[2018] UKFTT 0271 (TC)

TC06501

Appeal number: TC/2017/00667

INCOME TAX AND NATIONAL INSURANCE - intermediaries legislation - IR35 - sections 48-61 ITEPA 2003 - personal service company - contract for services or contract of service – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JENSAL SOFTWARE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JENNIFER DEAN

Sitting in public at Manchester on 4 – 6 October 2017

Mr A. Vessey of Qdos Consulting Ltd for the Appellant

Ms G. Hicks, Counsel instructed by HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. By Notice of Appeal dated 27 December 2016 the Appellant appealed against a regulation 80 determination assessed in the sum of £14,658 and notice of decision in respect of Class 1 NICs assessed in the sum of £12,011 arising from the application of the intermediaries legislation (commonly referred to as "the IR35 legislation").

2. The purpose of the IR35 legislation was set out by Robert Walker LJ as he then was in *R (Professional Contractors Group & Others) v IRC* [2001] EWCA Civ 1945 at [51]:

> "…the aim of both the tax and the NIC provisions (an aim which they may be expected to achieve) is to ensure that individuals who ought to pay tax and NIC as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation."

3. The effect of the legislation, where it applies, is to treat the fees paid to a service company not as company revenue upon which corporation tax is payable but rather as deemed salary to the worker which is subject to income tax and NIC. The legislation applies to those workers who would be treated for NIC and income tax purposes as being employed under a contract of service by the client were it not for the involvement of the personal service company or agency.

4. By way of background, between 28 May 2012 and 4 April 2013 Mr Ian Wells provided business analyst services through a personal service company, Jensal Software Limited ("the Appellant") via an agency, Capita Resourcing Ltd ("Capita") to the Department of Work and Pensions ("DWP").

5. HMRC concluded that had there been a direct contract between Mr Wells and the DWP during the period of engagement it would have been a contract of service, not a contract for services; the Appellant was therefore required to account for income tax and NICs in the relevant period.

6. The Grounds of Appeal relied upon by the Appellant can be summarised as follows: it is disputed that IR35 applies to its contract with the DWP via Capita during the relevant period as the three prerequisites for a contract of employment to exist are not present (relying on *Ready Mixed Concrete (South East) Limited v Minister of Pensions & National Insurance* [1968] 1 All ER 433). During their investigation HMRC reviewed two contracts involving the Appellant during the period of enquiry, those being with the DWP and Lloyds Banking Group; HMRC agreed that the latter fell outside of the intermediaries legislation. The Appellant contends that the contract with the DWP also falls outside of IR35.

Issues to be determined

7. The Appellant does not dispute the amount of tax owed, subject to the determination as to whether the legislation applies. The issues therefore remaining between the parties can be summarised as follows:

(i) Whether Mr Wells personally performed or was under an obligation to perform services for the DWP, who was the client for the purposes of s49(1)(a) ITEPA 2003; and

(ii) Whether for the material time the provision contained in s49(1)(c) ITEPA 2003 is satisfied; namely, whether the hypothetical notional contract between Mr Wells and the DWP would have been a contract of service, as HMRC contends, or a contract for services as the Appellant contends.

Legal framework and authorities

8. The legislation for income tax purposes is found in section 49 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). The equivalent provision for national insurance purposes is contained in Regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000 ("the 2000 Regulations").

9. Section 49 provides as follows:

> (1) This Chapter applies where –
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that-
>
> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client...
>
> (4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided."

10. It is unnecessary to quote the broadly similar wording in respect of NICs; the parties agreed that the effects of the provisions as applicable to this appeal are materially similar and neither advanced any point in relation to the minor differences which are immaterial to the issues to be determined.

11. I was referred to a large number of authorities, all of which I considered carefully and about which I will say more in due course. However as a starting point many of the cases consider the conditions set out by MacKenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions & National Insurance* [1968] 1 All ER 433 [at 439-440] for the existence of 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."

12. The first condition is commonly known as "mutuality of obligation", the second relates to the degree of control and the third is a negative condition, i.e. where it is shown that there is:

> "requisite mutuality of work-placed obligation and the requisite degree of control, then it will prima facie be a contract of employment unless, viewed as a whole, there is something about its terms that places it in a different category"

(see *Weightwatchers (UK) Ltd v HMRC* [2012] STC 265 per Briggs J at [42]).

13. In *Market Investigations v Minister of Social Security* [1969] 2 Q.B. 173 Cooke J stated [at 184-185]:

> "… the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' 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. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, 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 he takes, 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. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him."

14. Nolan LJ in the Court of Appeal in *Hall v Lorimer* [1994]1 W.L.R. 209 [at 216] specifically approved of the comments made by Mummery J in the same case in the High Court [1992] 1 W.L.R. 939 at [944]:

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

15. In *Usetech v Young* (2004) 76 TC 811 Park J explained (at [9] and [36]) that the court is required to construct a hypothetical contract between the worker and the company and then enquire what the consequences would have been if it had existed. The court may take into account all relevant circumstances, including any existing contracts. However, statements within the contracts between worker, intermediary and client as to whether the parties intended their relationship to be one of employment will be given minimal weight, if any, in construing the hypothetical contract between worker and client. In *Dragonfly Consulting Ltd v HMRC* [2008] EWHC 2113 (Ch) Henderson J stated:

" 53. … 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.

55. I would not, however, go so far as counsel for HMRC who submitted that, as a matter of law, the hypothetical contract required by the IR35 legislation must be constructed without any reference to the stated intentions of the parties. If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even then, however, the weight to be attached to such a hypothetical statement would in my view normally be minimal, although I do not rule out the possibility that there may be borderline cases where it could be of real assistance."

16. With these authorities in mind I have approached this case by making a value judgment on the circumstances as a whole rather than focussing on isolated features.

Facts

17. The DWP required "contingent labour to take forward some business critical work for the [Universal Credit] programme as [they] could not secure civil servants for a temporary period." The DWP contacted Capita to source suitable candidates. Capita sent the CVs of suitably qualified candidates to Mr Gary McDonald at the DWP who interviewed the candidates by telephone and Mr Wells was offered the job.

18. The DWP did not enter into a direct contract with Mr Wells, instead it had a framework agreement with Capita. There was also no contract between Capita and Mr Wells but rather Capita engaged Mr Wells' services through a personal services company – the Appellant. The series of contracts between Capita and the Appellant which form the basis of this appeal were:

- 28 May and 25 August 2012;
- 26 August to 24 November 2012;
- 25 November 2012 to 23 February 2013; and
- 10 March to 29 June 2013.

19. Each of the contracts was fulfilled with the exception of the final contract which was terminated by Mr Wells on 4 April 2013. There were three chains of contracts:

- The contract between Mr Wells and the Appellant;
- The contract between the Appellant and Capita; and
- The written framework between Capita and the DWP.

Evidence

20. I was provided with witness statements and heard oral evidence from Mr Wells on behalf of the Appellant and Mr Andrew Lemon and Mr Gary McDonald on behalf of HMRC.

21. Mr Wells is the Director and majority shareholder of the Appellant which provides IT services to private and public sector clients on a contract basis. The Appellant has operated successfully in the contract/freelance market for approximately 25 years. Mr Wells explained that he is well-versed in the IR35 legislation and has applied his understanding of the legislation to the Appellant's engagements. Mr Wells explained that he has experience of IR35 from a previous HMRC enquiry in 2003. His experience is significant, having worked with approximately 20 private and public sector clients comprising in the region of 60 contracts, having been subject to periods of non-payment, summary termination and early closure of contracts with engagements varying in duration from 3 months to 2 years.

22. Mr Wells highlighted his complaint to HMRC who had extended their enquiry, in his view, without justification thereby causing severe delay, loss of time and inconvenience to the Appellant. He also noted that HMRC had been satisfied following their enquiry that his engagement with Lloyds Banking Group did not fall within the IR35 legislation; in Mr Wells' view the engagement with the DWP was no different and HMRC was not justified in reaching a different conclusion.

23. Mr McDonald has worked as a project manager in the Universal Credit Programme in the DWP since 2012 and had responsibility for the strategic design of a number of operational services. Mr McDonald had limited recollection of the working arrangements in place with Mr Wells; partly due to the passage of time, partly because he was not closely involved in the day to day work of Mr Wells and partly because he has worked with many contractors since that time. However Mr McDonald was able to provide the following evidence relating to the general practice of the DWP in working with contractors.

24. At the relevant time the DWP used a private sector organisation, Capita, to secure contractors at short notice in order to progress urgent or significant pieces of work which could not be resourced internally or quickly. The recruitment process involved completing a work specification for Capita, Capita considering suitable candidates and providing Mr McDonald with CVs which he would consider and then advise Capita of those he wished to interview and when. Mr McDonald recalls completing a number of telephone interviews and advising Capita of those he considered suitable in merit order.

25. As far as Mr McDonald recalled, Mr Wells' remit was to design and develop "demand and workflow" management arrangements in Universal Credit. Mr McDonald believed he would have met with Mr Wells to consider his proposals and discuss any changes required to meet the needs of the DWP. Once the approach and proposals were agreed Mr McDonald would have expected Mr Wells to take responsibility for leading delivery of the work agreed and to report progress to the DWP lead for the work area, Mr Lemon.

