TC01306

Appeal number TC/2009/15647

NATIONAL INSURANCE CONTRIBUTIONS – INCOME TAX (PAYE) – worker supplied through intermediaries – "IR 35" – whether worker would be employee if there were a contract between the worker and the client – no –Regulation 6, Social Security Contributions (Intermediaries) Regulations 2000 – s 48 Income Tax (Earnings and Pensions) Act 2003 – appeal allowed

FIRST-TIER TRIBUNAL

TAX

PRIMARY PATH LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: EDWARD SADLER (TRIBUNAL JUDGE)
NIGEL COLLARD

Sitting in public at 45 Bedford Square, London WC1 on 12 April 2011

Matthew Boddington, of Accountax Consulting, for the Appellant

David Lewis, of Her Majesty's Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Primary Path Ltd ("the Appellant") in relation to what is commonly referred to as the IR 35 legislation. That legislation has effect so that a company which makes available to its client the services of an individual (usually the controlling shareholder of the company) can be liable both to pay National Insurance contributions and to a charge under the Pay As You Earn regulations in relation to earnings attributed to the individual in question if the circumstances of the arrangements are such that the individual would have been an employee of the client (rather than a self-employed independent contractor) had the client engaged the services of the individual directly.

2. As detailed below, the Appellant provided the services of Mr Philip Winfield ("Mr Winfield") to the Appellant's client, GlaxoSmithKline plc ("GSK") (through the services of agency companies) on two occasions during the period 4 June 2001 to 14 March 2003. The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") took the view that the circumstances of those arrangements were such that, had they taken the form of a contract between Mr Winfield and GSK, Mr Winfield would have been regarded as an employee of GSK. Accordingly, the Commissioners:

(1) Issued a Notice of Decision dated 5 October 2007 addressed to the Appellant pursuant to section 8 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 and Regulation 6(4) of the Social Security Contributions (Intermediaries) Regulations 2000 for the period 6 April 2001 to 5 August 2002 treating the Appellant as liable to pay primary and secondary Class 1 National Insurance contributions in respect of Mr Winfield's attributable earnings from the arrangements (rendering the Appellant liable to a net contribution, after credit for contributions paid, of £9,676.89); and

(2) Issued two Notices of Determination, each dated 5 October 2007, under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 for the tax years 2001/2002 and 2002/2003 requiring the Appellant to pay in total £15,420.84 in relation to the attributable earnings of Mr Winfield from the arrangements with GSK.

3. The Appellant appealed against both the Notice of Decision and the two Notices of Determination on 24 October 2007.

4. At the hearing before us the Appellant agreed that if its appeal were decided in favour of the Commissioners, then the Commissioners were entitled to require further National Insurance contributions, for the period up to 14 March 2003, which is the date on which the arrangements between the Appellant and GSK were terminated. Accordingly, we were asked to give our decision in principle as to liability, leaving it to the parties to agree the final amounts due should we dismiss the Appellant's appeal.

5. The issue we have to decide is whether, had Mr Winfield been engaged directly by GSK (rather than providing his services under the arrangements actually entered into), he would have been regarded as an employee of GSK or as an independent contractor providing his services. In our judgment, and for the reasons given below, had there been such an engagement, the nature of that engagement would have been that of an independent and self-employed contractor providing services to a contractor, and not that of an employee providing services to an employer under an employment contract. Therefore the special provisions (that is, the IR 35 legislation) relating to workers supplied through intermediaries are not applicable in this case. We therefore allow the Appellant's appeal against the Notice of Decision and the two Notices of Determination referred to above.

The relevant legislation

6. The relevant provisions, as they relate to National Insurance contributions, are found in Regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000 (SI 2000 No. 727), and are as follows:

> *(1) These Regulations apply where –*
>
> *(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),*
>
> *(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and*
>
> *(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client.*
>
> *(2) Paragraph (1)(b) has effect irrespective of whether or not –*
>
> *(a) there exists a contract between the client and the worker, or*
>
> *(b) the worker is the holder of an office with the client.*
>
> *(3) Where these Regulations apply –*
>
> *(a) the worker is treated, for the purposes of Parts I to V of the Contributions and Benefits Act, and in relation to the amount deriving from relevant payments and relevant benefits that is calculated in accordance with regulation 7 ("the worker's attributable earnings"), as employed in employed earner's employment by the intermediary, and*
>
> *(b) the intermediary, whether or not he fulfils the conditions prescribed under section 1(6)(a) of the Contributions and Benefits Act for secondary contributors, is treated for those purposes as the secondary contributor in respect of the worker's attributable earnings,*
>
> *and Parts I to V of that Act have effect accordingly.*

(4) Any issue whether the circumstances are such as are mentioned in paragraph (1)(c) is an issue relating to contributions that is prescribed for the purposes of section 8(1)(m) of the Social Security Contributions (Transfer of Functions, etc) Act 1999 (decision by officer of the Board).

7. Regulation 7 of the Social Security Contributions (Intermediaries) Regulations 2000 sets out the way in which the amount of "the worker's attributable earnings" for any tax year is calculated. The calculation is a complex, nine-step, exercise. In this case the figures are not in dispute, and so we need not consider these provisions further.

8. In relation to the collection of income tax under the PAYE regulations, the charge to income tax is now found in Part 2 of Chapter 8 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") (for the periods covered by this appeal the legislation was to be found in Schedule 12 to the Finance Act 2000, but nothing turns on that, so the parties were content to refer to the current form of the legislation). Section 49 ITEPA 2003 sets out the situation in which the income tax charge arises, and, so far as relevant to this case, is as follows:

(1) This Chapter applies where –

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),

(b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and

(c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client.

(2) ...

(3) ...

(4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.

(5) ... .

9. Section 50 ITEPA 2003 treats the worker whose services are provided in this way as receiving earnings from an employment in respect of any payment or benefit he receives from the intermediary (other than a payment or benefit that is otherwise employment income), and the amount of such earnings is calculated under the provisions of sections 54 and 55 ITEPA 2003, in a complex eight-step process. Section 56 ITEPA 2003 applies the general taxing provisions (and in particular the PAYE provisions) in relation to the amounts treated as earnings from an employment, so that the intermediary is treated as the employer of the worker, and hence is brought within the PAYE provisions in respect of the deemed earnings of the worker. Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 entitles the

Commissioners to determine, to the best of their judgment, the amount of any income tax which an employer has failed to pay to the Commissioners under those Regulations.

10. There is no dispute between the parties as to the construction of these various provisions. Nor is there any dispute as to the arrangements under which Mr Winfield ("the worker") performed services for GSK ("the client") under a contract with the Appellant ("the intermediary") – the point of difference between them is whether Mr Winfield would have been an employee of GSK had he been engaged directly by GSK. In arguing their respective cases the parties therefore referred to the extensive case law (in tax, employment law, and other jurisprudence) on the distinction between an employment contract and a contract for the services of an independent contractor.

