TC01807

Appeal number TC/2010/06086

INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS – individual providing construction services – whether relationship is one of employment – yes - regulation 80, Income Tax (PAYE) Regulations 2003 – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

ERIC NEWMAN DEVELOPMENTS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ALEKSANDER
DR CHRISTINA HILL WILLIAMS DL

Sitting in public at 45 Bedford Square, London WC1 on 11 October 2011

KWJ Saunders, chartered accountant of Simpson Wreford and Co. for the Appellant

David Lewis, an officer of HM Revenue and Customs, for the Respondents

DECISION

1. Eric Newman Developments Limited appeals against decisions made under section 8, Social Security Contributions (Transfer of Functions etc) Act 1999 and determinations made under regulation 80, Income Tax (PAYE) Regulations 2003.

2. Details of the decisions and determinations are as follows

Tax Year	**Income Tax (Reg 80) (£)**	**NICs (section 8) (£)**
2004/05	286.92	387.29
2005/06	1971.86	1774.19
2006/07	2449.10	2123.14
2007/08	1238.30	1000.38
2008/09	2307.00	2037.50

3. The decisions and determinations were made on the basis that the engagement of David Filipiak by the Appellant was one of employment. Payments made by the Appellant to Mr Filipiak would therefore be subject to deduction of income tax under PAYE, and would be subject to class 1 National Insurance Contributions.

4. The issue before the tribunal is whether Mr Filipiak was at the relevant times an employee of the Appellant.

5. The Appellant was represented by its accountant Mr Saunders and HMRC was represented by Mr Lewis. We heard evidence from Mr Eric Newman (a director of the Appellant), Mr Filipiak and Ms Gaynor Leadbeater (the HMRC officer responsible for the decisions and determinations). We also had before us bundles of written evidence.

Legislation

6. As regards national insurance contributions ("NICs"), Section 2 (1) Social Security Contributions and Benefits Act 1992 defines the phrases "employed earner" and "self-employed earner" as follows:

> " Categories of earners
>
> (1) In this Part of this Act and Parts II to V below—
>
> (a) “employed earner” means a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with general earnings; and
>
> (b) “self-employed earner” means a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment)."

7. Sections 6 and 7 of the same Act set up the circumstances in which Class 1 NICs are to be paid and who is liable to pay them. Paragraph 3 of Schedule 1 makes the

employer liable to pay the primary (employee's) contribution and sets up the circumstances in which you can recover the contribution from the employee, as follows:

> "(1) Where earnings are paid to an employed earner and in respect of that payment liability arises for primary and secondary Class 1 contributions, the secondary contributor shall (except in prescribed circumstances), as well as being liable for any secondary contribution of his own, be liable in the first instance to pay also the earner's primary contribution or a prescribed part of the earner's primary contribution, on behalf of and to the exclusion of the earner; and for the purposes of this Act and the Administration Act contributions paid by the secondary contributor on behalf of the earner shall be taken to be contributions paid by the earner.
>
> (2) . . .
>
> (3) A secondary contributor shall be entitled, subject to and in accordance with regulations, to recover from an earner the amount of any primary Class 1 contribution paid or to be paid by him on behalf of the earner; and, subject to sub-paragraphs (3A) to (5) below but notwithstanding any other provision in any enactment], regulations under this sub-paragraph shall provide for recovery to be made by deduction from the earner's earnings, and for it not to be made in any other way."

8. Section 8 Social Security Contributions (Transfer of Functions, Etc) Act 1999 provides:

> "Decisions by officers of Board
>
> (1) Subject to the provisions of this Part, it shall be for an officer of the Board—
>
> (a) to decide whether for the purposes of Parts I to V of the Social Security Contributions and Benefits Act 1992 a person is or was an earner and, if so, the category of earners in which he is or was to be included,
>
> (b) ….
>
> (c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay,"

9. Regulation 10 of the Social Security (Decisions and Appeals) Regulations 1999 SI 1999/1027 places the onus of proof on an appellant in respect of a decision and made under section 8 above.

10. The Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) ("the PAYE Regulations") require an employer to deduct an account for PAYE when making payments of employment income to an employee. Regulation 80 of the PAYE Regulations provides:

> Determination of unpaid tax and appeal against determination

(1) This regulation applies if it appears to [HMRC] that there may be tax payable for a tax year under regulation 68 by an employer which has neither been—

(a) paid to [HMRC], nor

(b) certified by [HMRC] under regulation 76, 77, 78 or 79.

(2) [HMRC] may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.

(3) A determination under this regulation must not include tax in respect of which a direction under regulation 72(5) has been made; and directions under that regulation do not apply to tax determined under this regulation.

