

IR35: HMRC successfully overturns 'Kickabout' decision at Upper Tribunal



HMRC has secured a [decisive IR35 victory at the Upper Tribunal \(UT\)](#), overturning its high profile First-Tier Tribunal (FTT) defeat to radio presenter and comedy writer Paul Hawksbee.

Hawksbee had successfully challenged his deemed status and a tax bill of roughly £140,000 [following a FTT decision released in June 2019](#), after HMRC had challenged an engagement between his limited company Kickabout Productions Limited (KPL) and radio station Talksport between 2012 and 2015.

However, many factors in what was originally a borderline case were interpreted differently by the UT, with Judge Mr Justice Zacaroli concluding: *'Taking all of the relevant factors into account, we consider that viewed as a whole they are not inconsistent with the hypothetical contracts being contracts of employment.'*

Key status factors count against Kickabout at UT

The FTT decision was notable for the fact that it was made via a casting vote, while limited weight was granted to the key employment status tests. Significantly, the FTT determined that the degree of mutuality of obligation (MOO) present between Talksport and KPL did not exceed the 'irreducible minimum' and therefore wasn't sufficient to indicate employment. Consequently, MOO was considered of diminished importance.

However, this was at odds with the interpretation of UT Judge Zacaroli, who noted that while the FTT didn't state expressly that Talksport had no obligation to provide Hawksbee with work under the two hypothetical contracts in question, it was clear from the decision that this was the FTT's conclusion. Zacaroli would go on to state that this was both an error of law and highly material to the FTT's overall decision.

Though the UT agreed with the FTT's conclusion that, in practice, Talksport had relatively narrow control over what tasks Hawksbee performed, this was deemed of diminished importance, with Judge Zacaroli noting there was a sufficient framework of control to satisfy stage two of the *Ready Mixed Concrete* analysis. This included the ultimate right to decide on the form and content of a particular episode.

The UT also took issue with a number of contractual factors that the FTT had argued pointed towards self-employment. This included the decision that the fixed fee that Hawksbee received per show was indicative of 'financial risk', and its conclusion that Hawksbee was not 'part and parcel' of Talksport, which Zacaroli argued *'adds little in this case'*.

What does this latest ruling mean for contractors?

Despite the apparent conclusiveness of the UT ruling, ContractorCalculator CEO Dave Chaplin notes that the possible repercussions for traditional contractors are far less clear:

“This is a surprising and unexpected ruling. Some careful analysis will be required before drawing any firm conclusions on how it will impact IR35 and Off-Payroll for more traditional based contractors in IT and engineering.

“The case law on presenter cases is still settling down through the courts and the decisions being made can appear to contradict each other. All of the cases have their own unique nuances, and a common theme is badly drafted contracts that don't reflect the reality of the situation.”

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