made and the services performed. The legal hypothesis which then has to be made is that the arrangements had taken the form of a contract between the worker and the client. To the extent that "the arrangements" are in the particular case to be found only in contractual documentation, it may be true to say that the interpretation of that documentation is a question of law. Even in that case, however, the findings of the fact-finding tribunal will be determinative of the factual matrix in which the interpretative process has to take place, and influential to a greater or lesser degree in enabling the essential character of the arrangements to be identified. Where, on the other hand, the arrangements cannot be located solely in contractual documentation, their identification and characterisation is properly to be described as a matter of fact for the fact-finding tribunal. The fact that the tribunal is then asked to hypothesise a contract comprising those arrangements directly between the worker and the client does not, by itself, convert the latter question from being a question of mixed fact and law into a pure question of law. …"

16. The Tribunal finds, indeed it was not contested by the Appellant, that the statutory requirements (above) as to the arrangements involving an intermediary under which the services are performed are satisfied.

17. So the approach to be taken by this Tribunal is to hypothesise a notional contract between the worker (Mr Brajkovic) and the client (Avecia), and then to consider whether under that notional contract the worker would have been an employee of the client. That should be done by applying normal principles of contract and employment law – the IR35 legislation provides no special code in that regard.

Whether a (notional) contract of employment exists

18. This is, of course, a question often posed to the tribunals and courts, and from the very considerable body of case law on the topic this Tribunal draws the following principles – all of which were endorsed by both parties to the present appeal.

19. In *Ready Mixed Concrete* (*South East*) *Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 MacKenna J stated (at 515):

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

20. In *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 Cooke J stated (at 184–185):

> "… the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no," then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

21. In *Hall v Lorimer* [1992] STC 599 Mummery J stated (at 612) (in a passage approved on appeal by Nolan LJ - [1994] STC 23 at 29):

> "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* (*Inspector of Taxes*) [1986] STC 236 at 245: "It is, in my judgment, 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 was given by another tribunal to the common facts. The facts as a whole must be looked at, and a factor which may be compelling in one case in the light of the facts of that case may not be compelling in the context of another case.""

22. Mr Hall in his skeleton argument proposed the following list of factors for consideration, and we agree these are the relevant factors:

(1) Extent and degree of control exercised by the client over the worker.

(2) The worker's right to engage helpers or substitutes.

(3) Mutuality of obligations between the worker and the client.

(4) Financial risk of the worker.

(5) Provision of equipment.

(6) Basis of payment of the worker.

(7) Personal factors

(8) The existence of employee rights.

(9) Termination of the contract.

(10) Whether the worker was part and parcel of the client's organisation.

(11) Exclusive services.

(12) Mutual intention.

We bear in mind the admonishment of Mummery J not to treat this as a checklist to run through mechanically. Instead they are the factors that go towards painting the picture whose overall effect must be evaluated.

The hearing

23. The Tribunal took evidence as follows. For the Appellant: Mr Brajkovic gave no formal evidence but made his submissions as advocate. The Tribunal considered that satisfactory but noted that it denied Mr Hall the opportunity to cross-examine formally for HMRC. For HMRC: Mr Steve Black, a former IT team leader at Avecia, adopted a witness statement dated 26 August 2009 and gave sworn oral evidence; and Ms Jill Dugdale, a former IT manager at Avecia, adopted a witness statement dated 24 September 2009 and gave sworn oral evidence. The Tribunal considered both witnesses to be credible and reliable, with good recollection of the events within their personal knowledge.

Consideration of the various factors

24. We arrange the submissions made, evidence taken and our findings under the various factors set out in paragraph 22 above.

Extent and degree of control exercised by the client over the worker.

25. The Tribunal notes that in *Ready Mixed Concrete* (cited above) MacKenna J stated (at 515):

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."

26. In a letter to HMRC dated 30 June 2003 Ms Dugdale replied to a set of standard questions used by HMRC in IR35 enquiries, and wrote:

> "The contract with Mr Brajkovic was based on a 36 hour week. Core hours of 10.00 – 16.00 are mandatory. Start/end times flexible from 7.00 – 10.00 & 16.00 – 19.00. Manual timesheets were completed at start and end of day to track start/end times and hours worked on a daily basis. It is possible to collate up to + or – 10 hours in any given month."

On this last point, there was a system of flexitime that allowed carry forward or back between months of up to 10 hours. The letter continues:

> "Mr Brajkovic would have been expected to work a 5 day week, hours within the time periods described [above]. Permission would have been required if Mr Brajkovic wanted to vary start/end times within the core hours or outside the earliest start time/latest end time. Mr Brajkovic would make a request to his manager for leave. If sick, a phone call to manager would be expected. Mr Brajkovic was not paid by Avecia for leave or sickness."
>
> "Mr Brajkovic was expected to follow the team standards and procedures. … Mr Brajkovic would work on projects as and when allocated to him, which were appropriate to his skills."

27. Mr Brajkovic for Novasoft submitted:

> (1) Mr Brajkovic was working on specified projects and he was not obliged to comply with any requests to assist outside those projects. He would try to accommodate reasonable requests, if possible, out of courtesy, but there was no obligation. In order that the IT programming was intelligible to persons outside the immediate project team (for example, for later correction or updating) all work was performed according to industry-wide Microsoft standards governing naming conventions and formatting. Beyond that, Mr Brajkovic was expected to use his specialist skills and Avecia exercised no control over how he implemented his skill and knowledge to arrive at the delivered solutions.
>
> (2) Mr Brajkovic preferred to start work early rather than work late, and also to take time off for recreational activities with his young family or in relation to his sporting interests. He arrived at Avecia's premises no later than 8 am and left no later than 4 pm, sometimes significantly earlier. Avecia's employees were expected to work set hours. Mr Brajkovic completed agency timesheets; these were a budgetary and accounting device, to record the number of hours worked. Mr Brajkovic estimated that his average hours were around 36 per week, compared to 40 for employees of Avecia. Mr Brajkovic usually took 8 to 12 weeks vacation each year, which was an attraction of working freelance and was not available to employees of Avecia. Although Mr Brajkovic would inform Avecia of any intended absences, that was a matter of courtesy and there was no requirement for authorisation.
>
> (3) In cross-examination Ms Dugdale had noted that the hours recorded in some weeks towards the end of the contract were less than the 36 hours per week that she had recollected in her letter to HMRC. Although complete records were no longer available, that was a consistent picture of the work pattern throughout the assignment – there was flexibility that would not be available to an employee.
>
> (4) All Mr Brajkovic's work on the Avecia projects was undertaken at Avecia's premises. This was because of security issues and to facilitate access to IT infrastructure, servers and corporate databases. Access was governed by Avecia's business operation and building access hours.

28. Mr Hall for HMRC submitted :

> (1) For a professional person a light-touch manner of control was sufficient. Members of the Avecia IT team could not do whatever they wanted.
>
> (2) Clause 12 of the Lower Contract stated that Novasoft would be under the direct supervision of Avecia.

(3) Mr Brajkovic was allocated tasks by Mr Black which would be executed to set standards and protocols at the direction of Avecia – those templates and protocols were prepared by Mr Black and his colleagues and preceded (but were later superseded by) the Microsoft standards. Mr Black had confirmed that team members had to comply with the Avecia standards he had promulgated. Tasks had to be performed within deadlines and budgets set by Avecia. That work was checked and reviewed by colleagues in the team.

(4) While HMRC accepted that Mr Brajkovic could work flexible hours, that was open to employees as well to a certain extent. A review of remittance advices provided by Novasoft (these did not cover the entire period under consideration) and the accounts of the company indicated that the billings reflected hours worked by Mr Brajkovic broadly equivalent to the contractual hours of Avecia employees. That accorded with Ms Dugdale's answers to HMRC's questions. Ms Dugdale had also said that she did not recall Mr Brajkovic having a lot of time off work.

(5) Mr Black's evidence was that he expected to be asked in advance about holiday absence, and that he would refuse if it was inconvenient to the project.

29. The Tribunal notes that in *Morren v Swinton and Pendlebury Borough Council* [1965] 2 All ER 349 Lord Parker CJ stated(at 351):

> "The cases have over and over again stressed the importance of the factor of superintendence and control, but that it is not the determining test is quite clear. In *Cassidy v Minister of Health*, Somervell LJ referred to this matter, and instanced, as did Denning LJ in the later case of *Stevenson, Jordan & Harrison v MacDonald & Evans*, that clearly superintendence and control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience. Instances of that have been given in the form of the master of a ship, an engine driver, a professional architect or, as in this case, a consulting engineer. In such cases there can be no question of the employer telling him how to do work; therefore, the absence of control and direction in that sense can be of little, if any, use as a test."

30. We conclude that the notional contract between Avecia and Mr Brajkovic would have required Mr Brajkovic to undertake his work in accordance with standards and protocols necessary to make the project work-product fit for purpose and maintainable in the future by other IT experts; also to commit sufficient time to that work in order for deadlines and budgets to be met; also to ensure any significant absences fitted with the staffing of the projects overall. Otherwise, the notional contract would not have been prescriptive as to exact hours of attendance, or the exact manner in which Mr Brajkovic implemented the skilled tasks assigned to him.

The worker's right to engage helpers or substitutes.

31. Clause 8 of the Lower Contract (quoted at paragraph 9 above) provides that only Mr Brajkovic may be provided and no substitution is allowed.

32. Both Mr Black and Ms Dugdale were clear in their evidence that Avecia expected Mr Brajkovic to perform the work personally; had Mr Brajkovic nominated a substitute then that person could not have gained access to the department because of security issues, and would not have been allowed to work on the project software because his/her technical competence had not been established by the project leader and manager.

33. The Tribunal notes that in *Ready Mixed Concrete* (cited above) MacKenna J stated (at 515):

> "The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be …"

Although a right of substitution would generally be inconsistent with a contract of employment, its absence does not point definitely to such a contract.

34. We conclude that the notional contract between Avecia and Mr Brajkovic would not have permitted substitution.

Mutuality of obligations between the worker and the client.

35. Mr Hall for HMRC submitted that the irreducible minimum of mutuality of obligation was clearly satisfied. HMRC accepted that there was no obligation on Lorien to offer further work on expiry of the contract – nor on Novasoft to accept it – but while the contract was in place mutual obligations did exist.

36. Mr Brajkovic for Novasoft submitted that the formal expiry date of the contract was 27 December 2002 but it was terminated on 13 December 2002 with no offer or expectation of any rights in respect of the final fortnight. There was no right or expectation to be offered any contracts on future phases of the projects. Avecia did subsequently ask if Mr Brajkovic was available but that was declined. After the end of the contact Novasoft did not secure another assignment for three months.

37. Both Mr Black and Ms Dugdale were clear in their evidence, and Mr Brajkovic confirmed, that if there had been an unexpected incident that prevented work on the project (for example, a total power outage) then Mr Brajkovic would have been expected not to include the down-time on his worksheets – so Novasoft would not have received any fees for that down-time.

38. The Tribunal notes that in *Usetech Ltd v Young* [2004] STC 1671 Park J stated (at 1699):

> "[57] … If there is a relationship between a putative employer and employee, but it is one under which the 'employer' can offer work from time to time on a casual basis, without any obligation to offer the work and without payment for periods when no work is being done, the cases appear to me to establish that there cannot be one continuing contract of employment over the whole period of the relationship, including periods when no work was being done. There may be an 'umbrella contract' in force throughout the whole period, but the umbrella contract is not a single continuing contract of employment. …
>
> [58] That leaves open the possibility that each separate engagement within such an umbrella contract might itself be a free-standing contract of employment …
>
> [59] However that may be for a case where the argument is that there has been a succession of separate contracts of employment, this case is not really of that nature. In contrast to a case like *Market Investigations* (or so it seems to me), the facts lend themselves readily to the conclusion that, if Mr Hood [the worker] had been working for ABB [the client] under a direct contract, it would have been a contract of employment. The engagement lasted for 17 months. Viewed

> realistically there was nothing casual about it. On Mr Hood's own evidence he worked for an average of 58 hours a week. The Special Commissioner found that 'he was, as a rule, expected to work the "core" hours from 8am to 5pm' (para 26 of the decision).
>
> [60] I would accept that it is an over-simplification to say that the obligation of the putative employer to remunerate the worker for services actually performed in itself always provides the kind of mutuality which is a touchstone of an employment relationship. Mutuality of some kind exists in every situation where someone provides a personal service for payment, but that cannot by itself automatically mean that the relationship is a contract of employment: it could perfectly well be a contract for free lance services. …"

39. We conclude that the notional contract between Avecia and Mr Brajkovic would have established mutuality of obligations during the term of the contract but, for the reason put forward by Park J in *Usetech*, consider that that is appropriate to a self-employment contract as well as one of employment.

Financial risk of the worker.

40. The Tribunal notes that in *Hall v Lorimer* in the Court of Appeal [1994] STC 23 Nolan LJ stated (at 29):

> "… the risk of bad debts and outstanding invoices is certainly not one which is normally associated with employment."

But, as Mr Hall for HMRC pointed out to us, in that case the longest engagement was 10 days – usually they were only for one or two days – and the taxpayer had an average of 120 to 150 engagements each year spread among some 20 producers, all of which had to be invoiced and collected.

41. The evidence of both Mr Black and Ms Dugdale was that if some of Mr Brajkovic's work had been unsatisfactory then the time spent by Mr Brajkovic in correcting that work would have been remunerated, so that Novasoft would have received fees for that extra work. Mr Brajkovic stated that there had not been any such occasions (this was confirmed by Mr Black) but if there had then he would have felt professionally obliged to remedy matters without putting the time on his timesheet, even if Avecia would have been willing to pay.

42. Mr Brajkovic for Novasoft submitted that the contract could be terminated immediately by Lorien in certain circumstances without compensation. Novasoft bore the risk of late payment or non-payment of invoices by Lorien. Novasoft incurred costs of training, printing of materials and stationery, hardware upgrades, library of IT manuals. Novasoft was required to carry professional indemnity insurance.

43. Mr Hall for HMRC challenged Mr Brajkovic's assertion that Novasoft incurred training costs; Mr Brajkovic stated that much training in the IT world was provided free by software companies, but still required absence from paid assignments and so represented an economic cost. Mr Hall submitted that the arrangements with Avecia did not permit Novasoft to win extra profit by working harder.

44. We conclude that the notional contract between Avecia and Mr Brajkovic would have given Mr Brajkovic a risk of non-payment by Avecia (see also paragraphs 48-50 below

concerning manner of payment) but do not see that as a helpful distinction between a contract of service or one for services in the circumstances of this notional contract.

Provision of equipment.

45. Mr Brajkovic for Novasoft submitted that there was no requirement or expectation that Mr Brajkovic (or Novasoft) should provide any IT equipment in connection with the Avecia projects. The IT systems were those of Avecia and (as Mr Black confirmed in his evidence) there would be security concerns about permitting outside hardware being connected to the Avecia IT system. Mr Brajkovic was provided with IT equipment (for use outside Avecia) by Novasoft.

46. Mr Hall for HMRC submitted that Avecia provided to Mr Brajkovic all the necessary hardware and software in connection with the projects on which he worked. There was also the provision of office accommodation and canteen facilities (both stipulated in clause 4 of the Upper Contract) and car parking. HMRC accepted that in the context of the facts of the present appeal, this was unlikely to be an important factor.

47. We conclude that the notional contract between Avecia and Mr Brajkovic would not have required Mr Brajkovic to provide any IT equipment or software of his own – and indeed may have required him to use only that provided by Avecia, because of security concerns. It would have been an implied term that Mr Brajkovic would have access to the buildings to the extent necessary to perform his work.

Basis of payment of the worker.

48. Mr Brajkovic for Novasoft submitted that Novasoft was paid an hourly rate for Mr Brajkovic's services that was negotiated between Lorien and Novasoft. That hourly rate was different from that paid by Avecia to its employees. It was also different from that charged by Lorien to Avecia. Novasoft invoiced Lorien and charged VAT on its invoices, and payment was made by Lorien to Novasoft. The amounts varied form month-to-month, which contrasted with the receipt of a regular monthly amount of salary expected by an employee.

49. Mr Hall for HMRC submitted that payment by reference to project milestones might indicate self-employment. Payment by the hour might be more typical of employment – but he accepted that many professional advisers operate on the basis of an hourly charge-out rate.

50. We conclude that the notional contract between Avecia and Mr Brajkovic would have provided for an hourly rate of compensation, and would have required proper invoices to be delivered periodically.

Personal factors

51. The Tribunal notes that in *Hall v Lorimer* in the Court of Appeal (cited above) Nolan LJ stated (at 30):

> "A self-employed author working from home or an actor or a singer may earn his living without any of the normal trappings of a business. For my part I would suggest there is much to be said in these cases for bearing in mind the traditional contrast between a servant and an independent contractor. The extent to which the individual is dependent on or independent of a particular paymaster for the financial exploitation of his talents may well be significant."

52. Mr Brajkovic for Novasoft submitted that the total length of the contract with Avecia was four and a half years. Mr Brajkovic's previous assignments had involved long travelling (120 and 80 miles round trips) and so as Avecia was only a few miles away it suited him to accept extensions of the assignment there.

53. Mr Hall for HMRC submitted that Mr Brajkovic had effectively worked full-time for Avecia from August 1998 until December 2002. HMRC accepted that a self-employed businessman may work exclusively for one client because it is commercially advantageous to do so, but Mr Brajkovic did not present an image of a businessman offering his services to the marketplace; rather, of someone comfortable working for the same client on terms equivalent to employment.

54. We conclude that the notional contract between Avecia and Mr Brajkovic would not have contained any provisions specifically relevant to this factor.

The existence of employee rights.

55. Mr Brajkovic for Novasoft submitted that he was not provided by Avecia with any of the types of benefits commonly enjoyed by employees:

(1) He had no entitlement to holiday pay.

(2) He had no entitlement to sick pay. He had no requirement to produce to Avecia "sick notes" in support of any absence due to illness.

(3) He had no entitlement to participate in any corporate pension scheme.

(4) He had no entitlement to the bonuses or profit-related pay arrangements that were operated by Avecia.

(5) He had no entitlement to paternity leave.

(6) He had no entitlement to redundancy compensation.

56. Mr Hall for HMRC submitted that this was a consequence of Mr Brajkovic's choosing -or being required – to work through a service company. He did enjoy these rights but by virtue of his employment by Novasoft, his own company, which had responsibility for these matters.

57. We conclude that the notional contract between Avecia and Mr Brajkovic would not have provided for any of these benefits. We do not consider it appropriate to "read across" into the notional contract between Avecia and Mr Brajkovic any features which were confined to the actual contract between Novasoft and Mr Brajkovic, which was twice removed from the notional contract – being the other side of both the Upper Contract and the Lower Contract.

Termination of the contract.

58. Mr Brajkovic for Novasoft submitted that the contract could be terminated immediately by Avecia in certain circumstances, without compensation. In contrast, Avecia employees, depending on grade, would be given a minimum of three months notice of termination.

59. Mr Hall for HMRC submitted that a typical self-employment contract came to an end on completion of the work for which the contractor was engaged, whereas an employment contract usually contained provision for termination by one party or the other. Both the Upper Contract and the Lower Contract broadly permitted termination on one month's

notice. That was similar to a normal contract of employment and so was an indicator of employment status.

60. We conclude that the notional contract between Avecia and Mr Brajkovic would have provided for it to be terminable by either party on reasonable stated notice (say, one month) or immediately in the event of breach.

Whether the worker was part and parcel of the client's organisation.