11. One final point to note in relation to the legislation is the difference in the wording between the two hypothetical contracts predicated by, respectively, the NIC legislation and the income tax legislation. In the case of the NIC legislation the hypothetical contract is formulated by reference only to the arrangements entered into between worker, intermediary and client: in the case of the income tax legislation the hypothetical contract is not so strictly constrained – it is the contract which the client and worker would have entered into had they contracted directly for the services provided, having regard to the circumstances including the terms of the contracts comprising the arrangements under which the worker's services were made available to the client (see the case of *Dragonfly Consultancy Ltd v HMRC Commissioners* SpC 655 at paras. 32 to 34 and that case on appeal to the High Court, *Dragonfly Consultancy Ltd v HMRC Commissioners* STC 3030 at paras. 14 to 19). As is noted in the decision of Henderson J in the decision in that case in the High Court, in the great majority of cases an analysis of the two different hypothetical contracts to determine whether or not they are contracts of employment will lead to the same conclusion. In *Usetech Ltd v Young (HM Inspector of Taxes)* 2004 TC 811 Park J noted that the respective wordings of the provisions relating to National Insurance contributions and to income tax are not identical, but that both provisions have an identical meaning in that the hypothetical contract must be constructed from a consideration of all the circumstances – not simply by reference only to the terms of the actual contracts entered into by the various parties.

The evidence

12. We had in evidence before us three bundles of documents comprising correspondence between the Commissioners and the Appellant and its representatives; notes of meetings between the Commissioners and GSK and correspondence between those parties; contracts between agency companies and the Appellant for the provision of the services of Mr Winfield to GSK; contracts between GSK and the agency companies for the supply by the agency companies of the services of a consultant; time sheets completed by the Appellant in respect of the services of Mr Winfield supplied to GSK; and invoices rendered by the agency companies to GSK in respect of the services of Mr Winfield.

13. Mr Winfield gave evidence at the hearing for the Appellant. Mr Winfield had prepared a witness statement, and he was cross-examined by Mr Lewis, who represented the Commissioners at the hearing. For the Commissioners Mr Matthew Lamming gave evidence at the hearing. Mr Lamming has worked for GSK as an IT/business consultant for twenty years and for the period from April 2001 to August 2002 he was the project manager responsible for a team of ten workers engaged on a particular project for GSK. That team was a mix of employees of GSK and independent contractors engaged through agencies. Mr Winfield was engaged as a member of that team. Mr Lamming had prepared a witness statement, and he was cross-examined by Mr Boddington, who represented the Appellant at the hearing.

The findings of fact

14. There was no dispute between the parties as to the primary facts in this case. Our findings of the facts are set out in the following paragraphs 14 to 37.

15. The Appellant was incorporated in May 2000 and began trading in October 2000. The Appellant's business is the provision of services in the field of database software development, and in particular the development of software for the Oracle database. The Appellant's business address is Mr Winfield's home address, and the Appellant has an office with the usual office and business facilities and equipment at that address.

16. The Appellant's sole shareholder and director is Mr Philip Winfield. Mr Winfield is not an employee of the Appellant and has no contract with the Appellant for the supply of his services. For the periods relevant to this appeal the Appellant's business services were provided solely through the services of Mr Winfield. Mr Winfield's expertise is in the design and development of database software, and in particular interface software, that is, software which enables two or more different database systems to work together. He has a particular specialisation in database software in relation to medical, pharmaceutical and healthcare sectors.

17. In the period from 16 October 2000 to 1 June 2001 the Appellant entered into a sequence of contracts with different contract agencies for the supply of services to British Telecom. Thereafter the Appellant entered into the following contracts for the period from 4 June 2001 to 31 August 2004:

Contract with	End Client	Start Date	End Date
Abraxas	GSK	4 June 2001	21 December 2001
Abraxas	GSK	21 December 2001	29 March 2002
Abraxas	GSK	30 March 2002	26 April 2002
Galt Associates		1 May 2001	1 May 2003
Spring	GSK	26 November 2002	28 February 2003

Spring	GSK	3 March 2003	14 March 2003
Galt Associates		17 March 2003	29 August 2003
Galt Associates		1 August 2003	29 February 2004
Harvey Group		20 September 2003	
Galt Associates		1 March 2004	31 August 2004

18. The Appellant marketed its services through its website, through its membership of a professional body and by searching and responding to websites specialising in finding contract workers in the relevant specialist fields.

19. The first sequence of contracts to provide services to GSK (for the period from 4 June 2001 to 26 April 2002) was entered into through the agency of Abraxas plc. GSK approached Abraxas plc with details of the specification for the particular project it intended to carry out and its specifications for the contractors it required for the team for the project. GSK required the services of independent contractors to add particular skills to its existing employee team and to give flexibility in staffing the project – independent contractors were hired usually for the short-term and for a particular project, that is, for situations where GSK did not require the continuing services of an employee. Abraxas plc put forward candidates it thought met the specification, who would then be interviewed by GSK. Following interview GSK selected the candidates acceptable to it and the appropriate contracts were then entered into.

20. The contract between GSK and Abraxas plc is dated 1 February 2001 and is entitled "IT Agency Staff Agreement". It recites that GSK requires from time to time expert help in the performance and completion of various IT projects and that Abraxas plc has agreed to supply contract IT staff with the required knowledge and expertise. The principal provisions of the contract relevant to this appeal include the following:

(1) GSK engages Abraxas plc to provide Consultants to carry out the specified project. For these purposes "Consultants" are independent computer or other consultants who may be either employees or sub-contractors of Abraxas plc appointed for the purposes of the agreement. Abraxas plc agrees to provide a list of potential Consultants who meet the specification drawn up by GSK, and GSK then selects the Consultants it requires for the project. The selected individual Consultants are then identified in a schedule to be appended to the contract. GSK can reject a Consultant at any time, in which case Abraxas plc must provide a replacement;

(2) The contract has effect from 13 December 2000 and continues until terminated by either party on three months' notice;

(3) GSK agrees to provide each Consultant with instructions, facilities, equipment and access to enable the Consultant to perform his obligations as per the agreed specification;

(4) GSK agrees to monitor the Consultant's performance, agree weekly timesheets provided by the Consultant as to the work he has performed, and to pay invoices submitted by Abraxas plc based on submitted timesheets and applying the hourly rate identified in the agreed specification;

(5) GSK agrees to allow the Consultant to take holiday or time off to attend training courses provided that the Consultant gives GSK ten days' notice, and that such holiday or time off does not affect the project or delay it. If it is appropriate, Abraxas plc can offer a substitute to continue with the project during the Consultant's absence;

(6) More generally, Abraxas plc may at any time offer a substitute for the Consultant, provided that such substitute meets the agreed specification and is accepted by GSK;

(7) Abraxas plc is required to ensure that each Consultant has in place adequate professional indemnity insurance to a specified minimum level of cover;

(8) GSK may require Abraxas plc to terminate the engagement of any particular Consultant;

(9) Abraxas plc is required to conclude an agreement with each individual Consultant to reflect the terms of the GSK/Abraxas plc agreement. Such agreement must include a substitution clause in a form agreed by GSK;

(10) GSK accepts that each Consultant is in business on his own account and therefore may be engaged by other parties during the currency of the agreement and may work simultaneously for other clients, but Abraxas plc is required to ensure that nothing will prevent the Consultant from working to carry out the project to the agreed specification and timetable.

