Neutral Citation: [2023] UKFTT 00890 (TC)

Case Number: TC08965

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/05706
TC/2020/03534

PROCEDURE – application to amend grounds of appeal – whether real prospect of success –prejudice to the parties – application refused

Heard on: 29 June 2023
Judgment date: 23 October 2023

Before

TRIBUNAL JUDGE CANNAN

Between

MYPAY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Rebecca Murray of counsel, instructed by Jurit LLP

For the Respondents: Adam Tolley KC and Sadiya Choudhury of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an application by the appellant ("Mypay") to amend its grounds of appeal ("the Application"). The Application was made following a decision of the First-tier Tribunal ("the FTT") (Judge Popplewell) released on 11 October 2022. That decision sets out the circumstances in which the Application came to be made.

2. Mypay contracts with workers who provide their services to end clients in various sectors including healthcare, IT and engineering, both public sector and private sector organisations. The worker obtains an engagement with the end client through an employment agency. At the same time the worker enters into a contract with Mypay. The contract between the worker and Mypay is described as "*Statement of Main Terms and Conditions of Employment*" ("the Contract").

3. At all material times and for many years, Mypay has treated itself as the workers' employer. It receives payment from the employment agencies in relation to the services of workers and then makes payment to the workers, deducting PAYE and national insurance.

4. The appeal concerns determinations under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 and a decision charging national insurance under the Social Security Contributions (Transfer of Functions) Act 1999. The determinations charge tax of £286,556 and £330,381 for tax years 2014-15 and 2015-16 respectively. The decision charges national insurance of £1,692 in respect of both those tax years but relates to only one worker. I understand it is a test case in relation to other workers where the national insurance chargeable is £795,848. I understand that the total amount in issue in the appeal is approximately £1.4m.

5. Mypay lodged appeals with the FTT against the determinations and the decision in August 2019 and September 2020. Those appeals were lodged in time. They acknowledge that the workers were employees of Mypay. The first appeal was stayed for a period of time behind the appeal of another taxpayer. HMRC served a statement of case covering both appeals on 3 March 2021. There had been some delay on the part of HMRC prior to service of their statement of case.

6. Mypay applied to HMRC for alternative dispute resolution in May 2021, but HMRC did not accept the dispute for ADR. Thereafter, neither party took steps to progress the appeal.

7. In October 2021, Mypay appointed Jurit LLP to act for it in the appeals, in place of its previous representative. In November 2021, Jurit indicated that they were minded to make an application to amend the grounds of appeal. What happened then is set out in the decision of Judge Popplewell which I shall not repeat here. Briefly, the Tribunal made a direction on 18 February 2022 granting the appellant permission to amend its grounds of appeal in accordance with a draft sent to the Tribunal on 24 January 2022. It did so on the mistaken assumption that the amendment had been agreed by the parties. In fact, the parties were not in agreement as to the most significant aspect of that amendment and on 11 October 2022 Judge Popplewell set aside the direction which had given Mypay permission to amend its grounds of appeal. He gave the appellant permission to make an application to amend its grounds of appeal and that led to the present Application which was made on 25 October 2022.

8. During the relevant tax years, Mypay had accounted for PAYE and national insurance on payments made to workers. It also made tax free payments to some workers in relation to travelling expenses incurred in travelling from home to their places of work. This was on the basis that the contract between Mypay and each worker was an overarching contract of

employment which covered periods during which a worker was working on assignments for an end-client as well as periods between assignments. Mypay considered that the location of each assignment was not a permanent workplace for the purposes of section 338 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") and expenses of the workers in travelling from home to the workplace were not ordinary commuting. A deduction from earnings would therefore be permitted for such payments in relation to both income tax and national insurance.

9. The determinations and decision under appeal were made by HMRC on the basis that there was no overarching contract of employment. HMRC considered that there were separate contracts of employment between Mypay and the workers in relation to each assignment, but not in relation to the periods between assignments. The workplaces were therefore permanent workplaces and payment of the workers' travelling expenses to those workplaces amounted to earnings. In reaching that conclusion HMRC relied on the Upper Tribunal decision in *Reed Employment plc v HMRC* [2014] UKUT 0160 (TCC).

10. *Reed Employment* concerned tax on travelling expenses of agency workers. One of the issues in the Upper Tribunal was whether there was an overarching contract of employment covering all assignments or a series of contracts of employment covering each individual assignment. The Upper Tribunal held that there was no mutuality of obligation in the gap periods and therefore no overarching contract of employment. The case went to the Court of Appeal, but not on that issue.