61. Mr Brajkovic for Novasoft submitted:

> (1) Avecia employees underwent a half to full day induction programme on first joining the company – Mr Brajkovic had no such induction.
>
> (2) He did not attend the mandatory annual staff away-days.
>
> (3) He was not part of Avecia's staff training programme.
>
> (4) His security pass was a contractor's pass of a different design to that used by staff, and had an expiry date.
>
> (5) He was not permitted to use the staff car park, even when ample spaces were available.
>
> (6) He was excluded from Avecia's personal accident insurance cover.
>
> (7) Although he was given an Avecia email address, that was because there was no access to external email on the Avecia IT system.

62. Mr Hall for HMRC submitted that Mr Brajkovic was embedded in the Avecia organisation. Mr Brajkovic reported to Mr Black informally on a daily basis and more formally each week. Mr Brajkovic was a part of the Avecia IT project team structure for over four years. Clause 12 of the Lower Contract states "[Zeneca] has also agreed to provide the same facilities in terms of restaurant, canteen, car parks and other amenities as may be made available to [Zeneca's] own staff of a similar standing."

63. We conclude that the notional contract between Avecia and Mr Brajkovic would not have provided for any of the points listed above by Mr Brajkovic. Avecia saw no reason to provide them to Mr Brajkovic while he was at their premises, and Mr Brajkovic saw no reason to demand or negotiate for them.

Exclusive services.

64. Mr Brajkovic for Novasoft submitted that he was free to undertake work for parties other than Avecia, subject to (a) a confidentiality undertaking that was normal practice in the IT industry, and (b) the agreement of Lorien. Mr Brajkovic did undertake another paid assignment at his time, being setting up a website for a music band.

65. Mr Hall for HMRC submitted that a single master is indicative of an employment.

66. We conclude that the notional contract between Avecia and Mr Brajkovic would have provided for Mr Brajkovic's services to be provided as required on the projects without competing demands – or at least, taking precedence over any competing demands – for his time; but would not have prohibited him from other assignments that did not conflict with Avecia's business interests.

Mutual intention.

67. Mr Brajkovic for Novasoft submitted:

> (1) There was no contract directly between Mr Brajkovic and Avecia. There was nothing in the documentation involving Novasoft, Lorien and Avecia to suggest that Mr Brajkovic was an employee of Avecia. The parties had seen no need to state that there was no employment because it was obvious that there was none.
>
> (2) Novasoft paid a salary to Mr Brajkovic and accounted for PAYE and NIC thereon. Mr Brajkovic did have an employer, and it was Novasoft. Avecia could never be considered to be Mr Brajkovic's employer.

68. Mr Hall for HMRC submitted that although HMRC accepted that the actual contracts were not intended to create an employment, minimal weight should be attached to that in considering the terms of the notional contract.

69. The Tribunal notes that in *Dragonfly* (cited above) Henderson J stated (at 3069):

> "I would not, however, go so far as counsel for HMRC who submitted that, as a matter of law, the hypothetical contract required by the IR35 legislation must be constructed without any reference to the stated intentions of the parties. 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."

70. We conclude that the notional contract between Avecia and Mr Brajkovic would not have provided for any statement of intention.

Other submissions

71. Mr Brajkovic emphasised that the engagement of Novasoft by Avecia (via Lorien) commenced 21 months prior to the introduction of the IR35 legislation; HMRC had accepted until April 2000 that the arrangements were a contract for services performed by Novasoft for Avecia, and that relationship did not change on 1 April 2000. While the Tribunal accepts that as factually correct, the point of the IR35 legislation is to change (from April 2000) the tax implications of such arrangements if the notional worker-client contract is one of employment; there is no "grandfathering" of pre-April 2000 contacts.

72. Mr Brajkovic submitted that he was aware of other IT consultants in a similar if not identical situation to himself who had been scrutinised by HMRC, including the same officers who had dealt with the affairs of Novasoft, and received confirmation that the IR35 legislation was not applicable to their arrangements. Mr Brajkovic acknowledged that each case must be considered on its own particular facts, and the Tribunal, while noting Mr Brajkovic's comments, has confined itself to the arrangements between the persons involved in the matters leading to the appeals before this Tribunal.

73. In correspondence between the parties prior to the hearing there had been reference to a possible "disguised employment" between Mr Brajkovic and one of the companies – however this was not pursued at the hearing.

74. Although not a formal submission Mr Hall drew to our attention – and Mr Black confirmed in his evidence – that Novasoft's previous representatives (who were no longer acting at the time of the hearing) had attempted in June 2009 to persuade Avecia to "clarify" a statement of arrangements made by Avecia to HMRC some five years earlier, with over eight pages of proposed changes. Mr Black told us that he felt the document was attempting to rewrite the outcome of a meeting held five years previously; that he considered parts of it were factually incorrect; that he felt uncomfortable with what he took to be a threatening tone; and that on the advice of the legal department of his group holding company he declined to participate. We were unable to question the former representatives on this matter and we have not drawn any inferences to the detriment of Novasoft.

Conclusions on the notional contract

75. We now bring together our conclusions on the factors which would have determined the contents of the notional contract between Avecia and Mr Brajkovic. As we have stated above, the notional contact:

> (1) would have required Mr Brajkovic to undertake his work in accordance with standards and protocols necessary to make the project work-product fit for purpose and maintainable in the future by other IT experts; also to commit sufficient time to that work in order for deadlines and budgets to be met; also to ensure any significant absences fitted with the staffing of the projects overall. Otherwise, the notional contract would not have been prescriptive as to exact hours of attendance, or the exact manner in which Mr Brajkovic implemented the skilled tasks assigned to him.
>
> (2) would not have permitted substitution.
>
> (3) would have established mutuality of obligations during the term of the contract but, for the reason put forward by Park J in *Usetech*, we consider that that is appropriate to a self-employment contract as well as one of employment.
>
> (4) would have given Mr Brajkovic a risk of non-payment by Avecia but we do not see that as a helpful distinction between a contract of service or one for services in the circumstances of this notional contract.
>
> (5) would not have required Mr Brajkovic to provide any IT equipment or software of his own – and indeed may have required him to use only that provided by Avecia, because of security concerns. It would have been an implied term that Mr Brajkovic would have access to the buildings to the extent necessary to perform his work.
>
> (6) would have provided for an hourly rate of compensation, and would have required proper invoices to be delivered periodically.
>
> (7) would not have provided for any typical employee benefits or statutory protections.
>
> (8) would have provided for it to be terminable by either party on reasonable stated notice (say, one month) or immediately in the event of breach.
>
> (9) would not have provided for any of the points listed in paragraph 61 above that might indicate that Mr Brajkovic was "part and parcel" of Avecia's organisation.
>
> (10) would have provided for Mr Brajkovic's services to be provided as required on the projects without competing demands – or at least, taking precedence over

any competing demands – for his time; but would not have prohibited him from other assignments that did not conflict with Avecia's business interests.

(11) would not have provided for any statement of intention. However, for the reasons outlined by Henderson J in *Dragonfly*, we attach little importance to that outcome.

76. We reiterate the words of Mummery J in *Hall v Lorimer*:

> "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."

77. In *Synaptek* Hart J stated (at 553): "Deciding, in a borderline case, whether a particular contract is a contract of service or a contract for services is notoriously difficult."

78. We consider that the overall picture painted is one of a contract of self-employment.

79. An "individual detail" in the picture is that, as we have found, Mr Brajkovic would not have been permitted to supply a substitute to perform the work. That could be an important detail - and was given some emphasis in both *Usetech* and *Dragonfly* – but in the particular situation of Novasoft and taking the picture as a whole that detail does not disturb the overall impression we have formed of the notional contract.

Decision

80. The appeals are allowed in full.

Right of appeal to Upper Tribunal

81. Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides that any party to a case has a right of appeal to the Upper Tribunal on any point of law arising from a decision of the First-tier Tribunal. The right may be exercised only with permission which may be given by the First-tier Tribunal or the Upper Tribunal. Rule 39(2) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 SI 2009/273 provides that a person seeking permission to appeal must make a written application to the Tribunal for permission to appeal, which application must be received by the Tribunal no later then 56 days after the date that the Tribunal sends full written reasons for the Decision. Rule 39(5) provides that an application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors in the decision, and state the result the party making the application is seeking.

82. This document contains the full written reasons for the Decision.

TRIBUNAL JUDGE

RELEASE DATE: 6 April 2010

Check Employment Status for Tax (CEST) Formal Independent Testing

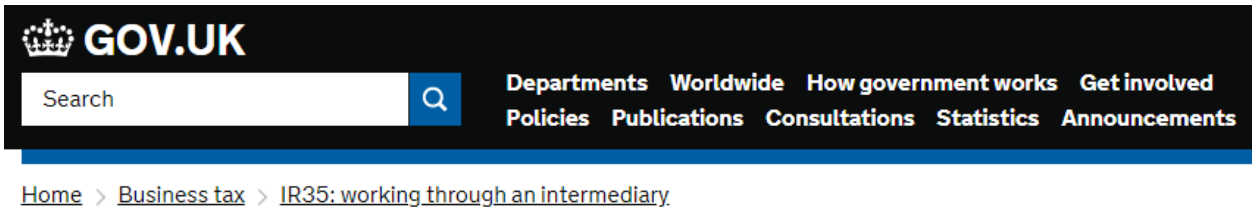
Test number: 005
Case name: Castle Construction (Chesterfield) Ltd
Case date: 29th September 2008
Case reference: SPC00723

Legal decision:
http://www.bailii.org/uk/cases/UKSPC/2008/SPC00723.html

TEST CONCLUSION

Court judgment:	Self-employed (IR35 does not apply)
Independent CEST testing of court judgment:	Employed (IR35 Applies)
IS CEST ACCURATE?	**NO**

CEST:
https://www.gov.uk/guidance/check-employment-status-for-tax



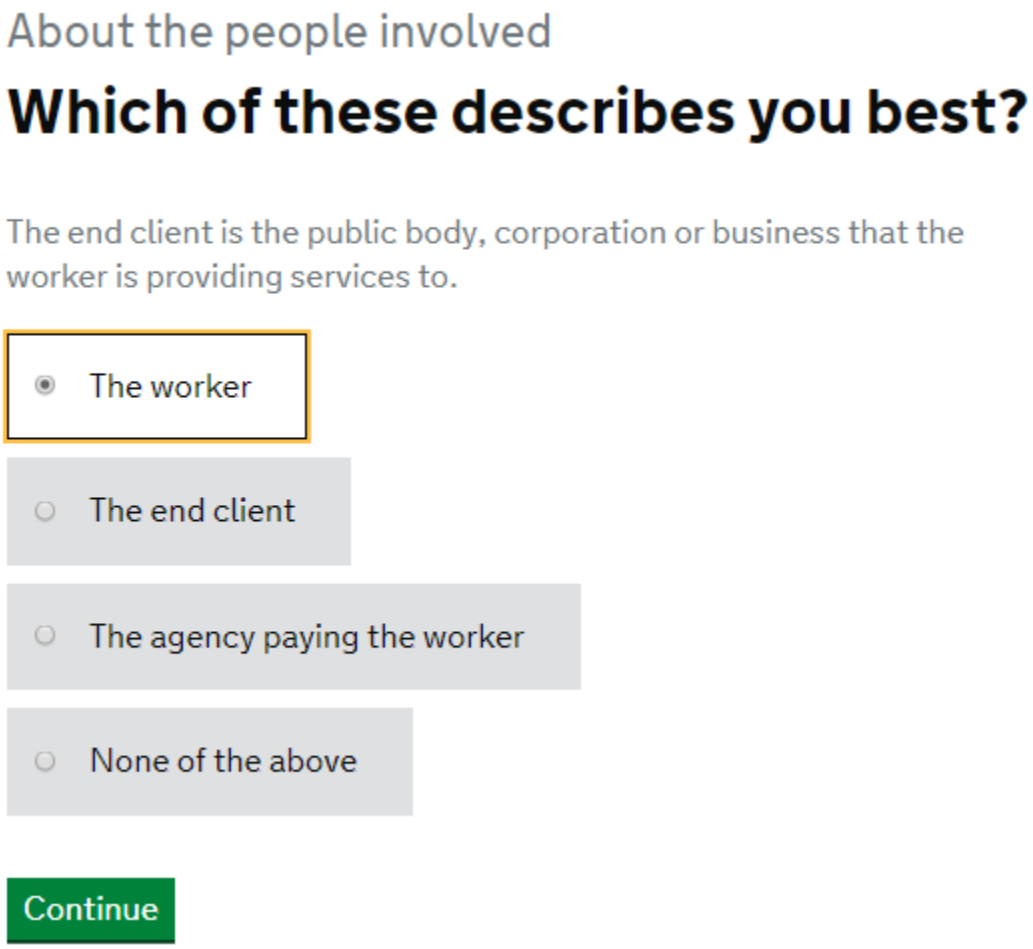
Guidance

Check employment status for tax

Use this service to find out if you, or a worker on a specific engagement, should be classed as employed or self-employed for tax purposes.

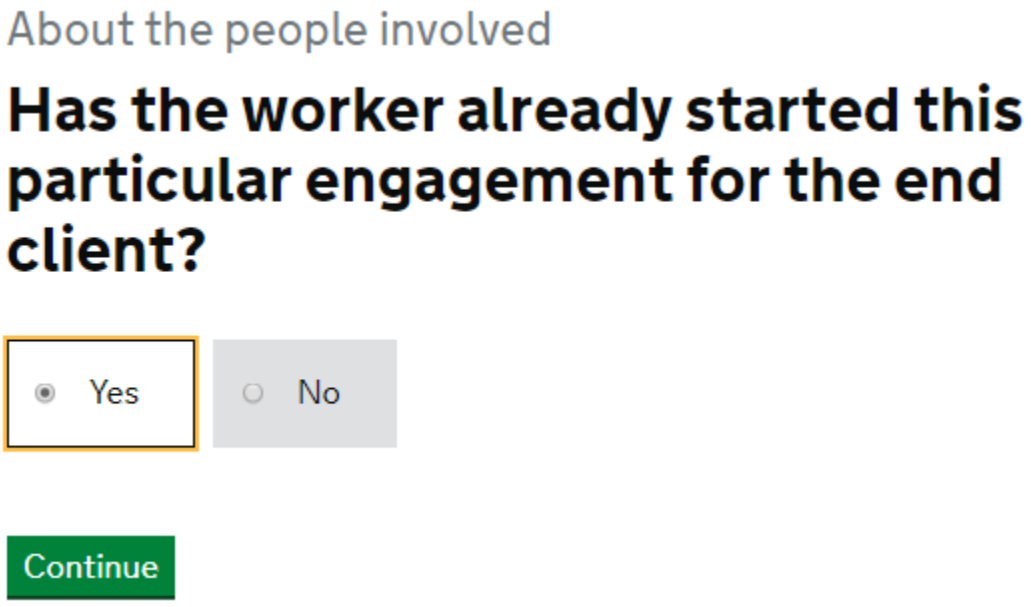
So, let's get started:
https://www.tax.service.gov.uk/check-employment-status-for-tax/setup

Question: Preliminary – P1



We chose “The Worker”. We are running this as if the contractor is trying to assess their position for tax purposes.

Question: Preliminary – P2

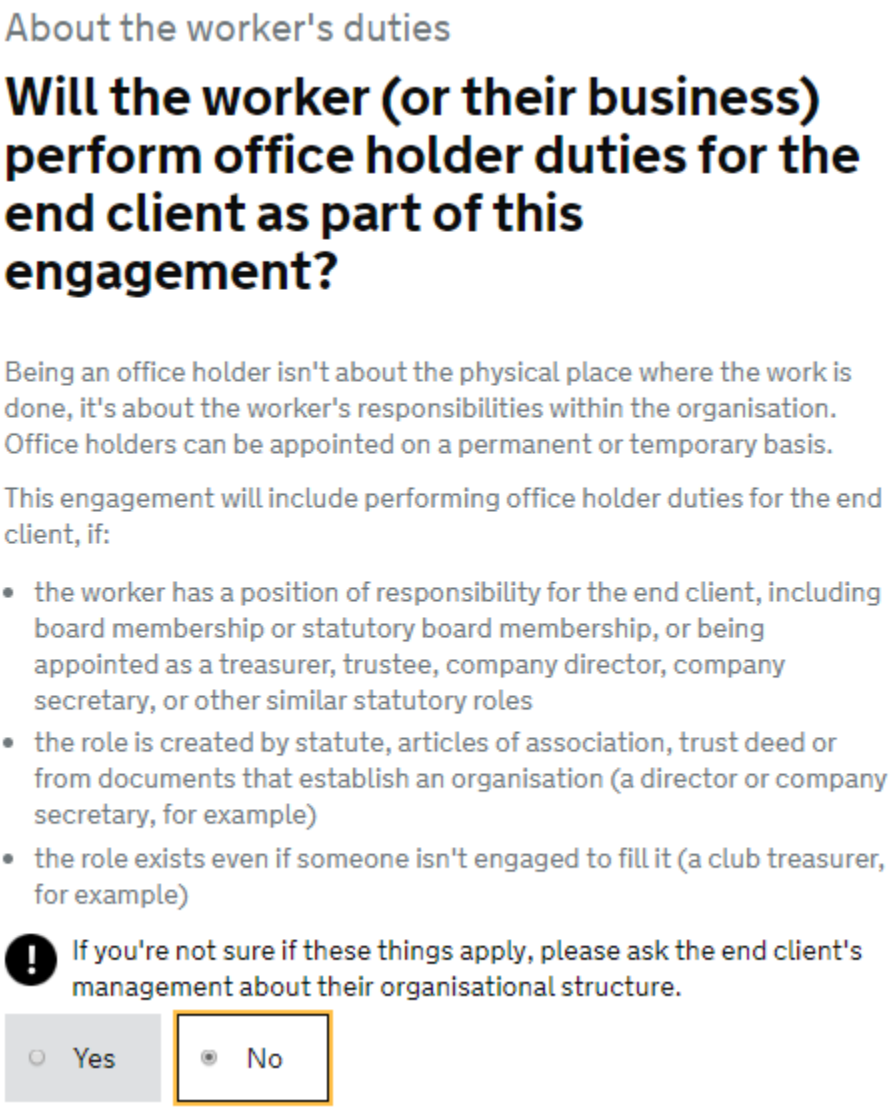


The contract is finished, but so we can use the tool we will say Yes.

No (cQuestion: Preliminary – P3

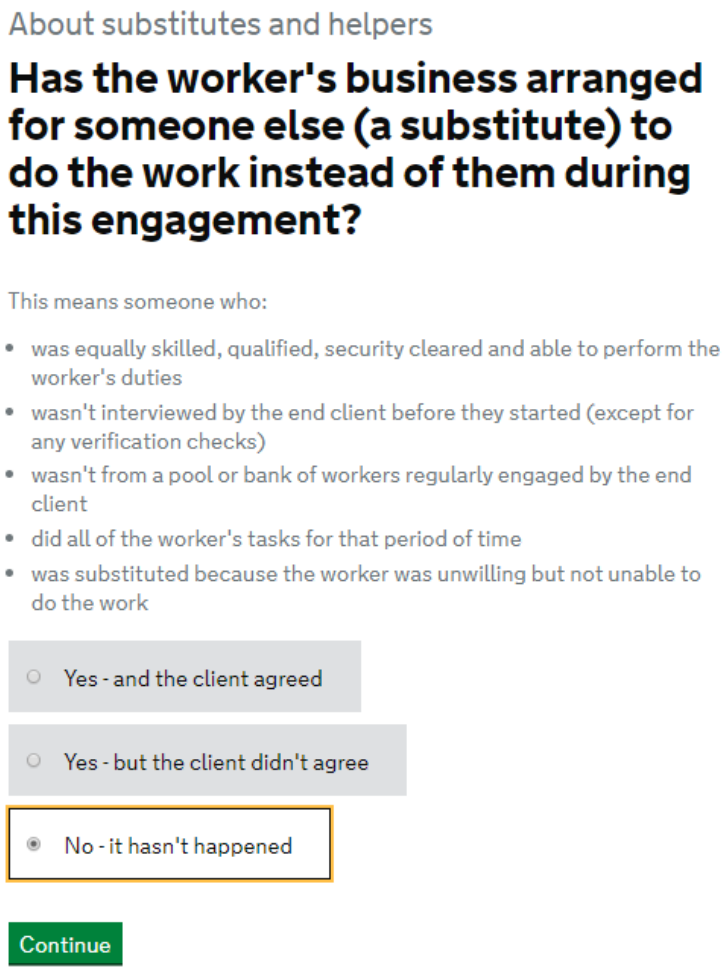
Judgement: They are all sole trader, working under the CIS scheme.

