



[2019] UKFTT 0647 (TC)

**TC07422**

*INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS – intermediaries’ legislation – IR35 – television presenter – personal service company – series of engagements under a framework agreement – whether presenter would have been regarded as an employee if engaged under a contract directly with the television company – no – appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2017/04157**

**BETWEEN**

**CANAL STREET PRODUCTIONS LIMITED**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE ASHLEY GREENBANK**

**Sitting in public at Taylor House, Rosebery Avenue, London on 8 to 11 October 2018**

**David Goldberg QC and Laura Inglis, counsel, instructed by H W Fisher & Company,  
for the Appellant**

**Adam Tolley QC and Christopher Stone, counsel, instructed by the General Counsel and  
Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. The appellant, Canal Street Productions Limited (“Canal Street”), appeals against determinations for income tax deductible via Pay as You Earn (“PAYE”) and a notice of decision in respect of Class 1 National Insurance Contributions (“NICs”) for the tax years 2012-13 and 2013-14. The determinations were made and the notice was issued by the respondents, the Commissioners for Her Majesty’s Revenue and Customs (“HMRC”).
2. The determinations and the notice relate to arrangements entered into between Canal Street and ITV Breakfast Limited (“ITV”) for the provision of the services of Ms Helen Fospero as a presenter of programmes produced by ITV.
3. The amount of PAYE income tax assessed (not including interest) is £49,426.40: £19,613.60 in the tax year 2012-13 and £29,812.80 in the tax year 2013-14). The total NICs assessed (not including interest) are £31,344.56: £13,734.12 in the tax year 2012-13 and £17,610.44 in the tax year 2013-14. The total amount which has been assessed and appealed (excluding interest) is therefore £80,770.96.

### THE LEGISLATION

4. The determinations and notice which are the subject of this appeal are made under legislation which is referred to collectively as “the intermediaries legislation” or, perhaps more commonly, as “IR35”, a term which derives from the designation of the press release which announced the introduction of this legislation on 9 March 1999, the day of the Budget in that year. That legislation is now found in sections 48 to 61 of the Income Tax (Earnings and Pensions) Act 2003 (“ITEPA”) and the Social Security Contributions (Intermediaries) Regulations 2000 (the “2000 Regulations”). I have referred to these rules together as “IR35” or the “IR35 legislation” in this decision notice.
5. In summary, if the IR35 legislation applies to the arrangements between Canal Street and ITV, payments received by Canal Street from ITV are treated for tax and NICs purposes as if they are employment income or earnings of Ms Fospero, but the liabilities to account for income tax and NICs fall on Canal Street rather than Ms Fospero. The parties agree that these are the consequences if the IR35 legislation applies.
6. The only issue before the Tribunal is whether the IR35 legislation can apply to payments made by ITV to Canal Street under the arrangements relating to the provision of Ms Fospero’s services.
7. The circumstances in which the IR35 legislation can apply for the purposes of income tax are set out in s49 ITEPA. So far as material, at all relevant times, s49 ITEPA provided as follows:

#### **49 Engagements to which this Chapter applies**

- (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, or

(ii) ...

(3) ...

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

(5) In this Chapter “engagement to which this Chapter applies” means any such provision of services as is mentioned in subsection (1).

8. There is an equivalent provision in the 2000 Regulations, which determines when the IR35 legislation applies for the purposes of NICs. It is found in regulation 6 of the 2000 Regulations. At all material times, regulation 6 provided, so far as relevant, as follows:

#### **6 Provision of services through intermediary**

(1) These Regulations apply where–

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

(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and

(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner’s employment by the client.

(2) Paragraph (1)(b) has effect irrespective of whether or not–

(a) there exists a contract between the client and the worker, or

(b) the worker is the holder of an office with the client.

(3) ...

(4) ....

9. The wording of s49 ITEPA and regulation 6 of the 2000 Regulations is similar, but not precisely the same. It was acknowledged by Henderson J in *Dragonfly Consultancy Limited v Revenue and Customs Commissioners* [2008] EWHC 2113 (Ch), [2008] STC 3030 (“*Dragonfly*”) (at [13] to [19]) that, in appropriate circumstances, the differences in wording – in particular, the fact that the 2000 Regulations do not contain an equivalent of s49(4) ITEPA – may lead to different conclusions as to the applicability of the IR35 legislation for income tax and NIC purposes. However, the parties agreed that, in this case, those differences in wording do not affect the analysis. The parties made their arguments to the Tribunal as to whether the IR 35 legislation might apply in this case by reference to the income tax provisions (in s49 ITEPA) and on the assumption that, if IR35 applied for income tax purposes, it would also apply for the purpose of NICs. I have proceeded on the same basis.

#### **THE ISSUES BEFORE THE TRIBUNAL**

10. As I have mentioned, the only issue before the Tribunal is whether the IR35 legislation applies to the arrangements between ITV and Canal Street for the provision of the services of Ms Fospero. For the reasons that I have given, I shall refer throughout to the test in s49(1)

ITEPA. There is no dispute between the parties that the first two limbs of the test in s49(1) – those in paragraph (a) and (b) – are met in the present case: the worker (Ms Fospero) personally performed services for the client (ITV); those services were not provided not under a contract directly between the client (ITV) and the worker (Ms Fospero) but under arrangements involving an intermediary (Canal Street). The only question is whether the requirements of s49(1)(c)(i) are met: namely, that the circumstances were such that, if Ms Fospero’s services had been provided under a contract directly between ITV and Ms Fospero, Ms Fospero would be regarded for income tax purposes as an employee of ITV.

11. As identified by Park J in *Usetech Limited v Young* [2004] EWHC 2248 (Ch), [2004] STC 1671 (“*Usetech*”) at [9], this enquiry involves the construction of a hypothetical contract (in this case, between Ms Fospero and ITV) which did not in fact exist, and then enquiring what the consequences would have been if it had existed. The terms of that hypothetical contract must be derived from all of the “circumstances” in which the services were provided, but as a starting point from the terms of the contracts under which the services were actually provided (see Park J in *Usetech* at [36]).

12. There was some dispute between the parties both as to the effect of the actual arrangements between the parties and as to what the contents of any hypothetical agreement that might be considered to exist for the purposes of the application of s49(1)(c) ITEPA between Ms Fospero and ITV would have been. The approach that I have taken in this decision notice is therefore as follows.

