McCann Media Limited IR35 appeal dismissed by FTT

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/05686
TC/2019/09189

BETWEEN

MCCANN MEDIA LIMITED Appellant

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS Respondents

A second tribunal decision relating to services provided to British Sky Broadcasting Ltd ("Sky"), this time by a TV football pundit, has now been released, with the tribunal again not upholding the appeal. A month after this appeal hearing, the Little Piece of Paradise ("LPPL") case decided in favour of HMRC, involving Dave Clarke, who primarily presented darts on Sky TV. This time, Judge Zaman has ruled that the appeal for McCann Media Limited ("MML") could not be allowed for services provided in respect of the tax years spanning 2013-14 to 2017-18.

This latest case concerns Neil McCann ("NM"), a former Scottish Premiership footballer who played international football representing Scotland and later became a qualified coach. After retiring as a player, he moved into punditry and provided his services to Sky.

The tribunal applied the three-staged test of *Ready-Mixed Concrete. It* concluded that the first two conditions, coupled with taking account of the whole picture, meant that the provisions of the hypothetical contract were consistent with a contract of employment.

Dave Chaplin, CEO of IR35 Shield, who attended the three-day tribunal, said: "Like a written football match report, it is no substitute for understanding the detail of what happened at the match itself. It will be easy for an 'IR35 pundit' to adorn their Captain Hindsight hat and suggest it was a foregone conclusion – but that was far from the case. The entire matter rested on very nuanced arguments, pronounced contradictory clauses and it could have gone either way."

Chaplin further adds that "MML took professional advice before he entered into the Sky contract, and oral cross-examination of the witnesses included both his lawyer and accountant. The Tribunal regarded him as a credible witness and none of the evidence suggested he sought to avoid tax, and neither did HMRC seek to impose any penalties. It would be a considerable stretch of the imagination to suggest they and Sky had somehow contrived a situation to obtain a tax advantage. There was no finding as such by the judge, nor were the contracts deemed to be a sham."

Again, the unfairness of IR35 bites

The headline amount of tax under appeal was significant - although the final amount due after offsetting corporation tax and income taxes already paid in IR35 cases is typically estimated to be around a third of that figure, representing the secondary Class 1 National Insurance Contributions on those earnings - a tax which employers, not employees always pay.

Once again, the cruel irony of "IR35 reform" bites. Since HMRC's IR35 review began, the new Off-payroll working rules have come into play in the private sector, and had the engagement been investigated against the new rules, Sky TV would pick up the tax bill, not MML. To add further salt to the IR35 wound, HMRC recently revealed, as reported by the Financial Times, that under their new regime, contractors get tax refunds if HMRC overturns decisions.

Chaplin says: "We saw the witnesses explain at the tribunal that Sky was not amenable to any changes being made to the contract, and the

tribunal observed that the contracts were 'standard form'. Had those contracts been more carefully drafted to align with the relationship McCann believed he entered into, the decision may have been different. It's difficult not to feel sympathy for the position he has now found himself in."

Key legal points of the case

The tribunal applied the IR35 statute and the tests to identify a contract of service based on the 1968 case of*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*. The evaluation process consists of examining whether personal service is present, along with sufficient mutuality of obligation and control, together with considering all of the other factors. After considering all of the circumstances, one must "stand back" and decide based on an impression of the overall whole.

To construct the hypothetical contract on which to apply the status tests, the tribunal relied on the three steps defined in common law (*Revenue & Customs Commissioners v Kickabout Productions Ltd [2020]* UKUT 216 (TCC) at [6]):

> 1. Step 1: Find the terms of the actual contractual arrangements and relevant circumstances within which the individual worked.
> 2. Step 2: Ascertain the terms of the hypothetical contract postulated by s49(1)(c)(i) ITEPA 2003 and the counterpart legislation as applicable for the purposes of NICs.
> 3. Step 3: Consider whether the hypothetical contract would be a contract of employment.

Other key authorities drawn upon by the tribunal for the construction exercise included *s49(4) ITEPA 2003* of the Intermediaries legislation, *Usetech Ltd v Young [2004]* EWHC 2248, *HMRC v Atholl House Productions Ltd [2021]* UKUT 37 and *Christa Ackroyd Media Ltd v HMRC [2019]* UKUT 326.

The tribunal carefully considered the guidance from the Upper Tribunal in *Atholl House*, noting that "the process by which the hypothetical contract is constructed is not an exercise in transposition; the terms of the actual agreements are highly material; whilst the manner in which the actual contract is performed is typically irrelevant to its construction, it is not necessarily irrelevant when determining the terms of the hypothetical contract in the context of the intermediaries legislation, albeit that you cannot simply disregard the terms of the actual contract."

Interestingly, both the LPPL and MML tribunals found that the standard Sky contracts did not reflect what happened in practice.

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, MML did not seek to rely on the existence of the substitution clause in the Sky Contracts. If MML had proposed a substitute, Sky was not required to accept them, and even if they did, Sky would have entered into a direct contractual relationship with that substitute. Chaplin says: "It was clear that McCann was the person hired, and substitution clauses that attempt to negate the stark reality of personal service aren't worth a row of beans. They are like trying to stick a label on a cat saying 'this is not a cat'."

Lack of strong mutuality of obligation, whilst not a determinative factor in status cases, and insufficiency of employment like control was a central part of the appellant's case and to the tribunal's decision. The witness evidence of NM, and other presenters, all indicated that they were part of a talent pool, which was strongly emphasised during the hearing, and acknowledged by the tribunal: "…such talent pool does exist and was an important part of how Sky operated – it had a pool of talented individuals, with overlapping but different skill sets and appeal, available to it, and those individuals were keen to provide services to Sky and to appear on Sky broadcasts."