21. The contract between Abraxas plc and the Appellant whereby the services of Mr Winfield were made available to GSK is undated. It covers three periods: 4 June 2001 to 21 December 2001; 22 December 2001 to 29 March 2002; and 30 March 2002 to 26 April 2002. It specifies Mr Winfield as the "Nominated Individual" and GSK as the "Client". The principal provisions of the contract relevant to this appeal include the following:

(1) The relationship between the parties is one of independent suppliers, and no partnership or employer/employee relationship is created;

(2) The Appellant agrees that the Nominated Individual will be provided to undertake the services specified in the Works Schedule (which mirrors the project specification drawn up by GSK). The Appellant "may change or replace [the Nominated Individual] provided that Abraxas plc and GSK are satisfied that the proposed replacement possesses the necessary skills and expertise to carry out" the project;

(3) The Appellant is required to invoice Abraxas plc for fees calculated using the hourly rates specified in the Works Schedule, and when submitting its invoice the Appellant is also required to provide a progress report on the project;

(4) The Works Schedule includes a "work pattern", being a standard commitment of 37.5 hours per week or such other times as may be agreed with GSK;

(5) The Appellant is entitled to undertake other assignments during the period of the contract provided that there is no conflict of interest in relation to GSK;

(6) The Appellant is required to ensure that by its actions it is an "Independent External Expert", and not an employee of GSK or Abraxas plc. The Appellant acknowledges that it has no authority to commit or bind Abraxas plc or GSK;

(7) The contract between Abraxas plc and the Appellant may be terminated by Abraxas plc on four weeks' notice, or without notice in certain specified "default" circumstances.

22. The project undertaken by GSK for which it secured the services of the Appellant through the agency of Abraxas plc was the design and build of interface software to permit the web-based synchronising and joint operation of various medical dictionary and database systems created and used by GSK and also to synchronise GSK's dictionaries with certain external industry-wide specialist dictionary and database systems. The project required close liaison between GSK and a US company, Galt Associates. GSK had no employees with specialist knowledge in this field.

23. Before the Appellant was engaged for the project Mr Winfield had discussions with GSK personnel to discuss the nature of the services required by GSK and the scope and extent of the project, Mr Winfield's skills, his experience in the relevant fields, and his availability for the project and the required visits to the US.

24. Mr Winfield brought a unique skill set to the project team. GSK required those skills specifically and only for the project in question. When the Appellant was engaged it was given a broad remit by GSK in terms of completing that part of the project for which it was responsible. It was required to work within a timeframe which was part of the overall timetable for completion of the project. It was for the Appellant to determine how to carry out and manage its part of the project, and Mr Winfield discussed matters with the project manager and reported to the wider project team at progress meetings to ensure delivery in accordance with, and consistent with, the project as a whole. The initial – and critical – part of the Appellant's work comprised the preparation by Mr Winfield of a design document setting out its plan for the design and build of the specialist interface software. That design document was prepared with little input from GSK. It required the approval of a business analyst engaged (as an independent contractor) by GSK for the purposes of the project. Throughout the project there was little involvement with GSK employees in respect of the technical aspects of the work undertaken by the Appellant, but the work was in support of the project undertaken by the team as a whole and was checked against the standards, quality requirements and conduct of the project stipulated by GSK.

25. Mr Winfield could determine his own working hours. There was an expectation (but not a contractual requirement) that he would be available during the "core hours" of the working day. Normally he worked at GSK's premises. If he chose to work at

home he could do so provided the requirements of the project did not require his presence at GSK's premises. He required a GSK laptop computer in order to connect to GSK's network, but could copy information onto the Appellant's own laptop computer in order to work on the project at his home.

26. Mr Winfield was required to make a business trip to the US for the purposes of the project. The trip was made in the company of the GSK project manager and two others from the project team. The travel, accommodation and other arrangements for the trip were made on his behalf by GSK through its central facility and were at GSK's cost.

27. Mr Winfield's holidays were notified in advance to GSK. In fixing holiday dates Mr Winfield was mindful of the requirements of the project and of the Appellant's responsibilities towards the project, and also of the need to retain the goodwill of GSK for the sake of possible future contracts. There was never an issue between GSK and the Appellant as to Mr Winfield's holiday dates.

28. The situation did not arise where either the Appellant or GSK had to consider a temporary replacement or substitute for Mr Winfield. Since Mr Winfield had specialist skills required by GSK for the project such a substitution would have been feasible (and acceptable to GSK) only if the substitute had had comparable skills. On another (later) contract undertaken by the Appellant for a different client it had proved possible to find a substitute for Mr Winfield, and on a different occasion the Appellant had provided Mr Winfield as a substitute for another contractor.

29. GSK paid for the Appellant's services on the agreed contractual terms, that is, by reference solely to the number of hours worked by Mr Winfield and the stipulated hourly rate of payment. The average number of hours worked per week was stipulated in the contract, and any additional hours of work done which would have resulted in an increase in the weekly average would have required the approval of GSK, since the project had been budgeted by reference to the stipulated hours of work.

30. GSK made monthly payments to Abraxas plc, the party with whom it contracted, and in turn Abraxas plc made monthly payments to the Appellant, against delivery of invoices (supported by timesheets of Mr Winfield's hours worked) and progress reports. The payments made by Abraxas plc were between one week and six weeks after invoices were submitted by the Appellant.

31. GSK did not make any payment in respect of holiday or sickness or other absence on the part of Mr Winfield. There was no additional payment for overtime or unsocial hours worked. Nor did GSK make any payment or other provision in respect of bonus, pension, health insurance, training or other employee benefits which it made for its employees. Mr Winfield was entitled to use the GSK canteen and staff car parking facilities. Mr Winfield was not appraised in the course of the employee appraisal programme conducted by GSK.

32. The second sequence of contracts to provide services to GSK (for the period from 26 November 2002 to 14 March 2003) was entered into through the agency of Spring IT Personnel plc ("Spring"). There is a contract referred to as the UK Master Services Agreement between GSK (in this case a group company called GlaxoSmithKline Services Unlimited) and Spring whereby Spring agrees to provide Contingent Workers to GSK. There is also a contract between Spring and the Appellant whereby the Appellant agrees to provide services to GSK (as a client of Spring) for a specific assignment, summary terms of which are set out in a scheduled Assignment Summary, which stipulates the start and end dates, the rate per hour and the number of hours per week to be worked on average, and the termination notice period.

