

Personal tax update (Lecture P1316- 18.30 minutes)

IR35 cases in the Court of Appeal

At the end of April, the Court of Appeal released its judgments in two IR35 cases:

- In *Kickabout Productions Ltd* it upheld the Upper Tribunal's finding that the intermediaries legislation applied to the services provided by Paul Hawksbee. There was sufficient mutuality of obligation and control, with other factors adding little to the case.
- In *Atholl House Productions Ltd* the Court of Appeal accepted the hypothetical contracts satisfied mutuality of obligation and control but remitted the case back to the Upper Tribunal to apply the correct test when assessing whether overall a contract of employment would have existed under hypothetical contracts between Kaye Adams and the BBC.

Kickabout Productions Ltd v HMRC [2022] EWCA Civ 502

Paul Hawksbee provided his services to Talksport as a radio presenter through his personal service company, Kickabout Productions Ltd.

HMRC argued that the intermediaries legislation applied to the services provided by the taxpayer on the basis that the hypothetical contract between Mr Hawksbee and Talksport was equivalent to a contract of employment.

The First Tier Tribunal had allowed the company's appeal but the Upper Tribunal had overturned this decision, agreeing with HMRC. They had found that Paul Hawksbee's services were agreed for a fixed period presenting a daily three-hour show Monday to Friday. He had to make himself available for at least 222 days per year, giving Talksport 'first call' on his services which pointed to employment status. Talksport had the right to decide on both form and content of each show, controlling when and where the work happened. Although the Upper Tribunal considered factors like sick and holiday pay, training, and pensions, the Tribunal concluded that these were insignificant in this case.

Kickabout Productions Ltd appealed to the Court of Appeal, on the grounds that the Upper Tribunal had erred in its:

1. interpretation of the contracts as regards the obligation of Talksport to provide work;
2. approach to the jurisdiction of the Upper Tribunal to remit or remake the lower Tribunal's decision;
3. evaluation as to the issue of control over Paul Hawksbee by Talksport; and
4. approach to its evaluation regarding stage three of the *Ready Mixed Concrete (RMC)* test.

The Court of Appeal dismissed the company's appeal on all four grounds.

As a result of the express terms of the contract between Talksport and Kickabout Productions Ltd, mutuality of obligation existed. Talksport was obliged to offer a minimum number of programmes which Paul Hawksbee was required to present.

With all of the First Tier Tribunal's findings of facts available to them, the Upper Tribunal was well-placed to remake the decision.

The Court of Appeal agreed with the Upper Tribunal's decision over control. Kickabout Productions had not identified any error of principle or approach taken by the Upper Tribunal. No irrelevant factors had been taken into account nor had relevant factors been disregarded.

Finally, the court considered none of the criticisms of the Upper Tribunal's evaluation of the facts were well founded. The absence of workers' rights in the contract did not count greatly in determining Paul Hawksbee's status as if there was an employment relationship, he would enjoy the rights conferred under employment law. Further it was reasonable to conclude that a two-year contract could still represent employment as under 'modern employment conditions, many employees would regard a two-year engagement, terminable during the term on not less than four months' notice, as providing significant security, all the more so when combined with an obligation on the parties to negotiate in good faith for an extension'.

Kickabout Production Ltd's appeal was dismissed.

HMRC v Atholl House Productions Ltd [2022] EWCA Civ 501

Kaye Adams hosted a BBC radio show, with her services provided through her personal service company, Atholl House Productions Ltd.

HMRC taxed the services provided under the IR35 rules on the basis that, if she had provided her services directly to the BBC, she would have been classed as an employee.

Kaye Adams appealed to the First Tier Tribunal who found in her favour. HMRC appealed to the Upper Tribunal who dismissed HMRC's appeal. The Upper Tribunal considered the content of the actual contract as well as that of a hypothetical contract. Applying the three Ready Mixed Contract tests, the Tribunal concluded that mutuality of obligation existed and that the BBC did have sufficient control over when, where and how work was carried out. Finally, the Tribunal considered the third test to see if there were sufficient other factors that would override mutuality of obligation and control. Was Kaye Adams in business on her own account? The Tribunal accepted that she was already carrying on similar activities on her own account when she took on the BBC contract. Consequently, the BBC work was part of her existing business and was not a contract of employment. IR35 did not apply.