Question: Preliminary – P4



Judgement: They are mainly brick layers.

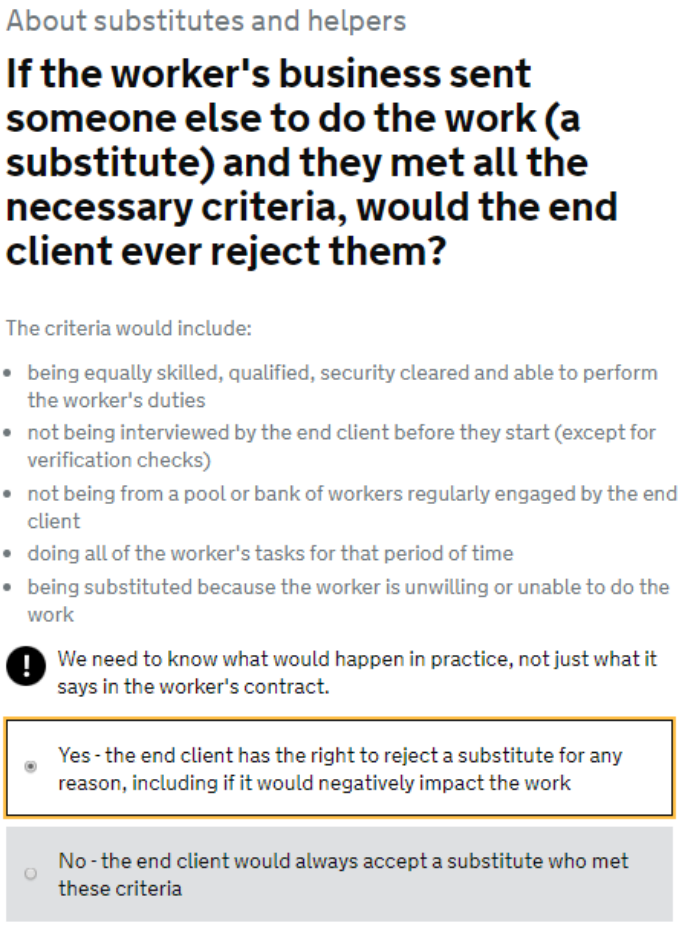
Question 1:



Judgement: Para 76

In all the circumstances of this case, it seems to me that the substitution clause was a fiction, designed by an adviser, or the draftsman of some precedent document, to enhance the "non-employee" case, and that on the facts of this case, that endeavour fails, and is if anything (by suggesting the need to resort to such artificiality) counter-productive.

Question 3:

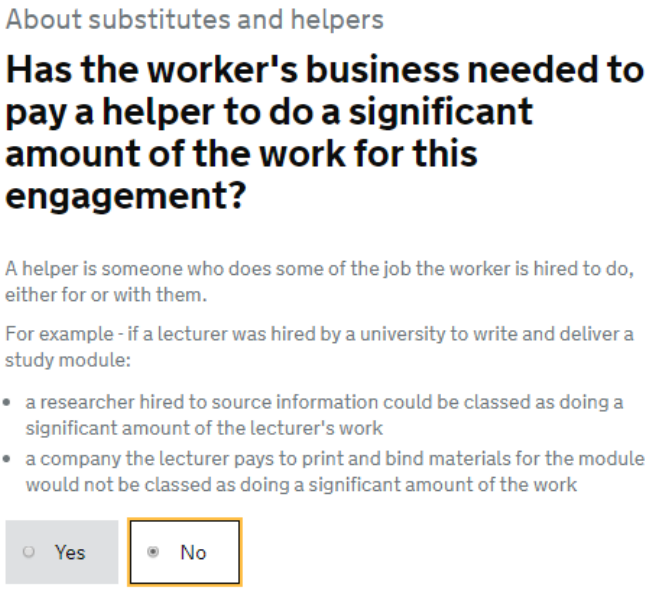


Judgement. Para 75:

In this case, and to his credit, counsel for the Appellant said that he was placing little reliance on the existence of the substitution clause. On the evidence given to me, I believe that there was no example of anyone having used the clause

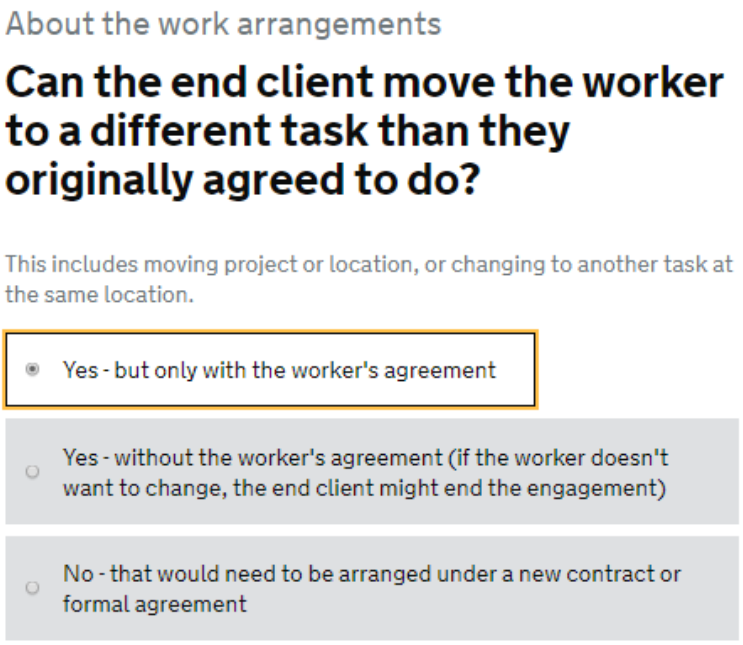
Combined with 76, we answer this as above, because the service was for personal service.

Question 5:



Judgement: There is no mention of helpers

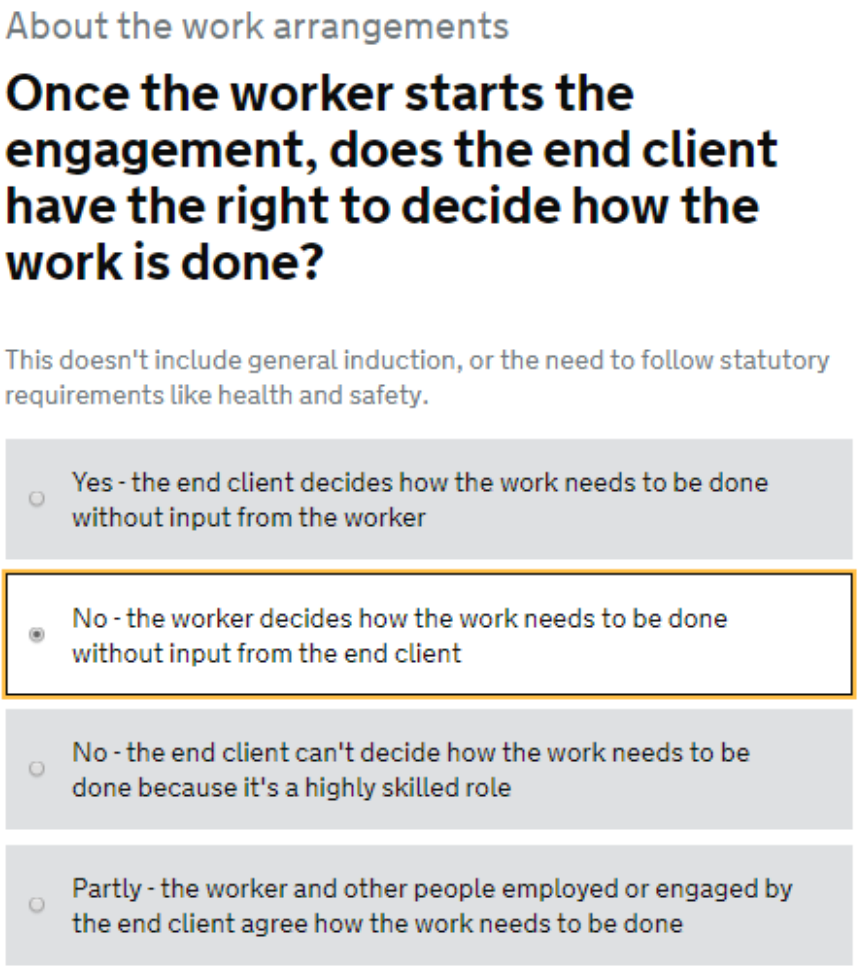
Question 6:



Judgement. Para 58:

…..In this context there were several examples of workers having been asked to switch sites. This is not remotely surprising of course because there would doubtless be occasions when workers on one site would fall below the required numbers on account of people terminating, and if another site was ahead of schedule with ample workers, it would make sense to try to move some workers from the one site to the other. Again I can attach little significance to this. Those wanting to work fairly consistently would have every incentive to be cooperative and if the other site was no less convenient than the one they were previously working on, it would seem entirely natural that they would be prepared to work on the other site. There was no question that they were engaged on a site-by-site basis; they were engaged until either party wished to terminate the arrangement, and since self-evidently the worker could not be required to work at all, or to work on the other site, the fact that in most cases there was no objection to moving from one site to another does not indicate any particular element of "control". Amongst the few workers who gave evidence in person, Mr. Johnson indeed mentioned that in February 2007 he had rejected a move of job to Nottingham with Castle because it was too far to travel, and presumably that was when he obtained work with Ian Cooke Builders

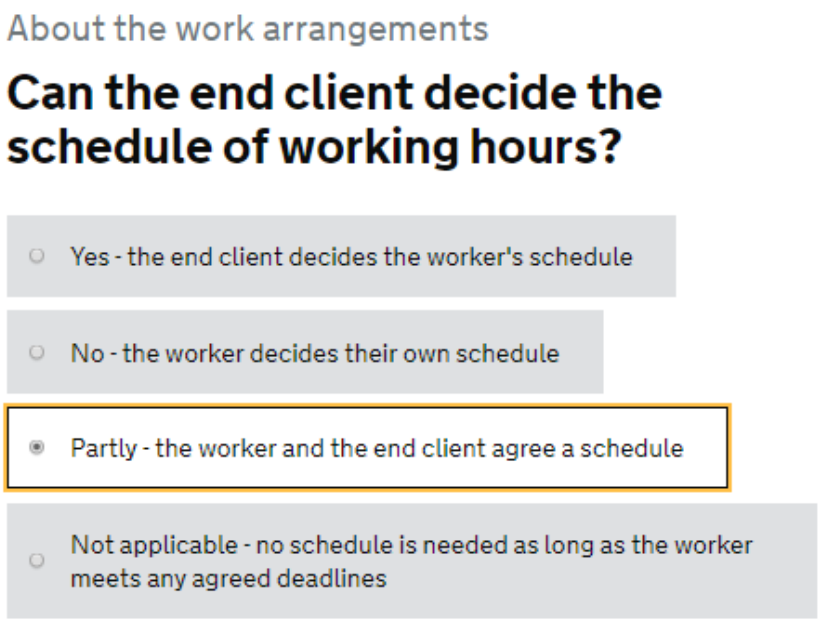
Question 7:



Judgement. Para 56

…This did not however derogate from the general impression that these inspections would have been more geared to seeing that the cooperation between the main contractor and Castle's foremen, who would be passing on the main contractor's instructions to the workers, and the workers was all operating smoothly, and there was no indication that anyone was ever told how to do his job. Consistently the job description of the "foreman/bricklayers" indicated that their prime function, as well as laying bricks, was to interpret the architect's plans, and to see that walls were built in the right place, rather than to instruct the bricklayers on how to lay bricks.

Question 8:

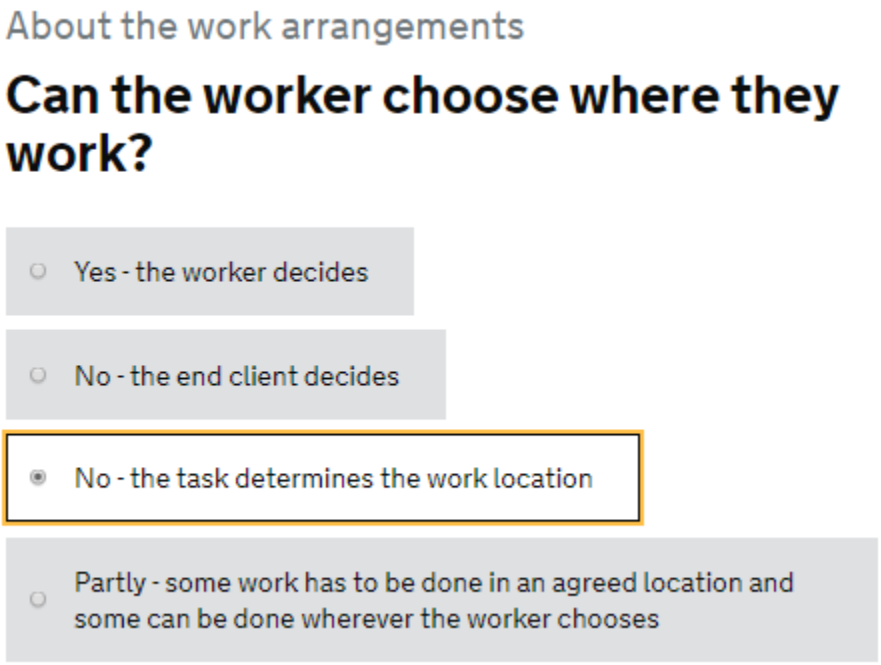


Judgement. Para 38:
One factor that is reasonably clear is that even if the hours were flexible, Mr. Botham ran the Appellant company with a firm hand.

Para 42:

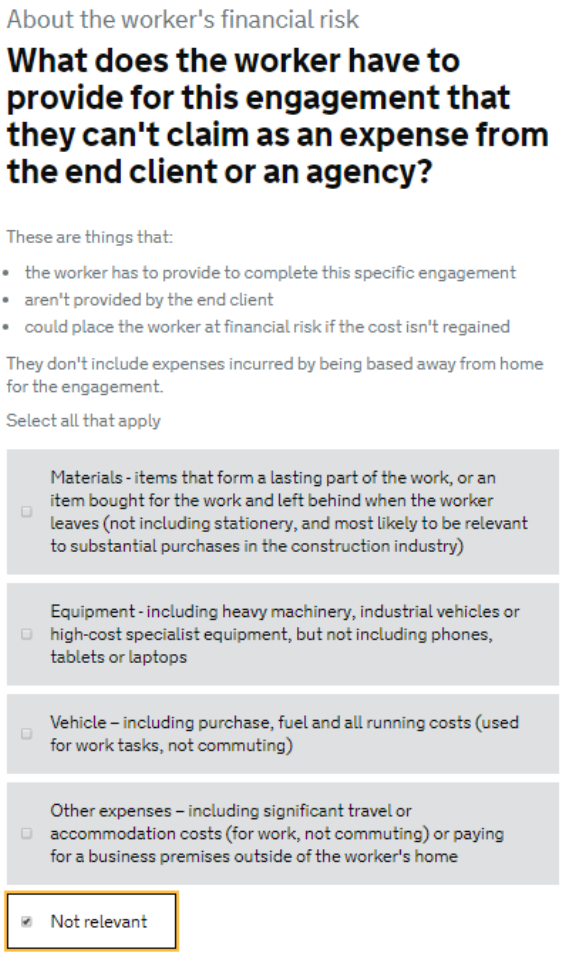
There is however far too much divergence between the figures in all of the time sheets for me to reach any conclusion other than that there must be credibility to the Appellant's claim that the sub-contractors liked flexible working hours; some worked very long hours; and others were happier to stop work when they chose and when they either had some alternative demand on their time, or had earned sufficient for the week.

Question 9:



They were brick layers.

Question 10:



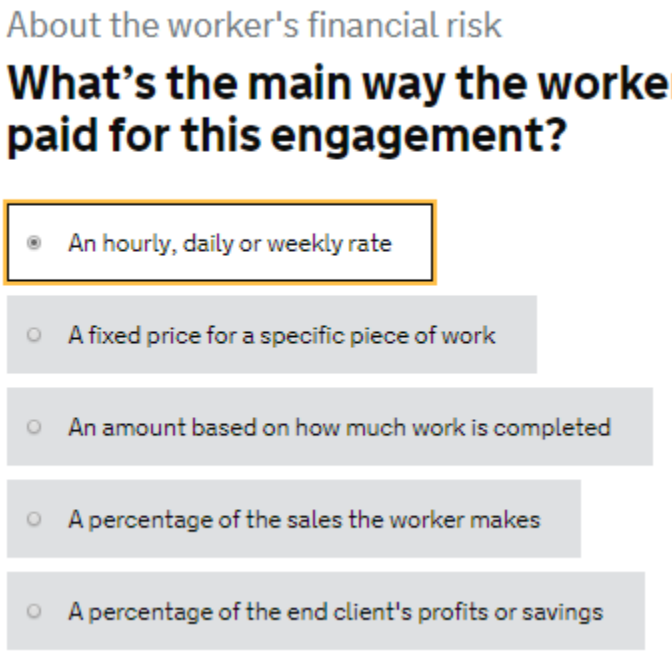
Judgement. Para 47 dealt with tools:

So far as the tools were concerned, there may be no or little significance in the fact that the sub-contractors provided their own tools since it has long been recognised that the provision of a few hand tools does not preclude some workers from being employees. It is, however, worth providing the list of the hand tools that had to be used and provided by the sub-contractor bricklayers because they were more extensive than the trowel that might otherwise be assumed to be all that was involved. According to Mr. Burling's evidence, he provided "lines and pins, corner blocks, chisels, brick hammers, a scotch hammer, a lump hammer, a bolster chisel, a pointing trowel, 600 and 1200 mm levels, trowels, thin pointing trowels (narrow gauge), a tape measure and a set square". According to whether sub-contractors purchased cheaper or best quality tools, the cost of these tools was in the range from £500 to £1000. Two tools that the sub-contractors

did not provide were a Hilti gun and a Stihl saw. Only one of each of these tools was needed on a site, so that it was inappropriate for bricklayers, of whom there might be many on a large site, to own and provide these tools. The Hilti gun was a powered gun with the amazing and somewhat alarming capacity to fire staples, designed to tie brickwork to rolled steel joists, up to 10 mm into the RSJs. The Stihl saw was a petrol-powered brick-cutting saw. Whilst these were provided on site by the Appellant, there was a site rule that if either went missing and it was not known who had taken them or failed to secure them at the end of a shift, then all the sub-contractors on the particular site would be charged between them with the replacement cost of the missing item.

Comment: Whilst the judge considered the tools relevant, the CEST question alludes to something more required in terms of the level of expenses of the tools. So we have to answer “Not relevant.”