MML argued that the restrictive covenants in the standard form contracts were irrelevant and contradictory in light of the existence of the talent pool. There was also no minimum matches or days specified in the agreement, but there was a pro-rata clause exercised and therefore MML would only be paid for work done. Curiously, the tribunal made a finding that MML could have been paid whilst he was working elsewhere, which may have distorted the appeal decision.

However, despite those contractual clauses and evidence of McCann not being paid for the six weeks when he told Sky he would not be available, the tribunal concluded that the annual fee would be "payable irrespective of the level of services requested by Sky or actually performed by Mr McCann, save in circumstances where Mr McCann did not perform any services for more than four weeks (in which case Sky would have the right to terminate the contract)."

With regards to the obligation to accept work, the tribunal said "that he could decline a game that he was offered" and "once accepted, the 'when' and 'where' were largely functions of the location and timing of the game." The tribunal also acknowledged that "Sky's control over when and where services are to be performed merely reflects, in this context, the practicalities of the industry and the location of games, and is of little assistance."

The tribunal quoted the authorities of *Carmichael v National Power plc* [1999] ICR 1226 and *HMRC v Professional Game Match Officials Ltd [2021]* EWCA Civ 1370 for its references to mutuality. It stated that "The Court of Appeal thus confirmed that individual contracts can be contracts of employment if they merely provide for a worker to be paid for the work he did, and provisions which enable either side to withdraw before performance do not of themselves negate mutuality of obligations."

However, Chaplin suggests there may also be contention around this finding: "The PGMOL ruling considered both overarching contracts and single engagements within the overarching one. McCann had one contract and argued there was no contractual obligation to offer and accept work (or pay for it) during the contract term – due to the lack of a minimum amount of work in conjunction with the pro-rata clause – and that is the reason in PGMOL why the contract was found not to be one of employment. The argument about declining work before the performance in PGMOL was concerning declining work before an engagement started – but for McCann, he had the power to decline during the *currency* of the contract, not just before it started. HMRC never advanced an argument about individual engagements. The Court of Appeal in PGMOL also never resolved the status concerning individual engagements within the context of an overarching one and instead remitted the decision back to the FTT."

Chaplin continues: "Whilst we know that mutuality is not determinative on its own, the power to decline work also bleeds into arguments around control because MML could effectively decline an offer to work when, where, what they worked on."

On control, referring to the second condition in McKenna framework, the tribunal stated, "…taking account of the entirety of the arrangements, Sky did have a sufficient degree of control to satisfy this condition." The tribunal referred to the apparent ability of Sky to control the roles each person performed once they had agreed to a game, and that there was a restrictive covenant in place that "he [McCann] was not permitted to provide services to competing broadcasters."

Chaplin questions whether that is sufficient: "Whilst the contract was widely drafted, NM was hired primarily as a pundit, and had the power to accept or decline specific games, thereby being in complete control of his diary – so it's difficult to see how that would be considered sufficient control. It's an arguable point and heavily overlaps with the nature of the mutual obligations."

The tribunal considered other factors, including whether NM was in business on his own account, but there was nothing of sufficient weight within the third stage of Ready Mixed Concrete to displace the prima-facie employment conclusion already reached. Therefore the decision was that the hypothetical contracts were contracts of employment.

Could MML appeal to UT?

Many IR35 cases are appealed to the Upper courts, but the question for the taxpayer is always "could" versus "should". After many years of being under pressure, the taxpayer can often decide they have had enough, irrespective of how strong they or their advisors think the case is. And if the company bank account is already drained from the expense of defending the case, then there can be little reason or appetite to continue.

The Upper courts are also in the costs regime and necessitate the hiring of specialist Counsel. Whilst some barristers will work on a full or partial pro-bono basis (only get paid if you win), if the taxpayer loses, they will still face a further significant bill from HMRC. And, if the taxpayer wins, HMRC could still reach into the public purse again and seek to appeal to the Court of Appeal as they have done with Atholl House. Although, albeit only where a principled point of law is being challenged.

Overturning a decision at Upper Tier is also not easy. It is not a simple rematch, and the "battle rules" are different. The appellant has to either demonstrate a material conclusion was drawn without a factual justification or show the law was incorrectly applied.

"At first blush," says Chaplin, "there do appear to be some elements of the decision that are more than just a little curious. There may be potential grounds of appeal, and the decision around mutuality and how it blends with control, if overturned, would materially infect the entire decision. But whether an Upper court would agree is another matter."

Lessons from the case

First-tier tribunal decisions do not set binding precedents, and the media-based cases are very fact sensitive. A Public Accounts Committee meeting on 21st Feb 2022 revealed that approximately 100 cases in the media had still not been settled. Therefore, we are likely to see more, with each case argued on its facts.

Chaplin says: "Without examining the McCann evidence in detail, the man on the Clapham omnibus is likely to form a simplistic view that it was an engagement akin to employment. But, when looking at the detail, and in particular understanding how the talent pool worked, and how the workers were in control of their diaries and had the power to decline work, there were solid arguments that the engagement was not one of 'deemed employment.

"But, in this instance, the wide drafting of the standard form contract, combined with the difficulty in garnering corroborating evidence many years after the event, meant the defence team entered the tribunal somewhat handicapped.

HMRC have the power to form a binding opinion based on the evidence they gather. In contrast, the task of discharging the burden proof by the appellant is a more demanding challenge, especially because crucial witness evidence which could swing the decision can often be unobtainable many years later.

This imbalance is why, under the new Off-payroll working rules, firms need to focus on gathering evidence during the engagement, rather than leaving it to four years later when the wolf is at the door, and it may be near on impossible to collect.

The key lessons: (1) Beware of standard form contracts. (2) Gather corroborating evidence during the currency of the contract.

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