(4) A determination under this regulation may—

(a) cover the tax payable by the employer under regulation 68 for any one or more tax periods in a tax year, and

(b) extend to the whole of that tax, or to such part of it as is payable in respect of—

(i) a class or classes of employees specified in the notice of determination (without naming the individual employees), or

(ii) one or more named employees specified in the notice.

(5) A determination under this regulation is subject to Parts 4, 5 . . .and 6 of TMA (assessment, appeals, collection and recovery) as if—

(a) the determination were an assessment, and

(b) the amount of tax determined were income tax charged on the employer,

and those Parts of that Act apply accordingly with any necessary modifications.

(6) . . .

[references to "HMRC" were added in 2008 and have been included for ease of reference]

11. Section 50 (6) Taxes Management Act 1970 places the onus of proof on an appellant in respect of a determination made under Regulation 80 of the PAYE Regulations.

Background Facts

12. On the basis of the evidence before us, we find the background facts to be as follows:

13. Eric Newman Developments Limited undertakes the business of property development. It buys properties which it improves or renovates and then sells. It also lets properties that it has bought and renovated, but which it is unable to sell at the

price it desires, and undertakes maintenance on such properties. Mr Newman is the principal shareholder and director of the business. Also working in the business are his son and son-in-law who are both skilled tradesmen (carpenter and bricklayer).

14. Mr Filipiak started to work for the Appellant in 2004, shortly after Mr Filipiak came to the UK from Poland. Prior to coming to the UK, Mr Filipiak had some experience of construction work in Poland. He needed to work on a flexible basis, as his mother was in poor health, and he would need to return to Poland to be with her at short notice and for uncertain periods. This arrangement suited the Appellant, as Mr Newman was running down the business in the light of the uncertain economic situation and as he wanted to retire anyway. He therefore could not guarantee regular work and did not want to enter into long term commitments. It was therefore agreed that Mr Filipiak would be engaged on a self-employed basis. Mr Filipiak engaged an accountant to prepare his tax returns, and registered under the construction industry scheme.

15. Included in the document bundles are copies of the written agreement concluded between the Appellant and Mr Filipiak. Clause 4 of the agreement provides that the "Sub-contractor" (Mr Filipiak) shall

> a. perform the work in a professional and businesslike manner in accordance with normal practice and standards of the trade, by supplying expert and adequate level of personnel and materials
>
> b. use best endeavours at all times to do all things necessary to comply with the requirements of the Contractor [the Appellant]
>
> c. indemnify and hold the Contractor harmless from any claims or liability whatsoever arising from the Sub-contractor's work under this contract
>
> d. not be entitled to holiday pay, or sickness pay for any absence for such purposes nor be entitled to any benefits offered by the Contractor the Contractor's employees
>
> e. be entitled to engage their own staff and assistance as and when necessary to discharge the Sub-contractor's obligations towards the Contractor, provided that they shall accept all liability for the terms of engagement of such staff and assistance, and shall indemnify and hold the Contractor harmless from any claims or liability whatsoever
>
> f. in respect of all notified deadlines for parts of the services to be performed, time shall be of the essence
>
> g. be entitled to choose how and when to carry out the services as long as the performance of such services is to the satisfaction of the Contractor
>
> h. be responsible for providing their own equipment and materials whenever appropriate at own cost
>
> i. arrange for and be responsible for the provision of adequate public liability insurance and provide written evidence thereof if required by the Contractor

j. be responsible for correcting, without further charge, any defective or incomplete work as soon as the same is either discovered by the Sub-contractor or notified to the Sub-contractor by or on behalf of the Contractor within a reasonable time period

k. be entitled to freely undertake work for any third party at any time

l. be entitled to negotiate the contract price and benefit from own good management.

16. Clause 5 of the agreement provides for prices and charges to be specified on the contract, and clause 6 provides that any extra supplementary services shall be set out in writing and attached to the contract.

17. Some doubt was expressed by Mr Lewis about the provenance of this agreement. Two copies of the agreement were included in the bundles. Both copies were expressed in identical terms, but the copies were laid out differently and had different typefaces. One, provided to HMRC on 13 February 2008 was undated, and the other, sent to HMRC during the appeals process was dated 1 October 2004, but gives as an address for Mr Filipiak an address to which Mr Filipiak did not move until May 2007. The provenance of these agreements is unsatisfactory, and we place little upon them as evidence of the terms of the agreement reached between the Appellant and Mr Filipiak.