Question 11:

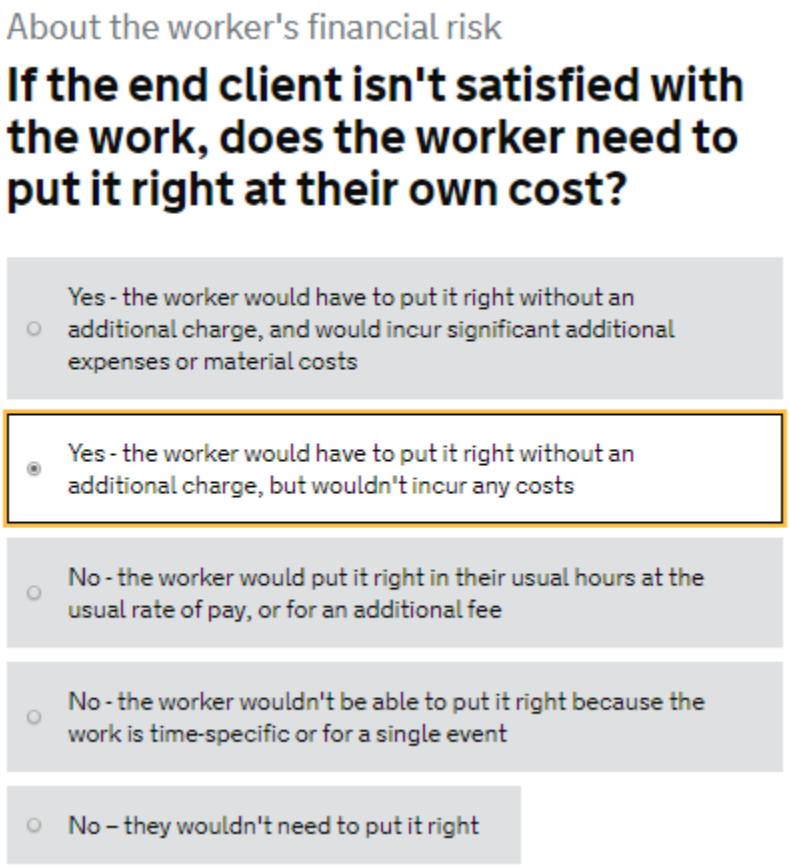


Judgement.

Para 5:
All the workers in the present case were paid only for hours worked;

Para 60:
As already mentioned, all the Appellant's workers were paid on the basis of an hourly rate, it being understood that in order to claim pay for each half-hour interval, workers had to be on site and working for the whole of the half hour.

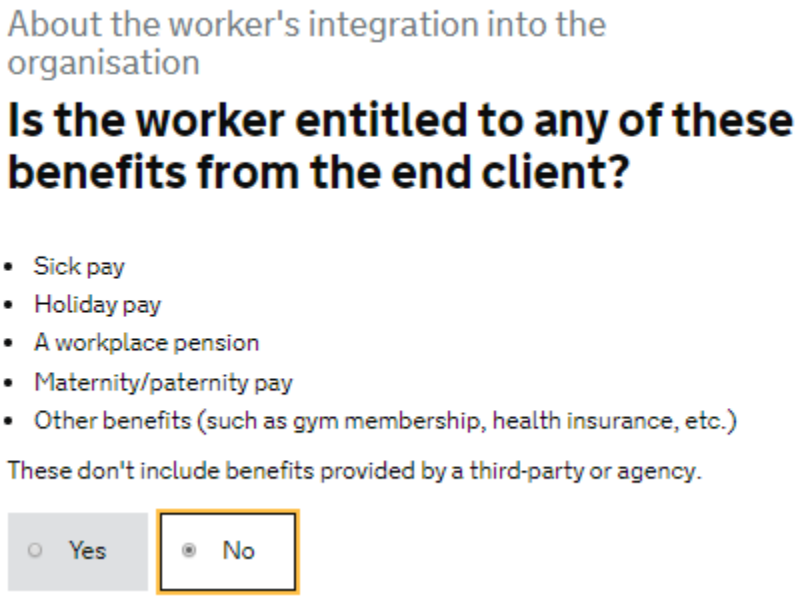
Question 12:



Judgement. Para 59:

One of the distinctions drawn to my attention in relation to the working terms for the sub-contractors and the employed trainee bricklayers, and those still employed in the early years after training was that if mistakes were made, the sub-contractors had to correct them themselves in their own, unpaid, time.

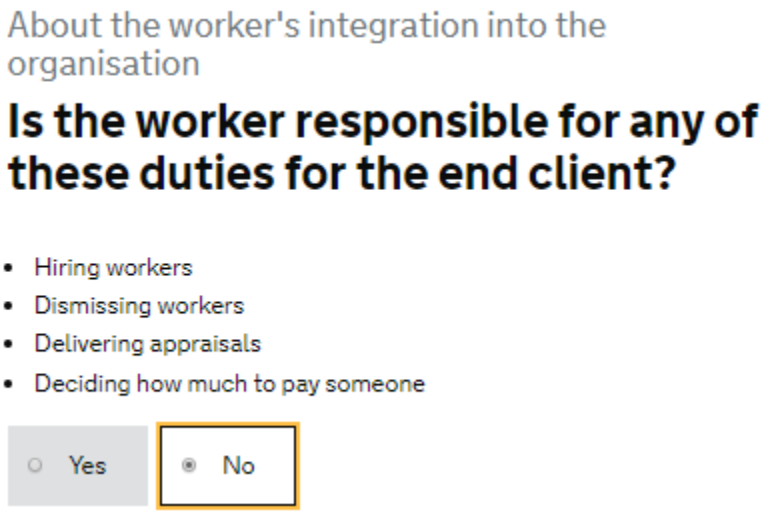
Question 13:



Judgement. Para 19:

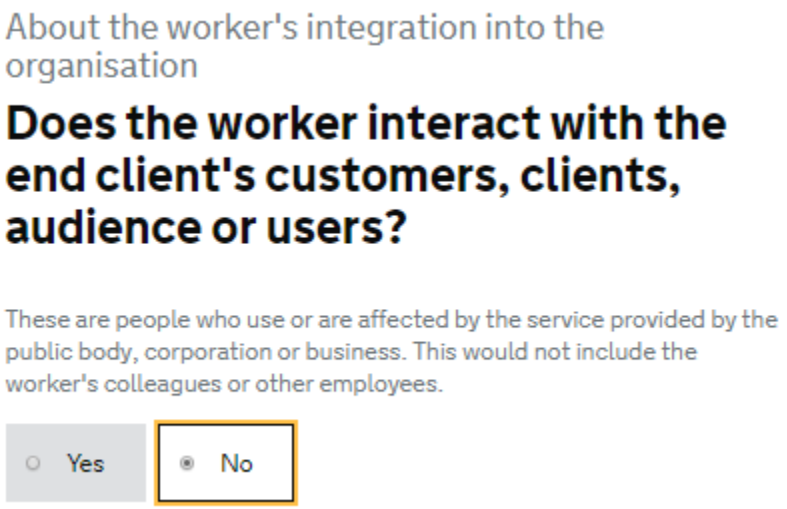
Various advantages were also enjoyed by the workers. They had the flexibility to enter into and leave engagements as they chose, and often did so for better money elsewhere or for a more convenient site. They also claimed to have, and to relish, the flexibility to work the hours that they wished. I will have to comment on a certain divergence in the evidence in this regard, but for the present purpose it is appropriate to assume that the workers regarded this as a real feature of the way in which they were engaged and as an attractive one. Since they were also paid strictly on the basis of an hourly wage for work actually undertaken, calculated in half-hour increments that they worked ***in full,*** with no holiday pay, sick pay, or pay when weather or any other factor rendered work impossible, and since the sub-contractor status was thought to eliminate NIC deductions from pay, and employers' NIC secondary liability, they were actually paid a considerably higher gross hourly rate (and a yet higher net rate) as sub-contractors than they would have received as employees.

Question 14:



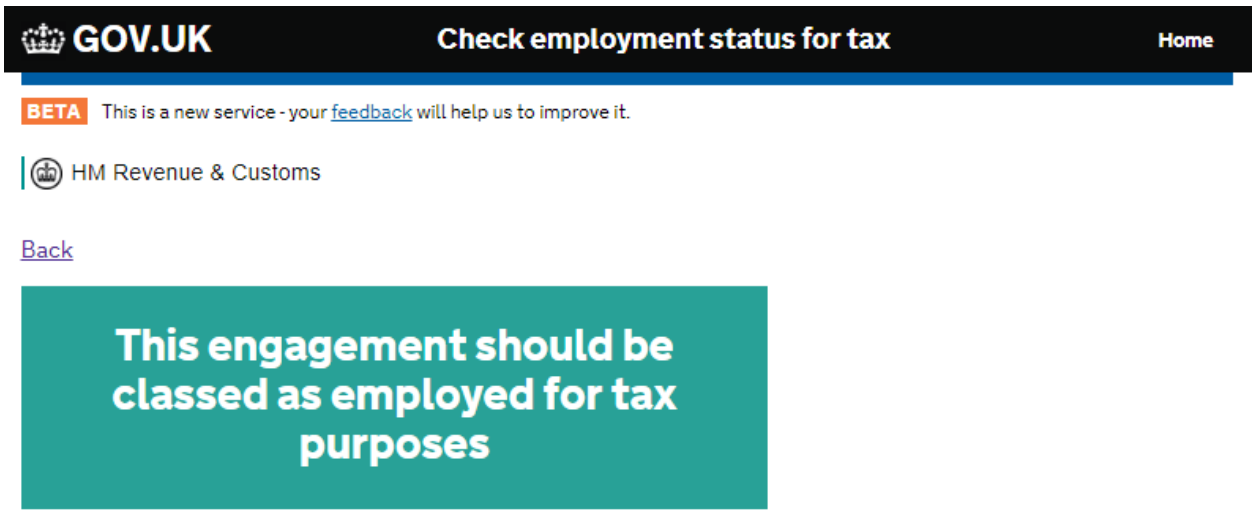
Judgement. They were mainly brick layers

Question 15:



Judgement. No. They were brick layers.

RESULT:


GOV.UK
Check employment status for tax
Home
BETA
This is a new service - your feedback will help us to improve it.
HM Revenue & Customs
Back
This engagement should be classed as employed for tax purposes

Name of the person that completed this check	David Chaplin
End client's name	Castle Construction
Engagement job title	Brick layers
Reference (worker's name or contract number, for example)	005

This engagement should be classed as employed for tax purposes

Why are you getting this result

The answers you've given tell us that the worker is directly engaged, and the working practices of this engagement means that they are employed for tax purposes.

About the people involved

Which of these describes you best?

The end client is the public body, corporation or business that the worker is providing services to.

> The worker

Has the worker already started this particular engagement for the end client?

> Yes

How does the worker provide their services to the end client?

> As a sole trader

About the worker's duties

Workers that perform office holder duties for the end client are classed as

employed for tax purposes. You've told us that the worker will not perform office holder duties during this engagement.

Will the worker (or their business) perform office holder duties for the end client as part of this engagement?

Being an office holder isn't about the physical place where the work is done, it's about the worker's responsibilities within the organisation. Office holders can be appointed on a permanent or temporary basis.

This engagement will include performing office holder duties for the end client, if:

- the worker has a position of responsibility for the end client, including board membership or statutory board membership, or being appointed as a treasurer, trustee, company director, company secretary, or other similar statutory roles
- the role is created by statute, articles of association, trust deed or from documents that establish an organisation (a director or company secretary, for example)
- the role exists even if someone isn't engaged to fill it (a club treasurer, for example)

  If you're not sure if these things apply, please ask the end client's management about their organisational structure.

> No

About substitutes and helpers

We ask these questions to find out if the worker is being engaged as a business or on a personal service basis. If the end client hasn't or wouldn't agree to the worker's business arranging for a paid substitute to work instead of them, it suggests that they're being engaged on a personal service basis.

Has the worker's business arranged for someone else (a substitute) to do the work instead of them during this engagement?

This means someone who:

- was equally skilled, qualified, security cleared and able to perform the worker's duties
- wasn't interviewed by the end client before they started (except for any verification checks)
- wasn't from a pool or bank of workers regularly engaged by the end client
- did all of the worker's tasks for that period of time
- was substituted because the worker was unwilling but not unable to do the work

> No - it hasn't happened

If the worker's business sent someone else to do the work (a substitute) and they met all the necessary criteria, would the end client ever reject them?

The criteria would include:

- being equally skilled, qualified, security cleared and able to perform the worker's duties
- not being interviewed by the end client before they start (except for verification checks)
- not being from a pool or bank of workers regularly engaged by the end client
- doing all of the worker's tasks for that period of time
- being substituted because the worker is unwilling or unable to do the work

> We need to know what would happen in practice, not just what it says in the worker's contract.

> Yes - the end client has the right to reject a substitute for any reason, including if it would negatively impact the work

Has the worker's business needed to pay a helper to do a significant amount of the work for this engagement?

A helper is someone who does some of the job the worker is hired to do, either for or with them.

For example - if a lecturer was hired by a university to write and deliver a study module:

- a researcher hired to source information could be classed as doing a significant amount of the lecturer's work
- a company the lecturer pays to print and bind materials for the module would not be classed as doing a significant amount of the work

> No

About the work arrangements

We ask these questions to find out how much right of control the end client has over what the worker does during this engagement. If the end client has a right of control, this would suggest the working practices are similar to those of an employee.

Can the end client move the worker to a different task than they originally

agreed to do?

This includes moving project or location, or changing to another task at the same location.

> Yes - but only with the worker's agreement

Once the worker starts the engagement, does the end client have the right to decide how the work is done?

This doesn't include general induction, or the need to follow statutory requirements like health and safety.

> No - the worker decides how the work needs to be done without input from the end client

Can the end client decide the schedule of working hours?

> Partly - the worker and the end client agree a schedule

Can the worker choose where they work?

> No - the task determines the work location

About the worker's financial risk

We ask these questions to identify the level of financial risk the worker must take during this engagement. Workers who don't risk their own money by, for example, buying assets, or paying for overheads and materials are more likely to be employed for tax purposes.

What does the worker have to provide for this engagement that they can't claim as an expense from the end client or an agency?

> Not relevant

What's the main way the worker is paid for this engagement?

> An hourly, daily or weekly rate

If the end client isn't satisfied with the work, does the worker need to put it right at their own cost?

> Yes - the worker would have to put it right without an additional charge, but

> wouldn't incur any costs

About the worker’s integration into the organisation

We ask these questions to find out how integrated the worker is into the end client’s organisation. Workers who receive benefits, have line management responsibilities for other people and represent themselves as working for the end client are more likely to be employed for tax purposes.

Is the worker entitled to any of these benefits from the end client?

- Sick pay
- Holiday pay
- A workplace pension
- Maternity/paternity pay
- Other benefits (such as gym membership, health insurance, etc.)

These don't include benefits provided by a third-party or agency.

> No

Is the worker responsible for any of these duties for the end client?

- Hiring workers
- Dismissing workers
- Delivering appraisals
- Deciding how much to pay someone

> No

Does the worker interact with the end client's customers, clients, audience or users?

These are people who use or are affected by the service provided by the public body, corporation or business. This would not include the worker's colleagues or other employees.

> No

You should now do the following:

If you're the engager you need to operate PAYE (https://www.gov.uk/paye-for-employers/paye-and-payroll) for this worker.

If you're the worker you should tell your engager to operate PAYE for you.

About this result

HMRC will stand by the result given unless a compliance check finds the information provided isn't accurate.

HMRC won't stand by results achieved through contrived arrangements designed to get a particular outcome from the service. This would be treated as evidence of deliberate non-compliance with associated higher penalties.

HMRC can review your taxes for up to 20 years.

> HMRC won’t keep a record of this result.

Decision Service Version: 1.5.0-final

This version number is used for HMRC internal purposes only. HMRC will stand by your result unless working practices have changed, in which case you should use this service again to reflect those changes

Castle Construction (Chesterfield) Ltd v Revenue & Customs [2008] UKSPC SPC00723 (03/12/2008)

Spc00723

Income Tax and National Insurance – whether bricklayers and other construction workers engaged by the Appellant were employees or self-employed sub-contractors – Appeal allowed as regards the majority of the workers

THE SPECIAL COMMISSIONERS

CASTLE CONSTRUCTION (CHESTERFIELD) LIMITED Appellant

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS Respondents

Special Commissioner: HOWARD M NOWLAN

Sitting in public in London on 29 September - 3 October 2008

David Yates, counsel, for the Appellant

David Seaman and David Weissand, Appeals Cross Cutting Group of HMRC, for the Respondents

DECISION

Introduction

1. This has been a case on a very familiar topic, namely the issue of whether various workers are properly classed as employees or self-employed sub-contractors. It is also a case where my decision should be relatively straightforward since there are countless authorities on the subject. In the course of the hearing many of these authorities were drawn to my attention and I have read them all. Notwithstanding this, I have found it extremely difficult to reach my decision. In the event, my decision is that with the exception of 7 workers, all the remaining workers, that is 314 out of the total of 321, were rightly classed by the Appellant as self-employed sub-contractors.

2. The Appellant's trade is to undertake building work, generally on construction projects where another company (often one of the household name building companies) is the main contractor. The Appellant's trade was until recently confined to undertaking sub-contracted bricklaying services. It has recently sought to expand and also to provide scaffolding services, and to a lesser extent, carpentry and joinery services. Its workload varies very considerably according to the health of the building sector. On one occasion the Appellant was providing bricklaying services on 17 sites. At the date of the hearing that number was down, not surprisingly, to 5 projects.

3. In common with many other building companies, the Appellant has always hired its workers on a sub-contract basis, and its only employees have been its permanent head office staff, quantity surveyors and "trainee" bricklayers and "novices" in the first two years following training. Hiring workers on a sub-contract basis in all other cases, under which workers could be hired and terminated with absolute flexibility, has suited the company and its ever-fluctuating workload. It has suited virtually all of the workers who also relish the flexibility to come and go, much as they please, and to work for different contractors when that seems more attractive. The disparity in time worked by a random sample of the 321 workers whose status is in dispute in this case is not a theoretical matter with little reflection in reality. There is considerable evidence of workers commencing and ceasing engagements with regularity. On a different level there is a great disparity in time worked in each week by the people being engaged at any one time.

4. One of the unchallenged statistics given by Mr. Botham, the director in charge of the Appellant's day-to-day business, was that in one year the Appellant had engaged 450 individual bricklayers at times during the year, but would have only required 150 to do the same work, had the 150 operated as full-time employees, each working an ordinary full week.

5. All the workers in the present case were paid only for hours worked; they were not paid if rain or frost prevented them from working; they were not paid if they took time off for holidays, illness or indeed for any reason whatsoever. For these various reasons, and because employee and employer National Insurance Contributions (NICs) did not have to be deducted and paid in respect of sub-contractors, the hourly-rate paid to the workers was considerably higher than the rate that would have been paid, had the workers been full-time employees doing the same work. This is because the extra pay had to compensate for these various disadvantages, and for the loss of state sick pay, and redundancy benefits and the absence of any State Earnings Related (SERPS) pension benefits, all of which resulted from the NIC implications of the sub-contractor status.

6. It is the Respondents who suggest that the workers must properly be analysed to be employees. When this was suggested and the Appellant notified its workers that pragmatically they would have to enter into employment contracts, it is said that many walked out in protest. As a result the Appellant decided that with a few exceptions it would continue the sub-contract arrangements, and challenge the Respondents' claims and assessments by bringing this appeal.

7. In the present case the Appellant company has invariably paid the workers that it has engaged under deduction of 18 or 20% tax under the Construction Industry Scheme ("the CIS scheme") so that virtually no liability to income tax has been affected by the "status" issue or by my conclusion that almost all of the workers were indeed rightly treated as self-employed. This case is thus essentially about the fact that Class 2 and possible Class 4 National Insurance Contributions ("NICs") payable by the self-employed, are lower than Class 1 primary and secondary contributions payable in respect of employees.