(1) First, I have sought to identify the factual background and, in particular, the key terms of the actual arrangements between the parties and their effect as derived from the documentary evidence and witness evidence.

(2) Second, I have set out what, in my view, the key terms of the hypothetical contract between Ms Fospero and ITV would have been if she had provided her services under a contract directly between herself and ITV.

(3) Finally, I have considered what the consequences would have been if that contract had existed; that is, whether Ms Fospero would be regarded as an employee of ITV if she had provided her services to ITV under those hypothetical arrangements.

13. Before I turn to establishing the facts in this case, I should also note that, although there is no dispute between the parties as to the consequences if the IR35 legislation applies, it was apparent in the hearing that there may be some relatively minor disputes between the parties as to the precise amount of income or earnings to be assessed if the IR35 legislation applies. I have not been asked to resolve those issues. Rather I have been asked to determine, as a matter of principle, whether or not the IR35 legislation applies, it being assumed that the parties will be able resolve any issues as to the quantum of any liabilities to income tax and NICs between themselves if I arrive at the conclusion that the IR35 legislation should apply.

#### **THE HEARING AND THE EVIDENCE**

14. I was provided with four bundles of documents for the hearing. The bundles included two witness statements from Ms Fospero and witness statements from each of Ms Emma Gormley, Managing Director for Daytime at ITV, Mr Jonathan Shalit, a director and chairman of Roar Global Ltd (“Roar”), a talent agency used by Canal Street, and Mr Erron Gordon, who, at the material time, was a director of ITV’s morning television programmes.

15. Ms Fospero, Ms Gormley, Mr Shalit and Mr Gordon all gave evidence and were cross-examined on their witness statements.

## **THE FACTS**

### **Background**

#### ***Ms Fospero's early career***

16. After various jobs as a print journalist, Ms Fospero was engaged by Sky News in 1988 as an “overnight news editor”. She was employed by Sky News for nine years in various roles from producer to reporter and eventually as a host of a live 24-hour news programme and a producer and presenter of documentaries.

17. In 1997, Ms Fospero took up a post with GMTV, at that time, ITV's breakfast show. She was employed as an entertainment correspondent, interviewing celebrities, hosting premieres and attending film and television industry events.

18. In 1999, Ms Fospero was asked by ITV to work in New York as a news reporter for the 1999/2000 US presidential election. After the presidential election, she stayed in New York and was employed by ITV as a news reporter for a further two and a half years.

#### ***The incorporation of Canal Street***

19. In 2002, Ms Fospero returned to the UK. She was approached by the BBC to become the anchor presenter for “Look North” in Hull. When she took up this role, Ms Fospero was told that she could not be an employee of the BBC, but must be engaged as an independent contractor through a personal service company.

20. Ms Fospero established Canal Street for this purpose in 2002. Ms Fospero was and remains the sole shareholder and only director of Canal Street. Canal Street entered into arrangements with the BBC to provide Ms Fospero's services to the BBC for the purposes of the programme.

21. The arrangements with the BBC contained a guaranteed minimum number of days work, of approximately four days per week. However, Canal Street was paid if Ms Fospero did more days' work than the guaranteed amount and the fee was reduced if Ms Fospero did fewer days' work.

#### ***Canal Street's business after 'Look North'***

22. Ms Fospero left the BBC in 2004. She returned to London. Through Canal Street, Ms Fospero undertook on-screen assignments with various broadcasters, including engagements with Channel 5 and Sky News as a relief news presenter. She also did other presenting work, through Canal Street, for a range of corporate clients. This work largely comprised hosting award ceremonies and conferences. She also undertook, again, through Canal Street, voice-overs for corporate videos and advertisements.

23. During the period for which Ms Fospero was working for the BBC and thereafter, Canal Street engaged agents, initially to manage the relationship with the BBC, but more generally to secure more broadcasting and other work for Ms Fospero. Over the years Canal Street appointed various agents to promote Ms Fospero's services – including Mr Shalit's firm Roar – and at times, appointed separate agents for broadcasting work and other work such as voice-over work.

#### ***The relationship with ITV***

24. In 2009, Ms Fospero was engaged by ITV, again through Canal Street, as an emergency cover news presenter on GMTV when the regular news presenter was on sick leave. This engagement was initially for a period of 12 weeks but extended over several months.

25. In June 2011, Ms Fospero was called by Ms Gormley and asked, at very short notice to present an edition of “Lorraine” - the weekday programme usually hosted by the presenter,

Lorraine Kelly - the following day. Following that performance, Ms Fospero was asked by ITV to host seven other editions of “Lorraine” and two editions of the early morning programme “Daybreak” in the remainder of 2011. These were all casual engagements for which the fee paid by ITV to Canal Street was negotiated at the time by Canal Street’s appointed agent, Mr Shalit.

26. In February 2012, Lorraine Kelly had a riding accident. Over the next few months, Ms Fospero was engaged by ITV, once again through Canal Street, to host several editions of the programme during Ms Kelly’s absence. Ms Fospero was not the only guest presenter used by ITV in this period. The relationship was essentially casual; Ms Fospero was engaged on a performance by performance basis.

27. It is at this point that Canal Street entered into the contractual arrangements for the provision of the services of Ms Fospero to ITV that are the subject of this appeal. These arrangements related to appearances on “Daybreak” and “Lorraine” usually as a guest host presenter or as a news presenter. The arrangements covered the period from April 2012 to April 2014. I will need to go through the terms of these arrangements in some detail. My summary is set out at [31] to [75] below.

28. In early 2014, Ms Fospero was offered a post by ITV as a news correspondent based in the US. If she had accepted the post she would have been engaged as an employee of ITV. It was made clear to Ms Fospero at the time that, if she turned down the offer, it was unlikely that further work would be forthcoming from ITV.

29. Ms Fospero turned down the post as it would have involved moving her family to New York. She was not offered further work by ITV.

#### ***Canal Street’s business after April 2014***

30. During the period whilst the arrangements with ITV were in place, although Ms Fospero had not undertaken any other television work, Canal Street’s other business had continued. It continued when the arrangements with ITV terminated in April 2014. Furthermore, after April 2014, Ms Fospero continued to do some on-screen work, through Canal Street, as a presenter or news reporter for other broadcasters, for example, appearing on BBC programmes such as “The One Show” and “Watchdog”.