26. Mr Lemon has worked as a project manager in the Universal Credit Programme in the DWP since 2012. Mr Lemon confirmed that he was not personally involved in the recruitment process involving Mr Wells and that his role working alongside Mr Wells commenced after the contract began. He explained that Mr Wells was tasked to provide expert input into the design of a new national workflow process to be adopted in Universal Credit from April 2013. As far as he recalled, Mr Lemon believed that Mr Wells had responsibility for setting out proposals for and implementing the final design of the organisational structure to be adopted. Mr Lemon was unable to recall the specifics of the work.

27. Mr Wells explained that he was required to provide expert advice in relation to the operational readiness of approximately 16 components of the Universal Credit Programme. Mr Wells had seen the engagement advertised by Capita and provided his CV. He stated that he was unaware that the DWP had looked to recruit internally.

He was paid a daily rate; Mr Wells explained that the number of working hours was never specified but he was paid for a "professional working day".

28. Mr Wells explained that initially he was engaged in a broad role to look at the operational aspect and assess the design readiness of the areas involved; the completeness of the designs for the areas were coded as red, amber and green. At that point Mr Wells stated that he probably spoke with Mr McDonald about once each month about the project. He identified the status of a number of areas, for instance one key area was identified within telephony as being critical and required Mr Wells to take the initiative in completing the design to an appropriate level of detail. Mr Wells explained that this typically required visits to a number of site visits according to a schedule set by him and identification of tasks for incorporation in plans used by the DWP. The Appellant did not set work hours as the work was goal orientated and focussed on delivery to projected timescales; consequently the hours varied.

29. Mr Wells explained that he took the initiative in terms of the way forward and determined how best to discharge consultancy across the project. There was liaison with the DWP management regarding progress and task identification however the Appellant was the driving force in setting out the tasks for completion and timescales. There were no limitations on location at which work was completed although a significant amount of time was spent across various DWP sites in order to gather and disseminate information central to design and assessment. The Appellant had no line management responsibilities nor was the Appellant provided with a document entitled "HMRC Questions DWP Engagement Jensal" which was completed by Mr McDonald and Mr Lemon on 11 January 2016 and in respect of which Mr Wells had had no input; the questionnaire was completed at HMRC's request by the DWP (hereafter referred to as "the HMRC questionnaire").

30. Mr Wells explained that very low levels of supervision underpinned the engagement; initially Mr Wells worked with one other consultant to understand the operational readiness across 13 areas supporting the Universal Credit Programme following an initial high level briefing by Mr McDonald. Thereafter meetings took place every three to four weeks to present progress. Approximately six months into the engagement Mr Lemon joined the team and spent time familiarising himself with Mr Wells' work; it was only towards the end of the contract that Mr Lemon took a lead role as opposed to deferring to Mr Wells' direction.

31. Mr Wells stated that he had a right of substitution which was confirmed by Capita. He explained that although in practice it was not common within the sector to appoint a substitute and, in his view, deeming the right as fettered on the basis that the end client needs to approve it is completely unrealistic within mainline IT given the specialist/expert nature of the appointment.

32. Mr Wells was shown the DWP's internal recruitment document relating to the project; he explained that this had not been provided to him when he was engaged nor had it been disclosed until the documents for the appeal hearing were served. Under "Background" the document stated:

"To successfully support and deliver design activity within the Business Process and Products strand of the Universal Credit Programme on budget, to specification and compliant with DWP governance, ensuring the processes and experience are in line with departmental and ministerial requirements"

5 33. Mr Wells agreed that the statement was generally accurate but did not tell the whole story as it was too broad. He agreed that the skills required on the document such as "proven experience in designing and delivering change in a high profile, complex and fast moving business environment" were not incorrect but added that many more skills were required; he has specialist skills which he thought would be 10 useful to the project. Mr Wells agreed that the DWP would have looked for an individual with experience rather than a company; he stated that the scale of the tasks involved did not require a company with multiple personnel.

34. Mr Wells was asked about the HMRC Questionnaire. The document stated:

"Describe how the work was found and if there was a tender process…or 15 interview/selection process please describe any process that took place?

To the best of my recollection. We needed contingent labour to take forward some business critical work for the UC Programme as we could not secure civil servants for a temporary period. Capita were asked to advertise help us find people to take the work forward for a temporary period and they sourced a 20 number of CVs. I conducted telephone interviews with Ian and a number of other candidates and offered a temporary position to Ian via Capita and based on the CV and telephone interview."

Mr Wells was unaware of the terms used within the DWP such as "line manager" but confirmed that Mr McDonald set out the scope of the investigations and areas to be 25 assessed. Mr Wells stated that he expected to work with minimum supervision and he met Mr McDonald about once a month to keep him updated as to progress. He believed that the onus rested more with himself than Mr McDonald in terms of setting timescales and so as with any project there were nominal target dates. Mr Wells drew an analogy between Mr McDonald's role and that of a project manager; he did not 30 know where Mr McDonald was based, although he believed it was Cambridge, and he was aware that Mr McDonald oversaw a number of other projects. The amount of contact between the two was commensurate to the skill and expertise expected of consultants. Mr Wells explained that there was an internal DWP hierarchy but he did not agree that he was supervised, instead he explained that he had discussions with Mr 35 McDonald which did not, in his view, amount to him being "checked up on". Mr Wells did not recognise time constraints as he was the one who planned how the work would take place and when it would be completed.

35. Mr Wells explained that his level of contact with Mr Lemon was minimal. He did not agree with Mr Lemon's recollection that they had spoken daily as it had taken 40 Mr Lemon time to familiarise himself with the work which was not Mr Lemon's area of expertise, although he accepted that contact may have been more frequent towards the end of the project as Mr Wells prepared to leave and hand over the project. Mr Wells explained that being "answerable" to Mr Lemon did not capture the spirit of the

relationship; Mr Wells directed the work as he believed it needed to proceed, he did not agree that Mr Lemon drove the work although the pair "touched base". Mr Wells confirmed that Mr Lemon was responsible for approving his time and expense sheets. He stated that there was no expectation for him to call in each day and explain his location. He agreed that he would have let Mr Lemon know if he was not going in to work, stating that this would be a reasonable expectation in any working relationship. Mr Wells travelled to any locations he believed necessary, particularly in the latter stages of the project when he visited call centres on an ad hoc basis in order to talk to experts. Mr Wells did not need permission for the trips; generally his whereabouts would be known and the reasons for the trips but not always.

36. The DWP framework with Capita stated:

> "Interim Personnel assigned to the Authority shall be under the supervision and control of the Authority and the Authority shall be responsible for the operational direction, supervision and control of Interim Personnel assigned to the Authority under any Services Order."

37. Mr Wells fully disagreed with the suggestion that he was answerable to or under the control of the DWP; he stated he had never seen the document and if he had read such a clause he would not have accepted the contract. Mr Wells explained that it was unreasonable for the DWP to assert such control over an expert and although he accepted that he was working at DWP sites on a programme devised by the DWP he stated that the clause was inaccurate and inappropriate for the work he did. Mr Wells agreed that Mr McDonald and Mr Lemon would have been responsible if he had failed to fulfil the work required but stated that errors can be made in all contractual situations and had this happened he would have made good the error.

38. Mr Wells agreed that the contract between the Appellant and Capita confirmed that his work was owned by the DWP. He stated he was unaware of any "core hours"; he worked between 6am and midnight and was paid a daily rate irrespective of the hours he worked. Mr Wells stated it had never been established whether or not he could work from home; he probably worked at home only 10% of the time as his task involved meeting and eliciting information from people. Mr Wells was not instructed on the DWP standards and policies; he assumed that his own working practices would be compatible.

39. Mr Wells was never informed that his expenses were limited until the end of the project when he was advised that the limit had been reached at which point he simply carried out the task irrespective of whether he would be reimbursed the expenses as the task needed completing. Mr Wells did not recall ceasing travelling as a result of expenses nor could he recall a specific occasion when he personally covered any costs. Mr Wells explained he was exposed to financial risk if his contract was terminated or he had to make good defective work which is why he had contractual insurance. He also risked prosecution if, for instance, there was an error in the user domain.

40. The contract between the Appellant and Capita contained a clause allowing substitution if agreed by the client. Mr Wells agreed that the situation did not arise but explained it was an option. Mr Wells was unaware of (having never seen) the clause in the contract between Capita and the DWP which required a contractor to be vetted. He confirmed that he had a security pass for the DWP buildings which identified him as a contractor and that he had a DWP laptop and password protected profile. Mr Wells had not considered how a substitute would have been paid or how he/she would have accessed his laptop. However he did not agree that substitution was not a viable option stating that it existed in the contract and was entirely feasible. Mr Wells confirmed that he could have taken on other work at the same time as that for the DWP but stated that the task needed full commitment and chose to work full time on it.