8. In 2002 HMRC officers had considered the status of the Appellant's workers and confirmed that they were rightly being treated as self-employed. In November 2005, HMRC notified the Appellant that it was considering a further review and intimated in June 2006 that it now believed that it was likely that it would assert that all the workers should have been ranked as employees. At this point, HMRC were unaware of their earlier review and had lost the letters that had confirmed that self-employed status was correct. In view of this, when HMRC gave their official Determination that the workers were now (apparently, according to the Appellant, on no different facts) to be classed as employees, assessments were only made for the year 2006/7, rather than any earlier years, in recognition of the earlier confirmation given to the Appellant that HMRC had forgotten about.

9. It is worth noting that if HMRC's assessment of additional NICs was now to be sustained, the Appellant would face a bill for approximately £0.5 million, though to the extent that this figure included an amount in respect of PAYE income tax, it was said that this would in practice be reduced very significantly on account of a credit for the income tax already accounted for under the CIS machinery. This tax claim is calculated by reference to the payments made to people assumed to have been sub-contractors, so that the hourly rate was considerably higher than it would have been had the workers been classed as employees. I will refer in due course to one aspect of this that seems to me to be highly relevant to the merits of the case. One fact that has, and must have, no relevance to my decision, is that if the appeal was dismissed and the assessments sustained, I do not doubt for an instant the statement of Mr. Botham, the director in charge of the day-to-day affairs of the Appellant, that the Appellant would immediately become insolvent. In the light of the massive downturn in the building industry, this can hardly be surprising.

10. This case was in no way a test case. However I was asked to determine the correct status of 8 categories of worker, there being 217 bricklayers in just the first category. It follows that, since I heard evidence from only two bricklayers, and no direct evidence at all in relation to two or three of the minor categories of worker, my decision is based on a fairly general summary of facts, rather than the specific detail as it applied to each individual.

The evidence and the facts in more detail

11. Evidence was given on behalf of the Appellant by Mr. Steve Botham, the Director in charge of the day-to-day affairs of the Appellant; by Mr. Stephen Barton, a labourer, by Mr. Christian Burland, a bricklayer, by Mr. James Smith, a scaffolder, by Mr. Dean Johnson, an experienced bricklayer and by Mr. Danny Kestle, previously a supervisor/labourer and now Operations Manager and thus now an employee of the Appellant. Mr. Kestle was related to Mr. Botham.

12. Evidence was given on behalf of the Respondents by Mrs. Susan Kahler, an officer of HMRC specialising in employee/self-employed status work; and by Mr. Saul McIntyre, whose role had often been to accompany Mrs. Kahler when she made visits to interview workers and former workers.

Complaints about the lack of direct evidence produced by HMRC

13. There was a certain amount of discussion and argument about the fact that the Respondents had called no witnesses amongst the 15 or so workers whom Mrs. Kahler had interviewed (four of whom had not been engaged in

the one tax year for which assessments have, to date, been made). There was also some dispute as to whether I should pay full regard to the notes of interview in the light of the possibility that some of the workers had evidently fallen out with the Appellant and had not been called to give direct evidence, and also that some might have been asked leading questions during interviews. My conclusion in relation to these issues is that, although on one or two points there is a difference in emphasis between the general answers given to Mrs. Kahler and the direct evidence that was given to me on behalf of the Appellant, the overall picture was broadly the same. Since, as I have already said, I have got to judge the status of 321 workers when I only received direct evidence from 5 and recorded notes prepared by HMRC in relation to another 15, the minor differences in emphasis (one or two of which I find it quite easy to reconcile) are not of much significance.

14. I ought indeed to add that I think that any implicit criticism of the way in which Mrs. Kahler had undertaken her enquiries was not sustained, save in one minor respect. That minor respect was that her opinion letter of 15 June 2006, which initially revealed that she considered that the workers should be classed as employees, was sent after she had undertaken a number of interviews, but before she had interviewed a single bricklayer. Since the vast majority of the workers are bricklayers, the status of the labourers is somewhat likely to follow that of the bricklayers (rather than the other way round), and since I myself find it most realistic to start my decision process by looking first at the core category, I do find this to have been something of an omission. But beyond that, Mrs. Kahler's work seems to me to have been fairly and properly conducted.

The evidence in general

15. Very little of the evidence was particularly contentious. Whilst I was very impressed indeed by Mr. Botham, and rather imagine that it is his firm hand that enables the Appellant to conduct an efficient business, he was perhaps inclined to put the best gloss on things in giving evidence. But he struck me to be an honest man, and I had no reason to doubt his, or indeed any other, evidence.

The Appellant's business

16. As I have already said, the Appellant's business is to contract with main contractors building domestic houses and commercial buildings, to undertake the bricklaying work. Most of its work is bricklaying work, though it has started to operate in a similar manner in providing scaffolding services, and joinery work to a much lesser extent. It undertakes the scaffolding work on about half of the projects on which it undertakes the bricklaying. It also undertakes a few developments of its own but this

sounded to be a minor activity and little attention was given to it. In such cases I imagine that it sub-contracted those activities in which it had no specialisation itself to outsiders, though even this was not clarified and I do not think that it matters.

Background matters in relation to the sub-contractor status of the Appellant's site workers

17. The Appellant's full-time head office staff, including quantity surveyors, were employed, and paid under the PAYE and appropriate NIC deductions. The Appellant also employed trainee bricklayers during their apprenticeship period. In the case of the apprentices Mr. Botham said that the apprentices often remained employees for about two years after they were trained, but his experience was that after about two years most left, in order to find work on their own, often with other contractors. Indeed he said that he was beginning to find the costs of training bricklayers no longer worthwhile because of the very high "wastage" rate after the further two-year period. These apprentices and newly-qualified bricklayers aside, however all of the of the remaining site workers were engaged as self-employed sub-contractors or "subbies".

18. In my opinion both the Appellant and the sub-contractors thought that this categorisation was realistic and correct. In various respects it suited both. It suited the Appellant in that it gave it total flexibility to hire and fire (or rather disengage) workers precisely to match its very variable work-load. I have already said that at one point the Appellant was working on 17 different projects, but that that figure was down by the time of the hearing to 5, and this obviously made it desirable to be able to match work supply with work demand. The Appellant also avoided the employer's liability to secondary Class 1 NICs if people were rightly classed as sub-contractors, and did not have to deduct and account for primary Class 1 NICs.

19. Various advantages were also enjoyed by the workers. They had the flexibility to enter into and leave engagements as they chose, and often did so for better money elsewhere or for a more convenient site. They also claimed to have, and to relish, the flexibility to work the hours that they wished. I will have to comment on a certain divergence in the evidence in this regard, but for the present purpose it is appropriate to assume that the workers regarded this as a real feature of the way in which they were engaged and as an attractive one. Since they were also paid strictly on the basis of an hourly wage for work actually undertaken, calculated in half-hour increments that they worked ***in full,*** with no holiday pay, sick pay, or pay when weather or any other factor rendered work impossible, and since the sub-contractor status was thought to eliminate NIC deductions from pay, and employers' NIC secondary liability, they were actually paid a

considerably higher gross hourly rate (and a yet higher net rate) as sub-contractors than they would have received as employees.

20. One can speculate as to who initiated the chosen self-employed status, and I think that the right answer is that this is a question to which there is no answer. Many people taking work with the Appellant for the first time already had the CIS cards appropriate to sub-contractors and assumed that they would continue on that status. The flexibility and the higher pay clearly gave them an incentive to retain this status. Where new workers had not worked before (a situation unlikely in the case of bricklayers presumably) it seems that they were sometimes told by the Appellant to apply for a CIS card so that they could be paid net of the tax deduction of 18%/20% applicable at different times to sub-contractors. But then the Appellant could hardly be engaging people to do similar work on different bases. At best this would be hopelessly confusing, and at worst one or other would have to be wrong. Having regard to a widespread belief that the self-employed status was common in the industry and correct for the type of labour concerned, and understood to have been confirmed as correct in 2000 by HMRC, I think that the self-employed status arose simply because everyone expected it, and it was believed to be attractive and appropriate. Any notion (vaguely implicit in the conclusions that I might have been expected to draw from the answers given by some workers to the HMRC question of who suggested the chosen status) that the workers were "pushed" by the Appellant into the sub-contractor structure is not realistic.

21. Whilst there is little significance in this issue of whether the Appellant or the workers initiated the sub-contractor status, two further points are worth mentioning.

22. Firstly HMRC had in 1999 and 2000 reviewed and confirmed the self-employed status, as recorded in the following letter, which the Appellant had fortunately not lost, as HMRC had done:-

> *"I am writing following the visit by Mr. Patterson on 9 July 1999 to discuss the categorisation of sub-contract workers used by the business.*
>
> *This and similar cases have been considered at depth by both our Technical Support Section and the Status Officer. Various factors have been taken into account including interviews with the business and individual sub-contractors D.Kestle and R. Clay.*
>
> *In the case of the sub-contractors discussed on 9 July, the weight of evidence of factors in the working relationship*

indicates a contract for services and self-employment has therefore been accepted.

However if the working relationship that existed at that time changes, the status issue will need to be looked at again.

Thank you for your help and co-operation in this matter."

23. Another factor relevant to who, if anyone, had the greater incentive in supporting the structure can be gleaned from that, when HMRC indicated in 2006 that in their revised view all sub-contractors should be re-classified as employees, it was said that when the Appellant relayed this to the workers, a substantial number walked out. I initially found this a little difficult to accept because the fact that the company was pursuing an appeal and that the status had not been changed, other than for a few supervisors, made it rather odd that people would have walked out when the remainder were still largely being engaged as self-employed sub-contractors. It is the case however that in the interview notes prepared by HMRC, following their interviews with various workers, there are indeed references to this walk-out and to the problems that the Appellant had in staffing projects. And this was not just in the exchanges with Mr. Botham, but in discussions with ordinary workers.

24. Mr. Botham himself had of course complained bitterly about the walk-out. In Mrs. Kahler's own note of 23 June 2006, she recorded a 'phone conversation with Mr. Botham in the following terms:-

"Since I visited the company 130 have left and the remaining 70 are due to walk out on Monday. I told him I could not believe I had had such an impact. Mr. Botham went on that they do not want to go on the books in fact they are refusing and he did not blame them, adding that no construction company has men on the books and before I ask, no he is not telling me who he is referring to.

This had now put the company in an awkward position as they have contracts totalling £2 million pounds and no workers, which will bankrupt the company. So the company is going to sue me, not me personally, but the Revenue."

25. One or two minor initial conclusions that I reach on this marginal topic are that:

- the Appellant thought that the basis on which it had been operating was both correct and that it had been reviewed and accepted to be correct by HMRC;

- if anything the Appellant wished to preserve the structure more to meet the demands by workers, and seemingly to stay in line with other industry practice, rather than because it itself had any particular benefits to be derived from the arrangements.

The 2006 HMRC enquiries

26. As indicated above, HMRC first indicated that it was going to conduct a fresh review of the status question in November 2005. This new enquiry resulted in a letter of 15 June 2006 in which the Status Inspector indicated that she considered *"the status of all workers to be one of employment"*. This letter did not give the official Determination and indeed there was a major meeting between the parties almost exactly one year after the opinion letter. That was finally followed by the Determination and Assessments, which were issued in July 2007. Once HMRC gathered that the company had been given an earlier status confirmation back in 2000, copies of which they had lost, HMRC accepted that they could not back-date assessments to any earlier point than the date when the opinion was first written to the company in June 2006, but nevertheless the assessment just for the year 2006/7, including interest as at 13 August 2007, was for £597,081.14. I was told that this would in practice be significantly reduced in the light of a credit that would be given for the income tax already deducted under the CIS machinery. I can only assume however that if the assessment were to be upheld by me, there would be a further assessment for the following year. Beyond that, and I accept that this factor cannot influence me, I was told, and I do not doubt, that if it is found that tax and NICs are properly due as claimed by HMRC, then the Appellant will become insolvent.

The contracts

27. Whilst some of the workers may not have signed a contract at all, it was certainly clear that all had provided CIS certificates to the Appellant. Whilst the HMRC publication on the subject makes it clear that workers can only be paid net under the CIS provisions, rather than paid as employees under the PAYE machinery and subject to the further NIC deductions and liabilities if it is first clear that they are not employees, it nevertheless seems that the very fact of payment under that machinery suggests that both parties considered the sub-contractor status to be agreed between them and to be correct, even when the written contract was not signed.

28. Whilst I have no information as to how many workers did and did not sign the contracts, where contracts were signed, they read as follows:-

"CIS Card Number NI Number

CSCS Reg No

THIS AGREEMENT is made the day of 200 BETWEEN

1. *Castle Construction (Chesterfield) Ltd of Unit M1 Bolsover Business Park Station Road Bolsover Chesterfield S44 6BD (the Employer) and … of…(the sub-contractor)*

2. *The Employer has engaged the Sub-Contractor to carry out work as a Bricklayer/Labourer from the …day of … 200 .*

3. *The hourly rate agreed between the parties for the work will be £ per hour.*

4. *It is expressly agreed between the parties that 7.5% of the hourly rate is holiday pay.*

5. *The Sub-contractor will accrue holiday pay at a weekly rate in accordance with the Working Time Regulations 1998.*

6. *The contractual provision in paragraph 4 as to the payment of holiday pay will count towards the Employer's payment of holiday pay pursuant to the Working Time Regulations 1998 in discharge thereof.*

7. *The Employer and the Sub-Contractor agree that the Sub-Contractor will take holidays at a time and date reasonably convenient to the Employer and agreed by him on at least one week's notice.*

8. *In all other respects, the Sub-Contractor confirms that he is self employed and remains liable for all payments of tax and National Insurance save for the Employer's statutory duty to retain tax pursuant to the CIS scheme operated by the Inland Revenue.*

9. *A substitute worker can be sent at the discretion of Castle Construction (Chesterfield) Limited.*

SIGNED etc

29. I have the following observations to make in relation to those few provisions, which seem to me clearly to contemplate that as between the parties, the worker is meant to be a self-employed sub-contractor.

30. The Respondents referred to the fact that the Appellant had been defined to be "the employer", and suggested that this was significant. I do not agree with that, first because it was merely the term used to denote the Appellant,

and secondly and more significantly because there is actually no, non-legalistic, word to describe the principal in a principal/sub-contractor relationship. It is perhaps worth noting that even Lord Denning used the term "employer" in precisely the same way in the extract that I have quoted in paragraph 81 below. It accordingly seems clear to me that this contract was designed to create a principal and sub-contractor relationship. The terms of clauses 4,5 and 6 talk about holiday pay, and reflect some legal provision dealing with holiday pay. My understanding is that their purpose was to indicate that sub-contractors had automatically been paid, as part of their hourly wage, their "holiday pay", so that if they then took a holiday they would not be entitled to be paid at that time. The contract refers to the hourly rate "for the work", and it was either these words or otherwise the clear understanding between the parties that rendered it clear that the sub-contractors would only be paid whilst actually working. Thus they were not paid if they were ill, if they chose to take a holiday, if weather made it impossible to work, or they were unable to work for any other reason. Thus, to take the example of one of the actual witnesses, Mr. Burland, he was not paid when he had to take his son to various hospitals for physiotherapy sessions, and did not need to obtain the Appellant's permission to take time off for this, or indeed, for any other reason.

31. Once one ignores the virtually irrelevant three clauses that deal with holiday pay, or rather the implicit inability to claim to be able to take paid holidays, there are few remaining clauses. Understandably sub-contractors were expected to give a week's notice of their intention to take time off for holidays, and clause 8 perfectly accurately reflected the joint expectations as regards taxation on the assumption (confirmed by HMRC in 2000) that the sub-contractors were indeed properly classified as sub-contractors.

32. I might just mention in passing that, for those few people who I consider should have been classified as employees, and indeed for all (should this decision largely in favour of the Appellant be over-turned on appeal), the Appellant might have an argument, available against those individuals who signed these written contracts, that clause 8 gave the Appellant a right to recover the tax and NICs charged on it from the people eventually ranked as employees. That is currently no concern of mine, and I obviously accept that the practical chance of the Appellant claiming reimbursement from the workers and former workers, is non-existent, though in common sense terms and ignoring the feature that it would be hopelessly impractical, it would actually be both fair and coherent for the Appellant to recover in this manner. For the higher pay that the workers received was all based on this assumption as regards the liability for tax and NICs.

Notice periods

33. Once I dismiss the substitution clause, clause 9, as I shall do in my decision on the ground that it is broadly nonsense, it becomes clear that this contract did little more than specify the hourly rate, and indicate (not terribly clearly, if indeed at all) that sub-contractors were only paid for time worked. It thus failed to indicate anything about notice periods for termination of the contract, or working hours.

34. As regards these two matters there was a certain divergence of evidence as between that given by the witnesses who appeared before me, and just some of the workers interviewed by Mrs. Kahaler. Those giving evidence before me said that there was, on their understanding, no required notice period on either side of the engagement, and also no stipulation as to the working week or the periods to be worked. Some of the people interviewed by Mrs. Kahler appeared to confirm the same, whilst others thought that there was a one-week notice period, and that there was a fairly rigid working week from 7.30 a.m. to 4.30 p.m., with two half-hour breaks, mid-morning and for lunch.

34. My conclusion in relation to the issue of whether there was any notice period required by either side to terminate the relationship was that there was not. There appeared to have been a number of instances where the relationship had been terminated on one side or the other with no notice, and there was no reference to this having been questioned. On the reasoning thus that absence of any notice requirement suited both parties, most confirmed that this was the position and no-one appeared to have challenged this position, this conclusion seems realistic.

The length of time sub-contractors worked for the Appellant

35. It is interesting to look at the Schedules that illustrate the start and finish dates of the various workers engaged as sub-contractors. Were I to see from these Schedules that the claim that people could come and go as they chose was purely theoretical because most worked for long periods, it would obviously be tempting to regard the claimed flexibility as rather a weak point. However, by picking six utterly random points in the very long schedule of workers, and calculating the weeks worked by the 10 workers at the points chosen and by the next 9 in the list, the numbers of weeks worked over total periods of engagement were as follows:

- 9, ½, ½, 9, 12, 44,7, 26, 6 and 6
- 10, 8, 30, 21, 1½ , 4, 6, 1½, 7 and 7;
- 24, 22, 8, 56, 3, 7, 7, 8, 47 and 8;
- 1, 55, 3, 38, 4, ½, 2, 188, 30 and 235;
- 20, 50, 5, 20, 8, 9, 2, 7, 40 and 7; and

- 7, 39, 5, 3, 1, 22, 60, 7, 10 and 75.

Having listed the times worked by 60 workers chosen at random, it is noteworthy how these figures show no pattern, and many workers worked for relatively short periods. Out of 60, only 6 worked for periods of longer than one year, and only two of those worked for significantly longer than a year.

36. It is also worth recording that of the few workers who gave evidence before me, there were examples of people who worked intermittently for others and for the Appellant. For instance, Mr. Johnson referred to work that be had done in 2007 for both Castle and Ian Cooke Builders in Barnsley.

The working hours per week

37. I turn now to the other question on flexibility, which is whether it really was credible that bricklayers could work the times that they pleased, knocking off early if they wished, albeit of course only being paid their hourly rate for each half-hour worked in full. Again there was a divergence of evidence in this regard in that whilst the witnesses who gave evidence personally all said that they were free to work the hours that they chose, several of the workers interviewed by Mrs. Kahler emphasised how Mr. Botham required them to work from 7.30 a.m. to 4.30 p.m. The evidence given by Mr. Botham had stressed that people with different motivations worked for very different periods. Those with families and responsibilities naturally worked fairly standard hours, whilst others were said to cease work as soon as they had earned enough money to pay for their beer and modest living expenses. There seemed a fairly general practice that people often ceased work an hour early on Friday, and in winter work usually stopped at 4.00 p.m. rather than 4.30 p.m.

38. One factor that is reasonably clear is that even if the hours were flexible, Mr. Botham ran the Appellant company with a firm hand. There were a number of references to people being aggrieved at not being paid for a particular half-hour of work if they arrived for work a few minutes late. It seems that the understanding of the terms was that people had to work the totality of each half-hour in order to be entitled to payment for that period, so that if they arrived late or took too long for a lunch break, they suffered a reduction in pay.