#### **The Framework Agreements**

31. There were three separate agreements between Canal Street and ITV which applied to the period from April 2012 to April 2014. I have referred to these agreements collectively as the “framework agreements” for reasons that will become apparent once I have described their terms.

#### ***The April Contract***

32. The first such agreement was signed on 23 April 2012. The parties referred to this contract as the “April Contract”. I have adopted the same terminology in this decision notice.

33. The April Contract is in two parts: a letter agreement; and a set of “General Terms and Conditions” which is annexed to the letter agreement, the terms of which are incorporated into the letter agreement. The contractual arrangements also included an “inducement agreement” which was made between ITV and Ms Fospero. I have described some of the contents of these documents in the paragraphs below.

#### ***The letter agreement***

34. The parties to the April Contract are ITV and Canal Street. Canal Street is referred to in the following terms:

“CANAL STREET PRODUCTIONS LIMITED (“you”, “your”, “yourself”) for the services of HELEN FOSPERO (the “Individual”)...”

As can be seen from this definition, the terms “you”, “your”, and “yourself” in the letter agreement are intended to refer to Canal Street. However, these terms are not used consistently. There are various points in the letter agreement at which it is clear from the context that the terms “you”, “your”, and “yourself” are being used to refer to Ms Fospero and not Canal Street.

35. The scope of the agreement is described in the letter agreement as follows:

“This agreement (the “Agreement”) sets out the terms upon which you have agreed to provide the services of the Individual on a first call basis during the Term for the Programme referred to below, which we intend, but do not undertake, to produce. The attached general terms and conditions and inducement letter shall form part of this Agreement.”

36. The “Programme” is defined to include “Lorraine” and “Daybreak”.

37. The “Term” of the agreement is described as being “from the date of signature hereof to 31 December 2012 (inclusive)”.

38. The “Engagement Dates” are defined as follows:

“ENGAGEMENT DATE(S) such dates during the term as we shall notify to you (the “Engagement Date(s)”).”

39. The letter agreement also contains a description of the services, which are to be provided under the agreement, and where they are to be performed. In the letter agreement, the services are, in broad terms, limited to those of a guest host presenter and those services are to be provided at ITV’s studios. The description of the services is as follows:

“SERVICES you agree to provide your services as a guest presenter to the Programme at the Venue or such locations as shall be notified to you and such services shall include (without limitation):

(a) appearing in and/or out of vision as a guest presenter on such live or pre-recorded episode(s) of the Programme based in studio (with each such appearance herein defined as a “Guest Host Appearance”):

(1) in relation to each Guest Host Appearance, if so requested by us:

- (i) attending a reasonable amount of filming sessions, production meetings and rehearsals for the Programme;
- (ii) providing creative input into the production of the Programme;
- (iii) participating in occasional short voiceovers and video tape recordings;
- (iv) providing interviews, contributions and behind the scenes material and participating in online chats and webcasts;
- (v) making reference to the Programme websites (ITV.com/Lorraine and ITV.com/Daybreak), Twitter account (@itvlorraine and @itvdaybreak) and other websites connected with the Programme on your official personal social networking site(s) (if any);
- (vi) undertaking promotional and public relations work from time to time; and
- (vii) rendering such other services as are usually rendered by a first class television presenter.

(All such participation above to be referred to as the “Services”).”

40. The services provided under the April Contract are therefore limited to a single engagement type, that of a “Guest Host Appearance”. This is in contrast to the later agreements.

41. The letter agreement provides for a fixed fee “plus VAT, if applicable” for each Guest Host Appearance. The fee is expressed to be payable:

“Upon completion by you and the Individual of the Services for each Engagement Date undertaken during the Term, subject to the full execution and return of this agreement by you and the Individual.”

42. The letter agreement contains an exclusivity clause in the following terms:

“You hereby agree that, from the date of this Agreement until the end of the Term, you shall not provide either directly or indirectly your services as a presenter, reporter or contributor to any television or other audio visual programme which is broadcast and/or transmitted in the UK between the hours of 6:00am and 1:00pm on the Engagement Date(s) during the Term.”

This clause therefore sought to restrict Ms Fospero’s ability to appear in rival programmes that might be broadcast at or around the same as “Daybreak” and “Lorraine”.

#### *The General Terms and Conditions*

43. As I have mentioned above, a set of “General Terms and Conditions” was annexed to the letter agreement.

44. The General Terms and Conditions contain a series of standard form “boiler-plate” provisions, such as those designed to protect ITV’s intellectual property rights in the programmes. The key terms for present purposes and those to which I have been referred by the parties are set out below.

45. Clause 2 contains various warranties and undertakings given by Canal Street to ITV. These include:

(1) an undertaking that neither Canal Street nor Ms Fospero would engage in any conduct that may bring ITV into disrepute and that Ms Fospero would inform ITV immediately of any criminal proceedings brought against her (clause 2.2);

(2) an agreement to procure that Ms Fospero would provide her services “conscientiously and in a competent manner as and where required” and “in full and willing cooperation” with any persons required by ITV (clause 2.4);

(3) an undertaking to procure that Ms Fospero would observe all rules and regulations for the time being in force at the places where she provided her services and in particular the guidelines laid down by Ofcom (clause 2.5). (This provision included a specific obligation to procure that Ms Fospero would not wear branded clothing or clothing with visible logos and would immediately remove or change any item of clothing, if required to do so by ITV.);

(4) a warranty or undertaking that Ms Fospero’s input into the programmes would not contain “any defamatory or blasphemous or racially inflammatory material” or otherwise expose ITV to any civil or criminal proceedings and an agreement to procure that Ms Fospero follow all “reasonable instructions” of the executive producer in this respect (clause 2.8);



(5) an undertaking to notify ITV before the transmission of any programme of any advertisement or commercial with which Ms Fospero was involved which might be broadcast any time during transmission of the relevant programme (clause 2.10).

46. ITV was entitled to terminate the agreement on 4 weeks' written notice to Canal Street (clause 5) or immediately by notice to Canal Street on the occurrence of certain events (clause 4). These included:

“4.2 if the Individual is unable personally to render the Services herein for any reason other than as set out under clause 4.3;

4.3 if the Individual is unable personally to render the Services herein due to ill health, injury, mental or physical disability or other cause for more than five (5) days in aggregate provided none of the foregoing have been caused by the Individual's reckless and/or wilful acts or omissions;”

47. ITV was entitled to assign the benefit of the agreement to any person whereas Canal Street was prohibited from assigning the benefit of the contract (clause 11).