18. When first engaged by the Appellant, Mr Filipiak had few skills, and worked as a general labourer. However over time, Mr Filipiak built up his skills, and can now undertake basic carpentry, decorating, tiling, plus some labouring and digging. Mr Filipiak has accumulated basic tools over the period since he started to work for the Appellant. Initially Mr Filipiak required supervision from Mr Newman and his other workers, but as Mr Filipiak's skills improved, he required less supervision, and now largely works unsupervised. Mr Newman and his son will monitor the quality of Mr Filipiak's work when a particular job is finished. Mr Filipiak will from time to time ask advice of more experienced colleagues on how to tackle some aspects of his work. Currently Mr Filipiak is undertaking largely maintenance work for the Appellant, and will be given keys to premises where he has to work – and could spend most of the day there alone. Again Mr Newman or his son would just check the work when he had finished.

19. Mr Filipiak has worked almost exclusively for the Appellant. Although both Mr Newman and Mr Filipiak said in evidence that Mr Filipiak was free to work for others, in practice, although Mr Filipiak has done some work for others, it has been insignificant in the context of the overall engagement by the Appellant. Mr Filipiak has not advertised for customers, and the little work he has done for others has come from word-of-mouth recommendations. When asked why he did not actively advertise for other customers, Mr Filipiak replied that it was easier to work for just one customer with regular money, rather than have one good job and then have a break with no money whilst waiting for the next job.

20. Both Mr Newman and Mr Filipiak stated that Mr Filipiak was paid by the job. Mr Newman would discuss a particular job with Mr Filipiak (such as decorating a room), and Mr Newman would specify a price for the job. Mr Filipiak was free to either take the job at the specified price or to turn it down. As and when a job was finishing, Mr Newman and Mr Filipiak would discuss the next job and agree a price for it. However neither Mr Newman nor Mr Filipiak documented their agreement, and no invoice for any particular job was ever produced. When asked why, Mr Filipiak said that his written English was poor.

21. At a meeting with HMRC on 13 February 2008, Mr Newman said that his subcontractors work on a fixed price (the price is set by Mr Newman, and then then mutually agree to it). The subcontractor is then paid a fixed amount each week, with a balancing charge on completion. No formal records were kept allocating payments to particular jobs, although Mr Newman told us that he recorded the price in his diary (although the diary was not produced in evidence). When Mr Newman was asked how he knew that he did not over (or under) pay Mr Filipiak for any particular job, Mr Newman replied that he just knew from his experience in the business over many years.

22. Included as an attachment to Mr Newman's witness statement was a schedule of the weekly payments made to Mr Filipiak during the tax year 2010/11 (although this year is not under appeal. This shows that Mr Filipiak was not paid a balancing amount on the conclusion of each job – instead Mr Newman made weekly payments to Mr Filipiak of a fixed amount each week. In 2010/11, Mr Filipiak worked for 28 weeks. In all but four of those weeks, he was paid £328 for each week worked. He was paid less in four of those weeks, and we note that there were public holidays in three of the four weeks in which he was paid less.

23. We find these explanations unconvincing. Even if Mr Filipiak's command of written English was poor, we would expect that he would maintain some record in Polish of the amount agreed for a particular job for his own records. Equally we are unconvinced by Mr Newman's statement that he "just knew" when Mr Filipiak had been paid the correct amount for a job. This is reinforced by the evidence that in 2010/11, Mr Filipiak was consistently paid £328 for each full week. We find that Mr Filipiak was paid not by the job, but rather an agreed fixed sum for each full week that he worked.

24. Mr Newman also told us (and we find) that from time to time he paid Mr Filipiak bonuses if a job was done particularly well. No specific goals were set in order to be rewarded by a bonus, it would be down to Mr Newman's discretion.

25. Mr Filipiak supplied his own hand tools. More substantial equipment was supplied by the Appellant. Whilst working on the Appellant's properties, Mr Filipiak was covered by the Appellant's insurance policy.

Legal Analysis

26. "Employment" is not defined in the tax legislation, and the principles as to whether an individual is engaged as an employee are derived from general case law. Fundamentally, the key consideration is whether the individual is in business on his own account.

27. The courts have set out various factors which should be considered in any analysis of whether an individual is an employee, which can be summarised as follows:

(1) the well-known threefold test set out by MacKenna J in *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 1 All ER 433;

(2) whether the worker is in business on his own account: see in particular the judgment of Cooke J in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173;

(3) the "mutuality of obligation" test: see the judgment of Park J in *Usetech Ltd v. Young (HMIT)* [2004] STC 1671 and *Cornwall County Council v Prater* [2006] EW CA Civ 102;

(4) the "substitution issue": see the decision of the Supreme Court in *Autoclenz v Belcher* [2011] UKSC 41 (the decision of the Supreme Court was released after the hearing, but the decision of the Court of Appeal was cited to us), the decision of Park J in *Usetech* (see above) and the decision of Henderson J in *Dragonfly Consultancy Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2008] EWHC 2013 (Ch);

(5) whether the individual is "part and parcel" of the business;

(6) the intentions of the parties.