33. The general tenor of these contractual arrangements corresponds to that of the GSK/Abraxas plc/Appellant contractual arrangements, so that it is not necessary to set out those arrangements in detail. It is worth mentioning specifically that the contract between GSK and Spring contains a provision as to the relationship of the parties which specifies that Contingent Workers are not employees or sub-contractors of GSK and that GSK has no right to control the manner, means, or method by which Spring provides services under the contract, save that GSK is entitled to direct where and when the services are to be performed. There is a corresponding provision in the Spring/Appellant contract, reserving to the Appellant the right to determine the manner, means and methods required to ensure its services are performed to GSK's satisfaction, and reserving to GSK the right to direct the Appellant as to where and when such services are to be performed.

34. The work undertaken by the Appellant for GSK under this second sequence of contracts was less specialised (and payment was at a lower hourly rate). It related to the development of interface software for synchronisation with the Oracle database system, and was the initial stage of a larger programme being undertaken within GSK for implementing new systems. This work was for a different team within GSK. Mr Winfield worked with one other contractor for the contract period on discrete tasks within the larger project, and there was limited interaction with the project co-ordinator and the rest of the GSK team as to the technical aspects of the work.

35. In the course of working on the first GSK project Mr Winfield developed a relationship with Galt Associates and the Appellant began to work for them in the design of an integration and interface system for medical dictionaries and a Galt Associates proprietary application. Some of the initial work was carried out for them on a speculative basis contemporaneously with the work for GSK on the first project and fee-paid work continued between the two GSK assignments. During the second GSK project the Appellant submitted timesheets to Galt Associates showing at least 21.5 hours of work undertaken for Galt Associates (other records of the Appellant indicated 58 hours of work undertaken for Galt Associates during this period). After the completion of the second GSK project further assignments came from Galt Associates as its customers required interface systems and the Appellant then worked extensively for Galt Associates. Mr Winfield worked from his office at his home address when working on the assignments for Galt Associates. In the course of working for them he made a substantial number of business trips to the US, making his own travel arrangements and recovering the cost from Galt Associates.

36. Also at this time the Appellant worked (in co-operation with another specialist IT contractor) on the speculative development of a management system aimed at GP surgeries – this work began in the period between the two GSK projects and continued whilst the Appellant was engaged on the second GSK project. The Appellant also carried out some work for a German company at this time.

37. Throughout this period (from before the GSK contracts and beyond) the Appellant maintained employer's liability and professional indemnity insurance cover.

The parties' submissions

The Appellant's submissions

38. For the Appellant Mr Boddington submitted that the legislation requires a hypothetical contract to be inferred from the circumstances in which the arrangements have been made (in the present case) by the Appellant for Mr Winfield to work for GSK. To determine the nature of that hypothetical contract it is necessary to look first at the actual contracts entered into (in this case the contracts between the Appellant and the agencies Abraxas plc or Spring and then the contracts between those agencies and GSK); then at what actually happened on a day to day basis in terms of the way in which Mr Winfield performed his services for GSK, looking at the evidence of both Mr Winfield and GSK; and thirdly at the broader business circumstances and general *modus operandi* of the Appellant. Once the nature of that hypothetical contract is established from those different sets of facts it can be ascertained whether, by reference to the extensive case law on the subject, it is a contract for the services of an independent contractor or a contract of employment.

39. In the present case the actual contracts between the Appellant and the agencies and the agencies and GSK as client were consistent with the services of Mr Winfield being provided to GSK as those of an independent contractor: they were for a specific task and for a specific period; they were for the provision of a specific person, but with a right to substitute another with equivalent skills; they allowed, within limits, the worker to undertake work for other clients during the contract period; they took great care to provide that the worker should not be regarded as an employee of the client.

40. As for the day to day reality of the arrangements, Mr Winfield had a great deal of autonomy as to the way he carried out his work provided it fitted in to the overall workings of the project; he was clearly regarded by the client as someone engaged for the short-term and for a specific project and in that regard different from an employee of the client; he was paid on an hourly basis for work done; he enjoyed no employee benefits beyond the use of certain on-site facilities. Again, that is all indicative of a relationship between one contractor and another.

41. The broader business circumstances and context of the Appellant are also consistent with a relationship which is that of an independent contractor: the Appellant is a small specialist consultancy which seeks work in a variety of ways and

markets, sometimes working speculatively and seeking ways to manage overlapping commitments, invoicing for work done and taking the financial risk of delay or default on the part of the contractor.

42. As to the case law, Mr Boddington referred to the "irreducible minimum" needed to create an employment contract as established in the authorities beginning with the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 91968) 2 QB 497: the relationship between the parties must be that of mutual and personal obligation, that is, the provision of work by the employer and the doing of that work by the personal service rendered by the employee; there must be control of the worker by the employer to the extent consistent with a master and servant relationship; and all contractual provisions must be consistent with an employment contract.

43. As to the personal obligation, a right to send a substitute, which was available contractually to the Appellant, is inconsistent with the requirement for service to be a personal obligation: *Express Echo Publications v Tanton* [1999] IRLR 367; *Wright v Redrow Homes (Yorkshire) Ltd* [2004] 3 All ER 98; *Lime-IT v Commissioners of Inland Revenue* (2002 SpC). As to the mutuality of the obligation, for there to be a contract of employment there must be a continuing relationship under which the employer provides work to the employee (and continues to pay the employee if for any reason the work is not so provided) and the employee stands ready to carry out that work: *Propertycare Ltd v Gower* [2003] UKEAT 0547/03. In the present case this was not so: the Appellant was engaged to perform a specific project by a series of contracts which were renewed as the project progressed – there was no sense of the Appellant or Mr Winfield standing ready to carry out whatever tasks GSK required of them.

44. In relation to control, for a relationship to be that of employment, there must be a level of control which is more extensive than mere supervision or direction. Mr Winfield exercised considerable autonomy in how he worked, provided he fitted in with the development of the project as it proceeded. He had skills not otherwise available to GSK, and so no "employer" control could realistically be exercised over him – it was a "business to business" relationship.

45. As to the nature of the contractual provisions, that poses some difficulties where the contract under scrutiny is hypothetical. But in the Appellant's case it is clear that GSK sought to differentiate between its employees and those it wished to engage as independent contractors for the project, and the contractual documentation reflected that: GSK would not have entered into a contract of employment with Mr Winfield.

46. Looking beyond the "irreducible minimum" test of the *Ready Mixed Concrete* case, Mr Boddington referred to the test of whether the worker can be considered to be "in business on his own account": *Market Investigations Ltd v Minister of Social Scurity* [1968] 3 All ER 732, which looks at the degree of control exercised over the worker, the extent to which the worker is at financial risk, and the extent to which the worker benefits from investment in and management of his business. The Appellant was at financial risk in that it invoiced for the work done (and only for hours actually

worked) and was at risk of delay or default in payment on the part of either GSK or the intermediate agency. The Appellant managed its business by seeking out work opportunities as a specialist consultancy and running its affairs in a business manner – raising invoices, complying with its VAT obligations, managing "overlapping" contracts, undertaking speculative work, maintaining office premises at the home of Mr Winfield, maintaining appropriate insurance cover, ensuring Mr Winfield kept his skills up to date and his membership of the relevant professional bodies maintained, and keeping financial records.