HMRC appealed to the Court of Appeal who found that the Upper Tribunal's approach was flawed. It was not enough to conclude that being in business on her own account meant that this hypothetical contract could not be a contract of employment.

The hypothetical contract needed to be analysed taking into account the specific circumstances that would have been known to both parties or were reasonably available to both parties. The Court of Appeal found that this was an analysis that had not been correctly made and remitted the case back to the Upper Tribunal, allowing both parties the chance to argue that further facts should be taken into account.

Fixed protection reinstated

Summary – A taxpayer's fixed protection 2016 was reinstated, as his auto-enrolment into a pension scheme had been undertaken without correctly notifying him.

Ian Moan worked in the financial services industry as a financial adviser. In 2016 he had a job interview to join Newcastle Financial Advisers Limited as a divisional manager.

At interview, he informed the company that he was awaiting a pension valuation from his previous employer. As he expected to have exceeded the standard lifetime allowance, which had just been reduced from £1.25 million to £1 million, he would be seeking to benefit from fixed protection 2016. This would allow him to keep his lifetime allowance at the higher figure provided he did not become a member of or accrue any further benefits under a registered pension scheme. Consequently, he stated that he would not wish to participate in the company's registered pension scheme.

In September 2016, at a meeting with the company's HR department to discuss and sign various joining documents, he confirmed that he did not wish to be enrolled in any pension scheme. He signed his contract of employment on 10 September 2016 but deliberately did not sign the payroll deduction form, on the understanding this meant he would not become a member of the pension scheme. He started work on 17 October 2016 and, hearing nothing further, believed that his wish not to join the pension scheme had been actioned.

The company supplied him with a smart phone for accessing his emails, diary and contacts list when he was working out of the office (approximately 95% of his time). Unfortunately, the smart phone was old and synchronisation was unreliable and had a habit of simply deleting emails, especially larger emails with attachments. Sometimes no synchronisation would take place for days at a time and then as many as 60 emails might be delivered all at once, causing the phone to crash. Some emails were delivered without the attachments they had been sent with. The problem was eventually resolved by him buying his own iPhone.

At the end of June 2017, he was finally able to gain online access to his payslips. At this time, he realised that pension contributions were being made on his behalf. He asked his employer to cancel his enrolment and refund his contributions, which they confirmed they would do.

Following this, Ian Moan applied to HMRC for a reference number confirming his Fixed Protection 2016, which they issued on 6 July 2017. However, when the company's pension scheme subsequently refused to cancel his enrolment, HMRC revoked his Fixed Protection 2016.

Ian Moan appealed, claiming that his employer had told him that provided he did not sign a payroll deduction form, he would not be auto-enrolled. Further, due to IT issues, he denied having been "given" the information; he had never seen the relevant email and attachment.

Alternatively, he pointed out that the wrong date had been included in the email the pension provider supplied had sent.

Decision

The First Tier Tribunal found that the relevant email was received into Ian Moan's email account, he deleted it, either without opening it at all or after briefly scanning it and dismissing it as "just more junk email". The email stated that the automatic enrolment date was 1 February 2017. The Tribunal concluded that receipt of the email on 6 March 2017 resulted in the information contained in it being "given" to Mr Moan.

Moving to the alternative argument, the Tribunal upheld the appeal agreeing that the wrong auto-enrolment date was on the email, making it technically an invalid notice. The Tribunal confirmed that Ian Moan's automatic enrolment date was his start date of 17 October 2016. Even if his notice of deferment had been given in time, the maximum permitted deferral would have been three months after the starting day, so by 17 January 2017. However, the date given in the notice emailed on 6 March 2017 stated that the automatic enrolment date was 1 February 2017. This was clearly

incorrect, making the notice invalid. As Ian Moan's opting out notice had been given in time, the Fixed Protection was reinstated

Ian Moan v HMRC (TC08449/V)

Director's Personal Liability Notice

Summary – A Personal Liability Notice (PLN) issued to a director, who failed to settle his company's NIC debt due before the company was liquidated, was upheld.