28. It is important to understand, however, that the courts have warned against a mechanistic approach to these tests. Each case must be decided on its own individual facts. The relationship between the parties must be examined in detail in each case. The factual matrix may mean that some of the factors mentioned above are very important or even determinative of the nature of the relationship. In other cases, the same factors will be of little help (or may even be irrelevant) in determining whether the relationship is that of employment or self-employment.

29. In *Hall v Lorimer* 66 TC 349 Mummery J said (at 366G):

> "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 the checklist 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 of the individual details. Not all details are of equal weight would importance in any given situation. The details may also vary in importance from one situation to another."

30. Mummery J's comments were approved on appeal by Nolan LJ, with whom Dillon LJ and Roch LJ concurred, (at 375 E-F) who said:

> "Mr Goldsmith invited us to adopt the same approach as that of Lord Griffiths in applying the test or indicia set out by Cooke J [in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173]. That is an invitation which I view with some reserve. In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another."

31. Nolan LJ continued (at 375 I) by expressing approval of the comments of Vinelott J in *Walls v Sinnett* 60 TC 150 at 164 where the learned judge said:

> "It is in my judgment, quite impossible in the field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are in common, what are different and what particular weight is given by another tribunal to the common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case."

32. In our view these comments set out the correct approach to be adopted by this Tribunal in determining the question whether Mr Filipiak was the Appellant's employee or whether he was self-employed. The detailed nature of the working relationship between the parties and all the surrounding circumstances must be examined. The various factors mentioned above must then be applied to that detailed factual matrix, with the Tribunal using its judgment to evaluate the weight or relevance of the factors involved and taking care to look at the picture as a whole. In the end, there is no one test that can determine every case. The process, once the facts and circumstances are determined, is one of evaluation and where mechanical application of the guidance contained in the many decided cases on this topic is to be avoided.

33. With this approach, and the reservations of Nolan LJ, in mind we now turn to consider in more detail the factors of employment considered in the authorities.

The tests of MacKenna J in the Ready Mixed Concrete case

34. MacKenna J set out his well-known test (at 439) as follows:

> "I must now consider what is meant by a contract of service. A contract of service exists if the following 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."

35. . As regards (i) he said (at 440):

> "There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. 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...."

36. The first test appears to concern the ability to substitute another person to carry out the work -- as to which, see below. We describe the second and third tests in more detail below.

Control

37. The second test put forward by MacKenna J relates to control by the employer of the employee. MacKenna J said (at 440):

> "Control includes a part 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 when 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."

38. It should be noted that in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 Cooke J (at 183) expressed the view that an analysis of the extent and degree of control was not in itself decisive.

39. Cooke J then set out an alternative test, viz whether the person was engaged in business on his own account, and we consider this test later in this decision.

40. In *Dragonfly Consultancy Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2008] STC 3030 (Ch) Henderson J held that a highly skilled IT system tester was an employee. The worker in question worked exclusively for the AA number of periods of several months. Although the worker was not subject to control as to how the work was done, he was subject to regular appraisal and monitoring.

41. From these decisions we conclude that control has relevant in determining whether that person can be characterised as an employee. However, the test is not decisive and will depend on the degree of control exercised in each case. In *Dragonfly* regular appraisal and monitoring over several months were held to be sufficient. In other cases, e.g. those cases cited by Cooke J in *Market Investigations Ltd*, control was not determinative, where other factors pointed towards self-employment.

In business on own account

42. As we have seen, Cooke J in *Market Investigations* rejected control as the decisive test. The learned judge, in a well-known passage, said (at 185):

> "…control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor'. The fundamental question which has to be asked is whether the person who has engaged himself to perform the services in question is performing them as a person in business on his own account. If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service."

43. Cooke J said that there is no exhaustive list which could be compiled of the considerations which are relevant in answering that question, nor could strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. Apart from control, factors, which may be of importance included

> "…are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk takes [sic], what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task …'

44. In *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 the Privy Council (in a judgment delivered by Lord Griffiths) approved the approach of Cooke J in *Market Investigations*, saying (see [1990] 2 AC 374 at 382) that 'the matter had never been better put.'

Mutuality of obligation

45. In *Nethermere (St Neots) Ltd v Taverna and Gardiner* [1984] ICR 612 the Court of Appeal referred to the first limb of MacKenna J's three tests referred to above. Stephenson LJ said (at 623):

> "There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service. I doubt if it can be reduced any lower than in the sentences I have just quoted."