47. Applying these various tests to the circumstances of the Appellant it is clear, in Mr Boddington's submission, that the hypothetical contract between Mr Winfield and GSK would be that of a self-employed freelance independent contractor, and not that of employer and employee.

The Commissioners' submissions

48. For the Commissioners, Mr Lewis largely accepted Mr Boddington's analysis of the way in which the hypothetical contract should be identified from the "circumstances" and "arrangements" comprising the actual relationships of the parties and the reality of the working relationship and conditions. He also agreed that the nature of the hypothetical contract must be analysed by reference to the tests which can be derived from the *Ready Mixed Concrete* and *Market Investigations* cases. Additionally, he referred to the case of *Hall v Lorimer* (1993) 66 TC 349, which makes it clear that the exercise is not a mechanical one of running through the items in a checklist, but of "painting a picture from the accumulation of detail", viewing the entirety of the arrangements in an informed and qualitative evaluation of the overall effect of the detail.

49. Where Mr Lewis differed from Mr Boddington was in his analysis of the evidence.

50. On the question of the extent and degree of control, the issue is whether there is a right to control, not whether in fact that control is exercised. That right of control must also be viewed in the context of the nature of the work and the worker – a skilled professional employee will not be subject to the same day-to-day control as an unskilled worker. The question is whether the "employer" has the power to decide what is to be done, the way in which it is to be done, the time when it is done and the place where it is done (see the *Ready Mixed Concrete* case and also *Dragonfly Consultancy Ltd v HMRC Commissioners* STC 3030). In the present case GSK had the right of control over what services had to be provided, and where and when those services had to be provided; work was allocated and monitored by GSK. GSK had sufficient rights of control to render the hypothetical contract one of employment.

51. As to the question of whether the Appellant could provide a substitute for Mr Winfield, Mr Lewis referred to the case of *Usetech Ltd v Young* (2004) 76 TC 811 and also to the decision of the Special Commissioner in the *Dragonfly Consultancy* case. The presence of a right to substitute in the hypothetical contract may be a pointer towards self-employment, but is not determinative of the matter. In the

Appellant's case Mr Winfield was specifically identified as the worker in the actual contractual documentation, and was hired for his specific skills. In practice he was engaged for the job and GSK, who had a veto right, would have been likely to resist any attempt by the Appellant or the agency to provide a substitute.

52. Mr Lewis referred to the concept of mutuality of obligation, referring to the cases of *Nethermere (St Neots) Ltd v Gardiner & Another* (1984) ICR 612, *Synaptek v Young* (2003) 75 TC 51, *Cornwall County Council v Prater* [2006] EWCA Civ 102, and *Dragonfly Consultancy*. He accepted that there must be an irreducible minimum of obligation on each side in order to create a contract of employment, but in his submission that went no further than an obligation on the worker to provide his work and skill and an obligation on the employer to pay for the work done. Those requirements were met in the Appellant's case.

53. As to other *indicia* as to the nature of the hypothetical contract, Mr Lewis argued that Mr Winfield was at little financial risk, and had little opportunity to increase his profit. He performed his services using equipment provided by GSK rather than his own equipment. The Appellant was paid on an hourly basis rather than by reference to a fee for the project undertaken. The termination rights in the contract were indicative of an employment arrangement (an independent contractor is usually engaged for a set period or to carry out a particular project: see *Morren v Swinton and Pendlebury Borough Council* (1965) 1 WLR 576). Mr Winfield was part of the team assembled by GSK (a mixture of employees and contracted workers) with similar working arrangements – he was effectively part and parcel of GSK's organisation: see the case of *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* 35 TC 311. Under the contractual arrangements Mr Winfield had a right to work for other contractors, but that was no more than a theoretical right, and in any event he was required to provide a minimum number of hours per week of service to GSK. Overall, there was little, if any, evidence to suggest that Mr Winfield could be regarded as a person in business on his own account: see the cases of *Market Investigations Ltd v Minister of Social Security* (1969) 2 QB 173 and *Lee Ting Sang v Chung Chi-Keung and Shun Shing Construction & Engineering Co Ltd* 2 AC 374.

54. Mr Lewis therefore submitted that the hypothetical contract between Mr Winfield and GSK which the IR 35 legislation required would, in the circumstances of the Appellant's arrangements with GSK, be one of employment, so that the disputed decisions made by the Commissioners rendering the Appellant liable to National Insurance contributions and PAYE liabilities should be upheld.

Decision and reasons for decision

55. In order to decide whether the relevant National Insurance contributions and income tax (PAYE) provisions apply to the Appellant in this case we are required to ascertain first what would be the terms of a hypothetical contract between Mr Winfield (the worker) and GSK (the client), and then to determine from the guidance in the cases whether such a contract would be a contract of employment or a contract for the supply of the services of an independent contractor.

The terms of the hypothetical contract between GSK and Mr Winfield

56. We are concerned with two sets of arrangements covering two periods of engagement: the first (through the agency of Abraxas plc) for the period from 4 June 2001 to 26 April 2002 (in itself a sequence of contracts for three contiguous periods, all those contracts being on the same terms); and the second (through the agency of Spring) for the period from 26 November 2002 to 14 March 2003 (a sequence of contracts for two contiguous periods, and again, all those contracts being on the same terms). As we have noted, the material contractual terms of the arrangements made through the Spring agency were, in their tenor, largely consistent with those made through the Abraxas plc agency, and the parties did not, in arguing their respective cases, significantly differentiate between the two. Where there are differences which we consider material to the terms of the hypothetical contract we have to construct, we identify those differences below.

57. We have noted at paragraph 11 above the discussion in recent cases as to the possible different bases for predicating the terms of the required hypothetical contract as appearing from the different language in the respective National Insurance and income tax provisions. The parties in this appeal made no issue of that point. The approach of Park J in the *Usetech Ltd* case is pragmatic. He said at paragraph 10, when comparing and contrasting the language of the respective provisions as they relate to the basis on which the hypothetical contract is to be predicated:

> "However, no-one has suggested to me, nor do I consider, that that or the other minor differences between the two statutory provisions affects this case or opens a possibility of the case being decided one way for NICs and another way for income tax and corporation tax."

He then went on to consider the terms of the hypothetical contract, in dealing with the question of whether it should include a right of substitution (which was one of the principal factors in that case) by reference to the wider circumstances including the conduct of the parties, and not simply the actual contractual terms (that is, by reference, in effect, to the approach inherent in the income tax provisions). We will follow that approach.

58. In this case, as with some others which have come before the tribunal, the exercise of constructing the hypothetical contract between the client and the worker is made more complicated by the interposition of an independent agency company between the appellant company and the client, so that in looking at the actual contractual terms governing the basis on which Mr Winfield's services were supplied to GSK in each of the contract periods it is necessary to look at the arrangements between GSK and the respective agency companies (Abraxas plc or Spring) and between those agency companies and the Appellant. In the present case the difficulties which this "two tier" situation may present are eased to an extent by the fact that there is a fair degree of consistency, or at least correspondence, of terms as between the "tiered" contracts.