41. Mr McDonald highlighted from his experience the difference between Mr Wells' role as a contractor and DWP employees; the level of management direction and day to day support provided to contractors is less than that for DWP staff. Mr McDonald explained that contractors are employed for their specific skills and experience and are expected to work independently. Contractors receive lower levels of feedback than DWP staff which is limited to their specific work contract, unlike feedback for DWP staff which is regular and follows a formal structure and sits within a personal performance and development process. Contractors are generally expected to manage their own time, whereabouts and activities. They are also expected to advise the DWP if they are unable to work unexpectedly. Contractors sourced via Capita provide worksheets to confirm days/hours worked and expenses incurred via a bespoke system.

42. Mr McDonald confirmed that had he not been satisfied with Mr Wells' proposals to complete the work or if Mr Wells had been unable to deliver the outcomes required, he would have advised Capita that he wished to terminate the arrangement. If Mr Wells had wished to provide a substitute, Mr McDonald stated that he would have contacted the DWP HR department for advice, although he has since been made aware that there is provision for the DWP to accede to such a request although he was unaware of this previously. The DWP would have no objection to Mr Wells working for other contractors as long as it did not affect his ability to meet his commitments to the DWP.

43. Mr McDonald confirmed the evidence given by Mr Wells as to his role; he had explained the programme and parameters after which Mr Wells devised a plan to achieve those results and, once agreed, points of contact were arranged. Mr McDonald explained that this is how he works generally with all contractors. Mr Wells' work was monitored in terms of meeting time scales and ensuring the product was evolving as it should and whether any issues had arisen that Mr McDonald needed to deal with. Mr Wells would provide Mr McDonald with assurances that the work was being done but Mr McDonald would not give instructions as to how the work should be done. Mr McDonald confirmed that the level of supervision with DWP staff differed to that of Mr Wells; the DWP employees would report to him in relation to work progression but he also monitored personal performance, health and wellbeing. In contrast his focus with contractors was product output. Mr McDonald

viewed and treated Mr Wells as a contractor as opposed to a DWP staff member. There was also a difference in terms of the duty of care and knowing the whereabouts which was monitored more closely with DWP staff than contractors; where Mr Wells chose to work was not a concern to Mr McDonald.

44. Mr McDonald agreed that he met with Mr Wells approximately every four weeks, increasing as the work came closer to delivery. Mr McDonald stated that he did not line manage Mr Wells. Mr McDonald explained that once Mr Wells had completed his task he would not fill the role as the task was complete; Mr Wells' role was to undertake a specific piece of work over a specific time.

45. Mr Lemon confirmed that the arrangement with Mr Wells was flexible in terms of the location from which he worked. He recalled that Mr Wells based himself at the DWP office in Leeds for the majority of time and that he worked at home at least one day per week. Mr Lemon could not comment on what time Mr Wells arrived at the office although he recalled that Mr Wells worked late on the majority of occasions and finished after 6pm on a regular basis. Mr Wells managed his own time and location around the demands of the role, occasionally travelling to DWP sites when needed. He explained that it was not unusual for DWP members of his team to work flexibly. Mr Lemon drew a distinction between line managing his direct DWP employees and the limited supervision of Mr Wells. He stated that to a large extent he would take Mr Wells' advice and decide if it was plausible. Mr Lemon did not monitor Mr Wells' time and expense sheets; he simply approved them and monitoring was limited to ensuring they did not seem excessive. Mr Lemon did not know if any hours of work were specified in the contract but as far as he was aware Mr Wells regulated his own hours; Mr Wells did not need to account for the hours he worked nor did Mr Lemon have any expectations beyond reasonable working hours.

46. Mr Lemon described Mr Wells' role as acting in an advisory capacity to his (Mr Lemon's) team on the organisation and job roles for the new operational model for workflow management. He stated that instructions for Mr Wells' work were discussed on an ongoing basis and that Mr Wells managed his own work within a broad remit. Mr Wells was provided with a DWP laptop and access to internal systems, although he also used his own laptop and software. Mr Wells attended meetings when required to do so and occasionally arranged meetings with DWP colleagues to assist in his work.

47. In oral evidence Mr Lemon explained that his own work relied on that of Mr Wells and therefore he needed regular sight of the designs. He agreed that they did not necessarily discuss work on a daily basis but they were often in the same location and contact was therefore regular albeit there was no formal 'checkpoint' of contact. In relation to who had the ultimate decision making authority Mr Lemon explained that he would take the design advice of Mr Wells and how his own work developed from there was a matter for him. Mr Lemon did not have direct responsibility for Mr Wells' work; he explained that he was accountable to Mr McDonald for his work and that part of that involved input from Mr Wells from which he was able to give Mr McDonald assurances regarding work that had been done. Mr Lemon explained that he had more accountability for his direct employees in terms of their development and

work as compared with Mr Wells in respect of whom he checked that the work was within the remit of the project but did not check how the work was delivered or the quality of it.

48. Mr Lemon could not recall a conversation in which Mr Wells stated he would absorb the cost of expenses once the limit was reached, as far as Mr Lemon could remember Mr Wells had stopped travelling at that point. He confirmed that Mr Wells had travelled at his own discretion; Mr Lemon's input was limited to advising who was based where. He stated that for health and safety reasons and a good working relationship it was preferable for him to know Mr Wells' whereabouts. On the issue of substitution Mr Lemon could only state that the situation did not arise.

49. Having recited the evidence I will now set out the parties' submissions as to how that evidence should be applied to the factors to be considered in deciding whether the hypothetical contract would have been a contract for services or a contract of services. Thereafter I will set out my findings on the evidence in so far as is relevant to the issue to be determined.

HMRC's submissions

50. On behalf of HMRC Ms Hicks made the following submissions:

Mutuality of obligation

51. The hypothetical contract between Mr Wells and the DWP would be one of employment as there would be an obligation on the DWP to provide work and for Mr Wells to perform that work in return for remuneration. Mr Wells was engaged between 28 May 2012 and 4 April 2013 with a gap of only 10 working days. That the work was performed under a series of contracts is not a factor that can be usefully considered in isolation but rather it must be considered alongside the general question of whether the worker was in business on his own account (see *Market Investigations Ltd* (ibid at [13]). Ms Hicks contended that where, as in this case, there are a series of contracts, the fact that there is no obligation on the company to offer further work outside those contracts is irrelevant for the purposes of IR35, as noted by Mummery LJ in *Cornwall County Council v Prater* [2006] ICR 731 at [40]:

> "The important point is that, once a contract was entered into and while that contract continued, she was under an obligation to teach the pupil and the council was under an obligation to pay her for teaching the pupil made available to her by the council under that contract."

52. The Tribunal need only determine whether or not there was sufficient mutuality of obligation within each period and whether the hypothetical contract covering the entire period under review would have been a contract of service or not. The Appellant did not dispute that Mr Wells personally performed the services provided and the statutory test under s49(1)(a) ITEPA is met. The work that the DWP was obliged to provide was performed by Mr Wells in return for remuneration; therefore the hypothetical contract between Mr Wells and the DWP would be one of employment. Mr Wells accepted in evidence that there was an obligation on him to

turn up for work and agreed that there was always work for him to do. Mr Wells stated in evidence that to not turn up to work would have been unacceptable and that the DWP rightfully expected and required him to do so.

53. Mr Wells provided the *"contingent labour"* needed by the DWP as described in the document provided by HMRC for completion by the DWP in relation to the engagement of the Appellant. He was in the terms of the Capita/DWP contract under *"Service Specification"* described as*" Interim Personnel"* (at section 3 clause 1) and was filling the role of an employee.

54. The DWP was obliged to pay Mr Wells a daily rate as specified in the contract between the Appellant and Capita; Mr Wells was not paid per project or on completion of a given project. HMRC submitted that the daily rate is analogous to a salary.

55. Mr Wells' work was not casual; he was engaged almost continuously for over 10 months, was obliged to turn up for work each day and worked the core hours of 8am/9am until 6pm or beyond as described in the document provided by HMRC for completion by the DWP in relation to the engagement of the Appellant.

<u>Substitution</u>

56. Ms Hicks submitted that the right of substitution may be a pointer away from employment; either it is *"fatal to the requirement that the worker's obligation is one of personal service"* or the right to avoid doing a piece of work may be so broadly stated as to be *"destructive of any recognisable obligation to work"* (see Briggs J in *Weightwatchers (UK) Ltd v HMRC* [2012] STC 265 at [32] – [35]). However a limited right to cover, for example in the case of ill health, is not inconsistent with an employment relationship.

57. Ms Hicks highlighted the substitution clause in the contract between the Appellant and Capita which states:

> "3.5 The Contractor (the Appellant) may use an alternative named Consultant in place of the Initial Consultant as named in Schedule 1 provided that:
>
> > 3.5.1 the Client and Capita state in writing that they are satisfied the alternative Consultant possesses the necessary skills, expertise and resources to fulfil the Client's reasonable requirements and meet the standards applicable to the Services…"

58. On behalf of HMRC it was submitted that the clause is not so widely drafted such that Mr Wells could decide never to turn up for work at all. Ms Hicks contended that the clause is far removed from an unfettered right of substitution. The HMRC Questionnaire which stated that Mr Wells' services *"could have been delivered by other suitably competent and qualified workers at the discretion of Jensal"* is misleading as consent had to be sought from both Capita and the DWP which would only have been provided if the proposed replacement had the necessary skills and expertise. Whilst Mr McDonald acknowledged that there was provision for the DWP

to accept substitution, HMRC submitted that it is evident that permission would be required and would not be automatically granted. Moreover HMRC submit that the stringent vetting process and security requirements at the DWP meant, in reality, that it was unlikely that anyone could have replaced Mr Wells and the suggestion that Mr Wells could easily and readily send someone as his substitute is fanciful.