11. The issues between the parties on these appeals are described in the following terms in HMRC's statement of case at [24] and [25]:

> 24. It is common ground between the parties that a contract of employment existed between the Appellant and each worker when that worker was engaged on an assignment.
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> 25. The main issue for this Tribunal is whether an overarching contract of employment existed between the Appellant and the workers so that they were and remained employees of the Appellant throughout the duration of the relationship between the parties, including in particular (but without limitation) in the periods between assignments… On the premise of HMRC's case that there was no such overarching contract, a separate contract of employment existed in respect of each separate assignment.

12. At the time HMRC served its statement of case this was a fair reflection of the issue between the parties.

13. Mypay says that HMRC's statement of case goes on to raise contradictory arguments at [33] to [44]. Those paragraphs appear under a heading "relevant cases" which includes various well-known authorities setting out the requirements for a contract of employment. There is also reference to *Reed Employment*. At [33], the statement of case refers to dicta of Lord Clarke JSC in *Autoclenz v Belcher* [2011] UKSC 41:

> 34. The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:
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> > '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 the law, it may be more common for a court or 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.'

> 35. So 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. This may be described as a purposive approach to the problem …

14. For present purposes, it is also relevant to note that Lord Clarke approved what had been said by Smith LJ in the Court of Appeal at [53]:

> [53] In my judgment the true position, consistent with *Tanton*, *Kalwak* and *Szilagyi*, is that where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right…

15. HMRC's statement of case sets out Mypay's grounds of appeal at [39] to the effect that there was mutuality of obligation during the periods between each assignment and a single, overarching contract of employment. It sets out HMRC's case at [40] – [49], where it is relevant to note the following passages:

> 41. … [I]t is necessary to determine whether an overarching contract of employment existed between each of the workers and the Appellant or whether each worker had a separate contract of employment in respect of each separate assignment. This question has to be determined by reference to the terms of the contract entered into by each of the workers and the Appellant, while also taking into account the parties' intentions, along with other objective inferences which could reasonably be drawn from what the parties said and did at the time they entered into these contracts and subsequently, in accordance with *Carmichael*. The Tribunal "*must be realistic and worldly wise*" when considering this question, as explained in *Autoclenz*.
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> 42. In particular, it is necessary to determine whether any, or any sufficient, mutuality of obligation existed between a worker and the Appellant in the gaps between assignments for a contract to exist at all. If it did, it is then necessary to determine whether the irreducible minimum, necessary for that contract to be a contract of service, was present in between all of the assignments.
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> 43. HMRC contend that the contracts between the Appellant and the workers were not global or overarching contracts of employment. HMRC are entitled to and will rely on the following facts and matters (and each of them):
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> (1) … (15)
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> 44. Based on the above, HMRC's case is that the Appellant's only operative obligation towards the workers was to manage pay, tax and expenses whilst the workers were contracted to undertake work by the end users. Once an assignment was entered into and while it continued, a worker was under an obligation to personally carry out the work and the Appellant was under an obligation to pay the worker under the Contract. But there was no

ongoing obligation on the Appellant to provide work or pay and no obligation on the worker to work or make herself available for work.

16. In these paragraphs, HMRC rely on what is described as the "Autoclenz approach" to construing employment contracts. The facts and matters relied on by HMRC at [43] to establish that there was no overarching contract of employment include various facts and matters, some which are said to be contrary to the express terms of the Contract. There are 15 facts and matters relied on by HMRC as follows:

(1) The workers did not understand there to be any contractual requirement to accept any work given to them by the Appellant, which did not in any event provide work. Assignments were instead found by the worker or the employment agency.

(2) There was no contractual requirement for the workers to work when required by the Appellant. Instead, working arrangements were agreed by the worker directly with the employment agency, through which the worker sought and received work. This was done independently by the worker and did not involve the Appellant.

(3) The workers were not obliged to provide their service exclusively to the Appellant and some of them had signed up with other employment agencies.

(4) The workers' terms of work and rate of pay were usually negotiated with the agency or the end client.

(5) Contrary to Clause 4.1 of the Contract, the workers were usually informed by the agency or the end client and not the Appellant of their place of work while on assignment.

(6) Contrary to Clause 4.3 of the Contract, the workers were not offered any work by the Appellant. As stated in (1) above, assignments were provided by the agency or found by the workers themselves.

(7) If (contrary to HMRC's case) Clause 4.3 of the Contract is found to have imposed any obligation on the Appellant, that obligation was so weak as to be effectively meaningless.

(8) The number of hours the workers actually worked were all set and agreed between the workers themselves and the agency or end client. The Appellant was not involved in this process. The Appellant is put to proof that the guaranteed minimum number of 336 hours of work in the calendar year under Clause 5.1 of the Contract were provided.

(9) If and in so far as the guaranteed minimum number of 336 hours of work were provided under Clause 5.1 of the Contract, any mutuality of obligation arising therefrom would have persisted only to the extent of such hours, and would not have continued thereafter.