59. Taking these points into account, the hypothetical contract between Mr Winfield and GSK would be on the following terms:

(1) The services of Mr Winfield are engaged for a series of fixed term contracts which may nevertheless be terminated before the expiry of the term by four weeks' notice.

We consider this to be the case because the Appellant has such arrangements in its contract with Abraxas plc, and notwithstanding that GSK can in the case of its agreement with Abraxas plc require the agency company to terminate the engagement of the worker, seemingly without notice. In the GSK/Spring agreement GSK must give thirty days' notice to terminate the engagement (Spring, in its contract with the Appellant, can terminate without notice if GSK exercises its termination right). In a "default" situation (misconduct or lack of performance) there can be summary termination.

(2) The services to be provided by Mr Winfield are specific and detailed.

In the first sequence of contracts (through the agency of Abraxas plc) the services relate to the development and testing of particular software programs and related database management and consultancy functions; in the case of the second sequence of contracts (through the agency of Spring) the nature of the services referred to in the documentation is general, but in fact Mr Winfield was engaged for the development of a specific interface software program.

(3) Mr Winfield is paid on the basis of a specified hourly rate for the number of hours actually worked: there is no payment in the case of absence for holidays, sickness or other causes. Over the contract period the average number of hours worked per week is set at 37.5, with scope to agree additional hours of work. Different hourly rates apply to the two respective sequences of contracts, to reflect the nature of the services provided and the market forces which influence fee or remuneration rates. Payment is made against invoices rendered with progress reports.

(4) Mr Winfield is not entitled to any pension or insurance benefits, benefits in kind, or bonus, share options or other incentive arrangements provided to actual employees of GSK.

(5) Mr Winfield must, in providing his services, co-operate with GSK and take account of its directions. Specifically, GSK has the right to direct Mr Winfield as to where and when and the timescale within which his services are to be performed, but Mr Winfield can at his discretion determine the manner, means and methods in or by which he performs the contracted services. On the days he works Mr Winfield is expected to be available during the "core hours" of the working day and to attend project team meetings, but otherwise he decides his working hours and whether he works in GSK's premises or at his office in his home.

(6) During his period of engagement Mr Winfield is entitled to undertake assignments for other contractors provided that there is no conflict with the interests of GSK and provided that there is no prejudice to the carrying out and completion of the GSK project.

This right is specifically provided in the arrangements for the first sequence of contracts and can be inferred in the case of the second sequence of contracts (during which Mr Winfield did in fact undertake work for other contractors).

(7) The contract is for the engagement of the services of Mr Winfield, but if Mr Winfield is not available for any reason he may propose a substitute for himself who may continue with the project during Mr Winfield's absence, provided that that substitute has comparable skills to those of Mr Winfield. GSK determines whether to accept such a substitute, depending on the appropriateness of the circumstances (including the proposed length of absence/substitution and the likely "learning curve" of any proposed substitute in terms of becoming familiar with the requirements of the project).

The arrangements for substitution in these terms are derived from the GSK/Abraxas plc contract and the Abraxas plc/Appellant contract. The second sequence of contracts (through the Spring agency) provide for a limited right of delegation under the GSK/Spring contract, and a right of replacement under the Spring/Appellant contract provided that GSK is satisfied that the proposed replacement has the necessary qualifications, skills and experience and is suitable to perform the services contracted for.

(8) There is no provision for training or other skills development for Mr Winfield other than a necessary and basic induction process. There is no provision for appraisal nor any grievance or similar employee rights procedures available to Mr Winfield.

(9) There is a requirement that Mr Winfield provides at his own cost public liability and professional indemnity insurance cover in the sum of not less than £1m (£250,000 in the case of the second sequence of contracts).

(10) The contract includes a declaration that Mr Winfield is not an employee of GSK.

The GSK/Spring contract provides that Contingent Workers shall not be employees or subcontractors of GSK, and the Spring/Appellant contract provides that the parties agree that their contract is a contract for services. There is no express provision on this matter in the GSK/Abraxas plc contract, but "Consultants" are stated to be independent consultants and GSK is expressed to have no responsibility for any payment of income tax or national insurance (with a corresponding indemnity from Abraxas plc) in relation to a Consultant. The Abraxas plc/Appellant contract contains an acknowledgement by the Appellant that the services supplied are those of an independent contractor.

The nature of the hypothetical contract: employment contract or contract for services

60. We now have to consider whether, having regard to the terms of this hypothetical contract, Mr Winfield is to be regarded as an employee of GSK or an independent contractor. In carrying out that task we note that in *Market Investigations Ltd v Minister of Social Security* it was stated that: "… the fundamental test to be applied is

this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'"

61. It is clear from the cases that although there is a range of factors or *indicia* which might usefully be taken into account in ascertaining whether a contract is one of employment or one for the provision of services by an independent contractor, there is no simple formula or process which can be applied to determine, in any particular case, which factors are relevant or the weight or significance which is to be attributed to any factors which are considered to be relevant. In *Hall v Lorimer* Mummery J expressed the nature of the process in these terms (subsequently approved by Nolan LJ when that case reached the Court of Appeal):

> "In order to decide whether a person carries on business on his own account, it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation another.
>
> The process involves painting a picture in each individual case."

62. The essential factors – the "irreducible minimum" – which must be present if an employment contract is to exist were set out in the *Ready Mixed Concrete* case by MacKenna J in terms which have since been recognised as the helpful starting point for the analysis of the true nature of contracts in this difficult area:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

63. The first of these conditions has evolved into two distinct factors: first, that there should be what has commonly been called "mutuality of obligation"; and second, that a defining feature of an employment contract is that the employee, and he alone, is the person whose services are to be provided.

64. The question of "mutuality of obligation" has led to discussion as to whether all that is required on the part of the employing party is that it should simply pay the remuneration contracted for, or whether a defining characteristic of an employment contract is that the employer is required to provide a flow of work and to continue to pay the contracted remuneration even if at times there is no work. The Special

Commissioner in the *Dragonfly Consultancy* case provides a helpful review of the cases which deal with the employer's obligation (see paragraphs 50 to 59), and reaches this conclusion: for a contract to exist there must, of course, be mutual obligations, but that obvious requirement is met if the "employee" is obliged to provide his labour and the "employer" is obliged to make payment for it; and that "an obligation on the employer to provide work or in the absence of available work, to pay, is not a precondition for the contract being one of employment, but its presence in some form…is a touchstone or a feature one would expect to find in an employment contract and where absence would call into question the existence of such a relationship."