39. I have to say that my initial reaction was that the claimed flexibility in hours to be worked seemed rather improbable, in that for numerous reasons it would seem very difficult to run an efficient building business if workers could virtually come and go as they pleased and in practice quite regularly did so. One of the obvious points is that where there were several

bricklayers working together, with the correct support of labourers, it would be terribly inefficient to find either that a couple of the bricklayers had disappeared, leaving the labourers with insufficient to do, and probably worse still if the labourers disappeared and ceased to feed bricks and mortar to the bricklayers. Also, it was often emphasised how great the time pressures were on sites, with various sections of wall often needing to be completed by given times in order that work between the various trades on site could be properly co-ordinated. This would again, one supposed, make it critical to have a reasonably reliable work pattern that would not be disrupted by unscheduled absences. Another reasonable assumption was that most workers would need and wish to work full weeks in order to earn good money. It was generally said that the Appellant's hourly rate of pay was good or at least competitive, but it seemed improbable that it was at the level that would enable many people to reckon that they could work short hours.

40. In practice I imagine that the vast majority of good workers would have indicated when they would wish or need to leave the site, and it was certainly stipulated that workers were meant to give one week's notice of intended holidays.

41. Having initially supposed that the vast majority of workers would have worked full weeks, and that the time sheets would regularly indicate that on most sites most workers worked 40-hour weeks, I was again astonished at the variation in hours shown to have been worked on the numerous weekly time sheets shown to me. These were compiled on a site-by-site basis with the result that disparities in time worked by the various workers engaged on a site cannot have been explained by such matters as different weather patterns on different sites, or the feature that some projects might have been completed.

42. Again taking random samples, and ignoring the odd figures that I could not read, I list the hours worked by various listed workers working on particular sites:-

- 41½, 24, 39, 37, 39, 23, 37, 29, 16, 34½ 39, 28 and 39;
- this particular week seemingly having a Monday bank holiday, 42, 22½, 13½, 15½. 21, 21, 13, 13, 40½, 39, 31, 24, 30, 30½, 30½, 28, 30½, 38½, 31, 33½ and 30½;
- 23, 8, 8, 32, 39, 39, 39, 8, 23, 31, 31, 31, 36, 39, 33 and 39; and
- 53½, 47, 52, 52, 39, 52, 47, 8, 52, 32, and 19½.

There is clearly enormous variety in these figures. It is possible that, had the witnesses been asked to dissect these statistics, and explain why some of the

hours worked varied, the answer might quite often not have been based on workers choosing to come and go as they pleased. There is however far too much divergence between the figures in all of the time sheets for me to reach any conclusion other than that there must be credibility to the Appellant's claim that the sub-contractors liked flexible working hours; some worked very long hours; and others were happier to stop work when they chose and when they either had some alternative demand on their time, or had earned sufficient for the week.

Annual income figures

43. I was also given a Schedule that listed the annual earnings in the tax year 2006/7 of the workers who had been interviewed by Mrs. Kahler. The two marked * should be somewhat discounted, because the figures for Mr. Green were distorted by the fact that he became a full-time employee part way through the year, and his earnings paid under PAYE have been ignored, and Mr. Burland only started with Castle in January 2007. Subject to that, the figures are as follows:

R.Yeardley £23,025

P. O'Neill £21,365

J Green * £3,284

JG Pearson £25,505

T Smith £1,275

R Holliday £1,680

J Webb £19,960

A Allcock £1,035

W Dixon £25,805

J White £1,382

S Lee £633

C Greig £5,265

S Barton £18,230

C Burland * £4,814

D Johnson £17,918

44. The conclusion that I reach is that these various statistics, which are genuinely random, do appear to illustrate precisely the point claimed on behalf of the Appellant, namely that people came and went with extraordinary rapidity, and when they were engaged their working hours showed very great fluctuations. I end up with a greater feeling of astonishment that Mr. Botham and the Appellant managed to get walls built efficiently, rather than a feeling that the claimed evidence in relation to working patterns was exaggerated. On this subject thus I repeat the point that I recorded in the Introduction where I referred to the claim by Mr. Botham that in one year he had engaged 450 bricklayers when, had they been full-time, 150 would have been sufficient.

45. Some of the reported authorities on status disputes and in particular on IR 35 disputes have periodically involved claims that individual workers were said to be able to work at the times they chose, but that in practice the relevant appellants had generally worked conventional working weeks, along-side other people who were indeed conventional full-time staff. This is unquestionably not such a case.

Who provided the tools, and visibility vests etc

46. There was a clear distinction between those few bricklayers who were employed, namely the apprentices and the newly qualified who remained employees for two years after completing their training, and the sub-contractors. As regards the former, their hand tools, and their visibility vests with the Castle logo on them, were all provided by the Appellant. The Appellant also provided transport to and from site for the employees. In contrast the sub-contractors all provided their own hand tools, and although they had to wear Castle visibility vests, they had to buy these. They also had to provide their own transport to site.

47. So far as the tools were concerned, there may be no or little significance in the fact that the sub-contractors provided their own tools since it has long been recognised that the provision of a few hand tools does not preclude some workers from being employees. It is, however, worth providing the list of the hand tools that had to be used and provided by the sub-contractor bricklayers because they were more extensive than the trowel that might otherwise be assumed to be all that was involved. According to Mr. Burling's evidence, he provided "lines and pins, corner blocks, chisels, brick hammers, a scotch hammer, a lump hammer, a bolster chisel, a pointing trowel, 600 and 1200 mm levels, trowels, thin pointing trowels (narrow gauge), a tape measure and a set square". According to whether sub-contractors purchased cheaper or best quality tools, the cost of these tools

was in the range from £500 to £1000. Two tools that the sub-contractors did not provide were a Hilti gun and a Stihl saw. Only one of each of these tools was needed on a site, so that it was inappropriate for bricklayers, of whom there might be many on a large site, to own and provide these tools. The Hilti gun was a powered gun with the amazing and somewhat alarming capacity to fire staples, designed to tie brickwork to rolled steel joists, up to 10 mm into the RSJs. The Stihl saw was a petrol-powered brick-cutting saw. Whilst these were provided on site by the Appellant, there was a site rule that if either went missing and it was not known who had taken them or failed to secure them at the end of a shift, then all the sub-contractors on the particular site would be charged between them with the replacement cost of the missing item.

48. It seems to me that whilst the hand tools provided by the sub-contractors were not so major as to be particularly compelling, or indeed so as to influence the description of the service provided by the sub-contractors in the manner considered by Mr. Justice MacKenna in one of the decisions to which I will refer extensively in due course, the tools provided do have some significance, particular as they had to be provided by the sub-contractors whilst they were provided for the employees.

49. It is apparently a health and safety rule that all workers on site nowadays have to wear visibility jackets and, in appropriate circumstances, hard hats. Again, these were provided to employees, and had to be purchased by sub-contractors. In order that main contractors knew who was engaging the various workers on site, it was a further rule that safety clothing had to bear the sub-contractor's (i.e. Castle's) logo. It followed, somewhat to the irritation of sub-contractors who already owned their own high visibility clothing, that they nevertheless had to buy a Castle jacket when working on a site where Castle were sub-contractors.

50. In a similar way, site passes were required for security purposes and these had to be held by anyone working on a site in any capacity for the Appellant.

The exercise of "control"

51. A number of aspects of the control exercised over the bricklayers in particular, were mentioned during the hearing. The two most fundamental aspects of control related to where, and in what sequence, walls should be built; and secondly the quality and method of bricklaying.

52. I was told that there were never bricklayer/foremen on small sites, that is sites with up to only five or ten bricklayers working. On larger sites, there were generally foremen/bricklayers. Their prime function was to attend site

meetings with the main contractors in order to clarify where walls were to be built, and in what sequence they were to be built. The foremen also worked as bricklayers when not attending to their coordination work. Mr. Botham described foremen/bricklayers as being the most intelligent bricklayers.

53. There was obviously complete control over where, and in what sequence, walls should be built. This was almost entirely dictated of course by the principal contractor, in that the principal contractor was naturally working to plans, and also as overall manager of the site, specified the order in which the various trades, bricklayers, scaffolders, plasterers, electricians, plumbers and others, were needed, and naturally these calculations often dictated the order in which walls would be built. I might observe at this point that I find it difficult to discern too much significance from this aspect of control. After all, if the brickwork had been sub-contracted to a team of brickies who provided all the equipment, and the bricks and mortar, and priced the job in one single quote for all the brickwork on the whole site (in other words to a team that would plainly have been sub-contractors on any test), the main contractor would have still had to ensure that the walls were built in accordance with the plans, and would still have needed to coordinate the bricklaying with the different trades being undertaken by others.

54. The more relevant aspect of control, it seems to me, is the issue of whether the Appellant or perhaps even the main contractors exercised control as to how bricks were actually laid. All of the Appellant's own witnesses consistently suggested that they knew how to lay bricks, and that no-one ever gave them any instructions as to how to exercise their craft. And had anyone done so, such instructions would not have been welcomed.

55. One of the former workers, who was interviewed by Mrs. Kahler, had clearly fallen out with the Appellant company, and was volunteering to provide HMRC with any assistance that they might require in preparing their case against the Appellant. Somewhat perversely, this witness made the following comments about his status and the issue of "control". He said:-

> "*I am self employed. I provided own tools.*
>
> *There was a foreman on the jobs but don't need people to tell me how to lay bricks - I've done it 20 years".*

This was, it seems the common attitude amongst all the workers. These remarks however, coming from a man whose other remarks indicated that he had seriously fallen out with the Appellant, are very relevant. They indicate first a conviction, derived presumably from considerable other experience with other contractors (this man only being engaged for about five weeks) that his status was "a given", and that it was at least influenced by his

provision of his own tools. This of course tallied with the industry expressions of "on the tools" and "on the books" to denote who was self-employed and who was employed. Finally however the contempt with which this worker described the academic possibility that someone might indicate to him how to lay bricks seems to provide very helpful evidence, contrary to his intentions, in favour of the Appellant.

56. I should say, in order to give a complete picture, that whilst none of the actual witnesses referred to any inspection of work by Castle head-office staff, either in their evidence in chief, or under cross-examination, there were some references in the statements made by the people interviewed by HMRC to someone from head office periodically visiting sites and inspecting things. This did not however derogate from the general impression that these inspections would have been more geared to seeing that the cooperation between the main contractor and Castle's foremen, who would be passing on the main contractor's instructions to the workers, and the workers was all operating smoothly, and there was no indication that anyone was ever told how to do his job. Consistently the job description of the "foreman/bricklayers" indicated that their prime function, as well as laying bricks, was to interpret the architect's plans, and to see that walls were built in the right place, rather than to instruct the bricklayers on how to lay bricks.

57. A number of site rules were required by health and safety legislation, and it was indeed said by Mr. Botham and others that the Appellant enforced all such rules rigorously. There had been a tragic accident where a worker had been killed in an incident with a fork-lift truck where the blame was laid on someone who had been using a mobile phone. As a result of this the Appellant banned the use of mobile phones on site, and I was told that numerous contractors had followed this example, and that such a ban was now common. It seems to me that the enforcement of safety rules, required by legislation, and sensible steps introduced after the tragic accident, are hardly indications of whether the Appellant is exercising the sort of control that would indicate that the people indisputably working for it were employees, as distinct from independent contractors.

58. Another matter referred to in the context of "control" was whether the Appellant could control the place where the sub-contractors worked. In practice, since they could obviously only work on sites where the Appellant was providing bricklaying or scaffolding services, this question became one of whether the Appellant could direct workers to cease working on one site and move to another. In this context there were several examples of workers having been asked to switch sites. This is not remotely surprising of course because there would doubtless be occasions when workers on one site would fall below the required numbers on account of people terminating, and if

another site was ahead of schedule with ample workers, it would make sense to try to move some workers from the one site to the other. Again I can attach little significance to this. Those wanting to work fairly consistently would have every incentive to be cooperative and if the other site was no less convenient than the one they were previously working on, it would seem entirely natural that they would be prepared to work on the other site. There was no question that they were engaged on a site-by-site basis; they were engaged until either party wished to terminate the arrangement, and since self-evidently the worker could not be required to work at all, or to work on the other site, the fact that in most cases there was no objection to moving from one site to another does not indicate any particular element of "control". Amongst the few workers who gave evidence in person, Mr. Johnson indeed mentioned that in February 2007 he had rejected a move of job to Nottingham with Castle because it was too far to travel, and presumably that was when he obtained work with Ian Cooke Builders

Rectifying bad work

59. One of the distinctions drawn to my attention in relation to the working terms for the sub-contractors and the employed trainee bricklayers, and those still employed in the early years after training was that if mistakes were made, the sub-contractors had to correct them themselves in their own, unpaid, time. The employees on the other hand would not lose pay in this situation and would still be paid if they remedied whatever mistakes had been made. The notion that mistakes might need to be corrected indicates that some sort of control was exercised. Again it seems that this was not control usually geared to the quality or method of bricklaying, but rather to cases where a wall had been built in the wrong place, or for instance with the wrong materials. Again the interview note of the discussion with the man referred to in paragraph 55 above referred to this sort of situation, in the following extract:-

> *"During last 2 days we were building with stone and we said we could not do it to their specifications. They said just do it. We did and they wouldn't pay us as they said work was bad – but I've looked since and that work was kept - so they ripped us off".*

The method of calculating payments

60. As already mentioned, all the Appellant's workers were paid on the basis of an hourly rate, it being understood that in order to claim pay for each half-hour interval, workers had to be on site and working for the whole of the half hour.

61. It was said by Mr. Botham that the reason why workers, and in particular bricklayers, were paid on an hourly basis rather than on a piece-work basis (of so much for 1000 bricks, or so much for a completed wall), was that on large sites it was impossible to calculate how much work had been done by each bricklayer, and that rushing brickwork, when working on a piece-work basis, generally resulted in poorer quality brickwork. I was also told that, contrary to the normal position for employees, if sub-contractors worked at weekends, they were not paid overtime rates but were simply paid at the same hourly rate. I was also told that very occasionally workers were paid on a piece-work basis and that when there was a particular urgency for work to be completed by a given date, a gang might be promised a particular amount for finishing the work on schedule.

Insurance

62. The Appellant itself carried insurance in respect of injuries and damage inflicted by both employees and by sub-contractors. It was suggested by the Respondents that this indicated that the Appellant was thereby accepting that it regarded the sub-contractors as employees for whom it was responsible. In this regard, I accept the alternative contention by the Appellants that there are circumstances where the Appellant could be liable for damage and injury inflicted by both employees and sub-contractors, quite apart from the further possible claim directly against the Appellant that it had initially been at fault in engaging the wrong person. Accordingly I attach no significance to the cover taken out by the Appellant. I was told that some of the workers, indeed including those who gave evidence in person, themselves took out PII cover. Mr. Burland for instance paid an annual premium of £70 for cover up to £2 million. It was also said in the HMRC interview notes that other workers did not take out their own insurance. Some asserted that they assumed that they were covered by Castle's policy, and indeed Mr. Botham confirmed not only that the Appellant's policy extended to cover the Appellant for its own liabilities incurred through the activity of sub-contractors, but that the policy would also cover the sub-contractors themselves, which is why they were not positively required to take out their own insurance. Those that did presumably took the view that the same might well not apply when working for other organisations so that it would be prudent to take out their own policies.

"Part and parcel" of the organisation

63. Reference was made to the fact that whilst full-time employees were taken to the races periodically and occasionally entertained in other ways, such as by having a Christmas party, these trips and entertainment were not extended to any of the sub-contractors. In general I got the impression that the relationship with the sub-contractors was a very arm's length

relationship, subsisting just during working hours for the benefit of both parties, and no particular effort seems to have been made to foster any spirit that the sub-contractors were "part and parcel" of the Appellant's business.

The law

64. There is no statute law that calls for any interpretation in this case. It was common ground that everything, in relation to both Income Tax and NICs, hinged on whether the workers were employees or independent sub-contractors. Naturally there is very considerable case law authority on that issue, and I will deal with that in the first part of the Decision below.

The contentions on behalf of the parties.

65. This is a case where I consider it unnecessary to list contentions advanced by either of the parties. In any case of this nature, the dispute requires me to look at all of the facts that I have listed above, and to refer to the reported cases to gain what assistance I can in judging whether, on balance, the workers in this case were employees or, as the Appellant contended, sub-contractors. There was relatively little actual dispute as to the law and the authorities, and in giving my decision I will endeavour to give, and explain, my decision by reference to the relevant tests to be extracted from the authorities.

My decision

The relevant tests according to the authorities

66. There are six slightly different lines of authority designed to clarify the distinction between the status of employees and that of self-employed sub-contractors. Many of the cases are employment cases and many others are tax cases where both Income Tax and NIC considerations can make the distinction important. Some of the employment cases are concerned with the presently irrelevant situation of there being several contracts at different periods of time, perhaps themselves employment contracts, where the critical point for employment purposes is whether there is an "umbrella contract" linking all the individual contracts together, and that can lead to the question of whether that umbrella contract creates one overall employment contract, or whether it influences the status of the numerous separate engagements. Those points seem to me not to be relevant in this case.

The various different tests or " pointers"

67. The six different lines of authority, or "material pointers" which I will deal with in turn, are:-

- the so-called "mutuality of obligation" requirement, or "touchstone";
- the famous and often quoted three tests set out by Mr. Justice MacKenna in *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* 1 QBD [1968] 433;
- the "substitution" point;
- the authorities that concentrate on the issue of whether the worker is in business on his own account;
- the intentions of the parties; and finally
- the approach based on balancing numerous pointers in each direction and standing back and looking at the overall picture.

"The want of mutuality" test

68. The so-called "mutuality of obligation" requirement is asserted to mean that for a relationship to be one of employment, there must not only be a contract and an obligation on one party to work and the other to pay (all of which is manifestly obvious) but something more. An obligation to provide work has been suggested to be an additional requirement, and it has been asserted that the "mutuality of obligation" requirement is an absolute prerequisite to establishing that there is a contract of employment. For present purposes, I accept that these suggestions go too far, and I agree with the conclusions on this point reached by Mr. Justice Park and Special Commissioner Mr. Hellier in the respective cases of *Usetech Ltd v. Young (HMIT)* (2004) 76 TC 811 and *Dragonfly Consulting Ltd v. HMRC* [2008] STC (SCD) 430. I think that a fair summary of the conclusions that they reached is that:-

- it is not clear, within the confines of one contract, that anything more is required to establish a contract of employment than the obligation to work and the obligation to pay;
- when considering whether the umbrella contract that links various separate employment contracts constitutes one continuous employment contract, there must then be some obligation to provide work or to offer work for the umbrella contract to constitute a continuing contract of employment; and
- an obligation on the employer to provide work, or in the absence of available work to pay, whilst not a precondition to a single contract ranking as an employment contract, is nevertheless a "touchstone" or a feature that one would expect to find in an employment contract.

Without wishing to explain my decision at this stage, I might just comment at this point that this case seems to me to be one where contractual provisions that one would normally expect to find in an employment contract are very notably, deliberately and genuinely (rather than speciously) absent.