46. In *Usetech Ltd v. Young (HMIT)* [2004] STC 1671 Park J said:

> "If there is a relationship between a putative employer and employee, but it is one under which the 'employer' can offer work from time to time on a casual basis, without any obligation to offer the work and without payment for periods when no work is being done, the cases appear to me to establish that there cannot be one continuing contract of employment over the whole period of the relationship, including periods when no work was being done. There may be an 'umbrella contract' in force throughout the whole period, but the umbrella contract is not a single continuing contract of employment. See *Clark v*

> *Oxfordshire Health Authority* [1998] IRLR 125 (Court of Appeal); *Carmichael v National Power PLC* [1999] 1 WLR 2042 (House of Lords);*Stevedoring & Haulage Services Ltd v Fuller* [2001] EWCA Civ 651, [2001] IRLR 627 (Court of Appeal).
>
> That leaves open the possibility that each separate engagement within such an umbrella contract might itself be a free-standing contract of employment, and it was, I believe, that concept which the Special Commissioner had in mind as covering this case. That is consistent with his referring in the same paragraph of his decision to the decision in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173,[1968] 3 All ER 732, in which part time interviewers for a market research company were held to be engaged under a series of separate contracts of employment. The judgment of Cooke J in that case contains a valuable and much cited discussion of principles which are relevant to distinguishing between contracts of employment and contracts for services rendered in a self-employed capacity (see especially [1969] 2 QB 173 at 184–185, [1968] 3 All ER 732 at 737–738). I confess that I have doubts about the factual conclusion which the learned judge reached when he applied the principles to the facts of the case. For myself, I see considerable force in the alternative analysis, namely that the interviewers provided their services on a freelance or casual basis and not as employees. See for an example of an analysis of that nature *O'Kelly v Trusthouse Forte plc* [1984] QB 90, [1983] IRLR 369."

47. In *Cornwall County Council v Prater* [2006] EW CA Civ 102 the Council engaged Mrs Prater as a home tutor to teach children who were unable to attend school. She worked under different engagements for the Council for almost 10 years. She taught some pupils for five hours a week and others for as much as 10 hours a week. The duration of the individual engagements varied from a few months to several years. It was argued on behalf of the Council that there was no mutuality of obligation because there was no on-going duty to provide work and there was no ongoing duty to accept work. The Court of Appeal rejected this argument. Longmore LJ said (at paragraph 43):

> "There was a mutuality of obligation in each engagement namely that the County Council would pay Ms Prater for the work which she, in turn, agreed to do by way of giving tuition to the people for whom the Council wanted her to provide tuition. That is to my mind is sufficient "mutuality of obligation" to render the contract a contract of employment if other appropriate indications of such an employment contract are present."

48. With respect, the ingredients of "mutuality of obligation" stated by Longmore LJ would be present in any contract for services just as much as in a contract of employment. Longmore LJ's comment must be understood in the light of the fact that the alleged absence of "mutuality of obligation" was the Council's only ground of appeal. Indeed, as Lewison J pointed out (at paragraph 51):

> "The question whether there is mutuality of obligation is not the complete test for determining whether a contract of service exists. I

> would have thought that the question of mutuality of obligation goes to the question whether there was a contract at all, rather than what kind of contract there was, if a contract existed. However the alleged lack of mutuality of obligation is the only ground of appeal."

49. We entirely agree with the comments of Lewison J. Once the "mutuality of obligation" test is understood as not requiring, in the context of a series of engagements, the hirer to promise or offer work other than in respect of each individual engagement, it does not in our view provide much assistance in determining the question currently before the Tribunal.

Substitution

50. As already noted, MacKenna J in *Ready Mixed Concrete* considered that an employee must be obliged to provide his own work and skill. The ability to do a job "either by one's own hands or by another's is inconsistent with the contract of service...." (at 515).

51. In *Express & Echo Publications Ltd v Tanton [1999] EWCA Civ 949* Gibson LJ appeared to suggest that any contract for services which contained any right for the worker to provide a substitute can never be a contract of employment. This was doubted by Park J in *Usetech* (at 1697) and he said (at 1699):

> "As it seems to me the present state of the law is that whether a relationship is an employment or not requires an evaluation of all of the circumstances. In the words of Hart J in *Synaptek Ltd v Young* [2003] STC 543, 75 TC 51, para 12, the context is one *'where the answer to be given depends on the relative weight to be given to a number of potentially conflicting indicia'*. The presence of a substitution clause is an indicium which points towards self-employment, and if the clause is as far-reaching as the one in *Tanton* it may be determinative by itself."