#### *The inducement agreement*

48. ITV and Ms Fospero also entered into an “inducement agreement” in relation to the April contract dated 20 March 2012. The inducement agreement was expressed to be made “in order to induce [ITV] to enter into the Agreement with [Canal Street]”.

49. Under the inducement agreement, Ms Fospero gave various assurances to ITV in relation to the April contract. In particular, Ms Fospero confirmed that:

- (1) she was a director and shareholder of Canal Street;
- (2) Canal Street was validly incorporated;
- (3) Canal Street was and would at all times be entitled to make Ms Fospero's services available to ITV in accordance with the agreement and to grant ITV the rights and consents that Canal Street purported to grant to ITV under the agreement;
- (4) she would render all services under the agreement to the best of her ability;
- (5) she would use her best endeavours to procure that Canal Street observed and performed all of its obligations under the agreement.

#### *The First Contract*

50. The April Contract did not run its full term. It was superseded by a further agreement made between Canal Street and ITV, which was executed on 24 August 2012. The parties referred to this agreement as the “First Contract” because the existence of the April Contract only came to light at a later stage in the preparation for the hearing. I have adopted the same terminology in this decision notice.

#### *The terms of the First Contract*

51. The First Contract covered the period from 3 September 2012 to 31 December 2013.

52. The First Contract was a single agreement; it did not refer to or incorporate a separate set of standard terms and conditions. It referred to Canal Street and Ms Fospero in similar terms to the April Contract.

53. The scope of the First Contract was described as follows:

“The following terms set out the agreement including Schedule 1 (this “Agreement”) between you and us for the services of the Individual as a presenter in connection with the television programme(s) provisionally

entitled “Daybreak” (the “Programme”) (with such definition to include any programme(s) broadcast between 6.00am and 9.30am on ITV1) which we intend but do not undertake to produce.”

54. Under clause 1 of the First Contract, Canal Street agreed to procure the services of Ms Fospero in the following terms:

“1. Engagement

1.1 You shall procure that the Individual shall render the Services (as defined in clause 2) to us on an exclusive and first call basis for the period from 3 September 2012 to 31 December 2013 (inclusive) or such other dates as may be agreed with the executive producer of the Programme (or our nominee) (the “Term”).

1.2 During the Term you shall procure that the Individual shall provide the Services (as defined herein) on such dates and at locations as notified to you in advance by us at our sole discretion (the “Engagement Date(s)”).”

...

55. In clause 1.4, the parties agreed that Ms Fospero was to be treated as self-employed for the purposes of the agreement. It provided:

“1.4 You understand and agree and shall procure that the Individual understands and agrees that she shall have the status of a self-employed person and shall not be entitled to any pension, bonus or other fringe benefit from ITV and the Individual shall be solely responsible for and shall account to the appropriate authorities for all tax of any kind whatsoever including her income tax and value added tax and national insurance or similar contributions in respect of the Fee(s) and any payments as outlined herein.”

56. Pursuant to Clause 2 of the First Contract, Canal Street agreed to provide the services of Ms Fospero “as a first class presenter in full and willing co-operation with requests made to [Ms Fospero] from time to time by the executive producer” of the programme.

57. The First Contract covered a wider range of engagement types than the April Contract. These are listed in clause 2.1 as follows:

“2.1 Completing each of the following types of engagement (the “Engagement Type(s)”) [as] shall be notified to and requested of the Individual on the Engagement Date(s)) for the avoidance of doubt, there shall only be one Engagement Type undertaken during each Engagement Date unless otherwise agreed with us in writing):

2.1.1 Appearing in and/or out of vision on screen as a guest news presenter on live episode(s) of the Programme based in studio usually on screen between 6.00am and 7.00am (with each such appearance herein defined as a “News Presenter Appearance”);

2.1.2 Appearing in and/or out of vision on screen as a guest news bulletin presenter on live episode(s) of the Programme based in studio usually on screen between 7.00am and 9.30am (with each such appearance herein defined as a “News Bulletin Appearance”);

2.1.3 Appearing in and/or out of vision on screen as a guest co-presenter on live episode(s) of the Programme based in studio usually on screen between 7.00am and 9.30am (with each such appearance herein defined as a “Guest Host Appearance”);

2.1.4 Recording features on location (away from the studio) for live or pre-recorded sections of the Programme (with each full individual day spent filming such day herein defined a “Filming Day”);

2.1.5 Spending a full day travelling, but not filming in connection with any Filming Day (with each such full day spent travelling referred to as a “Travel Day”);”

The First Contract therefore extended to engagements as a news presenter, a guest host presenter as well as certain out of studio filming days.

58. The First Contract then set out (in clause 2.2) a list of services in similar, although not identical, terms to the “Services” defined in the April Contract (see [39] above) of the services that could be provided within each engagement type.

59. Clause 2 concluded with the following words:

“For the avoidance of doubt, [we] anticipate requiring the services of the Individual for approximately 20 (twenty) News Presenter Appearances per annum or pro rata for any incomplete week or month or year of the Term. You acknowledge that the Individual’s participation in the Programme throughout the Term in the manner set out above is integral to the Programme and a material term of the Agreement.”

60. The First Contract then provided for a series of fixed fees for the different types of engagement. Each of these fees was expressed to be exclusive of VAT, if applicable, and, in a similar manner to the April Contract, payable by ITV “upon completion by you and the Individual of Services for each Engagement Type undertaken during the term”.

61. The First Contract included a provision for the payment of Ms Fospero’s travel expenses and a contribution up to a maximum amount of £1,500 per annum towards Ms Fospero’s “reasonable styling and clothing expenses”.

62. Clause 4 of the First Contract contains an exclusivity provision in the following terms:

“4. You agree that you shall not and shall procure that the Individual shall not provide either directly or indirectly the Individual’s services as a presenter or contributor to any television or audio visual programme for production, broadcast and/or transmission in the UK that is available to viewers between the hours of 6.00am and 1.00pm on days when the individual provides the Services to us during the Term. It is acknowledged that the individual may provide her services as a presenter or contributor to any television or audio visual programme for broadcast and/or transmission in the UK between the hours of 9.30am and 1.00pm upon days when the Individual provides the Services to us subject to our prior written approval.”