Mr. Justice MacKenna's three tests

69. The three tests set out by Mr. Justice MacKenna are as follows.

> *"I must now consider what is meant by a contract of service. A contract of service exists if the following 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."*

70. The first of those tests has often been taken to be a reference to the "want of mutuality requirement" that I have just summarised, though I am not convinced that that is right. As worded by Mr. Justice MacKenna, the first test initially seems to be a strange test for distinguishing between employment relationships and the contracts between principals and independent contractors, first because it appears to beg the question by referring to the terms "master" and "servant", and secondly because there will self-evidently be obligations on both sides of both relationships, on the one side to do something and on the other to pay. In the context of the case before Mr. Justice MacKenna, it seems to me that the point which he was actually stressing was the nature of the obligation, namely the obligation on the employee or contractor "to provide his own work and skill". In the relevant case, individuals who had previously been employed as drivers of Ready-Mixed's concrete delivery lorries had entered into a different relationship under which they leased the lorries themselves under one contract and then agreed to convey ready-mixed concrete for the company. Thus their obligation became the wider obligation of delivering concrete in their own lorries, to be distinguished from that of just providing work and skill by driving the company's lorries, as before.

71. That feature of the provision of the wider service is of course the foundation of what I have described in paragraph 67 above as the test of whether the individual is rightly regarded as being "in business on his own account". Whilst I will deal with that below, it would be wrong to leave the remarks of Mr. Justice MacKenna on this issue without referring to very relevant

examples that he gives (ostensibly as an illustration of his third and not his first point), shortly after the passage that I have quoted above. These two examples illustrate precisely the point that I have just assumed that Mr. Justice MacKenna was addressing, and they sound decidedly relevant to the facts of this case, so that it would be misleading not to mention them. The two contrasted examples are these:-

> *"A contract obliges one party to build for the other, providing at his own expense the necessary plant and materials. This is not a contract of service, even though the builder may be obliged to use his own labour only and to accept a high degree of control: it is a building contract. It is not a contract to serve another for a wage, but a contract to produce a thing (or a result) for a price."*
>
> "*A contract obliges a labourer to work for a builder, providing some simple tools, and to accept the builder's control. Notwithstanding the obligation to provide the tools, the contract is one of service. That obligation is not inconsistent with the nature of a contract of service. It is not a sufficiently important matter to affect the substance of the contract".*

I will return in due course to the second of those examples and explain why I do not consider that it concludes the issue in this case in favour of the Respondents. For present purposes I simply suggest that Mr. Justice MacKenna was concentrating, in his first test, on the nature of the supply and not in trying to articulate the "want of mutuality requirement".

The "control" test

72. Mr. Justice MacKenna's second test, that of "control", is clearly a vital one, albeit one that has been said in more recent decisions to have diminished in importance, and one that can also be quite difficult to apply. The various aspects of control are what make the "control" test difficult to apply, and these are readily indicated by the following extract from Mr. Justice MacKenna's decision:-

> *"Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where, it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."*

In explaining my decision I shall obviously refer to this control test.

The influence of the surrounding terms

73. Although there has been criticism of the third of the requirements that Mr. Justice MacKenna listed, this test seems essentially to be making the realistic point that one must finally look to all the terms, or indeed the notable absence of terms, in order to judge whether these reinforce or undermine the initial conclusions reached by applying the first two tests. Again I shall place some stress on this aspect in explaining my decision.

"The substitution point"

74. One of the additional points that Mr. Justice MacKinnon makes in his judgment is that employment is a contract for providing personal services, so that if a contract requires a person to undertake a service or to procure that someone else performs the service, that cannot be a personal service, and so cannot be an "employment" contract. In the light of this observation, which is obviously right, it is quite common for advisers to insert "substitution" clauses into contracts, or into the final contract with the client in IR35 ("intermediary") cases, obviously in an effort to diminish the impression that the relationship is one of employment, or that it would be one of employment on applying the IR35 fictions. In many cases, the substitution clauses inserted have been qualified by the requirement that the counter-party must consent to the choice of substitute. And as I have already noted, the short contracts in this case had substitution clauses, and indeed ones that required the Appellant to consent to a choice of substitute.

75. In this case, and to his credit, counsel for the Appellant said that he was placing little reliance on the existence of the substitution clause. On the evidence given to me, I believe that there was no example of anyone having used the clause. Since the existence of the clause forms no part of my decision in favour of the Appellant, I will immediately say why I dismiss it in this case as being irrelevant, if not counter-productive. It first seems to me that if there is to be nothing "personal" in the nature of the identity of the provider of the service, it should logically be irrelevant for the recipient of the service to have to consent to the service being rendered by a substitute. It might be acceptable for a service that requires the provider to have some qualification, to make the substitution right dependent on the substitute also having the required qualification, but beyond that the feature that the recipient of the service must consent to the identity of the substitute seems to erode the logic of the "substitution" point. For it demonstrates that the counter-party does require a personal service, or alternatively another personal service to which the counter-party consents. Whether a veto right would always be fatal to the claimed effect of a substitution clause is not presently particularly vital, because I consider that in the present case the clause was broadly nonsense, with no attention to reality. I do not know the

answer to this point, but it certainly occurs to me that when people are meant to pay non-employee workers under the CIS scheme under deduction of 20% tax, it may well be the case that if one bricklayer satisfied his obligations through a substitute, then both the Appellant and the worker in question would each have to deduct 20% tax, and I am not immediately clear that the bricklayer could credit his 20% tax deduction against his obligation to deduct from the payment made to the substitute. As I say, I do not know the answer to that question, but I do know that no-one else gave it any thought, in other words any thought to whether the structure of substitution was even practical in this case. It was also, of course, rather irrelevant because the Appellant itself was the very entity that specialised in engaging part-time "brickies", and since many worked erratic hours, the Appellant was often having to supply replacements. It seems surprisingly unlikely therefore that it would ever occur to anyone that a bricklayer might approach the Appellant for consent to the approval of a particular substitute, when the Appellant had a list of its own contacts that it could easily access in order to replace someone who had left work.

76. In all the circumstances of this case, it seems to me that the substitution clause was a fiction, designed by an adviser, or the draftsman of some precedent document, to enhance the "non-employee" case, and that on the facts of this case, that endeavour fails, and is if anything (by suggesting the need to resort to such artificiality) counter-productive.

The supplier's own business test

77. An often-quoted summary of the test that concentrates on whether the person rendering the services is doing so in the course of a business conducted by him on his own account is that given by Mr. Justice Cooke in *Market Investigations Ltd v. Minister of Social Security* [1968] 3 All ER 732 at 740. This summary was quoted with approval by Lord Widgery in *Global Plant Ltd v. Secretary of State for Social Security* [1971] 3 All ER 385, and was itself referring to remarks by Lord Wright in *Montreal Locomotive Works Ltd v. Montreal and A-G for Canada* (1947) 1 DLR 161 at 169 and by Lord Denning in *Bank voor handle en Scheepvaart NV v. Slatford* [1952] 2 All ER 956 at 971. It is as follows:-

> *"The observations of Lord Wright, of Denning LJ, and of the judges of the Supreme Court of the USA suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?". If the answer to that question is "Yes", then the contract is a contract for services. If the answer is "No", then the contract is a contract of service. No exhaustive list has been compiled and perhaps*

no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task".

It is thus perfectly clear that if a gang of plasterers, who provided their own plaster, and finish plaster, their own electric mixers and hand tools, very likely trestles and planks and almost certainly their own van, were engaged to plaster all the walls in a house, or indeed to undertake plastering work at a price per day or per hour, they would not be employees. By virtue of plainly needing to draw up their own profit and loss account, and by virtue of the short engagements, they would clearly be traders in business on their own account. Whilst it is not presently relevant, I consider that that conclusion would not change even if they were engaged for long periods by one building company. The bricklayers in this case are undoubtedly a more borderline category but I shall refer to this business test at some length in explaining my decision.

78. Prior to leaving the general summary of this test however it is worth just quoting the following paragraph from Mr. Justice Cooke's decision in Market Investigations, which confirms that the business test has its limitations. He said:-

"The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already-established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him."

The intentions of the parties

79. Whilst the status issue of whether particular individuals are employees or self-employed is to be determined by all of the facts, and certainly cannot be

resolved just because the parties declare, possibly in their contract, that the relationship is one or the other, the intentions of the parties can nevertheless be very important.

80. Mr. Justice MacKenna confirmed this at the very start of his decision in the Ready-Mixed case by saying that "such a declaration was not necessarily ineffective, for if it were doubtful for what rights and duties the parties wished to provide, such a declaration might help in resolving the doubt and in fixing them in the sense required to give effect to the expressed intention".

81. More significantly, Lord Denning made further and presently relevant reference to the significance of the intentions of the parties in the case, *Massey v. Crown Life Insurance Co* [1978] 2 All ER 576, where an insurance agent had deliberately agreed to change status from employee to self-employed, and then sought later to claim that he was genuinely an employee. Having quoted the remarks of Mr. Justice MacKenna that I have just quoted, Lord Denning made the following observations:-

> *"So the way in which they draw up their agreement and express it may be a very important factor in defining what the true relation was between them. If they declare that he is self-employed, that may be decisive.*
>
> *Coming back to this case, for myself I have considerable doubt whether Mr. Massey was really a servant from 1971 to 1973. It looks to me much more as if he was even in that time a commission agent. He could take on other work. He did in fact work for another insurance broker. He was paid on commission. He received a minimum sum but over and above that he was paid on commission as many commission agents are. So I think it is very doubtful whether he was under a contract of service from 1971 to 1973. But I am perfectly clear that afterwards in 1973, when this agreement was drawn up and recast, although the same work was done under it, the relation was no longer a master and servant relationship. It was an employer and independent contractor relationship. The change to "John L Massey and Associates" was an unnecessary complication. It is significant that the tribunal found that both sides agreed that the agreement was, and was intended to be, a genuine transaction and not something which was done solely for the purpose of deceiving the inspector of taxes. They said: "Had we thought otherwise, we would have held the agreement to be tainted with illegality with the consequence that it would have been void".*

……

In most of these cases, I expect that it will be found that the parties do deliberately agree for the man to be "self-employed" or "on the lump". It is done especially so as to obtain the tax benefits. When such an agreement is made, it affords strong evidence that that is the real relationship. If it is so found, the man must accept it. He cannot afterwards assert that he was only a servant.

In the present case there is a perfectly genuine agreement entered into at the instance of Mr. Massey on the footing that he is "self-employed". He gets the benefit of it by avoiding tax deductions and getting his pension contributions returned. I do not see that he can come along afterwards and say it is something else in order to claim that he has been unfairly dismissed. Having made his bed as being "self-employed", he must lie on it. He is not under a contract of service."

<u>*Standing back and looking at the whole picture*</u>

82. Several of the cases have referred to the fact that one cannot (certainly in all situations) just apply one test. Rather one must consider all points, and then stand back and look at the overall picture. Several passages are worth quoting in this context from the excellent decision of Mr. Justice Mummery in *Hall (HMIT) v. Lorimer* (1993) 66 TC 349. The decision includes the following remarks at pages 366 and 367:-

> "*It is clear from these cases that there is no single satisfactory test governing the question whether a person is an employee or is self-employed."*

He then refers to the great significance of the "own business" test, well summarised by Mr. Justice Cooke in *Market Investigations*. He then continues:-

> *"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 60 TC 150, at 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."*

The decided cases give clear guidance in identifying the detailed elements or aspect of a person's work, which should be examined for this purpose. There is no complete exhaustive list of relevant elements. The list includes the express or implied rights and duties of the parties; the degree of control exercised over the person doing the work; whether the person doing the work provides his own equipment and the nature of the equipment involved in the work; whether the person doing the work hires any staff to help him; the degree of financial risk that he takes, for example, as a result of delays in the performance of the services agreed; the degree of responsibility for investment and management; how far the person providing the services has an opportunity to profit from sound management in the performance of his task. It may be relevant to consider the understanding or intentions of the parties; whether the person performing the services has set up a business-like organisation of his own; the degree of continuity in the relationship between the person performing the services and the person for whom he performs them; how many engagements he performs and whether they are performed mainly for one person or for a number of different people. 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".

Those passages seem to me to be an excellent indication of the factors that I should consider; a correct observation that the facts that are significant in

one case may be minor or irrelevant in another, and a strong support for the notion of considering all the detail, and then standing back and looking at the overall picture.

Industry practice

83. Without suggesting that I should consider a seventh material test of employed and self-employed status, beyond the six that I listed in paragraph 65 above, it is perhaps finally material to note that Lord Denning did allude to the consideration of "industry practice" and tradition. Thus there were common assumptions as to how insurance agents might be engaged, and in the building industry it is known that many people have worked "on the lump", in other words as independent contractors. Indeed it was partly because of that feature that the CIS provisions were introduced so that people who were not employees, subject to the PAYE machinery provisions would still be paid subject to deduction of 18% and now 20% tax in respect of the work content of the payments made to them. Currently there are two expressions in the building industry denoting whether people are employees or self-employed, the first being referred to as those "on the books", and the latter as those "on the tools". I simply observe at this point that industry practice may or may not be right, but that at the very least it is common-place for many people working in the building industry to be "on the tools", in other words to be, or to claim to be, self-employed sub-contractors.

The application of the various tests to the facts in the present case

84. Since the vast majority of the workers whose status is in dispute were bricklayers, or "brickies", I will concentrate initially just on the bricklayers, and then subsequently address whether and when my conclusions are different for the other categories of worker.

The want of mutuality requirement

85. Were it the case that the "want of mutuality" requirement required something more than the respective obligations to work and to pay, to sustain an employer and employee relationship, and were such additional requirements absolute prerequisites to establishing the relevant status, this case would be concluded on that point. For it appears that the clear intention of both parties to these contracts was that there were to be just the bare obligations to work when, and only when, work was provided, and when work could be done, (weather, holidays and illness permitting), and to pay for work done satisfactorily on the basis of payment for every half-hour worked in full.

86. I consider that the absence in this case of any notice requirement, plus the features that working times were also entirely flexible, both in reality as well as in theory, and the feature that workers were only paid when they in fact worked, weather and illness permitting, are all features that are inconsistent with any normal employment contract. Whether this point is what is contemplated by the notion of the "want of mutuality" I do not know, but I still say that it seems to me that the engagements in this case were very different from those in normal employment contracts. In the normal cases, at least some element of loyalty and responsibility to the other party is required and is common, and possibly expected on both sides That loyalty may be for the employer to show a concern to struggle for work in an effort to keep workers in their jobs, and on the other side a loyalty in serving the employer. It would be unusual for an employee's pay to be stopped because he was genuinely ill or because he had to take an ill son to hospital. In this case the deal was quite clearly that if the Appellant had work, and workers were ready to work, then they would be engaged. And for the half-hour periods that they worked, they would be paid, and they would be paid in no other circumstances. And if the project ceased, and there was no replacement, then everyone knew that that was the end of the engagement.

87. Thus two minor conclusions that I reach at this stage are that if there is any substance in the "want of mutuality" requirement, then, whatever it is, it was absent in this case; and secondly the stark "in or out" terms of the engagement in this case would, at least, be most unusual in an employment situation. This observation is relevant to the "touchstone" notion in the "mutuality" test, and also to Mr. Justice MacKenna's exhortation to consider the other terms of the arrangement, and of course to the issue of the parties' intentions.

Mr. Justice MacKenna's example in relation to building labourers

88. I now turn to the tests set out by Mr. Justice MacKenna, and should first refer to the example that I quoted in paragraph 71 above, where he indicated that in his view a contract that obliged a labourer to work for a builder, providing some simple tools, and accepting the builder's control, would be a contract of employment. I entirely accept that that would indeed often be the result. In the cases of small building companies with a permanent work force, or indeed in any case where the labourers and brickies were a constant feature, i.e. "part and parcel" of the firm, the labourers and the brickies would often and realistically be employees. In my judgment however the deal in the present case was quite different from that. And it is on those factors that I will dwell in order to explain my decision. I also make the point that Mr. Justice MacKenna's comparison was really focusing on whether the service provided was just personal work, as distinct from the construction of a house or the carting of concrete from one place to another,

and he was not remotely concerned to look, in giving that example, at the detailed terms of engagement. And that is what I must look at here.

The "control" test

89. I do not find the "control" test terribly helpful in this case. It is of course perfectly obvious that the principal contractor's plans alone would govern where walls were to be built, and that, whether they were actually being built by sub-contractors or employees, they would have to conform precisely to the plans. And it was made quite clear at the hearing that it was the principal contractor that would liaise with the Appellant's "foremen/bricklayers" to pass on the instructions as to where the plans required the walls to be built, and that the Appellant had no responsibility for this aspect. I also accept that the principal contractor might have dictated the order in which different walls were to be built, but this would clearly be dictated by the coordination of the different building tasks, and not something remotely influenced by whether the workers were controlled employees or self-employed contractors. I can see no real relevance thus to the above inevitable aspect of control. I should emphasise that I reach this conclusion not because most of this aspect of control was exercised fundamentally by the main contractors (which may indeed not be relevant, on the authorities) but rather on the point that this element of control would have had to be exercised, however clear the sub-contractor status might have been, so that this factor can hardly be indicative that the workers were employees rather than sub-contractors.

90. The Respondents tentatively suggested that such things as working times and times for meal breaks were a feature of the exercise of control by the Appellant. I accept that the maximum working times were governed by the "health and safety" requirements as to when the site could be open, and beyond that I accept the Appellant's evidence that workers could work shorter hours if they pleased than the full hours that would have doubtless best suited the Appellant. As to meal breaks, since it is a well known-tradition in the building industry that there is a mid-morning break at 10.30, and a half-hour break for lunch at around 1.00 p.m., I cannot think that these common aspects can be attributed to any exercise of control by the Appellant. Beyond that, I also accept the Appellant's evidence that there were occasions when the principal contractors insisted that some workers would have their lunch break at say 12.30 p.m. and others at 1.00 p.m. where the canteen or covered area was too small to house all the workers on site at one single time. This represented again an element of common-sense administration on the part of the principal contractor, and not an example of any exercise of control that can coherently have any influence on the question before me.

91. On the perhaps more critical question of whether the Appellant, or indeed the principal contractors, told the bricklayers how to lay bricks, it was never suggested that they did. Since many of the workers were, I understand, highly skilled and experienced, I imagine that they needed no control in this regard and would most certainly not have welcomed it. Rather as Special Commissioner Mr. Williams concluded in *MAL Scaffolding v. HMRC* SPC 527 in 2006, the bricklayers were probably as fiercely independent as the scaffolders were in the *MAL Scaffolding* case, and would have been reluctant to accept control from anyone as to how they actually did their job.

92. Beyond the fact therefore that the principal contractors ensured that the architect's plans were followed, and rather obviously that walls were not put in the wrong place or built in the wrong sequence, there seems to have been little relevant exercise of control that can have much influence on my decision.

Mr. Justice MacKenna's third test

93. Mr. Justice MacKenna's third test geared to whether the other terms of the contract, or the absence of terms, was consistent with employment raises the same sort of issues as the issue of the intention of the parties, which I deal with below.

The test of "being in business on their own account"

94. I turn now to the very important question of whether the bricklayers were "in business on their own account".

95. It was argued on behalf of the Appellant that there were respects in which the bricklayers incurred risks and could make more profit. For if it rained constantly, they would earn no money, and if on the other hand they worked all available hours, they would earn more money.

96. I accept, with the Respondents, that these features do little to satisfy the "own business" test. I certainly accept that it is unusual for employees not to be paid if it rains or if they are ill, but I think that this is relevant to tests such as the "mutuality requirement", the intentions of the parties, and the issue of whether all the contractual provisions are consistent with employment or not.

97. On the easiest of fact-patterns, the business test is most obviously satisfied where the individual has significant items of his own business apparatus, and where his conventional method of pricing jobs might occasion the risk of real loss or the opportunity to make greater profit. Thus plasterers who might be very good or bad at judging the amount of plaster to mix, how to

price a job, whether to buy one or another type of plaster or to obtain it from one or another supplier, are obviously managing their business and making more or less profit in many cases according to their efficiency. That is the sort of risk and opportunity to make loss and profit that is fundamentally relevant in the context of the "own business" test. And that seems notably absent in the case of the present bricklayers.

