Third IR35 case involving BSkyB dismissed at FTT - Alan Parry Productions Ltd

A third tribunal decision relating to services provided to British Sky Broadcasting Ltd ("Sky"), this time by a football commentator, has been published, with the tribunal again not upholding the appeal. Previously dismissed IR35 cases involving the same broadcaster have been Little Piece of Paradise ("LPPL") and McCann Media Limited ("MML").

This third case concerns Alan Parry ("AP"), a well-known football commentator who has commentated for Sky for many years. The appeal covered services provided via Alan Parry Productions Limited ("APPL") for tax years 2013/14 to 2018/19.

The tribunal applied the three-staged test of Ready-Mixed Concrete, following the clarifications made in the Atholl House Court of Appeal ruling. It followed the multi-factorial approach and stood back to appreciate the detailed picture painted, stating that the overall impression of the relationship between Sky and Mr Parry was one of employment.

Dave Chaplin, CEO of IR35 Shield, who attended the three-day tribunal, said: "This is the third IR35 case to go before the FTT, on almost identical contractual conditions, and also the first FTT hearing after the crucial Atholl House Court of Appeal ruling.

"There were comprehensive pleadings and submissions made by both parties, not all of which made it into the written decision. Previous cases before Atholl House had considered more about what happened in practice, but this case heavily relied upon a literal interpretation of the contract.

Unfairness bites again

Whilst the headline amounts of tax under appeal were significant - the final amount due after offsetting corporation tax and income taxes already paid are typically around a third of that figure. The taxpayer also has to pick up the bill for secondary Class 1 National Insurance Contributions - a tax that employers, not employees, always pay.

Ironically, if the case were being judged under the new Off-payroll working rules, Sky would be picking up the tax bill, not APPL.

Standard form contracts unhelpful

All freelancers hired by Sky were under the same contractual terms. After the Atholl House Court of Appeal ruling and the decision that *Autoclenz* does not apply to tax cases, all contractual terms, however, mismatched with reality, are now highly material. The tribunals in the previous Sky cases, LPPL and MML, had found that the standard Sky contracts did not reflect what happened in practice.

Chaplin says: "From the three tax tribunals involving Sky, we understand that Sky was not amenable to any changes being made to the contract and that they were 'standard form'. Sky held the rights to the football, paid well, and the terms appeared to be offered on a take-it-or-leave-it basis."

In Parry's case, the contract gave Sky the right to make him work as either a commentator, presenter, interviewer, guest or other participant – although Alan insisted he was hired only as a Lead Commentator. The contract also said he had to work as and when required and comply with all reasonable directions, despite the fact he was hired to do 1-2 matches per week, and he worked collaboratively with Sky.

Chaplin says, "The contract was too widely drafted, giving Sky wide-ranging rights and obligations above what they needed, and what happened in reality. But, an unexercised right is still a right, and that was very hard to overcome. Had the contracts been more carefully drafted to align with the actual relationship, the decision may have been different."

Critical legal points of the case

The tribunal traversed the legislation (paragraphs 8 to 25), referring to the seminal case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* ("RMC") as the framework to identify whether the contract was one "for services" or "of service". RMC involves examining whether personal service is present, sufficient mutuality of obligation and control and other factors. One must then "stand back" and decide based on an impression of the overall whole.

The method to construct the hypothetical contract relied on the three steps defined in common law (*Revenue & Customs Commissioners v Kickabout Productions Ltd [2020]*UKUT 216 (TCC) at [6]): Find the terms of the actual contractual arrangements and circumstances, then ascertain the terms of the hypothetical contract, and then consider whether the hypothetical contract would be a contract of employment.

Considerable reliance was placed on HMRC v Atholl House Productions Ltd [2022] EWCA Civ 501, in particular the fact that *Autoclenz v Belcher* is not an applicable authority in tax cases. For contractual interpretation, the well-established rules in the Supreme Court decision in Wood v Capita Insurance Services Limited [2017] UKSC 24 were cited.

After reviewing all of the evidence, including the oral evidence provided by witnesses under cross-examination, the tribunal considered the factors in the context of*Ready Mixed Concrete*.