65. Turning to the hypothetical contract between Mr Winfield and GSK, there is an obligation for GSK to pay Mr Winfield for the work he has done in terms of payment at the agreed rate for each hour of work as invoiced. There is no obligation beyond that. It appear that there was an expectation that there would be, on average, 37.5 hours of work each week – in the Abraxas plx/Appellant contract it is expressed in these terms: "Work Pattern: the standard commitment is 37.5 hours per week or such other times as may be mutually agreed with [GSK]" – and no doubt in a substantial, well-planned, carefully budgeted and well-executed project such as that undertaken by GSK, that expectation had a sound basis. But the essence of the arrangement was that Mr Winfield was paid only for the hours he worked, and should at any time his strand of work within the overall project have suffered a hiatus for any reason, we cannot see that he had any contractual basis for demanding other work or payment whilst he waited for his work to resume. Nor is there anything to suggest that GSK had it in mind to offer work beyond the specific project for which Mr Winfield's services were engaged. This feature of his hypothetical contract we see as calling into question whether it is an employment contract – it is a feature which is more indicative of a contract for services.

66. It is convenient here to deal with a related point, which concerns the nature of the contractual remuneration. Mr Lewis made the point that hourly pay is an indication of employment in that an independent contractor customarily charges a specified fee for the carrying out of a particular task. We do not agree. For a highly-skilled specialist such as Mr Winfield we would expect an employment contract to remunerate him on a specified salary pro rated for each month. In the context of professional skills, remuneration by reference to hours worked at an hourly rate is, in the present world, a feature (although not necessarily the only feature) of the fee charging structure of professional service firms (and, for that matter, plumbers, electricians and other skilled technicians and craftsmen). Therefore, in so far as the nature of the remuneration in Mr Winfield's hypothetical contract points in any direction, it does so away from employment.

67. The second limb of MacKenna J's first condition relates to the personal nature of the "employee's" obligations. He said this by way of expansion of the point: "The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service though a limited or occasional power of delegation may not be."

68. The question of the ability of the person providing the services to supply someone in his place, and its relevance in determining the nature of the contract is reviewed in the *Usetech Ltd* case and also by the Special Commissioner in the *Dragonfly Consultancy* case. The conclusion reached in those cases is that if there is a general and unqualified right for the person providing the services to send along a substitute in his place, as in the *Express Echo Publications* case, then that is incompatible with the personal service nature of an employment contract, and determines the matter. Something less than that in terms of what the parties have agreed to by way of an ability to provide a substitute is unlikely in itself to be determinative of the question, but will nevertheless be a pointer away from an employment contract.

69. We agree with that: putting it baldly, no employment contract envisages that the employee will send along someone else in his stead to perform the duties he has been engaged to perform. Therefore any contract which has at least some recognition that the provider of the services can supply a substitute in certain circumstances must seriously be considered as being a contract other than for employment.

70. In Mr Winfield's case it is clear that his specific services were engaged by GSK in that his name, qualifications and experience were supplied to GSK by the agency company (initially, Abraxas plc and later Spring), he was interviewed by GSK, and he is named as the consultant to be provided to them. Mr Winfield had specialist skills which were required to make up the skills set put together by GSK in the team it was assembling for a particular project (this was more so for the first sequence of contracts). As matters transpired during the contract periods the question of substitution did not arise – Mr Winfield was able to fulfil the contract terms himself, and his only periods of absence (on holiday) were arranged to the satisfaction of himself and of GSK without any disruption to the project. There was some speculation on the part of both Mr Lamming of GSK and Mr Winfield as to how the question of substitution might have been dealt with had it arisen, but as mere speculation we did not find that to be helpful. Mr Winfield gave instances of other engagements he had undertaken where he had provided a substitute and where he had substituted for another contractor, which is some indication that the practice can be a feature of the business in which he works, and that therefore there is some foundation in practice for including substitution provisions in engagement contracts.

71. What is clear is that in the present case the contracts between the parties (that is, both "tiers" of contracts) contemplate the possibility of substitution. As we mention at paragraph 59(7) above, this is more specifically dealt with in the first sequence of contracts entered into through the Abraxas plc agency. Those provisions do not give the Appellant the right to substitute another consultant for Mr Winfield, but a substitute may be offered, and although GSK has the right to refuse to accept that substitute, there is a framework within which GSK is required to consider whether the circumstances are appropriate for a substitution to be made, of which a key feature is (not unexpectedly) whether the person substituted meets the specification by reference to which the original consultant was appointed. The hypothetical contract must reflect the terms of the actual contracts in this regard.

72. We do not regard a substitution clause in these terms to be determinative of the matter in the sense that it must lead us to conclude that the hypothetical contract between GSK and Mr Winfield cannot be an employment contract. But in the exercise of weighing up all the features and factors we consider that such a clause tilts the balance in that exercise away from employment.

73. MacKenna J's second condition relates to the degree of control which the "employer" has over the "employee". In amplification of this point the judge said this:

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."

74. The question of control – or the degree of control which points to a situation of employment – is problematic in the case of a person who is engaged for his specialist skills. The "master" himself may well not have the skills or experience to give specific direction to the "servant", and in the case of *Morren v Swinton and Pendlebury Borough Council* Lord Parker CJ said: "…clearly superintendence and control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience." In such a case one must look to more general questions of the level of supervision.

75. In the present case there is little in the first sequence of contracts relating to the question of control. There is provision in the Abraxas plc/GSK contract requiring GSK to "provide the Consultant with sufficient instructions and facilities or access to facilities and equipment…to enable the Consultant to adequately perform his/her obligations under the Specification", and there is also provision that "[GSK] shall be responsible for monitoring the Consultant's performance of the Specification and for reporting any shortcomings to [Abraxas plc]." Neither of these provisions is dealing with the nature or extent of the supervision by GSK of the consultant's work.

76. In the second sequence of contracts (those made through the Spring agency) there is explicit provision (see paragraph 33 above) – GSK can direct where and when the worker's services are to be performed, but not the manner, means or method by which they are performed.

77. As to the evidence from Mr Winfield and Mr Lamming as to what actually happened (at least in the case of the first sequence of contracts), it was clear that Mr Winfield had responsibility for delivering his part of the project by applying the skills and experience for which he had been engaged, and that he was required by GSK to exercise that responsibility by carrying out his work in a way which fitted in with the requirements of the project on which the team was working – both as to timing and as to the technical compatibility of the work (see paragraph 24 above).

78. All in all we consider that there was a minimum supervision of Mr Winfield on the part of GSK – he was hired for his expertise to be part of a team for a particular project, and subject only to such supervision and direction as was necessary for and in the course of the management of the project as a whole he was left to do the work as he saw fit. The level of control or supervision exercised did not go beyond that which one would expect in the hiring of an independent contractor. Whilst we take note that the question of control should not be given too much significance in the case of a specialist worker, in so far as it is brought into the balance in this case it points away from a contract of employment.

79. MacKenna J's third condition in determining whether a contract is an employment contract is that the other terms of the contract should be consistent with its being an employment contract. In this context we refer to the following matters which the parties brought to our attention:

(1) Mr Winfield was not entitled to pension or other benefits or to participate in bonus or share incentive plans which GSK offered to its actual employees, nor was he entitled to training, the benefits of appraisal, or the sort of employee protection procedures now customarily incorporated into employment contracts. This demonstrates that GSK did not want to treat Mr Winfield in the way it treated its employees and as such it is an indication of the way in which they regarded the relationship. In itself, the absence of such benefits in the hypothetical contract does not give a particular indication as to the true nature of that contract – an employment contract is not required to include such benefits.