The clause was therefore similar to that in the letter agreement which formed part of the April Contract except that it expressly provided for the possibility that ITV might agree to a relaxation of the restriction in the case of programmes broadcast later in the day.

63. The First Contract granted ITV an option to require Canal Street to procure the services of Ms Fospero for a further period of 12 months following the expiry of the initial term (i.e. from 1 January 2014 to 31 December 2014). The option was exercisable at any time up to three months after the expiry of the initial term. If the option was exercised, the fees for the various engagement types in the extended period of the contract were raised by 5% from those set out in the First Contract in relation to the initial term.

64. The First Contract also granted ITV a further option to require Canal Street to procure the services of Ms Fospero for a second 12 month period (from 1 January 2015 to 31 December 2015) following the expiry of the first option period. This second option was exercisable at any time after six months prior to the expiry of the first option period and three months after the expiry of that period. If this second option was exercised, the fees for the engagement types specified for the first option period were raised by a further 5% above those which applied in the first option period.

65. The First Contract also contained:

(1) a requirement for Canal Street to assign to ITV or procure the assignment to ITV of all copyrights and moral rights in all products of the services provided under the agreement including all the performances and material contributed by Ms Fospero to the programmes (clause 6);

(2) a specific provision (clause 6.5) for ITV to retain editorial control of any programme, in the following terms:

“You acknowledge and shall procure that the Individual acknowledges that we shall have absolute discretion and control over the editorial content of the Programme and to the Products of the Individual’s services.”

(3) an undertaking on the part of Canal Street to procure that Ms Fospero use her best endeavours to attain and maintain “such a state of health as well enable her to render her services... as effectively as possible” and to enable ITV to take out insurance on Ms Fospero on reasonable terms (clause 7.16);

(4) an undertaking (in clause 7.17) on the part of Canal Street to procure that Ms Fospero did not engage in “hazardous pursuits”, in the following terms:

7.17 You shall not and shall procure that the Individual shall not during the term without our consent engage in any hazardous pursuits (e.g. skiing, parachuting, snowboarding and other “adrenaline” type pursuits) nor take any risk the taking of which would invalidate or affect any normal policy of insurance on a health or life or otherwise affect the performance of her Services herein.

66. In addition, the First Contract included some restrictions on Canal Street and Ms Fospero’s other commercial activities. Clause 7.21 required Canal Street to disclose and to procure that Ms Fospero disclosed to ITV certain commercial activities:

7.21 You have disclosed to us and shall procure that the Individual has disclosed to us prior to the signature of this Agreement and will continue to disclose to us throughout the remainder of the Term all commercial activities involving you and/or the Individual or any commercial use of the Individual’s role in, or association with, the Programme (including but not limited to the endorsement and/or setting up of any product or services and/or any activity which we may consider could be associated with the Programme) (the foregoing shall be collectively referred to as the “Commercial Activities”).

and clause 7.22 required Canal Street to seek and to procure that Ms Fospero sought the approval of ITV before engaging in any new commercial activities:

7.22 You undertake that you will not and shall procure the Individual shall not, without our prior consent, enter into any new contract or arrangement for your or her participation in or authorisation of any Commercial Activities unless it is approved by us in writing in advance as follows:

...”.

67. The First Contract contained an express provision that nothing contained in the agreement was intended to constitute Ms Fospero as an agent, employee or partner of ITV (clause 9). Canal Street also confirmed that it would be responsible for complying with all statutory and legal requirements and the payment of all taxes (including income tax and national insurance contributions) in respect of the services under the First Contract. Consistent with that approach, the First Contract contained no provision for employee benefits such as holiday pay, sick pay or pension contributions.

68. During its initial term, the First Contract could not be terminated by either party unilaterally on written notice. However, ITV was entitled to terminate the First Contract by notice with immediate effect in certain specific circumstances (clause 12.1). These included:

- (1) certain material breaches of the contract; the inability of Canal Street or Ms Fospero to perform services due to ill-health or disability;
- (2) conduct on the part of Canal Street or Ms Fospero which might prejudice the production of the programmes;
- (3) the insolvency of Canal Street or the bankruptcy of Ms Fospero; Ms Fospero’s being convicted of any criminal offence or any act which might bring Ms Fospero or ITV into disrepute;
- (4) the public expression of public, political social or other controversy on the part of Canal Street or Ms Fospero; or
- (5) the commission by Canal Street or Ms Fospero of any act which might bring ITV into public disregard or involve ITV in conflict with Ofcom or any other relevant regulatory body.

69. If the Term was extended, ITV was entitled to terminate the agreement on six months’ notice (clause 12.2).

70. The First Contract contained various other provisions to which I was referred by the parties. These included:

- (1) obligations on Ms Fospero to assist in marketing and promotional activities for the programmes with which she was involved and for the ITV group more generally (clause 8);
- (2) a provision entitling Ms Fospero to a screen credit in relation to her participation in the programme (clause 10);
- (3) provisions excluding ITV’s liability for loss arising to Canal Street or Ms Fospero in relation to the loss of publicity or opportunity to enhance Ms Fospero’s reputation arising from a delay or abandonment of production of a programme, damage to Ms Fospero’s property whilst in transit and any personal injury suffered by Ms Fospero in the course of any engagement (clause 11);
- (4) a provision in similar, although not identical, terms to that in the April Contract prohibiting Canal Street or Ms Fospero from assigning the benefit of the First Contract to another person (clause 13).

#### *The inducement letter*

71. ITV and Ms Fospero also entered into an inducement letter in relation to the First Contract. The inducement letter was dated 21 August 2012. The inducement letter was

expressed to be made “in consideration of [ITV] entering into the [First Contract] with [Canal Street]”.

72. Under the inducement letter, Ms Fospero agreed:

- (1) that Canal Street was entitled to her “exclusive” services;
- (2) to procure that Canal Street observed and performed all the terms of the Agreement;
- (3) that she was “satisfied with the terms of the Agreement” in so far as they applied to her obligations and interests;
- (4) to be bound by the terms of the warranties, representations and undertakings contained in the Agreement and to render the services to the producer as set out in the Agreement;
- (5) to waive all moral rights or any similar rights in the products or the services.

### ***The Second Contract***

73. At the end of the term of the First Contract, Canal Street and ITV entered into a further agreement (the “Second Contract”). It was not dated.