(10) The workers were not obliged to and did not provide notice to the Appellant if they no longer wished to carry out an assignment. They would inform the agency or the end client.

(11) The workers did not inform the Appellant of their availability for work.

(12) The workers were not paid a retainer by the Appellant in the gaps between assignments and had no expectation that they would be. The workers were entitled to pay only in respect of hours in fact worked.

(13) The Appellant did not usually contact or interact in any way with the workers, either between or just before the end of assignments.

(14) Contrary to Clause 12.4 of the Contract, the workers did not provide the Appellant with one week's notice if they wished to take a holiday. Similarly, sickness leave was usually arranged with the end client or agency.

(15) The workers reasonably understood that the Appellant's only duty was to collect payment from the end client and deal with tax and NICs.

MYPAY'S APPLICATION

17. Ms Murray on behalf of Mypay says that it is clear from the citation of *Autoclenz* in the statement of case that HMRC are arguing that certain terms of the Contract should be disregarded because they conflict with the reality of the relationship between Mypay and the workers. HMRC's pleaded case is that the reality of the relationship is inconsistent with an overarching contract of employment. However, at the time of the determinations and decision under appeal there had been no reference to *Autoclenz*.

18. Mypay wishes to amend its grounds of appeal to ensure that if the FTT were to agree with HMRC about the reality of the relationship, then Mypay is not precluded from arguing that the reality of the relationship is that there was no employment contract at all between Mypay and the workers. This is described as Mypay's "Additional Ground" and it is intended to be in the alternative to its primary ground that there was an overarching contract of employment. Mypay's case is that if it is appropriate to apply *Autoclenz*, then various terms of the contract must be disregarded. The Additional Ground is stated as follows in a schedule to the Application:

> 9. … the Appellant will contend that *Autoclenz* is not authority for the proposition that the express written terms of a contract which are not a sham in the *Snook* sense may be disregarded in determining the terms of the actual agreement between the parties; on the contrary, in the context of a case concerned with whether a written contract is a contract of employment (including an overarching contract of employment), there is no need to look beyond the terms of the written agreement to find the parties' "true agreement" and therefore it is not legitimate to apply the *Autoclenz* approach. Instead, the actual terms of the contractual arrangements need to be determined by reference to well-established rules on the interpretation of contracts in general and without regard to the fact that the contractual arrangements relate to the context of employment: see *Atholl House Productions Ltd v HMRC* [2022] EWCA Civ 501 per David Richards LJ at [140] ff; and see also *Alan Parry Productions Limited v HMRC* [2022] UKFTT 194 at [21]-[24].
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> 10. The Appellant's second and alternative ground of appeal is that if it is legitimate to apply the approach in *Autoclenz,* and if applying that approach the Contract is not an overarching contract of employment, then applying that approach the Contract is not a contract of employment at all.

19. Mypay's amendment may be viewed as reactive rather than proactive in the sense that its primary ground is that HMRC's case is wrong in law because it applies the approach in *Autoclenz*. Mypay says that if that approach is permissible, then its application to periods when workers were engaged on assignments leads to a conclusion that there were no contracts of employment at all.

20. If the *Autoclenz* approach has any application, Mypay contends in its Additional Ground that the following clauses of the Contract should be disregarded for the reasons given:

> (1) Clause 2.2: the Appellant did not in practice monitor or review the performance or conduct of the Workers during the Probationary Period, or at all;

(2) Clause 3.1: the Workers did not in practice, and were not expected to, report to the named person and no other person was notified to them by the Appellant;

(3) Clause 3.2: the Appellant did not in practice require the Workers to undertake additional or alternative duties;

(4) Clause 7.1: Pay was not in practice agreed between the Appellant and the Workers;

(5) Clause 7.3: Pay rates were not in practice reviewed by the Appellant;

(6) Clause 10.1: Instructions and rules were not in practice issued by the Appellant;

(7) Clause 10.3: Workers were not required to and did not in practice report to the Appellant;

(8) Clause 10.4: the Appellant was not in practice informed of any Worker undertaking other work outside the contracted hours;

(9) Clause 12: holiday requests were not in practice approved by the Appellant;

(10) Clause 13: Sickness absences were notified to the End Client in practice rather than the Appellant;

21. I should note that Mypay has also used the Application to re-state its existing grounds of appeal. It was not intended by Judge Popplewell that the Application would deal with anything other than the Additional Ground of appeal. The arguments before me focussed on the Additional Ground of appeal. I pay no regard to the way in which Mypay has sought to re-state its existing grounds of appeal.

22. It is common ground that the Application should be determined applying the approach described by Carr J (as she then was) in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm):

> 36. An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.
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> 37. Beyond that, the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities...
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> 38. Drawing these authorities together, the relevant principles can be stated simply as follows :
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> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
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> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the

application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.