(2) A related point is the term in the hypothetical contract, derived from the actual contracts (see paragraph 59(10) above), that the relationship is not that of employer and employee. The issue is the true nature of the contract as seen from its terms and the way in which those terms were in fact given effect to, not what the parties considered the true nature of the contract to be. Despite the emphasis given to this point by Mr Boddington as an expression of the intention of the parties, we think that we should give only marginal weight to this point.

(3) The hypothetical contract is for a stipulated period but can be terminated, without cause, by a specified period of notice. We agree with Mr Lewis that this is a pointer towards a contract of employment, although in a contract for services, such as a retainer for a particular period, an early termination procedure may well be included in the terms to deal with the situation where for any reason the arrangement needs to be brought to an early conclusion.

(4) The hypothetical contract requires Mr Winfield to provide a specified level of public liability and professional indemnity insurance cover. We consider that this points towards a contract for services rather than an employment contract. As a factor it does not go to the heart of the issue as to the true nature of the contract, and therefore is certainly not determinative of that issue. But in an employment relationship it is generally the employer who is expected to bear the risks of such liability to third parties and to provide at its cost the insurance against such liability (although there are some professionally-qualified employees – for example in the medical field – who will provide their own insurance cover).

(5) The hypothetical contract provides that Mr Winfield may undertake assignments for other parties, subject to certain constraints which protect the interests of GSK and its need for the project to be completed to plan. This was a right which Mr Winfield exercised, especially in relation to the second sequence of contracts, when he undertook work for Galt Associates and also some speculative work for other parties when engaged to work for GSK. We return to this issue below, when considering whether or not Mr Winfield could be said to be carrying on business on his own account. For the present we observe that such a term in the contract is an indicator of the relationship being that of independent contractor, and not that of employer/employee.

80. The parties referred us to two other areas of enquiry based on case law, outside the immediate scope of the "irreducible minimum" conditions of an employment contract laid out in the *Ready Mixed Concrete* case. The first is the question of whether the worker carries the financial risk normally associated with being self-employed. The second (perhaps not entirely unrelated) is whether the worker can be regarded as carrying on business on his own account as one would expect to find if he were self-employed.

81. As to the question of financial risk, the general proposition is that a person who is self-employed carries the risks associated with running a business whereas an employee runs no risk other than that his employer will become insolvent owing him his wages or salary or that the employer will for some business reason make the employee redundant because a particular business operation has ceased or been reduced. Mr Boddington argued that the Appellant was bearing financial risk in a number of ways which would not be the case were Mr Winfield an employee of GSK: there was the risk of default by either GSK or the relevant agency company in paying the Appellant's invoices (and the fact that payment was irregular, at least as compared with a monthly salary payment); there was the risk of changes in the hourly rates (evidenced by the fact that the Appellant was able to negotiate only a reduced rate for the second sequence of contracts); there was the risk of sickness or other absence which resulted in loss of income; and there was the uncertainty as to the net return to the Appellant when it had to take account of its overhead and other costs such as insurance, keeping the skills of Mr Winfield up to date and maintaining membership of professional bodies, equipping and running the small office maintained in Mr Winfield's home, and marketing costs. Mr Lewis argued that the Appellant had invested minimal capital in the business, that in reality there was no way for the Appellant to increase its profits other than by having Mr Winfield work longer hours, that all the equipment required for Mr Winfield's work was provided by GSK, and that the risk of default in payment was very small.

82. We are of the view that the Appellant was exposed to financial risk in a manner and to an extent that Mr Winfield would not have been exposed to had he been an employee. Those risks are essentially the risks which are run by a self-employed worker. It is a definite pointer towards Mr Winfield being regarded as such in the assessment of his status which we are required to make.

83. Even more telling in that regard is the position if we apply the test as to whether the Appellant can be said to be providing services in business on its own account – if so, the case is one of a contract for services. As we have mentioned, this test was first formulated in the *Market Investigations Ltd* case. It looks not just to financial risk and the opportunity to create profit, but also to the wider business conduct of the person concerned and the context in which his activities are planned and carried out. It requires us in the present case to look beyond the immediate arrangements with GSK to the way in which the Appellant sought and obtained and conducted business.

84. The evidence of Mr Winfield is compelling in this regard:

(1) The Appellant actively sought out engagements by promoting itself through its website and by monitoring the websites of those who may have been seeking the expertise it has to offer.

(2) In the course of the first sequence of contracts with GSK the Appellant, through Mr Winfield, worked to secure business contacts with Galt Associates, a party involved in the GSK project, and carried out some work for them on a speculative basis: those contacts and that speculative work yielded a lengthy engagement for the Appellant once the GSK project was over and which continued concurrently with the second GSK project. (The extent of that concurrent work was not clear from the evidence – spreadsheets supplied by the Appellant to the Commissioners in the course of their enquiries indicated some fifty-eight hours of work for Galt Associates whilst the Appellant was engaged by GSK under the second sequence of contracts, but copy invoices related only to 21 hours of such work. In either event it was a material concurrent engagement.) That connection with Galt Associates resulted in further extensive work once the second GSK engagement was completed.

(3) In the period between the two GSK engagements, and whilst engaged by Galt Associates, the Appellant worked on speculative developments of at least two software products (in one case with another specialist computer software contractor) and some of that work continued during the period of the second GSK engagement, all with a view to maintaining or increasing a stream of fee income.

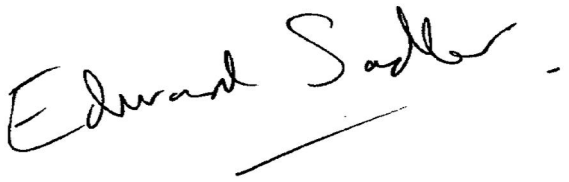
85. All this points firmly towards the conclusion that the Appellant was in business on its own account and that the services which it performed – including those it performed for GSK under the sequences of contracts which are the focus of this case – were performed in the course of that business.

86. If we stand back from the detail to view the overall picture, and make an informed, considered, qualitative appreciation of the whole as we are encouraged to do by *Hall v Lorimer*, we are clear that the picture we have of the relationship between GSK and Mr Winfield is one of an independent and self-employed contractor, and not that of employer and employee. This is the case not only by reason of the terms of the hypothetical contract we are required to construct for the purposes of the relevant legislation, where, as we have set out, the preponderance of factor or *indicia* point to this conclusion, but also in answer to the question of whether the services which were performed by the Appellant through Mr Winfield were performed as a person in business on its own account.

87. We therefore allow the Appellant's appeal.

Right to apply for permission to appeal

88. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.



EDWARD SADLER

TRIBUNAL JUDGE
RELEASE DATE: 6 July 2011

Authorities referred to in skeletons and not referred to in the decision:

McManus v Griffiths (1997) 70 TC 218
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