74. The Second Contract covered the four month period from 1 January 2014 to 30 April 2014. It was on substantially the same terms as the First Contract. The only material differences are:

- (1) the Second Contract included a reference to a further “Engagement Type” being that of a “Screening Day” for which Ms Fospero could be required to attend “movie screenings/movie junkets” and included a fee rate for a Screening Day;
- (2) the Second Contract did not include the options in favour of ITV to extend the contract;
- (3) ITV could terminate the Second Contract on six weeks’ written notice without the need to show cause.

75. ITV and Ms Fospero entered into an inducement letter in relation to the Second Contract. The inducement letter was on the same terms as the inducement letter in relation to the First Contract. It was undated.

### **The operation of the Framework Agreements**

76. I should at this point deal with some of the evidence relating to the operation of the contracts and the parties’ submissions on them.

77. In this context, I was referred by both parties to the decision of the Supreme Court in *Auto-clenz Limited v Belcher* [2011] UKSC 41, [2011] 4 All ER 745 (“*Auto-clenz*”), which concerned the status of car valeters and whether they should be regarded as “workers” for the purposes of the National Minimum Wage Regulations 1999 and the Working Time Regulations 1998. The leading judgment was given by Lord Clarke. He considered the application of principles of contractual interpretation to contracts of employment and, in particular, cases in which it was alleged that the written terms of the contract did not accurately reflect what the parties had actually agreed.

78. Mr Goldberg directed me to a passage from the judgment of Lord Clarke at [18] to [35]. I will not set out that passage in full. What I take from it is that, given that the Tribunal is required to identify the actual legal obligations of the parties by identifying what is actually agreed between them, in the context of an employment relationship (or alleged employment relationship), the Tribunal should bear in mind the relative bargaining position of the parties

and so, where appropriate, should investigate more thoroughly arguments that the written contract does not represent the actual terms agreed between them (*Auto-clenz* [34] and [35]). I also have regard to Lord Clarke's statement at [19(3)], to which I was referred by Mr Tolley, to the effect that simply because a term is not enforced does not mean that it does not form part of the contract.

79. With those principles in mind, I will turn to various points regarding the framework agreements on which the parties made representations, taking into account the evidence that I have heard from the witnesses.

***The obligation on Canal Street to procure the services of Ms Fospero***

80. All of the agreements – the April Contract, the First Contract and the Second Contract – require Canal Street to provide or procure the services of Ms Fospero to ITV. The wording of the April Contract is slightly different to the First Contract and the Second Contract in this respect, but the effect is the same.

81. Each of the framework agreements provides that the services of Ms Fospero must be made available “on a first call basis” (see the scope of the April Contract as set out at [35] above) or “on an exclusive and first call basis” (see clause 1.1 of the First Contract as set out at [54] above).

82. HMRC accepted that these provisions could not be taken to mean that Ms Fospero had to wait each day to see if ITV would require her services before engaging in any other work. In practice, it was clear that Canal Street and Ms Fospero did enter into arrangements to undertake other work and, if there was a subsequent conflict, Canal Street and Ms Fospero would simply turn down the offer of work from ITV. On that basis Mr Goldberg submitted that the reference to Ms Fospero being available on a “first call basis” simply reinforced Canal Street and Ms Fospero's obligations to undertake work if Canal Street had accepted an engagement. HMRC did not demur from this submission. In the circumstances, I have to agree with Mr Goldberg although it does render the phrase almost meaningless.

***The obligations to provide work and undertake work***

83. HMRC also accepted that the First Contract and the Second Contract did not contain an express obligation to offer work on the part of ITV nor an obligation on Ms Fospero to accept any work that was offered. It must follow that HMRC accepted that the position was the same under the April Contract as there was no material difference between their terms in this respect.

84. Mr Tolley did, however, suggest that the statement at the end of clause 2 in the First Contract that ITV anticipated requiring the services of Ms Fospero for approximately 20 “News Presenter Appearances” per annum during the term of the First Contract was evidence that the express terms of the contract did not accurately reflect the understanding of the parties at the time and that this wording was, in effect, an assurance that a minimum number of days' work would be offered by ITV.

85. On this issue, Ms Gormley, in her evidence, referred to the anticipated 20 days of work as a “realistic number of days” that Ms Fospero might expect to have worked each year as holiday cover or sickness cover for other presenters. In his submissions, Mr Tolley for HMRC sought to elevate that statement to the level of a commitment on the part of ITV to provide 20 days of work. Ms Gormley's evidence was, however, equivocal. Ms Fospero, on the other hand, was clear that she did not regard the statement setting out the anticipated number of days' work as being any form of guarantee. Her evidence was supported by Mr Shalit, who confirmed in his evidence that, although he had tried to do so, he had not been able to negotiate

any firmer commitment from ITV than that which was reflected in the contract. I accept Ms Fospero's and Mr Shalit's evidence on this point.

86. It follows that, although, as things turned out, Ms Fospero actually made many more appearances than the anticipated number during the 16 month period for which the First Contract was on foot, in my view, the evidence does not support Mr Tolley's submission that there was any prior agreement on the part of ITV to provide any given number of days' work under the First Contract. The wording in the contract accurately reflected the parties' hope and expectation that work was likely to be available. It was no more than that.

87. This does not mean that there was no benefit in the contract for ITV or Canal Street. As Ms Gormley explained in her evidence, and Mr Shalit confirmed, there was considerable benefit for ITV in maintaining a roster of capable presenters on which it could call at short notice to provide cover in cases of sickness or illness of regular presenters or in circumstances where there was a change in schedules. This type of arrangement provided ITV with flexibility in the operation of its business.

88. Although Ms Fospero's evidence was that the contract did not materially benefit her or Canal Street, I cannot accept that evidence. There were clear benefits to Canal Street and Ms Fospero in Ms Fospero maintaining her place on the list of potential presenters open to ITV; it maintained her opportunities to present news bulletins and programmes, which, she hoped, would lead to further work whether from ITV or other broadcasters.

89. Mr Tolley argued that the conclusion of the contracts demonstrated that, at the time, the parties intended that ITV would engage Ms Fospero's services at some point within the term. I accept that submission. But it falls short of saying that there was a contractual commitment on the part of ITV to offer work. Indeed, Mr Shalit's evidence, which I accept, was that he sought to obtain a guarantee of work from ITV on behalf of Canal Street and Ms Fospero. He had obtained such guarantees for other presenters, but was unable to do so for Canal Street and Ms Fospero.