23. In *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 the Court of Appeal summarised the 'merits test' to be applied at [17]-[18]:

(1) It is not enough that the claim is merely arguable; it must carry some degree of conviction …

(2) The pleading must be coherent and properly particularised …

(3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct …

24. I consider the relevant factors below. In brief, Mypay says that the Application is not very late. Mypay has acted promptly and has not caused any delay in the proceedings. The Additional Ground has a reasonable prospect of success, and it is simply an alternative argument based on HMRC's currently pleaded case. Mypay's primary argument is that the Contract is an overarching contract of employment. The Additional Ground does not involve relying on contradictory evidence. The merits of the Additional Ground cannot be determined at this stage because the reality of the relationship is a question of fact, and the parties have not yet served lists of documents or witness statements. Mypay says that the prejudice to Mypay if it is not permitted to amend its grounds of appeal would outweigh any prejudice to HMRC if permission is granted.

25. In summary, HMRC say by way of opposition to the Application that the Additional Ground of appeal lacks any real prospect of success. It contradicts Mypay's primary ground of appeal that there is an overarching contract of employment. HMRC say that there has been no proper explanation as to why the Additional Ground has been raised so late.

EVIDENCE

26. For the purposes of the Application, Mypay relies on two witness statements of Mr Stephen Hollins, dated 25 October 2022 and 11 May 2023. Mr Hollins is the managing director and shareholder of Mypay.

27. In his first witness statement, served with the Application, Mr Hollins outlines the business of Mypay, emphasising that it is not a tax avoidance scheme. He describes the fact that Mypay's operations included the reimbursement of travel and subsistence expenses to workers until a change in the law in April 2016. Since then, the business has grown substantially and he cited certain advantages to workers "engaged by Mypay" including "continuity of employment" when working on multiple assignments for one organisation. Mypay receives payment from the end-client or an employment agency and processes the payment to the worker after retaining its agreed margin.

28. Mr Hollins second witness statement was said to have been served in order to evidence the relationship between Mypay and the workers, and in order to enable the tribunal to assess whether it was an employment relationship. It was also said to respond to various factual matters raised by HMRC in their reply to the Application.

29. Between November 2022 and April 2023, Mr Hollins invited a sample of workers to complete an online questionnaire. He told the workers that Mypay wanted the information to "help with an audit", and not that he intended to present their replies to the tribunal. Otherwise, he thought that workers might not want to co-operate and he did not want the true reason to influence their answers. The results of the questionnaire suggest, I put it no higher, that most workers felt that they were supervised by the end-client and did not consider Mypay to be their employer.

30. HMRC take issue with some of the assertions made by Mr Hollins in his witness statements, but it is not appropriate for me to determine any factual issues on this Application. HMRC also objected to the second witness statement being admitted in evidence because it had been served late in the day without any explanation as to why it was being served late. It was only served on 26 May 2023, a month or so before the hearing.

31. In the event, Ms Murray did not rely to any great extent on the material in Mr Hollins second witness statement. In my view the statement does not take Mypay's submissions in support of the Application any further.

CONSIDERATION

32. It is important to note at this stage that the proposed amendment is not a "very late amendment" in the sense described in *Quah*. Indeed, the present proceedings have not progressed beyond HMRC's statement of case. It does however remain a late application. It was raised after Jurit had been instructed and Jurit considered it might amount to an arguable ground of appeal.

33. HMRC say that the Additional Ground lacks any real prospect of success. Mr Tolley KC on behalf of HMRC adopted phrases from the authorities, and submitted that the Additional Ground is inherently implausible, self-contradictory, not supported by contemporaneous documentation, lacks any degree of conviction, is not coherently particularised and lacks any factual basis. By self-contradictory, he meant that the Additional Ground is inconsistent with Mypay's primary case that there is an overarching contract of employment.

34. Mr Tolley also sought to argue that Mypay was subject to an estoppel by convention which should prevent it from relying on the Additional Ground (See *HM Revenue & Customs v Tinkler* [2021] UKSC 39 at [45] to [53]) . If Mypay were to lose on its primary argument and fail to establish an overall contract of employment, then I understand that HMRC would assert that there was an estoppel by convention whereby Mypay would be estopped from asserting that there was no contract of employment at all.

35. Essentially, Mr Tolley submitted that Mypay and HMRC expressly shared a common assumption that Mypay employed the workers during the periods of assignments. Mypay was responsible for that common assumption. HMRC progressed the enquiries on that basis and issued the determinations and the decision. They are now out of time to collect tax and national insurance from the workers or from the true employers.

36. Estoppel by convention was first canvassed in HMRC's skeleton argument and Ms Murray did not consider that she had had a reasonable opportunity to respond to it. In any event, I cannot say at this stage what strength HMRC's argument on estoppel by convention might have. It does not in my view add anything to HMRC's objection to the Application.