98. There are, however, still some differences between the bricklayers whose status is in dispute in this case and the apprentice bricklayers who were employees. The Appellant paid for and owned the hand tools used by the apprentices, it provided their safety clothing, and paid for their training days. By contrast the bricklayers engaged as self-employed owned their own hand tools. These were, as described, more extensive than just the bricklayer's trowel. They paid for any courses that they attended, and were of course not paid when doing so. They had to pay for their high-visibility vests. The employees were given transport to site, whilst the sub-contractors drove themselves or shared transport. Admittedly their Hilti guns and Stihl saws were owned or hired by the Appellant but this resulted from the obvious point that on a large site only one of each was required so that it was quite unnecessary for each bricklayer to buy a Hilti gun or Stihl saw.

99. It is also worth dwelling for a moment on the crucial differences between the bricklayers and the plasterers that put the latter clearly on the self-employed side of the dividing line. Those differences are the possession of more tools and the common provision of plaster by the plasterers, and the feature that plasterers will often be paid (though not always) by reference to rooms plastered for instance, and not necessarily on an hourly or daily rate. Most of these differences result however from obvious considerations that are not particularly fundamental to any difference in nature between the two trades. On a large site there were often, I was told, numerous bricklayers. They could hardly all select their bricks, or indeed buy and transport the bricks individually to site. Equally even the mortar, "muck" or "gobbo", is no longer mixed on site in cement mixers but is delivered by trucks on a "ready-mixed" basis. Bricklayers could be paid, and I was told were indeed occasionally paid on the small sites, on the basis of a fee for a given quantity of bricks, but I accept that there were two good reasons why this was impossible on a large site. It was first impossible to undertake calculations of how much of each wall each bricklayer had built, and bricklaying is something that cannot and should not be over-rushed. In all these respects plastering is different, even down to the fact that it must be done quickly. But these differences are in a sense secondary to the common fact that both trades will be working side by side, both engaged on identical terms, exercising their very real respective skills and under identical "control" or lack of control.

100. In my judgment however the bricklayers go yet further to satisfying the business requirement in a different respect. Bricklayers have all undergone a considerable training, and a period of apprenticeship. Many are experienced and many are very good indeed at their trade. They often have great pride in their work. One of the remarks made by Mr. Botham that somewhat illustrated this was his remark that if you blind-folded the bricklayers, they would all be able to identify their own hand-tools by feel. The point that I make from this pride and respect for their trade is that "brickies" do have their trade, and that trade is likely to remain their trade whoever they happen to work for. Thus if in conversation with a bricklayer you asked him his job, I suggest that he would say "I am a brickie", rather than refer to any firm for which he was currently working. If he worked, man and boy, in the one firm, the answer might be different, but when the Appellant in this case is somewhat akin to a bricklayer's agency for delivering services on numerous sites to numerous main contractors (possibly Wimpey, Barratts and others) I very much doubt whether a brickie would say "I work for Castle Construction". Illustrating the same point, if you asked a brickie how he viewed the prospect of the severe contraction in work in the building industry at present, I suggest that he would say, with concern, that "work will be hard to come by". He would not say that he was in fear of losing his job with Castle Construction.

101. The two bricklayers who gave evidence did not, I understand, work in a gang, though one very often worked with a particular colleague. I was told however that quite a number of the bricklayers worked in gangs together, and had a very marked preference to work together. Where thus they moved together from one engagement to another, I think that this adds further colour to the claim that their trade is the constant thread between the engagements that merely enable them to ply their trade.

102. It thus seems to me that the brickies do in a real sense have a trade and a business that is broader than their individual engagements. This argument is not the sort of "knock-out" blow that would result from a full business with management, risk and a profit and loss account, but it is more real than the Respondents credited, and when supported by other strong pointers in support of the self-employed status, contributes to this appeal being allowed.

The nature of Castle's role

103. It has apparently become more common in the building industry for the main contractors (often the household-name building companies) to sub-contract many of the trades on the building site to other specialist companies. This would often have been common for scaffolding, but the practice now apparently extends to bricklaying, tiling, joinery, electrical

installation, plumbing, kitchen fitting, so that the main contractor almost becomes just a project manager. The result of this practice is that the Appellant has a slightly unusual trade in that while it engages all the bricklayers, labourers and scaffolders, they all work on sites operated by a main contractor. I understand that in a very few cases, the Appellant has undertaken its "own developments", where I imagine that it may sub-contract to others those trades in which it has no specialisation, but its main activity by far is just to undertake sub-contract work.

104. There does appear to me to be some significance in this feature of the Appellant's general role where it undertakes sub-contract work for main contractors, and does so with a casual work-force. This is that this feature inherently means that any control that is exercised is almost invariably exercised by others than the Appellant. That control is then geared to the coordination of work activity on a site, and compliance with architect's plans, which will apply to all trades on site. Although it has been stated that the Appellant's workers had to correct any bad work in their own time and not on a paid basis, there was never a reference in any of the first-hand evidence, or cross-examination to the Appellant inspecting work standards. There was assumed to be little need for that with experienced bricklayers, and what inspection was done was presumably done by the main contractors.

105. Another consequence of the nature of the Appellant's role was that the workers would be less "part and parcel" of any establishment of the Appellant. Whilst working on a Wimpey site, albeit wearing a high-visibility Castle jacket, the bricklayers would presumably consider themselves to be building Wimpey homes, and their work standard would reflect on Wimpey. It is wrong to say that Castle was almost a booking agent for bricklayers, but had it in fact acted as an agent, with a responsibility to administer and pay the workers provided through its agency, no-one would have thought of contending that the workers were employees of the principal. While I accept that there was not an agency structure, and that there was a sub-contracting contract between the main contractor and the Appellant, and then contracts between the Appellant and its workers, the affinity with the booking agency parallel does tend to undermine the reality of the employment argument.

The intention of the parties

106. Whilst attaching unrealistic labels to contracts will not change the properly analysed status of employees or independent contractors, several of the decisions, including in particular *Massey v. Crown Life Insurance* do confirm that the intentions of the parties can be very important, certainly

influencing the analysis of the status in borderline cases, and possibly having a greater effect in some respects.

107. The notable points in the present case in relation to intentions are that:

- both parties consistently said in evidence that they wanted the relationship to be one of self-employment, genuinely understood it to be one of principal and sub-contractor, and the Appellant knew that this had been extensively reviewed by HMRC in 1999 to 2000 and confirmed to be correct;
- when the Appellant had broached the subject of a forced change of status on its workers, following the contentions advanced by HMRC, it was said and not disputed that many workers had left in protest, and that the Appellant had had to reduce its main contracts to match its reduced labour force, and apparently it thus abandoned the proposed change, save for one category of head-office supervisors;
- from the perspective of the Appellant, the advantage of the preferred arrangement was that it provided the flexibility to match its demand for labour to its available work load;
- additionally it reflected the fact that many of the people it would wish to engage had CIS cards, and regarded themselves as self-employed and expected to be engaged on that basis;
- from the perspective of the workers, the self-employment status gave them two important flexibilities. It enabled them to switch engagements for more money, given the opportunity. It also enabled them to work the hours they wished. I was told that those with families and responsibilities would thus often take the opportunity to work full hours and take few holidays and breaks. Those who were only interested in earning enough for beer money at the weekend would work much shorter hours, once they had enough money for the beer and living expense. In contrast to many of the reported cases, consideration of the weekly time-sheets shows that these flexible terms were the essence of the arrangement here, rather than merely some technical right to choose work times that was never exercised in practice;
- an additional major advantage to the workers was that their hourly rate was considerably higher than their

hourly rate would have been as full-time employees. Leaving the tax and NIC considerations to paragraphs 108 to 111 below, a major contributory factor to the higher hourly rate was the fact that the workers were only paid for hours worked, and were not paid when on holiday, when ill, or when work was impossible either because of weather, or the completion of the project. Whilst this approach would even itself out for the worker who took traditional holidays and suffered average illness, for the worker who was prepared to work all hours, it obviously produced more money for the worker, and more work for the Appellant.

108. In the *Massey* case it was implicit that the reason for the agreed change of status (albeit in itself regarded as realistic) was to derive tax advantages, and that did not remotely stop Lord Denning and the two Lords Justice from respecting the change. In the present case the factors that I have listed above were genuine and not related to any tax advantage. So far as tax was concerned in this case, all workers were paid net under the CIS machinery and the Respondents did not suggest that any significant Income Tax had been lost or affected by the self-employed status. The case was thus about the loss of Class 1 primary NICs, required to be deducted from employees' pay, and Class 1 secondary NICs required to be paid by the employer, as employer contributions, on top of pay. Three observations are relevant in relation to these NIC considerations.

109. First, NICs are slightly different than normal tax in that whilst they in no way fund benefits available to employees, and the SERPS pension is in no way actually funded, there is nevertheless some correlation between the contributions that an employee has made and the benefits that he might get when unemployed, sick, and certainly in retirement. I do not suggest that employee and employer can eliminate a liability to NICs merely because they may think the SERPS pension and other benefits a poor return for the contributions paid. Indeed there was no suggestion in this case that that equation had been considered. But it is nevertheless a fact that the self-employed man knows that he is "on his own" as regards pension, and some other benefits. He can and often will contribute to a private pension, and obtain an Income Tax deduction on doing so. Or he may simply assume that in later life he will have pensioned employment. But he will not earn a SERPS pension whilst being self-employed.

110. The second consideration is the corollary of the avoidance of the NIC costs, which is that the Appellant can afford to increase the hourly rate, because it will not have to pay secondary Class 1 contributions, and the employee will also avoid the primary NIC deductions. It was not quite

proven that all the savings in this regard were enjoyed by the worker, rather than pocketed by the Appellant, but there is certainly every indication that that was the result. That may partly, or even largely, account for why the workers were so incensed at the proposed forced change of status, because it would certainly have been the case that the wages as employees would have been considerably lower. This would have reflected all the additional risks encountered by the employer, holiday pay, sick pay, as well as employers' NIC etc. But in the meantime it is the workers who have taken the higher wages, reflecting the status agreed between the parties. A consequence thus of the clear intentions of the parties in this case is that the workers have been paid very considerably more than they would have been paid had the parties intended the relationship to be one of employment. And no-one can now change that clear result of those clear intentions.

111. The third point is thus the incongruous, though perhaps irrelevant, one that the bill would fall somewhat unfairly in this case on the wrong party were the appeal to be allowed. Lord Denning very much made the point that once the parties had made their bed, they must lie on it. In this case, were the appeal to be allowed, both parties would still be consistently supporting the structure that they had adopted, whilst the Appellant would become liable for both the employee and employer NICs, one of which at least should have been suffered by the workers. To add insult to injury both the primary and secondary NICs would all be calculated by reference to the inflated pay that it could afford to pay to sub-contractors, and which was very considerably higher than the wages that would have been paid to employees. There does seem to me to be some relevance to this fact in that the level of payments has all reflected the joint intentions of the parties, based on a structure jointly intended by the parties for a number of perfectly valid reasons, and having considerable reality. And if a third party now undermines that structure, the tax bill, measured on the wrong amount, would fall, in a realistic sense, on the wrong party. And, as a final completely irrelevant consideration, the Appellant would be insolvent.

Standing back and looking at the overall picture

112. I turn now to the key question of weighing the factors on each side of this argument, and of looking at the overall picture. At this stage, I am still just considering the status of the bricklayers.

113. In favour of the conclusion that the bricklayers are employees are the facts that they do only supply their skill and work; they only provide their hand tools; some or most may work fairly regular hours; some may continue under contract with the Appellant for fairly long periods; and somebody could certainly require them to correct or replace faulty work. They also fail

the "own business" test in many respects, at least when that is applied in a traditional manner.

114. In favour of the conclusion that they are self-employed are the facts that;-

- they do genuinely have a trade and a skill that underlies any of their particular engagements from time to time. This may not be the decisive factor that it clearly would be if the workers conducted a business with real management in which they could make more profit or suffer loss, according to their skill or lack of skill in managing the business. The feature however that the brickies do genuinely have a trade that continues possibly through countless engagements, and that those engagements are the almost marginal contracts through which they conduct their continuing trade is a far more important point than the Respondents gave credit for;
- their hand tools are more significant than merely the brickie's trowel;
- the shared use of a Hilti gun and Stihl saw apart, they use no other tools than those that they provide themselves;
- the terms on which they are engaged as regards lack of notice, flexible working hours, basis of payment and responsibility to correct mistakes in their own time are all inconsistent with the "touchstones" of normal employment contracts. All of these points diminish the significance of the engagements, and give further support to the first point made above;
- those terms are genuine and attractive to both parties for good reasons, including tax and totally non-tax considerations;
- they are terms deliberately agreed and terms that are reasonably common and traditional in the building industry;
- the level of pay has reflected the basis of the clearly agreed intention of both parties, reflecting the "work and pay" feature and the tax expectations;
- the facts demonstrate that there is dramatically more reality and substance to the flexibility available under those terms than there has been in the bulk of the reported cases;
- no material control appears to have been exercised or to be exercisable over the brickies either by the Appellant or by the various main contractors;

- whilst there was no actual evidence in relation to industry practice and tradition, it was certainly assumed and believed that countless workers in the building industry are "on the tools", and not "on the books", and the Appellant's case for saying that this is realistic, certainly in its case, is a particularly good one;
- and finally the very nature of the Appellant's somewhat intermediate role further erodes any bond between the brickies and the Appellant.

115. I need now to consider whether I should draw any distinction between those bricklayers who may only work for short periods for the Appellant and those who may have worked for quite considerable periods for the Appellant. I agree with the Respondents that on appropriate facts a person can be an employee when engaged for only a short period. The converse also appears true to me. I find it inconceivable that I should place some time period on the length of contract for which a brickie might work for the Appellant to sustain and retain the status of self-employed sub-contractor. The same reality of flexibility applies to all, and all of the other factors considered in paragraph 114 above apply equally to those who work for short periods and those who work for longer periods.

116. My decision is that all the brickies were rightly classed by the Appellant as self-employed.

The other categories of worker

117. Beyond the 217 bricklayers who were engaged at some point or another in the relevant year, this case also included appeals in relation to the payments to:

- 12 scaffolders;
- 75 labourers, being labourers both for bricklayers and scaffolders;
- 6 foremen/foremen bricklayers;
- 2 supervisors (supervising the labourers);
- 6 fork-lift drivers;
- 1 driver; and
- 2 slinger signalmen (who direct crane operators either by signal or by radio).

118. I find the status question in relation to all these workers to be more balanced than that in relation to the bricklayers. In the case of the

scaffolders it seems to me that all the points made above in relation to bricklayers apply equally, save that I assume that they have fewer hand tools, and I also question whether the continuing thread of their basic trade is quite as dominant as I believe it to be in the case of the bricklayers.

119. Much the same reservation applies to the 75 labourers. Their main function was to ensure that bricks and mortar were always provided to the bricklayers they were working with, so that the bricklayers could work without interruption. Again everything above applies as regards their terms of engagement, flexibility and control. But I have yet more reservation about the notion that being a labourer is quite as much a trader first and foremost, with the continuing thread of the trade predominating over the particular contract that enables the labourer to ply his trade currently. I do however accept that skills and stamina are required and that many labourers work in gangs with their brickies, and many stick to the same activity. I can, however, attach little importance to the provision of tools, being confined to a shovel, bucket and barrow.

120. The foremen bricklayers and the supervisor sound to be closer to the establishment of the Appellant. It was in fact illustrated in evidence, that the two categories probably spent much of their time working as bricklayers and labourers respectively, and that they were only distinguished in that they performed the role of liaising with the main contractors. I was told that they were in no way Castle supervisors, and that they were in no way more "part and parcel" of the Appellant's establishment, or head office function, than the bricklayers and scaffolders.

121. The trouble that I have with the fork-lift truck drivers and the one man described as "driver", who I believe simply drove a lorry, is that those 7 are fundamentally operating expensive plant owned or leased by the Appellant; they must logically be subject to more potential control in that it must be the case that there must be various directions as to how to operate, and care for, the equipment. Furthermore, whilst there might well be a somewhat special skill in operating a fork-lift truck, there is doubtless no difference in driving a builders' lorry than in driving any other lorry.

122. My conclusions in relation to these other categories of worker are as follows.

123. Partially in reliance on the MAL Scaffolding case, but also because their casual terms of engagement were identical to those of the bricklayers, and that to some real extent, they also conduct "their trade", regardless of the particular business for which they currently work, I consider that the scaffolders were self-employed.

124. Although for the reason given above, I consider the case of the labourers, both those for the bricklayers and for the scaffolders to be more finely balanced than the case of the bricklayers and scaffolders, when they work side by side with the bricklayers and scaffolders, and work on identical terms, I consider that their status is the same as that of the bricklayers and scaffolders, as self-employed.

125. I accept the evidence that the foremen/bricklayers and the supervisors of the scaffolders both worked as bricklayers and scaffolders and that their only distinction is that they were effectively the "team-leaders" who also performed the role of interpreting and passing on the instructions of the main contractors. Whilst this factor mildly suggests that they are being incorporated into the establishment of the Appellant, they nevertheless entirely remained site-workers, engaged on precisely the same terms as the main categories, and I reach, with some reservation, the same conclusion in relation to them. They were also self-employed.

126. I consider that the fork-lift truck drivers and the lorry driver fall into a different category. Partially in reliance on the authority of Lord Widgery CJ's decision in *Global Plant Ltd v. Secretary of State for Health and Social Security*, but also because these men were operating expensive plant owned or hired by the Appellant and must have therefore been subject to more control in the use of that equipment than the bricklayers and scaffolders, I consider that notwithstanding their casual terms of engagement, they should rank as employees. In the case of the lorry driver, I find it difficult, the casual terms of engagement apart (and they are indeed important), to distinguish the lorry driver from the men driving countless other building and non-building lorries, and I cannot think that they, as a general rule, are self-employed.

127. The two slinger/signalmen appear to me to have spent part of their time as labourers and not to be operating the plant that swayed my decision in relation to the fork-lift truck drivers and the lorry driver, and I consider that they were thus self-employed.

Closing remarks

128. It is of course possible that either party may appeal against this decision and that the decision may be over-turned on appeal.

129. In the event that no appeal is brought or that the appeal is dismissed, the consequence of this decision will be that some tax and NICs, in respect of the two small categories where I have decided that on balance the workers were employees, will be due by the Appellant. I can quite understand that HMRC cannot challenge cases of this nature, and concede

that where they succeed, the employee analysis will only have future effect from the date of the final decision. Were that the practice, then countless businesses could advance feeble arguments that workers were self-employed and there would be no disincentive to this practice.

130. In this case, however, it seems to me to be particularly unfair that the change of status should apply to the period prior to the date of any final decision. This is not a case where the Appellant has advanced a weak argument on the status issue, in conflict with industry practice. The Appellant appears to have had a particularly casual basis of engaging its workers, and so appears to have been on the stronger side of a difficult dividing line than others in the industry, who I am led to believe, and do believe, have operated similar practices. The Appellant was also relying on a ruling given by HMRC in 2000, given, it was said, after great consideration was given to "various factors". I am certainly not convinced that the Appellant's practice had changed in the intervening years. I have also found the case to be very difficult, and in particular I have agonised about whether the minor categories should fall on one or other side of the line.

131. In view of all these factors, and of the crucial fact, based on the intentions and expectations of both parties, that considerably higher pay has been paid to the men who I now say should be classed as employees, it would seem to me to be fair and appropriate that this status should apply only in future, and not for past periods. Of course I understand that I have no jurisdiction in relation to this suggestion, and I understand that the effect of this decision in relation to the 7 specified workers is that tax and NICs will strictly be due from the Appellant in respect of the year 2006/7, and presumably 2007/8.

HOWARD M NOWLAN
SPECIAL COMMISSIONER
RELEASED: 3 December 2008

SC 3207/2007