52. These views of Park J were endorsed by Henderson J in *Dragonfly* (at 3061).

53. Finally, in in *Autoclenz v Belcher* [2011] UKSC 41 (the decision of the Supreme Court was released after the hearing, but the decision of the Court of Appeal was cited to us), we are required to consider whether the provisions set out in agreement truly reflect the terms of the agreement reached between the Appellant and Mr Filipiak. The relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. Aikens LJ in the Court of Appeal (whose approach was approved by the Supreme Court) said the following (at paragraph 91 and 92):

> "91. Thus, in cases where there is a dispute as to the genuineness of the written terms of a contract relating to work or services, the focus of the enquiry must be to discover the actual legal obligations of the parties. Speaking for myself, I would respectfully suggest that it is not helpful to say that a court or tribunal has to consider whether the words

> of the written contract represent the "true intention" or the "true expectation" of the parties. There is a danger that a court or tribunal might concentrate too much on what were the private intentions or expectations of the parties. What the parties privately intended or expected (either before or after the contract was agreed) may be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the Chartbrook case at [64] to [65]. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed.
>
> 92. I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of law, it may be more common for a court of tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so …"

The influence of the surrounding terms

54. The third of the requirements that MacKenna J listed is essentially that one must finally look to all the terms, or indeed the notable absence of terms, in order to judge whether these reinforce or undermine the initial conclusions reached by applying the first two tests.

55. The Court of Appeal (Gibson LJ) in *Express and Echo Publications Ltd v Tanton* [1999] ICR 693 described the approach to be adopted as follows (at 697):

> "(1) The tribunal should establish what were the terms of the agreement between the parties. That is a question of fact.
>
> (2) The tribunal should then consider whether any of the terms of the contract are inherently inconsistent with the existence of a contract of employment. That is plainly a question of law, and although this court, as indeed the appeal tribunal before us, has no power to interfere with findings of fact (an appeal only lies on a point of law), if there were a term of the contract inherently inconsistent with a contract of employment and that has not been recognised by the tribunal's chairman, that would be a point of law on which this court, like the appeal tribunal before us, would be entitled to interfere with the conclusion of the chairman.
>
> (3) If there are no such inherently inconsistent terms the tribunal should determine whether the contract is a contract of service or a

> contract for services, having regard to all the terms. That is a mixed question of law and fact."

Part and parcel

56. The courts used to place emphasis on whether an individual was "part and parcel" of an organisation. However the courts have moved away from "part and parcel" being considered as a test of employment. We have therefore not given it further consideration.

Intentions of the parties

57. The status of an individual as an employee or an independent contractor is a question of law determined by reference to the facts. The mere fact that the parties have provided in an agreement that their status is either as an employee or as an independent contractor is not determinative. MacKenna J in *Ready Mixed Concrete* said (at 439) at the beginning of his judgment that "such a declaration was not necessarily ineffective, for if it were doubtful for what rights and duties the parties wished to provide, such a declaration might help in resolving the doubt and in fixing them in the sense required to give effect to the expressed intention".

58. In the *Dragonfly* case Henderson J (at 3068) said:

> "Having dealt at some length with the issues of substitution and control, I can now deal more briefly with the two remaining grounds of appeal. The main reason for this, so far as intention is concerned, is that statements by the parties disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement between them. It is true that in a borderline case a statement of the parties' intention may be taken into account and may help to tip the balance one way or the other: see *Ready Mixed Concrete* ([1968] 2 QB 497 at 513) and *Massey v Crown Life Insurance Co* [1978] 2 All ER 576, [1978] 1 WLR 676. In the majority of cases, however, such statements will be of little, if any, assistance in characterising the relationship between the parties."

Discussion

Introduction

59. We intend to examine the various tests or indicia discussed above and then, applying the guidance of Mummery J in *Hall v Lorimer*, to stand back and evaluate the overall picture.

Control by the Appellant

60. When Mr Filipiak was first engaged by the Appellant, he had little experience of working in construction, and was under a high degree of supervision and control by the Appellant. The degree of supervision and control would be suggestive of employment. As Mr Filipiak's has become more expert, the degree of supervision and

control has declined. It has not been argued that Mr Filipiak commenced his engagement as an employee, but as his expertise increased he became a self-employed contractor. The Appellant submits that Mr Filipiak's status has been one of self-employment throughout. As discussed above, we find that the test of control is of limited assistance. But to the extent that it provides any assistance, it is suggestive of employment, given the high degree of control and supervision exercised when Mr Filipiak was first engaged by the Appellant, and that his status has been unchanged since then.

Mutuality of obligation

61. As we have already indicated we consider that "the mutuality of obligation" test does not provide much assistance. We consider that there was no obligation on the part of the Appellant to provide work to Mr Filipiak, nor any obligation on Mr Filipiak to undertake work that was provided. It was clearly recognised by the Appellant that Mr Filipiak may have to return to Poland at short notice to be with his sick mother, and would therefore have to be free to be able to refuse work. It was also recognised by Mr Filipiak when we was initially engaged that the Appellant would not be able to guarantee Mr Filipiak continual work, and therefore could not be under a requirement to offer work as available. The test of mutuality of obligation provides little assistance, in our view, as to whether Mr Filipiak's engagement is a contract of employment. We therefore regard this factor as being neutral.