37. It is true that Mypay's Additional Ground of appeal is inconsistent with its primary ground of appeal that it had an overarching contract of employment with the workers. However, there is nothing wrong in principle with an appellant maintaining a primary ground of appeal, whilst at the same time having an alternative argument if the primary ground of appeal is not successful. Indeed, in some circumstances HMRC will make an assessment to tax on one basis, whilst making an alternative assessment on a different basis, without prejudice to their case that the first assessment is valid.

38. HMRC say that the FTT would have to consider two contradictory cases being advanced by Mypay at the same time. It is said that there is no explanation of how the FTT should treat Mypay's formal assertions that it employed the workers or the fact that it has deducted PAYE and national insurance contributions as an employer, when in the alternative it submits that it did not employ the workers.

39. I can see that difficulties that might arise for Mypay in putting forward its appeal on these alternative bases. The burden will be on Mypay to establish that there were overarching contracts of employment. If it fails to meet that burden, there would be a burden on Mypay to establish in the alternative that there were no contracts of employment at all. It is not clear how Mypay would intend to present its case walking that tightrope. The stronger its argument that there was an overarching contract of employment, the weaker its argument that there was no contract of employment at all.

40. It was not a submission before me, but I note that Judge Popplewell records a submission of Ms Murray in the application before him at [23(5)] as follows:

> HMRC overstate the procedural difficulties. It is a question of law for the FTT to decide, whether the workers were employees. The legal test has to be applied to the facts on which HMRC rely (as per their statement of case). It is not fair to say that the only issue in this case is whether the workers are subject to an overarching contract or to specific contracts. The appellant's primary submission is that the workers were employees under an overarching contract, but they now introduce a second submission that that was not the case. At some stage the appellant will have to nail its colours to the mast, but that will be once the evidence has been collated, sifted, and disclosed.

41. Ms Murray's submission to Judge Popplewell might suggest that the appropriate time for an application to amend to introduce the Additional Ground would be once lists of documents and witness statements had been served. However, it was not suggested before me that the timing of the Application was an issue, in the sense that it was being made too early. Quite the opposite, the submission from HMRC was that it was being made late in the day. However, there is no reason why Mypay should not have collated, sifted and considered the evidence relevant to the Additional Ground for the purposes of the Application.

42. I can deal with the question of the timing of the Application at this stage. Mr Tolley submitted that Mypay has not given any explanation for the delay between lodging its notice of appeal in August 2019 and its proposed change of case in January 2022. Whilst Jurit was

appointed in October 2021, Mypay has never revealed when the Additional Ground was first identified. Subject to questions of prejudice which I consider below, I do not consider that the timing of the Application weighs heavily in the balance. The proceedings themselves have not got beyond HMRC's statement of case.

43. I was referred to a very similar application before the FTT in *IPS Umbrella Ltd v HMRC* [2022] UKFTT 00081 (TC). The pleadings and contractual arrangements in that case were almost identical to the present case. The appellant sought permission to amend its grounds of appeal to assert that it was never in reality an employer at all. The amendment in that case appears to have been intended as a replacement ground of appeal rather than as an alternative to the primary ground as in the present appeals. In that case, the FTT refused permission to amend because the application was made late in the day and was contrary to the contemporaneous documentation.

44. The weight to be given to the lateness of an application must be judged by reference to the particular facts of the case. The FTT in *IPS Umbrella* was also faced with a different application, in that it was to replace a ground of appeal rather than to rely on an alternative ground of appeal. The decision does not really assist me on the present application.

45. At the heart of the Application is the position of the parties in relation to *Autoclenz* and the *Autoclenz* approach. Ms Murray pointed out that in *HMRC v Atholl House Productions Ltd* [2022] EWCA Civ 501, the Court of Appeal made clear at [156] that *Autoclenz* has no application in the context of identifying whether there is a contract of employment for tax purposes, in that case the intermediaries' legislation in IR35. That much is common ground.

46. Ms Murray stated that Mypay's proposed amendment follows from HMRC's reliance on *Autoclenz*, which was first raised in their statement of case in March 2021. In oral submissions she acknowledged that the Additional Ground only arises if it is legitimate to apply the *Autoclenz* approach in determining whether the Contract is an overarching contract of employment.