90. Mr Tolley also suggested in cross examination that ITV's options to extend the contract (found in clause 5 of the First Contract) were evidence of the parties' intention that work would be forthcoming under the contract. Once again, I accept his submission, but again it falls short of any form of contractual commitment on the part of ITV to offer work. Indeed, as Mr Shalit explained in his evidence, there were other commercial reasons for the inclusion of the options; they were designed to restrict the ability of Canal Street or its agents to negotiate greater increases in the fee rates for later periods if Ms Fospero's appearances during the term of the contract were particularly successful and ITV wanted to re-engage Ms Fospero. The inclusion of the options reflected the limited bargaining power of Canal Street and Ms Fospero in relation to the First Contract at the time.

91. My conclusions are therefore that the effect of the framework agreements were essentially as follows.

- (1) In relation to the performance of each engagement, the agreement set out the terms that would apply to each engagement.
- (2) But there was no obligation between each engagement on the part of ITV to offer any work or on the part of Canal Street or Ms Fospero to undertake any work.
- (3) The reference to 20 days of anticipated work in the First Contract was nothing more than that. It expressed a hope and expectation that ITV would be in a position to offer work and that Canal Street would accept it.



(4) There was no binding agreement on either side to offer work or to do work unless and until an offer of a particular engagement was made by ITV and accepted by Canal Street. When that happened, the relevant agreement provided the pre-agreed terms on which that engagement would be undertaken by Canal Street and Ms Fospero and paid for by ITV.

(5) That did not mean that the contracts did not have any effect in the periods between the engagements. They did. They included undertakings and obligations in particular in relation to Ms Fospero's personal conduct between engagements and the conduct of Canal Street's and her business. I have discussed these obligations below.

### ***No right of substitution***

92. When ITV offered an engagement and it was accepted by Canal Street, Canal Street had no rights to substitute any other presenter if Ms Fospero was not available. The contract was only for the services of Ms Fospero (see the preamble to the April Contract, and clause 1.1 of the First Contract). A failure by Ms Fospero to provide the services was grounds for ITV to terminate the contract (clause 4.2 of the April Contract, and clause 12.1 of the First Contract). If Ms Fospero could not perform a particular engagement, it was ITV's responsibility to find a substitute not Canal Street's.

### ***Performance of services under the framework agreements***

93. There was a good deal of time taken up in evidence and in argument over level of control exercised by ITV over the performance of services by Canal Street and Ms Fospero under the framework agreements. I have summarized my conclusions from the evidence in the following paragraphs.

(1) The nature of the work was determined by ITV through its choice of the type of engagement which was offered to Canal Street. Under the April Contract, there was only one type of engagement, that of "Guest Host Appearance", but the First Contract and Second Contract provided for several "Engagement Types". The choice of Engagement Type was entirely within the discretion of ITV and so, within those fixed types of engagement, the type of services which Ms Fospero was required to perform was determined by ITV.

(2) ITV was entitled to require Ms Fospero to perform various types of activities in addition to her broadcasting work as a presenter or newsreader in the studio. These included a right to require Ms Fospero to carry out promotional and public relations activities, in relation to the programmes with which she was involved but also more generally for the benefit of the ITV group.

(3) The framework agreements gave ITV the right to determine the time and location of the performance of services under the agreements. In any event, ITV's choice of the type of engagement or other activity would usually govern the location and timing of the performance of services. ITV had similar control over the timing and performance of any marketing and promotional activities. This was not disputed by Canal Street or Ms Fospero.

(4) This is subject to one caveat. Irrespective of the nature of the engagement, Ms Fospero's evidence, which was not challenged, was that she would often undertake several hours of preparation for an engagement. In relation to broadcast engagements, her evidence was that she would often arrive at ITV's studios several hours in advance of a broadcast in order to complete her preparation. However, when, where and even if she undertook that preparation was not dictated by ITV or governed by the framework

agreements. The evidence of Ms Gormley was that Ms Fospero was particularly diligent in this respect.

(5) ITV had editorial control over the programmes.

(a) This is reflected in the framework agreements: Canal Street and Ms Fospero acknowledged that ITV had absolute discretion and control over the editorial content (see, for example, clause 6.5 of the First Contract); Ms Fospero was required to act in “full and willing co-operation with” the producer of the programme and to follow the reasonable instructions of the producer (see, for example, clause 2 of the First Contract). Indeed, it was important to ITV to retain the right of editorial control in order to comply with its obligations to Ofcom

(b) This was also borne out in practice. The evidence of Mr Gordon, Ms Gormley and Ms Fospero confirmed that ITV had the right to exercise, and in fact exercised, control over important features of the programmes: the stories which were run; the running order; the guests who were interviewed; the format and look of the show; and technical matters such as camera angles and lighting.

(6) Within that framework, as with any other presenter of a live television programme, Ms Fospero was by and large expected to use her own skill and judgment to present the programme and was trusted to do so. On a live broadcast, Ms Fospero would, for the most part, use an autocue, but it was used primarily as a prompt and not to dictate the words that Ms Fospero actually used. This was not always the case: there were occasions – for example, when reacting to a breaking news event or during a live interview with a guest – when Ms Fospero would be expected to formulate questions or ad lib and present without the assistance of an autocue; and equally there were occasions – for example, where a script was subject to legal approval – that a script had to be read word for word from the autocue. In the final analysis, however, given that most of Ms Fospero’s engagements involved a live broadcast, it was impossible for ITV to dictate what Ms Fospero actually said during the broadcast and any right of control by ITV over what she said could only be exercised after the event, ultimately through termination of the contract with Canal Street.

94. These features are hardly surprising given the nature of the work that Ms Fospero was undertaking. For the most part, they would apply to any presenter of a live broadcast irrespective of whether the presenter was a regular presenter or a guest presenter.

95. In other respects, however, Ms Fospero was treated rather differently from regular presenters, who were engaged by ITV. Although, under the First Contract, ITV paid an allowance for clothing and other expenses, it was Ms Fospero’s evidence, which I accept, that this allowance would only cover a small proportion of the full cost of these items, whereas regular presenters would be provided with fuller clothing allowances. She provided some of her own equipment (for example, her earpiece and laptop), whereas regular staff were provided with equipment by ITV. And she had no office or fixed place of work at ITV’s premises and no ITV email address.