59. HMRC submitted that in the hypothetical notional contract Mr Wells would not have a right to substitute; the DWP sourced through Capita the services of an individual not a company, Mr Wells was identified by Capita as a suitable candidate and his CV (not the company portfolio) was sent to the DWP. Following interview Mr Wells was offered the job and named in the contract between the Appellant and the Capita. The substitution clause was contained in the contract between the Appellant and Capita, not the Capita and the DWP. The statement of intention in the contract between the Appellant and Capita was included in order to not create a contract of service and any such statement of intention should be given no weight (see *Dragonfly* at [55]).

60. In evidence Mr Wells explained that he always looked for a substitution clause *"because it is one of the indications for IR35 compliance"*; the right to substitution was therefore sought by Mr Wells in order to comply with the legislation, rather than an intention to send a substitute.

Control

61. The right of a company to control a worker in respect of what, how, when and where work is undertaken can be an important indicator of an employment relationship, however control will not be the decisive test as per Lord Parker CJ in *Morren v Swinton and Pendlebury BC* [1965] 2 All ER 349 at [351]:

> "…control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience. Instances of that have been given in the form of the master of a ship, an engine driver, a professional architect or, as in this case, a consulting engineer. In such cases there can be no question of the employer telling him how to do work; therefore, the absence of control and direction in that sense can be of little, if any, use as a test."

Ms Hicks contended that the key question is not whether in practice the company exercises control but whether it has a contractual right of control, as per *White v Troutbeck* [2013] IRLR 286 at [290]:

> "…the key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The key question is not whether in practice the worker has day-to-day control of his own work….In my judgment what was required was to analyse the terms of the agreement between the parties to see whether, expressly or by implication, Troutbeck…retained a right of control to a sufficient degree….Moreover, for the reasons I have given, it is not inconsistent with the concept of employment for an absentee owner to want someone to be responsible for maintaining and managing their property. The question is not by whom day-to-day control was exercised but with whom and to what extent the ultimate right to control resided."

62. Relying on *Autoclenz Ltd v Belcher* [2011] ICR 1157 (per Lord Clarke at [1163]) Ms Hicks submitted that if a right of control exists within the contract, the fact that the company does not exercise it does not detract from that fact:

> "Three further propositions are not I think contentious: (i) As Stephenson LJ put it in *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 623, "There must … be an irreducible minimum of obligation on each side to create a contract of service." (ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: *Express & Echo Publications Ltd v Tanton* [1999] ICR 693, 699 g, per Peter Gibson LJ. (iii) 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: see eg the *Tanton* case, at p 697 g."

63. As to how control was exercised, Mr Wells' evidence was that he was hired as "a specialist/expert appointment"; as such it is not inconsistent with an employment relationship for there to be little control in how he worked. There was however, HMRC noted, a contractual right to control how Mr Wells fulfilled the role; the Capita/DWP contract stated at section 2 clause 12.4:

> "Interim Personnel assigned to the Authority shall be under the supervision and control of the Authority and the Authority shall be responsible for the operational direction, supervision and control of Interim Personnel assigned to the Authority under any Services Order."

64. HMRC relied upon the evidence of Mr McDonald that feedback would be provided on the progress made by Mr Wells and the regular meetings and discussions that took place with Mr Lemon with whom the ultimate decision making responsibility lay. Ms Hicks submitted that Mr Wells was treated as a senior but temporary member of staff; his work was steered by Mr McDonald, the ultimate decision would be made by Mr Lemon as team leader and the DWP monitored the work, as Mr Lemon stated in evidence: "I had to check he was producing what he should have."

65. The contract between the Appellant and Capita provided for progress reports to be requested from Mr Wells and controlled his conduct outside of work to the extent that he would: "not engage in any conduct detrimental to the interests of Capita or the Client."

66. Mr Wells worked 37 hours and was expected to come to work each day. He was required to work from the DWP site at Leeds and did so for the majority of his engagement, occasionally travelling to meetings at other sites and with the permission of the DWP.

67. Ms Hicks highlighted *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC at [36] in which Lord Philips explained:

> "Today it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. Many employees apply a skill or expertise that is not susceptible

> to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it."

Ms Hicks submitted that the facts of this appeal are analogous to those in *Dragonfly Consulting Ltd v HMRC* [2008] EWHC 2113 (Ch) at [41] and [52] and that the degree of control needs only be sufficient as opposed to tantamount to that over an employee; that the DWP did not rely on or invoke its right is immaterial, the important fact is that the right existed:

> "Everybody agrees that control is in some sense an essential ingredient of a contract of employment. It is the second of the three conditions to which MacKenna J referred to in *Ready Mixed Concrete*. By way of amplification, he said at 515F:
>
> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted . . . . To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication."
>
> …
>
> On the strength of the oral evidence, the Special Commissioner was in my view fully entitled to conclude that Mr Bessell's performance of his duties was subject to a degree of supervision and quality control which went beyond merely directing him when and where to work. In the case of a skilled worker, you do not expect to find control over how the work is done. Conversely, in the case of a self-employed worker in business on his own account you would not normally expect to find regular appraisal and monitoring of the kind attested to by Mr Palmer and Miss Tooze. The weight and significance to be attached to this evidence was a matter for the Special Commissioner, and in my view it was open to him to conclude that the nature and degree of the control by the AA under the hypothetical contract was on balance a pointer towards employment."

Business on own account

68. Ms Hicks referred to *Market Investigations v Minister of Social Security* [1969] 2QB 173 in which Cooke J suggested that the test to be applied was whether the worker was an employee *"as a matter of economic reality"*. In making that assessment the following factors may be relevant:

- provision of own equipment,;
- whether he hires his own helpers;
- what degree of financial risk he takes;

- 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.

5 69. HMRC submitted that Mr Wells was not operating in a business on his own account; he bore no financial risk, he was paid a daily rate and expenses were reimbursed. There was no documentary evidence to support the suggestion that Mr Wells ever absorbed travel costs when the expense allowance ran out and Mr Wells' evidence was uncertain as to whether such an issue ever arose. The risk of a contract
10 not being renewed is immaterial as it is faced by all employees who move from one job to another (see *Lee Ting Sang* [1990] 2 AC 374 (Privy Council))

70. There was no opportunity for Mr Wells to profit; as with an employee he could only make more money by working overtime; the HMRC Questionnaire stated at question 26:

15 > "Other than by working extra hours…are you aware of any way JSL could have made any additional…profit from the contract?
>
> No"

71. In assessing whether Mr Wells carried on business on his own account Miss Hicks highlighted that this is not a "mechanical exercise of running through items on
20 a checklist" but rather the full picture "from the accumulation of detail" must be considered followed by standing back to make an "informed, considered, qualitative appreciation of the whole" (per Nolan LJ in *Hall v Lorimer*).

<u>Other relevant factors</u>

72. HMRC rely on the following as indicators of employment:

25 (i) The background to Mr Wells' engagement; the DWP was looking for temporary employees or "contingent labour";

(ii) The recruitment process bears the hallmarks of recruiting temporary employees as shown in DWP contract document under sections entitled "Hiring of Resource" and "Processes", namely by using a
30 search for candidates and interview process as opposed to a self-employed person or independent contractor pitching for work or entering a tendering process;

(iii) The contract between the DWP and Capita bears the hallmarks of a temporary employee recruitment provider, for instance the vetting
35 process, employment history checks and the existence of an equality and diversity policy;

(iv) The manner in which Mr Wells carried out work, for instance reporting to Mr McDonald and attending meetings when requested;

(v) Mr Wells was integrated into the DWP team; the only difference in Mr Lemon and Mr McDonald's management of Mr Wells related to the absence of pastoral care and personal development given to DWP employees. This is not indicative, either way, of an employment relationship given Mr Wells' fixed term contract.

The Appellant's submissions

73. On behalf of the Appellant Mr Vessey made the following submissions.

74. HMRC have breached Article 9 of the Taxpayer's Charter in their handling of the enquiries. The Appellant's complaint was upheld by HMRC in relation to its extension of the enquiry and the distress caused to the Appellant. HMRC have not acted impartially, for instance by seeking information from the DWP in the HMRC Questionnaire; the job of HMRC is to check if the correct amount of tax has been paid not to only seek evidence to support its own case.

Mutuality of obligation

75. Clause 13.2 of the Appellant/Capita contracts reads as follows:

> "Neither Capita nor the Client is under any obligation to offer work to the Contractor and the Contractor is under no obligation to accept any work that may be offered. No party wishes to create or imply any mutuality of obligation between themselves either in the course of or between any performance of the services or during any notice period. Capita is not obliged to pay the Contractor at any time when no work is available during this agreement."