47. HMRC, in their reply to the Application, stated as follows in relation to reliance on *Autoclenz*:

> 17. HMRC's Statement of Case was filed before the Supreme Court's decision in *Uber BV v Aslam* [2021] UKSC 5; [2021] ICR 657 and *HMRC v Atholl House Productions Ltd v HMRC* [2022] EWCA Civ 501, which confirmed that *Autoclenz* was concerned with matters of statutory interpretation in the context of employment law rights and did not form part of the ordinary principles of contractual construction. Whether or not the Appellant is granted permission to rely on the Additional Ground, HMRC intend to amend their Statement of Case to clarify that they rely on ordinary principles of contractual construction and statutory interpretation to contend that, for the purposes of the applicable provisions of ITEPA, the contract between the Appellant and its workers was not an overarching contract of employment (rather than on the approach derived from *Autoclenz*, which nevertheless leads to the same conclusion).

48. Ms Murray criticised HMRC for taking that position and suggested that they should have applied to amend their statement of case. She submitted that Mypay was entitled to view the statement of case in its unamended form as setting out the case Mypay has to meet. Hence, Mypay was entitled to rely on the Additional Ground because *Autoclenz* was still in play. If HMRC had amended their statement of case then the Additional Ground would have been rendered otiose.

49. I can see why HMRC took the approach of not seeking to amend its grounds of appeal whilst the Application was outstanding. Depending on the outcome of the Application, a

further amendment to the statement of case might have been necessary. Instead, HMRC alerted the appellant and the Tribunal to the fact that it was no longer relying on *Autoclenz*.

50. Initially, I considered that HMRC's approach was sufficient in the circumstances. On reflection, I was concerned that there was a potential for further dispute following this decision when HMRC came to formally amend their statement of case. I therefore directed HMRC to provide a draft of their proposed amended statement of case, gave Mypay the opportunity to make any relevant submissions and gave HMRC an opportunity to respond to those submissions.

51. HMRC's case is that whilst they are no longer relying on *Autoclenz*, they do maintain that the contracts must be construed by reference to a "*realistic and worldly-wise examination of the relevant contracts and the surrounding circumstances, including post-contractual circumstances*". Their new case is summarised at [37] and [38] of the draft amended statement of case:

> 37. In *Consistent Group v Kalwak* [2007] IRLR 560, Elias J stated at [57]-[59] that one must be alive to the concern that contracts may contain clauses as a matter of form even where such terms do not begin to reflect the real relationship. If and in so far as the contract contains provisions for unrealistic possibilities, those provisions will not alter the true nature of the relationship. But if the clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless. Tribunals should take a sensible and robust view of such matters in order to prevent form undermining substance.
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> 38. In *Atholl House v HMRC* [2022] EWCA Civ 501 at [158]-[159], the Court of Appeal addressed the relevant legal analysis apart from any question of the application (or otherwise) of *Autoclenz*. It stated that the UT had been correct, when deciding whether certain written terms were part of the real contractual relationship, to take account of the presence or absence of any obvious imbalance in bargaining power between the contracting parties and to ask whether the terms in question genuinely reflected what might realistically be expected to occur. The Court of Appeal specifically approved the comments of Elias J in *Consistent Group v Kalwak* summarised in the preceding paragraph and the approach of the UT in *Atholl House* of requiring a realistic and worldly-wise examination of the relevant contracts and the surrounding circumstances, including post-contractual circumstances.
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> 39. The Tribunal is entitled to take into account whether a given interpretation of any particular contractual provision would lack reciprocity and/or commercial common sense (such that it should be rejected): see *Kickabout Productions Limited v HMRC* [2022] EWCA Civ 502 at [59] (applied in *Exchequer Solutions Ltd v HMRC* [2022] UKFTT 181, at [173]-[174]).

52. In light of the fact that HMRC no longer rely on *Autoclenz*, it might have been expected that the rationale for the Application would fall away. Mypay's position was that the Additional Ground was being raised because HMRC were relying on *Autoclenz*. However, Mypay's response to the proposed amendments was that HMRC were not, as had been suggested, relying on ordinary principles of contractual construction. They were relying on the approach in *Kalwak* which was approved by the Supreme Court in *Autoclenz* but which was rejected by the Court of Appeal in *Atholl House* in the context of tax. Mypay therefore submits that the position is the same. If the FTT is entitled to "set aside" the terms of the contract because they do not reflect reality, then that approach must support Mypay's argument on the Additional Ground that there were no contracts of employment at all.

53. It is necessary to consider the decision of the Court of Appeal in *Atholl House* in more detail. The FTT had found that applying the reasoning in *Autoclenz*, certain clauses in the written contract did not reflect the true agreement between the parties and should therefore be

ignored. The Upper Tribunal held that in applying the *Autoclenz* approach, the FTT had failed properly to consider whether the written terms were unrealistic.