Right to engage substitutes

62. We note that the copy written agreements included in the bundles contained provisions allowing for substation of labour. However the provenance of those agreements is unsatisfactory, and we place no reliance upon those documents as reflecting the terms of the relationship agreed between the parties.

63. But even if the copy agreements included in the bundles did genuinely reflect the terms of a document agreed between the parties, we consider that they do not truly reflect the terms of the agreement reached between the parties. In particular we place no weight no the right expressed in the agreement for Mr Filipiak to be able to delegate or substitute the labour of others. In practice, Mr Filipiak did not exercise this power and told us that he did not employ anyone as he did not need anyone. Indeed when questioned about whether he (Mr Filipiak) could get someone else to carry out his work, he said that he was not sure whether he (Mr Newman) would trust anyone else to carry out the work. Included in the bundles of written evidence before use were notes of a meeting between HMRC and Mr Newman on 13 February 2008 and notes of a meeting and a questionnaire completed and signed by Mr Filipiak on 14 October 2008 during the course of the meeting with HMRC. None were challenged, and we find them to be an accurate record of the respective meetings. At the meeting between HMRC and Mr Newman, he confirmed that the Appellant would not allow sub-contractors to further sub-contract their work and send substitutes. Mr Filipiak separately confirmed that he must carry out his work himself, and that he could not send a replacement.

64. We find that Mr Filipiak had little bargaining strength in his relationship with the Appellant. When he was offered work, it was on a take it or leave it basis. This is consistent with the notes of the meeting of 8 February 2008, when Mr Norman said that he set the price at which subcontractors worked for him, and they either accepted that price or did not do the work.

65. We find that the provisions in clause 4 of agreement to be window dressing. Although, for example, clause 4i requires Mr Filipiak to have public liability insurance, in fact such insurance was provided by the Appellant. Clause 4h requires Mr Filipiak to provide his own equipment and materials, but in fact all equipment and materials (other than basic hand tools) were provided by the Appellant. Although clauses 5 and 6 of the Agreement require the amount payable to Mr Filipiak to be set out in the agreement, there was never any written record of the price payable for any "job".

66. Notwithstanding the terms of clause 4e of the agreement, we find that Mr Filipiak was engaged by the Appellant to provide his own personal services, and would not be free to substitute someone else to do his work for him. As regards substitution, we therefore conclude that the absence of an effective right of substitution is indicative that Mr Filipiak is an employee.

Whether in business on own account

67. The test of whether Mr Filipiak was in business on his own account is largely derived from the judgment of Cooke J in *Market Investigations* where the following tests were suggested:

(1) does the individual provide his own equipment;

(2) whether he hires his own helpers;

(3) what degree of financial risk he takes,;

(4) what degree of responsibility for investment and management he has; and

(5) whether and how far he has an opportunity of profiting from sound management in the performance of his task.

68. *Own equipment:* Over the period of his engagement Mr Filipiak acquired a set of hand tools which he used. However all materials and more substantial equipment was provided by the Appellant. Overall we consider this factor to be neutral.

69. *Hiring own helpers:* Mr Filipiak did not engage any helpers. Indeed the evidence is that it was up to Mr Newman whom he would allow onto a site, and therefore Mr Filipiak would not be able to engage helpers. We consider that this factor points towards employment.

70. *Degree of financial risk:* We found that Mr Filipiak was paid a week's wage for a week's work. We conclude that Mr Filipiak was exposed to minimal financial risk. We consider that this factor points towards employment.

71. *Degree of responsibility for investment and management:* In this case, Mr Filipiak has little or no responsibility for investment and management. Again, we consider that this points towards employment.

72. *Opportunity of profiting from sound management*: There is no evidence to suggest that Mr Filipiak could profit from sound management of a self-employment business (e.g. in the sense of making efficiencies etc). Mr Filipiak did not quote fixed prices for particular jobs, and could not juggle business priorities to maximise his profits. Although Mr Newman paid bonuses from time-to-time, these were entirely discretionary, and Mr Filipiak could not arrange his work in a manner that could (with any degree of certainty) attract a bonus. This factor also points towards employment..