76. This demonstrates the absence of mutuality of obligation both during and after the contract.

77. Mr Vessey submitted that mutuality of obligation can exist in both a contract of services and contract for services. Relying on *JLJ Services Ltd v HM Revenue and Customs* [2011] UKFTT 766 (TC) at [51]:

> "There is a feature in this case where the phrase "mutuality of undertakings" has some resonance. A touchstone of being an employee is the hope and expectation that there will be some relationship of faithfulness between employer and employee. In other words, the employer will generally endeavour to keep staff employed even when work is short. Contract workers will be dispensed with first. Employees will commonly have several "employee benefits", and in particular pension rights. With short term engagements, none of this will be relevant with contract workers."

78. Mr Vessey contended that further evidence must be found to support either a contract of service or a contract for services; that there was a contract for services is supported by the fact that there was no attempt by the DWP to keep Mr Wells

employed, the contracts were each of short duration with no expectation of renewal and the Appellant terminated the final contract early in order to start work elsewhere.

Substitution and personal service

79. The Appellant had a genuine right of substitution set out at clause 3.5 of the
5 Appellant/Capita contract which stated:

> "3.5 The Contractor may use an alternative named consultant in place of the Initial Consultant as named in Schedule 1 provided that:
>
> 3.5.1 the Client and Capita state in writing that they are satisfied the alternative Consultant possesses the necessary skills, expertise and resources to fulfil the
> 10 Client's reasonable requirements and meet the standards applicable to the Services;
>
> 3.5.2 the Contractor keeps Capita fully and effectively indemnified against any reasonable costs, claims or expenses that may be incurred by it or the Client as a result of such submission or substitution of staff including the reasonable cost of
> 15 all instruction (necessitated by the substitution) for the substitute named Consultant; and
>
> 3.5.3 the Contractor shall, at the request of Capita, provide such alternative Consultant free of charge for such period as Capita may reasonably require so that the Consultant can get up to speed on the Services."

20 80. Clause 4.6 implies an absence of personal service by its reference to sub-contractors and employees of the Appellant. Clause 14 indicates the ability of the Appellant to assign and/or sub-contract the services:

> "The rights and obligations of the Contractor under this Agreement shall not be assigned or transferred without the prior written consent of Capita, for which
> 25 Capita may charge an administration fee of up to £100 for such assignment or transfer. Capita shall not be obliged to give any reason for withholding such consent."

81. In *Express & Echo Publications Ltd v Tanton* [1999] IRLR 367 Peter Gibson LJ said (at [370]):

> 30 "It is, in my view, plain that Mr Swift is right in his submission that it is necessary for a contract of employment to contain an obligation on the part of the employee to provide his services personally. Without such an irreducible minimum of obligation, it cannot be said that the contract is one of service."

82. In an email dated 23 May 2016 Capita confirmed an absolute right of
35 substitution and that the contractual clause was a reality. Capita confirmed that once all regulatory procedures were satisfied a substitute worker could be sent at any time:

Email from Mr Vessey to Emma Smedley, Compliance Officer at Capita, on 23 May 2016:

> "…Can I just clarify two points…
>
> - Jensal Software Ltd could have utilised a substitute at any time during the contract, i.e a named substitute did not have to be disclosed at the very outset?
>
> - As an estimate, if Jensal Software Ltd had wanted to send a replacement worker, how long would it have taken for Capita & DWP to have satisfied themselves that the proposed substitute being suitably qualified & skilled?"

Response from Emma Smedley to Mr Vessey dated 23 May 2016:

> "Absolutely, this is something that could be done at any time during the contract and does happen.
>
> A substitute consultant can start as soon as they have provided all of the necessary vetting and screening requirements to Capita. By this, I mean everything we need from a regulatory perspective (proof of right to work in the UK, any required references, identity documents etc), and any proof of specifics for the role (required qualifications, experience). Once this has been obtained they can start working."

83. Mr Vessey submitted that Mr Lemon's evidence on this point was contradictory; at first saying substitution was not applicable and later that he was unsure. Mr McDonald accepted that the right of substitution existed. Although the Appellant had no need to invoke the right it nevertheless existed as a genuine right of substitution.

84. As to mutuality of obligation Mr Vessey submitted that the length of each contract, namely 3 months, suggests that the relationship was not expected to last any length of time. He highlighted the two week period between 24 February 2013 and 9 March 2013 when the Appellant was "left in limbo" and no fee was payable where services were not provided. The last contract was terminated by Mr Wells with immediate effect prior to the end date in order that Mr Wells could take work elsewhere which indicates a lack of mutuality of obligation (see *Marlen Ltd v HMRC* [2011] UKFTT 411 (TC)).

Control

85. The Appellant had full autonomy as to how the services were carried out as set out in Clause 3.1 of the Appellant/Capita contract:

> "The Contractor shall provide the Services with all reasonable skill and care. The Contractor shall decide the appropriate method and manner of performance of the Services but shall have due regard to the reasonable requests of the Client, and the documented requirements of the Assignment (if any)."

86. Clause 3.4.5 states that the rules applicable to DWP employees are not extended to contractors:

> "3.4 The Contractor agrees on its own part and shall procure that the Consultant agrees:…

> 3.4.5 to comply with any rules or obligations in force at the premises where the Services are performed to the extent that they are reasonably applicable to on-site visitors or independent contractors in the provision of the Services…"

87. Once work specification was communicated to Mr Wells he was left to carry out the work as it saw fit and manage his own workload. Mr Wells could not be moved from task to task at the whim of the DWP as any variation to contractual terms had to be agreed by both parties (see Clauses 12.1 and 13.3).

88. Mr Wells had discretion as to whether to attend DWP meetings and the degree of control must be placed in context, relying on *Marlen Ltd v HMRC* [2011] UKFTT 411 (TC) in which it was stated:

> "The degree of control that is exercised has to be looked at in the context of what is being done, what is being produced. There is no absolute standard which can be universally applied."

89. Mr Wells decided what needed to be done and the timescale in which it should be delivered. As Mr McDonald confirmed, once the proposals were accepted by the DWP the Appellant took responsibility for the work; the only feedback to report to the DWP was progress and products. In that regard the Appellant acted in an advisory capacity to the DWP. Both Mr McDonald and Mr Lemon accepted in evidence that the Appellant was not line-managed and although they were accountable for Mr Wells' work they had no direct responsibility for it; in that regard the Appellant's case is analogous to *Primary Path Ltd v HM Revenue and Customs* [2011] UKFTT 454 (TC).

90. The Appellant's assessments were peer reviewed which does not amount to control as noted in *ECR Consulting Ltd v HMRC* [2011] UKFTT 313 (TC) at [25]:

> "…VDS operated a Peer Review system for the monitoring and maintenance of standards. We do not accept that these reviews were to ensure that Miss Richardson had dealt with the system correctly, but rather for the whole team to examine how the project was progressing with a view to resolving problems."

91. The 37.5 hour working week was not recognised in the lower level contract or by the Appellant; 7.5 hours per day was stated as a minimum requirement in the DWP internal document "Terms of Reference". The hours worked by Mr Wells varied and the time sheets completed by Mr Wells did not exercise control but were produced for the purposes of budgetary control and payment to the Appellant. Mr Wells did not have to seek permission to take leave as DWP employees were required to do; the HMRC Questionnaire stated:

> "Time off was taken by agreement with Project Colleagues and with consideration of forward project demands and timescales. Jensal received NO payment for any break or holiday. No requests for time off were refused by DWP mainly due to compromise and forward thinking.
>
> It was not necessary for Jensal to seek permission to take time off in the same manner as DWP employees."

92. Mr Vessey highlighted the fact that Mr Wells was not restricted as to where to work as the nature of the work sometimes dictated location. He chose to base himself at the DWP site at Leeds but retained discretion as to where to carry out the work. Mr Vessey highlighted the absence of any reference in the Appellant/ Capita contract to core working hours and noted that Mr Wells did not adhere to any set working hours. Mr McDonald and Mr Lemon also confirmed that Mr Wells managed his own time and no permission was required to take leave. The Appellant was free to provide services to other clients.

93. Clauses 4.3 and 13.1 demonstrate that all parties intended to create a self-employed relationship:

> "4.3 For the avoidance of doubt, neither the Contractor nor the Consultant shall have any direct contractual relationship with the Client.
>
> 13.1 Nothing in this agreement shall be construed as a contract of employment between the Contractor or its Consultant on the one part and Capita or Client on the other. All parties agree that this Agreement is a contract for services only."

Financial risk

94. Mr Vessey highlighted the fact that the DWP could terminate the contract with the Appellant immediately in certain circumstances:

> "2.3 Unless explicitly changed in Schedule 1, Capita may terminate this Agreement immediately for any reason by giving notice, written or in person, to the Contractor without liability or cost.
>
> 2.4 Capita shall have the right to terminate this Agreement for breach forthwith, without liability or cost, in the event that:
>
> 2.4.1 the Contractor is at any time in breach of Clause 4.6; or
>
> 2.4.2 Capita has good reason to believe that the Contractor is, or will, in future, be in breach of Clause 4.6; or
>
> 2.4.3 any competent authority (including, without limitation, Her Majesty's Revenue and Customs) instigates any investigation or brings any charges against the Contractor in relation to the use of a scheme of the type identified in clause 4.6; or
>
> 2.4.4 the Contractor is in breach of any warranty or undertaking contained in this Agreement at any time."