54. The Court of Appeal at [153] to [155] referred to the Supreme Court decision in *Uber BV v Aslam* [2021] UKSC 5 which had considered the decision in *Autoclenz*:

> 153. The only judgment was given by Lord Leggatt. He underlined that the approach adopted in Autoclenz to determine whether the individuals fell within the definition of "worker" did not form part of the ordinary principles of contractual construction and that, if such principles had been applied, the court could not have concluded that they were workers. It was clear that, in the context of the issue in Autoclenz, the Supreme Court had adopted a different approach but "[w]hat was not…fully spelt out in the judgment was the theoretical justification for this approach" ([68]).
>
> 154. In supplying the theoretical justification, Lord Leggatt said that it was critical that the relevant rights were not contractual rights but were created by legislation. The task for the tribunals was not to determine whether under the contracts Autoclenz had agreed to pay the valeters the minimum wage but to determine whether they "fell within the definition of "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation." ([69]).
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> 155. Having reviewed the purposes of the Regulations and of the 1996 Act, which in short were to provide protection to vulnerable workers, Lord Leggatt said:
>
> > "76. Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it…
> >
> > 78. This is, as I see it, the relevance of the emphasis placed in the Autoclenz case (at para 35) on the relative bargaining power of the parties in the employment context and the reason why Lord Clarke described the approach endorsed in that case of looking beyond the terms of any written agreement to the parties' "true agreement" as "a purposive approach to the problem"."

55. The Court of Appeal then concluded at [156] and [157] that the *Autoclenz* approach was not applicable in the context of determining whether an individual would be an employee for the purposes of the intermediaries' legislation and the Upper Tribunal had been entitled to reject the FTT's application of *Autoclenz*:

> 156. The Supreme Court's decision in *Uber* raises as a threshold issue whether it is, in the very different context of the present case, permissible to apply the approach adopted in *Autoclenz* and *Uber*. It is common ground that whether the individual (Ms Adams in this case) would be "regarded for income tax purposes as an employee of the client" (the BBC in this case) under section 49 of ITEPA is to be determined by the application of the common law tests of employment. Both sides agreed that the statutory context gave no special meaning to the term "employee". This is not therefore a case which raises any issue of statutory construction of a

> term such as "worker" which is to be understood in the context of the purpose of the legislation and the need to ensure that such purpose is not defeated by the way the relevant contract is drafted. The justification, as analysed and identified by the Supreme Court in *Uber*, for the application of the approach approved in *Autoclenz* is entirely absent in the present case. In those circumstances, it follows in my judgment that it is not legitimate to apply the *Autoclenz* approach.
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> 157. On this ground, therefore, which was not of course available for the UT to consider, the UT's rejection of the FTT's reasoning and conclusion on the application of *Autoclenz* was correct.

56. The Court of Appeal went on to consider whether the Upper Tribunal had been entitled to find that the FTT had erred on the issue:

> 158. In any event, I consider that the UT was right to reject the FTT's decision on this issue for the reasons it gave.
>
> 159. The principal criticisms of the UT's decision on this issue, made on behalf of Atholl House, are that it took account of the absence of any obvious imbalance in the bargaining power between Ms Adams and the BBC and that it imposed a condition of "unrealistic" before it would depart from the written contractual terms. However, in my judgment, the UT was right to take these matters into account. I have cited above the passage from the judgment of Elias J in *Kalwak* which was quoted with approval by Lord Clarke. This makes clear that it was entirely appropriate for the UT to ask whether clauses 8.1 and 8.2 "genuinely reflect what might realistically be expected to occur", in the unlikely event that there was disagreement between Ms Adams and the BBC. I have also summarised what Lord Clarke said at [35] that "the relative bargaining power of the parties must be taken into account". The FTT was too influenced by the fact that there had not been any instance of disagreement between Ms Adams and the BBC and therefore the opportunity for the BBC to exercise its rights under clause 8.1 or clause 8.2 had not arisen. In *Autoclenz*, Lord Clarke stated as uncontentious: "If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement." The same point was made by Smith LJ in the passage from her judgment in *Autoclenz* cited with approval by Lord Clarke and quoted above.

57. HMRC appear to argue on the basis of [159] that whilst the *Autoclenz* approach is not appropriate, the contract should still be construed by reference to a realistic and worldly-wise examination of the relevant contracts and the surrounding circumstances, including post-contractual circumstances. Whilst I have not heard full argument on this point, I am not sure it is right. It appears to me that at [159] the Court of Appeal was describing why, even if *Autoclenz* did apply, the FTT had gone wrong. I do accept, however, that ordinary principles of contractual construction would involve the application of business common-sense, which is the point made at [39] of HMRC's draft amended statement of case.

58. It is clear from *Atholl House* that neither party can rely on the *Autoclenz* approach. HMRC now say that they rely only on the conventional approach to contractual interpretation, although they say that such an approach includes the principles outlined in *Kalwak*. Whether or not that is correct is, in my view, best determined on the basis of full argument at the substantive hearing of the appeal.