On personal service, attention was drawn to the fact that APPL had a contractual right to substitute, which, if genuine, would have negated mutuality of obligation. There was considerable discussions at the tribunal on this matter, with HMRC Counsel arguing that the substitution clauses should not make their way into the hypothetical contract. The judge disagreed, but when considering the clauses later, he applied the "dominant purpose" test from Pimlico Plumbers Limited v Smith [2018] ICR 1511, concluding that BSkyB engaged Mr Parry for his personal services.

On mutuality of obligation, the tribunal traversed the current law, as clarified by the Atholl House Court of Appeal case, and split out the consideration of mutuality of obligation into two limbs: client and worker [see 106]. On the client limb, the tribunal made a finding of fact that BSkyB was "obliged under the hypothetical contracts to pay Mr Parry the fixed amounts specified in the Contracts" and then stated that "There is no need for the client to have an obligation to provide work where the client is obliged to make payments come what may." The second limb, relating to providing personal service, was already met due to the conclusion on substitution.

HMRC had sought to claim that the ongoing offer and acceptance of work had crystalised into a legal obligation, citing St Ives v Haggarty [2008] EAT but retracted that claim in their later submissions. HMRC also claimed in their closing submissions that the contract was an overarching one, contrary to the claims by the appellant. There was a brief discussion [118], with the tribunal stating, "..the same is not true where the overarching contract includes an obligation on the part of the client to pay remuneration to the worker come what may and an obligation on the part of the worker to do work as and when requested."

Chaplin comments: "In the absence of the requirement to pay irrespective of whether work was done, HMRC would have needed to get home on their *St Ives v Haggarty* argument or try and leverage the PGMOL Court of Appeal ruling to claim the contract was overarching and that each time Parry commentated it was an individual engagement. Those approaches, in my view, would have been quite ambitious."

On control, the tribunal stated [119] "…it is clear to me that each hypothetical contract did confer on BSkyB control over the "what, how, when and where" in accordance with the prior authorities, and then listed several examples.

The tribunal considered other factors but concluded that the factors pointing towards employment outweighed the contrary indications.

Do we have contradictory case law?

Chaplin points to one aspect of the case that concerns him: "An expressed substitution clause was discounted by applying the dominant feature test from the Supreme Court ruling of Pimlico Plumbers. It was negated with reference to evidence from HMRC's notes of meeting with Sky, which were not cross-examined in court - i.e. it was hearsay. On the other hand, when cross-examined, Parry insisted he had that contractual right.

"Yet, the literal interpretation of the contract was relied upon, citing White v Troubtbeck, when it came to control, which indicated Sky could

ask Parry to work anywhere, anytime, and anyhow in any role they wanted. And despite the 'dominant feature' of control not matching what was in the contract and the cross-examined witness evidence from Mr Parry confirming the mismatch, the contract was not disturbed.

"Whilst the conclusion on substitution seems fair, the approach taken does not appear to reconcile with that taken for control, particularly with the reliance on the hearsay evidence from Sky, which was not cross-examined. To be clear, this is not a criticism of the tribunal, but more an observation on the current case law."

Lessons from the case

Central to the argument of APPL was that the contract was a commercial one, with fluctuating payments related to the amount of work done and, in particular external market forces, as evidenced by a significant reduction in fees when BSkyB lost the right to some games. The contract also contained many commercial clauses related to indemnities and warranties, which would not typically be seen in employment contracts. Also, Mr Parry paid an assistant circa £20,000 yearly as part of his commentating business.

Unfortunately, despite first-hand cross-examined witness evidence by Parry that demonstrated that the reality of the engagement did not match the broad drafting of the standard form contract, the tribunal had to rely on the contractual terms, no longer having the legal authority to depart from them using *Autoclenz*. Parry was not controlled as much as the contract expressed – which went against him.

Chaplin says, "The key lesson from this is to ensure the contracts accurately reflect the working practices and don't contain any holes. And if HMRC knock on the door, ensure all communications are conducted in writing, unambiguous and factually correct."

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