95. Mr Vessey noted that any defective work had to be remedied by the Appellant at its own cost (see clause 3.8). Moreover the Appellant was responsible for certain costs and losses in the event of negligence or breach of contract and was required to hold the necessary business insurance. There was also an administration fee payable of £100 if the Appellant wished to assign the contract. These factors point towards a contract for services.

96. Although Mr Wells was provided with a laptop by the DWP this was for security reasons and should not be seen as indicative of employment (relying on *Marlen Ltd v HMRC*). He initially used his own laptop and only later used that provided by the DWP for security reasons. Mr Wells provided his own projection equipment for on-site presentations.

97. Clauses 10 and 11 of the Appellant/Capita agreement set out requirements on the Contractor relating to indemnity, liability and insurance. Clause 14 contains a similar requirement on the Contractor to keep Capita indemnified against any reasonable costs, claims or expenses where the work is sub-contracted which, Mr Vessey submitted, points away from a contract of services.

Business on own account

98. Mr Vessey submitted this factor was of little assistance to someone carrying on a profession/vocation (see *Hall v Lorimer*). It is also possible for a person to be in business on his own account when supplying his own services (see *Turnbull v HMRC* [2011] UKFTT at [20]:

> "We find support from the decision in Barnett v Brabyn [1996] STC 716 where it was successfully contended for HMRC before the General Commissioners that it was quite possible for a person to be in business on his own account when all he supplied was his own services without providing any equipment or having any risk of loss of prospective profit."

99. As regards integration Mr Wells had no managerial responsibilities for DWP employees and the short contractual periods indicates that the Appellant was no more than an accessory required on an *ad hoc* basis. Furthermore no specific on-site facilities were provided to Mr Wells nor was he entitled to any DWP benefits.

100. Mr Vessey submitted that the parties' intention must be taken into account as stated in *Dragonfly*. The clear intention of the parties to create a self-employed relationship is reflected in the Appellant/Capita agreement at clauses 4.3 and 13.1 (see paragraph 94 above).

Discussion and Decision

Ancillary issue

101. The complaints raised by the Appellant as to HMRC's extending of, and conduct during the enquiries have no bearing on the issue for me to determine. The complaints were, as I understand the position, addressed through HMRC's complaints procedure. In those circumstances I make no further comment upon the complaints and I have reached my conclusion on the facts and evidence before me in relation to the issue in the substantive appeal.

The appeal

102. The issue for me to determine is whether Mr Wells personally performed or was under an obligation to perform services for the DWP and whether the hypothetical contract between Mr Wells and the DWP would have been a contract of services or a contract for services.

103. In this appeal there were three chains of contracts; the contract between Mr Wells and the Appellant (in respect of which there appears to have been no written contract and no such document formed part of the evidence before me), the contract between the Appellant and Capita and the "Interim Personnel Framework" ("the Framework") between Capita and the DWP. I note at this point that the Framework appears to be a standard form document intended for use with all contractors engaged to provide "essential specialist skills not available within the Department" and therefore it covered a range of matters, many of which were not relevant or of limited assistance to the issue in this appeal. I should also note that Mr Wells and the Appellant were not aware of the detail of the agreement between Capita and the DWP, however this does not mean that the terms contained therein would not have formed part of the hypothetical contract. The relevance of Capita, which was not 'the worker', 'the client' or 'the intermediary' but was clearly involved in the arrangements, is that its part in the arrangements must be taken into account. In reaching my decision I have considered as a starting point the express terms of the contract and Framework. Where the express terms are unclear or do not assist I have considered the evidence of the witnesses in reaching a value judgment as to the terms of the hypothetical contract.

104. As explained in *Primary Path Ltd and HMRC* [2011]UKFTT 454 (TC) the terms of all contracts must be considered:

> "…the exercise of constructing the hypothetical contract between the client and the worker is made more complicated by the interposition of an independent agency company between the appellant company and the client, so that in looking at the actual contractual terms governing the basis on which…services were supplied…in each of the contract periods it is necessary to look at the arrangements between GSK and the respective agency companies…and between those agency companies and the Appellant."

105. Both parties accept that the burden of proof rests with the Appellant. The standard of proof is the balance of probabilities which I have applied in reaching my findings of fact.

106. I note at this point that in assessing the reliability of the oral evidence I am satisfied that all of the witnesses gave honest accounts to the best of their recollection. The oral evidence provided assistance where the terms of the contracts were unclear. However in relation to the minor matters where a difference in recollection arose, I preferred the evidence of Mr Wells which I found clear and cogent and I bore in mind that Mr McDonald had explained that the passage of time and numerous contractors with whom he had worked over the years had, understandably, affected his specific recollection of events.

107. In *Primary Path Ltd* Judge Sadler helpfully set out the following at [61] – [64]:

> "It is clear from the cases that although there is a range of factors or indicia which might usefully be taken into account in ascertaining whether a contract is one of employment or one for the provision of services by an independent contractor, there is no simple formula or process which can be applied to determine, in any particular case, which factors are relevant or the weight or significance which is to be attributed to any factors which are considered to be relevant…
>
> The essential factors – the "irreducible minimum" – which must be present if an employment contract is to exist were set out in the *Ready Mixed Concrete* case by MacKenna J in terms which have since been recognised as the helpful starting point for the analysis of the true nature of contracts in this difficult area…
>
> The first of these conditions has evolved into two distinct factors: first, that there should be what has commonly been called "mutuality of obligation"; and second, that a defining feature of an employment contract is that the employee, and he alone, is the person whose services are to be provided.
>
> The question of "mutuality of obligation" has led to discussion as to whether all that is required on the part of the employing party is that it should simply pay the remuneration contracted for, or whether a defining characteristic of an employment contract is that the employer is required to provide a flow of work and to continue to pay the contracted remuneration even if at times there is no work. The Special Commissioner in the *Dragonfly Consultancy* case provides a helpful review of the cases which deal with the employer's obligation (see paragraphs 50 to 59), and reaches this conclusion: for a contract to exist there must, of course, be mutual obligations, but that obvious requirement is met if the "employee" is obliged to provide his labour and the "employer" is obliged to make payment for it; and that "an obligation on the employer to provide work or in the absence of available work, to pay, is not a precondition for the contract being one of employment, but its presence in some form…is a touchstone or a feature one would expect to find in an employment contract and where absence would call into question the existence of such a relationship."

108. In reaching my conclusion I have had regard foremost to the nature of the hypothetical contract and the principles to be applied from the authorities cited. I have considered the cumulative features and considered all of the relevant circumstances as per Park J in *Usetech Ltd v Young (Inspector of Taxes)* [2004] All ER (D) 106 (Oct) at [53]:

> "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."

109. From the authorities I derive the following as relevant factors:

(i) Mutuality of obligation to perform personally work offered and to pay remuneration is the "irreducible minimum ... necessary to create a contract of service" (see *Carmichael v National Power Plc* [1999] 1 WLR 2042);

(ii) Whether the worker is subject to "a sufficient degree" of control in terms of what is to be done, and where, when and how it is to be done as a contractual right (see *White v Troutbeck [2013] IRLR 286*);

(iii) The existence of a right to substitute, irrespective of whether or not that right was exercised in practice (see *Autoclenz Ltd v Belcher* [2011] ICR 1157);

(iv) Whether the worker was in business on his own account, including consideration of factors such as whether the worker had to provide at his own expense the necessary equipment, hires his own helpers, whether the worker bears a financial risk, whether the worker has the opportunity to profit and whether the worker engaged himself to perform services in the course of an already established business of his own; and

(v) The duration of the contract, degree of continuity and whether the worker was "part and parcel" of the organisation (see *Hall v Lorimer*).

110. In considering these factors I conclude that the hypothetical contract between Mr Wells and the DWP would be on the following principal terms:

(1) The services of Mr Wells are engaged on a fixed term or for a series of fixed term contracts which can be terminated before the expiry of the term.

The reason I am satisfied that this is the case, is that the contract between the Appellant and Capita at Clause 1 provides:

> "Unless explicitly changed in Schedule 1, Capita may terminate this Agreement immediately for any reason by giving notice, written or in person, to the Contractor without liability or cost".

The contracts also contain provision for immediate termination in specific circumstances.

The Contractor is at liberty to terminate the Agreement by agreement with Capita and the DWP on such notice period as agreed or, in the event of certain circumstances, on 4 weeks' notice (or such other period as Capita is obliged to provide the Client).

The Framework also contains provision for termination of the contract at any time or upon change of control, insolvency and default.

I am satisfied that the hypothetical contract in respect of the right to terminate would reflect the position between the parties which occurred, namely that Mr Wells ended the final contract early without any issue arising as to breach of contract.