59. Be that as it may, it was always open to Mypay to raise the Additional Ground, if it considered it had merit. There is no reason that Mypay's position should depend on how HMRC put their case. There is no reason Mypay should not have relied on ordinary principles of contractual construction to argue that there were no contracts of employment at all if it was considered such arguments had merit.

60. Without trespassing on the merits of the existing ground of appeal, in my view the language used in the Contract is consistent only with the existence of an overarching contract of employment or separate contracts of employment covering each assignment.

61. The Contract defines Mypay as the employer. The document itself is headed "*Statement of Main Terms and Conditions of Employment*". It includes numerous provisions drafted on the basis that the worker is an employee and Mypay is the employer. For example, there are clauses dealing with commencement and termination of the employment, that the worker will report to Mr Hollins, the place of work, and the hours of work. The employer will notify the worker where they are required to work and guarantees a minimum of 336 hours work per year. The wage was to be agreed between the worker and the employer. The employer agreed to endeavour to provide the worker with work.

62. Throughout the relevant tax years, Mypay operated a PAYE scheme and deducted tax and national insurance from payments made to workers. In all the correspondence between Mypay and HMRC in connection with HMRC's enquiry, Mypay's representative acknowledged and asserted that Mypay was the employer of workers during periods where there were assignments and in the periods between assignments. The original grounds of appeal for each appeal and the documents relied on by Mypay contain numerous references to the workers being employees and Mypay being the employer.

63. It is notable that Mr Hollins in his first witness statement does not say clearly what the Contract was for if it was not a contract of employment at all. Mypay retained an agreed margin from payments made by the agencies and treated the balance as earnings of the workers. The Application does not contain any analysis of what the payments represented if Mypay did not employ the workers. Indeed, Mr Hollins in his first witness statement continues to refer to the workers as employees, without identifying who the employer was or the nature of its contractual arrangements with the employer.

64. In the circumstances, I am not satisfied that Mypay's argument that there were no contracts of employment at all has any real prospect of success. It certainly does not have a sufficient degree of conviction to justify granting permission to amend the grounds of appeal. On that basis, I must refuse the Application.

65. If I were satisfied that there was merit in Mypay's Additional Ground, I would have a discretion whether to permit an amendment to its grounds of appeal. In exercising that discretion I must consider all the circumstances including any prejudice to the parties. Clearly there would be prejudice to Mypay if the Additional Ground had some merit and Mypay was not permitted to amend its grounds of appeal.

66. HMRC also say that if Mypay were to lose on the primary ground of appeal but succeed on the Additional Ground, then they would be prejudiced. They could not now seek to recover additional tax from the workers, or from whichever legal entity was liable to account for PAYE and national insurance.

67. It was not disputed that HMRC would ordinarily be subject to a 4 year time limit from the end of the relevant tax year to seek to make determinations and decisions charging tax and national insurance. Further, that time limit would be extended to 6 years in the case of carelessness by workers or the entities liable to account for tax and national insurance. The appeals concern tax years 2014-15 and 2015-16 and HMRC could have issued determinations and decisions relying on carelessness at the time the appeals were lodged. On any view, HMRC could not now issue determinations or decisions for 2014-15. In theory, HMRC would have been in time for 2015-16 if there was carelessness. They had between January 2022, when the possibility of an application was first raised, and April 2022 to make alternative determinations and decisions. I am satisfied that did not give a realistic window to

conduct enquiries as to who might be liable for the tax and national insurance and to issue appropriate determinations and decisions. HMRC were deprived of that opportunity which they would have had if Mypay had raised the Additional Ground in 2019 when the first appeal was lodged.

68. Taking into account all the circumstances, I would have refused permission to amend even if the Additional Ground had any merit.

CONCLUSION

69. For the reasons given above, I refuse Mypay's application to amend its grounds of appeal to rely on the Additional Ground.

70. It is appropriate for me to make further directions to progress the appeals. I note that Mypay seeks to rely on two further amendments to its grounds of appeal and HMRC do not oppose those amendments. I therefore direct as follows:

(1) Mypay shall have permission to rely on grounds 3 and 4 in its draft amended grounds of appeal dated 24 January 2022.

(2) HMRC shall serve an amended statement of case within 28 days of the date of this decision. The amended statement of case shall deal with grounds 3 and 4 referred to above.

(3) HMRC shall also have permission at the same time to amend its statement of case to delete [33] and [38] of its original statement of case and introduce new paragraphs [37] to [40] with consequential amendments at [43] and [45] as set out in their draft amended statement of case dated 7 September 2023. The effect of these amendments is to remove reliance on *Autoclenz* and to rely instead on what are said to be ordinary principles of contractual construction.

(4) The parties shall seek to agree further directions to progress the appeals and shall update the Tribunal in that regard within 42 days from the date of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

71. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

Release date: 23rd OCTOBER 2023