73. Nolan LJ indicated in *Hall v Lorimer* that, in the context of a professional person (by which we take into mean a highly trained or specialised worker) the duration of engagements and whether the individual was dependent on one engager should also be considered. In *Hall v Lorimer* the individual performed a large number of engagements which lasted on average from one to two days and was engaged by a large number of different people. We do not consider that Mr Filipiak is a professional person of the kind described by Nolan LJ, but we note that he was engaged almost exclusively by the Appellant – apart from breaks to go back to Poland to be with his sick mother, and more recently from very few other engagements with third party customers. The fact that there was only one engager and that Mr Filipiak was therefore financially dependent upon the Appellant is a factor which, in our view, points towards employment.

74. Standing back, we note that Mr Filipiak does not invoice the Appellant for payment, and was paid a fixed amount each week by direct credit to his bank account. He maintains no business records (other than his bank statements and CIS records). He does not advertise for customers. These all suggest that he is not conducting his affairs in a manner consistent with being in business on his own account, and point towards employment.

Influence of surrounding terms

75. It is usual for employees to be given benefits such as sick or holiday pay. Their existence is an indication of employment. Their absence does not however necessarily indicate self-employment, it may be a reflection of how the parties viewed their relationship.

76. Mr Filipiak did not have benefits such as sick or holiday pay. We regard this as a neutral factor. The terms of the agreement concluded between the parties are clearly intended to convey the impression that Mr Filipiak is self-employed and that he is not an employee. In any event, the absence of any entitlement to sick pay or holiday pay is entirely consistent with the nature of the engagement envisaged by the parties, which is one where the Appellant was under no obligation to provide work to Mr Filipiak, and Mr Filipiak was free at any time to stop work are return to Poland to be with his sick mother.

77. An obligation to work exclusively for one person may be an indication of employment (although exclusivity clauses can appear in contracts for services). Both Mr Newman and Mr Filipiak in evidence stated that Mr Filipiak was free to work for other customers, although in practice this was done very rarely, and Mr Filipiak stated that he preferred to work solely for the Appellant. Although this might be regarded as indicative of self-employment, it is also consistent with an analysis that Mr Filipiak was engaged under a series of short successive employment contracts, and that he was free to undertake work for other customers between the times spent working for the Appellant. Our assessment is therefore that this is a neutral factor.

Intention of the parties

78. The authorities indicate that the intention of the parties is not determinative, except perhaps borderline cases. In our view, in this case, the parties intention was that the relationship between Mr Filipiak and the Appellant would be one of self-employment.

Looking at the whole picture

79. Having examined each factor in turn, we now step back and look at the overall picture in accordance with Mummery J's guidance and that of the Court of Appeal in *Hall v Lorimer*.

80. First, we consider the control test to be broadly indicative that Mr Filipiak is an employee of the Appellant.

81. Secondly, the mutuality of obligation test is neutral.

82. Thirdly, as regards the right of substitution, we consider that there was no such right and that this is indicative of employment.

83. Fourthly, as regards whether Filipiak was in business on his own account the majority of the tests point towards employment. We therefore conclude that on the "in business on his own account" test the result is points towards Mr Filipiak being an employee.

84. Fifthly, as regards the tests set out by Nolan LJ in *Hall v Lorimer*, we consider that nature of the engagements concerned point towards employment..

85. Sixthly, we consider that the terms of the agreement reached between the parties are compatible with both a contract of employment and a contract for services in the sense that it does not preclude each individual engagement constituting either a contract of employment or a contract for services.

86. Finally, the intention of the parties is that their relationship should not be one of employment but rather that Mr Filipiak should be self-employed. We note that this is the only test that points towards the relationship being one of self-employment. But it is a factor that only carries weight in the event that the other tests are inconclusive.

As the other tests point towards employment (or are neutral), we give this factor little weight.

87. Overall, we have reached the conclusion that Mr Filipiak has at all times been an employee of the Appellant..

Conclusion

88. We therefore dismiss this appeal.

89. 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.

NICHOLAS ALEKSANDER

TRIBUNAL JUDGE
RELEASE DATE: 8 February 2012

Cases referred to in skeleton arguments and submissions but not mentioned in this decision:

Morren v Swinton and Pendlebury Borough Council [1965] 1 WLR 576
Synapteck Ltd v Young [2003] EWHC 645 (Ch)
Carmichael and anr v National Power [1999] 4 All ER 897
Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property (1952) 35 TC 311
Massey v Crown Life Insurance Co [1978] 2 All ER 576
Global Plant Ltd v Secretary of State for Social Services (1971)
Netherlane Ltd v York [2005] STC (SCD) 305
Byrne Brothers (Formwork) Ltd v Baird [2001] UKEAT 542_01_1809
Stephenson v Delphi Diesel Systems Limited [2003] ICR 471
Parade Park Hotel and anr v HMRC [2007] STC (SCD) 430
MFB Design Services Ltd v HMRC [2011] SFTD 383
Barnett v Brabyn (1996) 69 TC 133