(2) The services and obligations of Mr Wells relate to a specific project within the DWP in respect of which Mr Wells agrees to furnish the DWP with progress reports as requested. There is no set location from which to work nor are there set core hours. The ultimate responsibility for the project lies with the

DWP although it is up to Mr Wells to devise the proposal for what is needed and how to implement the proposal once agreed.

Schedule 1 to the contract between the Appellant and Capita sets out a description of the assignment role of "Business Process Design Leads." In the same contract the terms provide that the contractor:

> "…shall decide the appropriate method and manner of performance of the Services but shall have due regard to the reasonable requests of the Client, and the documented requirements of the Assignment (if any)."

The Framework provides only a general outline, stating:

> "Interim Personnel assigned to the authority shall be under the supervision and control of the Authority and the Authority shall be responsible for the operational direction, supervision and control of Interim Personnel assigned to the Authority…"

The statement is generic and I am satisfied on the facts of this case that Mr Wells' particular expertise was to be utilised in determining how best to design and meet the task. I take the view that the Framework does not assist in determining the terms of the hypothetical contract in this case; it was clear from the evidence that no such operational direction or supervision existed and the ultimate responsibility held by the DWP was no more than would exist in the case of an independent contractor.

I am satisfied that the hypothetical contract did not require Mr Wells to be located at any particular site on the basis that the contract between the Appellant and Capita gives a principal location of Leeds with Mr Wells permitted to work from home. In contrast the HMRC internal recruitment document specified Sheffield or Warrington as the main base location with other sites permitted. The evidence on this matter was not contentious and I accept it as fact; Mr Wells was permitted to work at any site he deemed necessary to perform his duties.

(3) Payment is made on the basis of authorised weekly timesheets presented**.** Expenses are reimbursed and there is no entitlement to payment for absences such as holidays, sickness, etc.

Schedule 1 to the contract between the Appellant and Capita set a daily rate of £450 inclusive of expenses etc. Due to its generic nature I am satisfied that the Framework does not provide any further assistance in determining the terms of the hypothetical contract between Mr Wells and the DWP.

The HMRC internal recruitment document sets out that over the contract period the average number of hours worked per day is set at 7.5, with scope to agree additional hours of work. There is no other reference to set hours and I accept the evidence which was not in dispute; Mr Wells submitted timesheets, there was no requirement to work set hours and the hours worked by Mr Wells varied.

(4) Mr Wells may propose a substitute for himself subject to agreement and satisfactory security checks.

The contract between the Appellant and Capita contains provision for a substitute subject to the agreement by the DWP that the skills and requirements applicable to the services are met. I infer from the verification process and security checks required of Mr Wells prior to undertaking the role that the same would be required of a substitute.

The Framework is widely drafted and requires approval before the contract is assigned, sub-contracted or in any other way disposed of; I am satisfied that this provision would include the issue of substitution.

(5) Mr Wells is entitled to engage in other contracts provided that there is no diminution in the standard of his services to the DWP.

This provision is expressly included in the contract between the Appellant and Capita. The Framework contains a guarantee by the contractor which I am satisfied is drafted sufficiently widely so as to cover other engagements, namely that:

> "it is not subject to any contractual obligation, compliance with which is likely to have a material adverse effect on its ability to perform its obligations under the Contract".

(6) Mr Wells is liable to rectify defects in the services at his own expense and maintain public liability insurance and professional indemnity insurance.

Both the contract between the Appellant and Capita and the Framework contain express provisions as to indemnity and liability requirements on the Appellant.

111. In applying the terms of the hypothetical contract between Mr Wells and the DWP I make the following findings.

Mutuality of obligation

112. In *Usetech* at [60] the Court said:

> "I would accept that it is an over-simplification to say that the obligation of the putative employer to remunerate the worker for services actually performed in itself always provides the kind of mutuality which is a touchstone of an employment relationship. Mutuality of some kind exists in every situation where someone provides a personal service for payment, but that cannot by itself automatically mean that the relationship is a contract of employment: it could perfectly well be a contract for free lance services."

113. On the particular facts of this case I take the view that although Mr Wells provided his services for payment, the mutuality of obligation does not of itself demonstrate a contract of services. The DWP paid Mr Wells a daily rate for the work

carried out in accordance with the agreed rate as invoiced. There is no contractual obligation beyond that. The internal recruitment document sets a daily work minimum of 7.5 hours which accorded with Mr Lemon's evidence. However I am satisfied that it was no more than an expectation as to the hours that would be worked each week and I accept the evidence of Mr Wells that the daily rate was paid irrespective of the hours worked.

114. HMRC relied on the HMRC Questionnaire as support for the proposition that Mr Wells was obliged to work core daily hours. However I take the view that no weight should be attached to this document which was completed after the period with which I am concerned and for the purpose of HMRC's enquiry. I am satisfied that the document would not form any part of the hypothetical contract.

115. Each contract lasted a short duration. The break between the penultimate and final contracts of approximately 2 weeks indicates that there was no contractual obligation for the DWP to provide continuous work. It was also clear from the evidence of all of the witnesses that Mr Well's engagement did not extend beyond the specific project in respect of which his skills were required; as Mr McDonald explained once the task was completed there was no role for Mr Wells to fill. The position as borne out by the facts is that there was a period during which one contract ended and the DWP was under no obligation to continue to offer a further contract. No further work was offered for a short period. Moreover Mr Wells was under no obligation to perform the work and in relation to the final contract Mr Wells terminated the final contract when a better offer presented itself.

116. The essence of the relationship was that there was no continuing obligation on the part of the DWP to provide work; if it chose to abandon the project there was no contractual basis upon which Mr Wells could demand further work. I am satisfied that these factors point away from a contract of service.

Substitution

117. The second limb of MacKenna J's first condition considers the nature of the worker's obligations. In *Weightwatchers (UK) Ltd v HMRC* [2012] STC 265 at [32] – [37] Briggs J said:

> "Substitution clauses may affect the question whether there is a contract of employment in two ways. First, the right to substitute may be so framed as to enable the person promising to provide the work to fulfil that promise wholly or substantially by arranging for another person to do it on his behalf. If so, that is fatal to the requirement that the worker's obligation is one of personal service: see for example Express & Echo Publications v Tanton [1999] IRLR 367, in which the contracting driver was, if unable or unwilling to drive himself, entitled on any occasion, if he wished, to provide another suitably qualified person to do the work at his expense. He was, plainly, delivering the promised work by another person, and being paid for it himself.
>
> At the other end of the spectrum, contracts for work frequently provide that if the worker is for some good reason unable to work, he or she may arrange for a

> person approved by the employer to do it, not as a delegate but under a replacement contract for that particular work assignment made directly between the employer and the substituted person.
>
> The true distinction between the two types of case is that in the former the contracting party is performing his obligation by providing another person to do the work whereas in the latter the contracting party is relying upon a qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he finds a substitute to contract directly with the employer to do the work instead.
>
> The second possible relevance of substitution clauses is that, even if the clause is of the latter type, so that the substitute is not performing the contractor's obligation, his right to avoid doing any particular piece of work may be so broadly stated as to be destructive of any recognisable obligation to work. Mr Peacock submitted that the relevant distinction was between clauses providing for substitution only where the contractor was unable to work, and clauses permitting substitution wherever the contractor was unwilling to work, relying upon Tanton and MacFarlane as illustrative of that distinction.
>
> I am not persuaded that that is the relevant distinction. It is, in the real world, unrealistically rigid. Take the example of a teacher who is, otherwise, obviously an employee, but whose contract permits her to absent herself, and find a replacement to be engaged for that purpose by her school where, although able to work, she would for understandable reasons rather attend a wedding, or funeral, of a close relative. It would be absurd to treat that sensible provision as incompatible with a contract of employment.
>
> In such cases the real question is in my judgment whether the ambit of the substitution clause, purposively construed in the context of the contract as a whole, is so wide as to permit, without breach of contract, the contractor to decide never personally to turn up for work at all. That was indeed held to be the true construction of the relevant clause in Tanton."

118. I considered the ambit of the right to substitution which I find exists in the hypothetical contract in this case. Although the right is fettered by requiring the agreement of the DWP in relation to the proposed substitute's skills and security checks, I am satisfied that, purposively construed in the context of the contract, the right falls at the wider end of the spectrum. There is no restriction on the substitution clause being used only in specified circumstances, for instance in the event of Mr Wells' inability to carry out the work. In reality, if Mr Wells had simply decided he no longer wished to work on the project he could have relied on his contractual right of substitution. I take the view that given there is some restriction on the right (i.e. the requirement for the agreement of the DWP) this factor is not determinative but in the context of this case I am satisfied that it points away from an employment contract.

119. In my view the reason for Mr Wells' insistence on the inclusion of such a provision in the Appellant/Capita contract (namely his familiarity with the legislation) does not negate the existence of the right. The question is not whether, as Mr Wells accepted, substitution is uncommon in the industry, but rather whether or not the right

actually existed. I accepted the evidence of Mr Wells that the right of substitution was always included in his contracts and there is no basis upon which to conclude that this would not have been the case had he contracted directly with the DWP. I did not find the evidence of Mr Lemon assisted on this issue as he could only say that the issue did not arise and he was unsure as to whether the right existed. Mr McDonald accepted that the right to substitution existed and I am satisfied that the oral evidence, together with the supporting evidence in the form of the email from Emma Smedley at Capita demonstrates that although the question of substitution did not arise the hypothetical contract recognised the possibility of substitution which shifts the balance away from employment.

