

## BBC presenters fighting IR35: the final day in court



A two-week first-tier tax tribunal concluded last Friday 11th May 2018 at the High Court, involving three BBC news presenters appealing against a combined tax bill of around £300,000. Joanna Gosling, David Eades and Tim Willcox were reportedly pressured by the BBC to engage via personal service companies (PSCs).

Whilst some of the headline sums reported, spanning many tax years, are considerable, Jonathan Peacock QC, representing the presenters, highlighted that his clients had already paid a large portion of the tax: "The net sums are in fact much smaller – circa £300,000. This sum is largely made up of employer's National Insurance (NI), which would have been paid by the BBC if my clients had been employed."

Though the case has been billed as a test case in the media, with more appeals expected to be launched, Adam Tolley QC, representing HMRC, stated to the judge, Harriet Morgan, on the last day: "There are many similar cases behind these cases, but these are not test cases in any sense. You have no responsibility to set a precedent for all subsequent cases."

### Parties differ over level of control

Tolley, from HMRC, argued that an implied contract must exist between the presenter and their personal service company (PSC) for them to pass the intellectual property (IP) rights of their output to the BBC, as required by the terms in their contract with the BBC. This contract, he claimed, should be considered by the judge when constructing the hypothetical contract.

Peacock disagreed that any such conclusion could be drawn, arguing that any type of implied contract between a presenter and their PSC would suffice in passing the IP rights.

Considering control within the working environment, Peacock pointed towards the fact that the presenters couldn't be instructed on how to present live programmes as an indication that a sufficient degree of control wasn't present.

This was disregarded by Tolley, who said that, while no pre-emptive control may have existed, there was still control exerted over the presenters outside of the live broadcasting hours. Peacock argued that this "amounted to control over the content and output, but not the presenters".

### BBC's Editorial Guidelines examined in detail

Central to the debate over control were the BBC's Editorial Guidelines and the extent to which they demonstrated a right of control over the presenters.

Peacock argued that the Editorial Guidelines are used by everybody engaged with the BBC to help produce content and that they aren't

solely adopted by employees. He went on to stress that they are merely guidelines.

This point was supported by a witness statement provided by [Mr David Jordan](#), the Director of Editorial Policy and Standards at the BBC, who stated: "We engage people with good judgement and encourage them to exercise that good judgement. These are guidelines. They are not rules."

Tolley countered by referencing clauses within the guidelines relating to news broadcasting. It stated that presenters were required to secure consent from the BBC before producing content for another organisation in the event that a conflict of interest arose, and claimed that this surmounted to control because the BBC has control over ensuring the impartiality of the content produced.

He pointed towards this as an indication that the presenters were subject to control, adding that the right of control, not whether it was exercised, was the important factor.

Peacock argued that control had to be exercised over the presenters themselves for it to be a relevant employment indicator, adding that control over the output amounted to an irrelevant test.

## **Presenters entered 'an elegant form of zero-hours contracts'**

Discussions over mutuality of obligation (MOO) were extensive, with multiple references to past tribunal cases and differences of opinion over whether they were relevant to the case in question.

Peacock maintained that MOO wasn't present on the grounds that the presenters were only paid for work completed, adding that the arrangements that the presenters entered into were comparable to "an elegant form of zero-hours contracts":

"The whole tenor of these terms is that the contributor is invited to present the programmes, but not invited to be available to present the programmes."

There were differing interpretations of contractual clauses and the inference of MOO. Tolley asserted that the fact that the contracts stated a number of days implied a minimum commitment by the presenters to accept work, and by the BBC to provide work. He said the contracts inferred that if the presenters had made themselves available, but the BBC choose not to use them, then the BBC could still be charged by the presenter.

In response, Peacock argued that any supposed minimum commitment was negated by the fact that the presenters would not be paid the full number of days if the programmes weren't made.

## **Debate over personal service yields few conclusions**

No evidence was provided to suggest that the presenters had an unqualified right to substitute. Peacock concluded that, while a clear right of substitution would provide a solid indication of a contract for services, the absence of such a right does not imply a contract of employment.

## **Was carelessness involved?**

The cases concerning the three presenters go back further than four years, meaning HMRC must provide proof of carelessness by either the appellant or their advisor if it is to be allowed to extend its investigations a further six years.

The matter sparked considerable debate. Tolley did stress though that apportion of blame wasn't with the presenters, stating: "We are not relying on personal carelessness of the appellants. The focus is on the acts of agents [accountants] in relation to the PSCs."

Commenting on an IR35 review conducted by one of the presenter's accountants, Tolley added: "Overall, he may have been doing his honest best to advise, but he failed on the standard of a reasonably competent professional on IR35."

Peacock dismissed the references to carelessness as vague. He also pointed out the fact that HMRC had decided not to call any evidence to support its burden of proof regarding carelessness, adding that the taxman was ultimately unable to prove that this had brought about the loss of tax.

The case will now be considered by the judge, Harriet Morgan, and released within a few months.

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