Michael Eames was the sole director and shareholder of A1 Recovery Portsmouth Limited, a company that entered compulsory liquidation on 3 July 2017, owing HMRC £108,000 in NIC plus interest.

A1 Recovery Portsmouth Limited began operating in January 2016 and made a payment in respect of PAYE/NICs on 23 February 2016, in respect of the January 2016 period.

The company continued to make net payments to employees but made no further PAYE and NIC payments until a time to pay arrangement was entered into with HMRC on 26 July 2016. The company made three payments in relation to the time to pay arrangement of £7,000 each in July 2016, August 2016 and September 2016 but no further payments were made thereafter. The company made and continued to make net payments to employees but the accruing NICs liabilities in those months and thereafter were also not paid to HMRC.

Michael Eames had been the sole director and shareholder of two previous companies, A1 Recovery Limited and A1 Recovery & Garage Services Limited, both of which had gone into liquidation owing PAYE and NICs of £70,000 and £79,000 respectively.

All three companies undertook maintenance and repair work on motor vehicles and provided roadside recovery services on a contract basis for national breakdown assistance services. As each company failed, its successor company acquired the business and assets of its predecessor company in order to commence trading.

Michael Eames was also the director and shareholder of a number of other companies and was disqualified from acting as a director for six years from 6 February 2019 although he remains a director of one of the companies with the permission of the court. This disqualification arose from the liquidation of A1 Recovery and Garage Services Limited.

Michael Eames was issued with a Personal Liability Notice for the £108,000 of NICs owed, with HMRC believing that he had prioritised the company making payments to himself and to related companies rather than settling the amounts due to HMRC.

Michael Eames argued that his failure to pay was not attributable to his neglect but was due to 'poor business decisions made in good faith in a difficult marketplace and that Mr Eames lacked any formal qualifications.' Without payment, the other companies would have failed.

Further, he argued that, if he was to be liable for anything, it should be limited to the NICs unpaid after the time to pay arrangement broke down as his behaviour before that could not be described as neglect.

Decision

The First Tier Tribunal found that Michael Eames was well aware that there were substantial risks involved with his business as he had had two previous companies undertaking the same type of business. Both of which had failed owing substantial amounts to HMRC.

Michael Eames was aware that the NICs were due monthly and should have prioritised their payment. The Tribunal concluded that allowing a company to accrue a large NICs debt before seeking a payment arrangement, and then failing to ensure that the company made the required payments under that arrangement was not a reasonable course of action and did not mean that there was no neglect by Michael Eames.

The Tribunal stated that a prudent and reasonable person in his circumstances would:

- not have prioritised payments to connected companies, and themselves, over payment to HMRC;
- have taken steps to conduct the company's business in a different manner in order to minimise the risk of repeating the difficulties that had arisen with his previous companies.

The First Tier Tribunal found that the company's failure to settle its NIC debt was attributable to Michael Eames neglect.

The appeal was dismissed.

Michael Eames v HMRC (TC08450)

2022/23 Working from home tax relief

From 6 April 2022, guidance for claiming tax relief on expenses for working from home has changed.

During the COVID pandemic, the government relaxed the eligibility rules regarding claiming home office relief in 2020/21 and 2021/22. During this time, Individuals could claim the tax relief in full for each tax years provided they were required to work from home for a limited period.

From 6 April 2022, the government has tightened up on the rules and individuals can cannot have just chosen to work from home.

In 2022/23, HMRC guidance states that to be eligible to make the claim, one of the following must apply:

- there must be no appropriate facilities available for the individual to perform their job on their employer's premises;
- the nature of the job requires them to live so far from their employer's premises that it is unreasonable for them to travel to those premises on a daily basis; or
- the individual is required, under government restrictions, to work from home.

Where an employer now allows staff to work flexibly as it suits each individual, the home office relief is no longer available.

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