Control

120. As to the condition relating to control, MacKenna J explained:

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

121. The Court of Appeal in *Montgomery v Johnson Underwood Ltd [2001] EWCA Civ 318* said:

> "Society has provided many examples, from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent. In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment."

122. The authorities recognise that absence of control in the case of a skilled worker is not an automatic indicator away from employment (see *Morren v Swinton and Pendlebury Borough Council* [1965] 1 WLR 576). As explained in *Various Claimants v Catholic Child Welfare Society & Ors [2012] UKSC 56* per Lord Phillips at [36]:

> "In days gone by, when the relationship of employer and employee was correctly portrayed by the phrase 'master and servant', the employer was often entitled to direct not merely what the employee should do but the manner in which he should do it. Indeed, this right was taken as the test for differentiating between a contract of employment and a contract for the services of an independent contractor. Today it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it."

123. The issue is whether a contractual right of control existed to a sufficient degree, irrespective of whether that right was exercised (*Autoclenz v Belcher* [2011] UKSC 41 at [19]).

124. In this appeal I am concerned with the engagement of Mr Wells for a particular task and in determining the level of control I have considered the fact that Mr Wells possesses an expertise in his field which was not available within the DWP and which I have taken into account in the context of assessing what Mr Wells did and how he did it.

125. The Appellant/Capita contract (at 3.1) is widely drafted, allowing Mr Wells the freedom to decide the method and manner in which to undertake the work with "due regard to the reasonable requests of the Client, and the documented requirements of the Assignment (if any)."

126. The documented requirements are in my view, vague. I took into account the Framework which stated

> "Interim Personnel assigned to the Authority shall be under the supervision and control of the Authority, and the Authority shall be responsible for the operational direction, supervision and control of Interim Personnel assigned to the Authority under any Services Order."

127. However the oral evidence indicated that the DWP engaged Mr Wells for his expertise in assessing the operational readiness what was ultimately to become the Universal Credit Programme. The witnesses were consistent in their evidence from which I am satisfied that any instructions in relation to the assignment were, in reality, limited and that Mr Wells utilised his skills to decide what was needed, how those needs could be met and the timescales in which the task could be completed. I bore in mind the evidence of Mr MacDonald that he was presented with Mr Wells' proposals for consideration and agreement. However I am satisfied that this did not amount to "supervision" as such, but rather to ensure that Mr Wells understood the nature of the DWP's request and that all workers understood how the task was to be carried out and any timeframes involved which would have a bearing on the work to be undertaken once Mr Wells' task was completed. The control aspect is also limited both in the Framework, which states that Mr Wells could not be directed to undertake tasks outside the scope of the engagement, and in the Appellant/Capita contract which required any variation to the terms of the agreement to be agreed in writing.

128. Although there was an expectation that Mr Wells would attend meetings with Mr MacDonald or Mr Lemon there was no contractual obligation on him to do so and it was clear from the evidence that this was no more than a practical necessity in order to keep the DWP up to date with progress of the project as a whole. Mr Lemon and Mr MacDonald agreed that Mr Wells was not line managed nor was he subject to the same level of supervision as employees at the DWP. I considered the evidence of Mr MacDonald and Mr Lemon that they were ultimately accountable for Mr Wells' work; in my view this did not amount to control such as would be expected of a manager over an employee but is more akin to the responsibility of ensuring the needs of the

DWP are met as would be required of any independent contractor engaged to provide a specific service.

129. The witnesses agreed that Mr Wells decided where to work, which was dependent on the nature of the task in hand, and I do not consider the fact that Mr Wells chose a base for the occasions he was office based as an indicator of a sufficient degree of control.

130. I agreed with the submission of Mr Vessey that a parallel can be drawn between the facts of this appeal and *First Word Software Ltd v Revenue & Customs* [2007] UKSPC SPC00652 (11 December 2007) in which it was said at [62]:

> “In considering whether Mr Atkins was subject to "a sufficient degree" of control by Reuters I bear in mind that Mr Atkins was engaged for his specific expertise and was engaged only for a particular project. To the extent that the provisions of the 1998 agreement are inconsistent with the oral evidence and the 2000 agreement I prefer the latter. Clause 6.1 of the 2000 agreement provided that his method of work should be his own. The evidence was that Mr Atkins was engaged to provide "a small piece of a large jigsaw" and the way in which that was done was left to him. Although Reuters decided the thing to be done, (namely the migration of the legacy computer systems) Mr Atkins decided the way in which the migration of the human resource and payroll systems was to be undertaken. He also decided on the means to be employed in doing it and the time when it was to be done so long as it met the overall requirements of the main project. Mr Atkins could, and did, choose his hours of work so long as he met the timescales and milestones of the project. During the period of the relevant contract Mr Atkins worked at Reuters' office in London because he needed to access Reuters' computer; however he also chose to do work on the train and at home. Although Mr Atkins sent up-dates to a technical manager in Geneva, the evidence was that the manager did not control Mr Atkins in the way he worked in the way that an employer controls an employee, even a senior professional employee. Finally, Mr Atkins was free to work for others at the same time as he worked for Reuters. The arrangements were consistent with the conclusion that Mr Atkins acted as a sub-contractor, with responsibility for part only of a larger project, and not as an employee.”

131. There was no dispute that Mr Wells was subject to minimum checks. The evidence of all of the witnesses, taken together with the documentary evidence indicates that the control to which he was subject was substantially less and clearly distinct from that over employees. Mr Wells’ involvement with the team of employees and frequency of meetings with Mr MacDonald and Mr Lemon was no more, in my view, than an indication of a professional and close working relationship. The level of control exercised did not go beyond that which was usual for an independent contractor. In balancing all of the factors I conclude that Mr Wells was not subject to the degree of control which would be necessary to constitute a contract of employment.

132. The final condition laid down by MacKenna J in determining whether a contract is an employment contract whether the other provisions of the contract are consistent with its being a contract of service. Although there is mutuality of obligation it does

not, in my view, extend beyond the irreducible minimum nor does it demonstrate that the relationship was one of a contract of employment. Moreover, the level of control falls far below the sufficient degree required to demonstrate a contract of service. On these two factors I am satisfied that the contract was one for services. Nevertheless, I have considered the final condition in order to reach a conclusion as to whether other provisions of the contract indicate the contrary.

133. Mr Wells was not entitled to holiday or sick pay, pension or other benefits, he was not provided with training and he was not afforded the protection of personal performance and development processes provided to employees. Whilst there is no requirement for a contract of employment to include such features, in my view the absence of them indicates that Mr Wells was not considered to be or treated as an employee. He was also in business on his own account as evidenced by his evidence of similar engagements with Lloyds Banking Group.

134. Henderson J in *Dragonfly* made it clear that statements by the parties may assist in a borderline case, although little weight would normally be attached to such a statement. To the extent that the parties' intentions are a relevant consideration it is clear from the contract that neither party intended to create a contract of services however I am satisfied that the contract is sufficiently clear in this case and I therefore attach minimal weight to the statement at Clause 13.1 which stated:

> "Nothing in this agreement shall be construed as a contract of employment between the Contractor or its Consultant on the one part and Capita or Client on the other. All parties agree that this Agreement is a contract for services only."

135. I considered the submission on behalf of HMRC that the DWP has sought to recruit internally before outsourcing the work. In my view whether Mr Wells was engaged because he possessed expertise which could not be found within the DWP or whether there were simply no employees with such expertise available for the project does not alter the terms of Mr Wells' engagement and does not assist in determining whether the contract was one of services or for services.

136. In relation to financial risk and whether Mr Wells can be regarded as carrying on business on own account, there was no scope for Mr Wells to increase his profits as payment was a fixed daily rate. However looking at financial risk in a wider context, he was exposed to some risk which would not affect a worker with employment status. There was a contractual obligation for Mr Wells to remedy any defect at his own expense which was not an obligation imposed on employees.

137. Mr Wells was supplied with a computer by the DWP. Given the nature of the DWP and the security protections required by the organisation and, by extension, all those who work within it, I take the view that this is a neutral factor which does not point towards or away from a contract of service.

138. Mr Wells was obliged to take out public liability and professional indemnity insurance cover. I do not find this a particularly strong indicator but in so far as it tips

the balance on way or other I take the view that it points towards a contract for services.

Conclusion

139. Looking at the overall picture and making a qualitative assessment I am satisfied that the relationship is consistent with a contract for services not a contract of service. In reaching this decision I have made a value judgment on the features in this case; some of which are neutral and some which provide a more compelling indicator that the hypothetical contract would be one for services.

140. The appeal is therefore allowed.

141. 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.

JENNIFER DEAN
TRIBUNAL JUDGE

RELEASE DATE: 16 MAY 2018