#### ***Restrictions on other commercial activities***

96. The framework agreements sought to place restrictions on Canal Street and Ms Fospero’s other commercial activities during their term. In this respect, there was some dispute between the parties about the scope of the relevant provisions and the extent to which they represented the true agreement between the parties.

97. The provisions fall into two broad categories: those relating to Ms Fospero's other broadcasting work and those which sought to impose restrictions on Canal Street and Ms Fospero's other commercial activities.

(1) In the First Contract, the restriction on Ms Fospero's other broadcasting activities is set out in clause 4. There were similar restrictions on Ms Fospero's contributions to other programmes for other broadcasters in the April Contract, although, as I have mentioned above, the First Contract expressly contemplated the possibility that Canal Street might seek ITV's consent for the restriction not to apply in specific circumstances.

(2) The restrictions on Ms Fospero's other commercial activities are in clause 7.21 and clause 7.22 of the First Contract. These clauses required disclosure of other commercial activities undertaken by Ms Fospero or Canal Street to ITV and required Canal Street to seek the consent of ITV for any new commercial activities.

98. It was clear from the evidence of the witnesses, principally Mr Shalit and Ms Fospero that, in practice, Canal Street and Ms Fospero did not request consent to appear in other programmes under clause 4 of the First Contract. The occasion simply did not arise. As regards broadcasting opportunities, Mr Shalit accepted that he had not been as successful as he might have hoped in securing broadcasting work for Ms Fospero in the period in question.

99. As regards other commercial activities, there was evidence of only one occasion on which Canal Street had requested permission (under clause 7.22) for Ms Fospero to undertake another activity. This was not because neither Canal Street nor Ms Fospero undertook other activities which potentially fell within the provision. They did. But neither Ms Fospero nor Mr Shalit saw the need to seek approval.

100. There were various reasons for this.

(1) First, to an extent Mr Shalit self-regulated. Mr Shalit would not accept engagements for other work to which he knew from experience ITV would object.

(2) Ms Fospero was well aware of the strict Ofcom regulations regarding the endorsement of products by news and current affairs presenters and so was careful to ensure that she did not undertake such work as it would have precluded her from news presenting work both for ITV and for other broadcasters.

(3) As regards other commercial activities of Canal Street and Ms Fospero, although some of those activities potentially fell within the ambit of the provisions of clause 7.21 and 7.22, Mr Shalit's evidence, which I accept, was that he knew from experience the type of activities to which ITV would object so he and Canal Street did not seek consent on many occasions when it was clear that approval would be given, for example, for hosting corporate events. Ms Fospero's evidence was that in practice she took a similar approach.

101. There was no evidence of any of these provisions being enforced by ITV against Canal Street or Ms Fospero. That does not mean to say that the provisions were of no import. Ms Gormley's evidence was that the provisions were regarded as important to ITV: to enable it to monitor its compliance with Ofcom regulations regarding the endorsement of products by news and current affairs presenters and to protect ITV's own commercial interests where there was a potential conflict of interest. So whilst there was no evidence of ITV insisting on being informed of other commercial activities or the provisions having been otherwise relied on or enforced, it is clear that they constituted real contractual restrictions, which ITV would have been prepared to enforce if it had been in its commercial interests to do so. On the other hand,

there was a clear understanding between the parties that the provisions would not be operated so as to prevent Canal Street and Ms Fospero conducting other commercial activities, including other broadcasting work, provided that it did not impinge unduly on ITV's legitimate interests.

#### ***Restrictions on non-commercial activities***

102. The agreements also sought to impose restrictions on aspects of Ms Fospero's personal life by placing obligations on Canal Street to procure that Ms Fospero maintain her state of health (clause 7.16 of the First Contract) and did not engage in dangerous sports activities (clause 7.17 of the First Contract).

103. Ms Fospero's evidence was that these restrictions did not impose material obligations upon her: she would have been careful to maintain her state of health in any event and she did not engage in any of the dangerous sports or activities listed in the agreement. Nevertheless, I accept Mr Tolley's submission that, notwithstanding that Ms Fospero regarded them as matters which were in her own best interests to follow, they represented real commercial terms of value to ITV.

#### ***Arrangements between Canal Street and Ms Fospero***

104. There was no written agreement between Canal Street and Ms Fospero. However, Mr Tolley, in cross-examination, put it to Ms Fospero that the only basis on which Canal Street could agree to provide or procure Ms Fospero's services to or for ITV (or any other customer) was that Canal Street was entitled to Ms Fospero's services under an unwritten contract of employment with Ms Fospero.

105. Mr Tolley suggested that this approach was also consistent with other provisions which formed part of the arrangements, for example, the representations given by Canal Street in the framework agreements regarding Ms Fospero's conduct, the representations given by Ms Fospero in the inducement agreements that Canal Street was in a position to provide Ms Fospero's services to ITV, the provisions in the framework agreements in relation to copyright and moral rights (which, he suggested, presupposed an agreement between Ms Fospero and Canal Street assigning to Canal Street any such rights which Ms Fospero herself possessed) and certain statements in Canal Street's accounts.

106. I do not accept that it was inevitably a consequence of these provisions and arrangements that Ms Fospero must be an employee of Canal Street. That may be one explanation. But, the reality of the case is that Ms Fospero controlled Canal Street and that Ms Fospero was herself bound into these arrangements through the inducement agreements.

#### **Canal Street's other business arrangements**

##### ***Pattern of work***

107. In the two tax years in question, it is clear that ITV was Canal Street's most significant client: approximately 61% of Canal Street's total income in 2012-13 was derived from ITV and approximately 72% in the tax year 2013-14. Although in each of the two tax years, Ms Fospero worked, through Canal Street, for between 10 and 20 other clients, after ITV, Canal Street's next most significant client in terms of revenue provided approximately 10% of Canal Street's total income.

108. There was some difference between the parties as to precise figures and the most appropriate means of calculation but in the two years, in question, Ms Fospero performed 152 separate "engagements" under the framework agreements for ITV on 108 separate days, without taking into account any additional preparation work which Ms Fospero would undertake. In the same period, Ms Fospero's evidence was that she undertook 154 days' work

for other clients of Canal Street, but these figures include preparation work and, on occasion, count the same day as a separate day of work for different clients.

109. The precise figures do not matter. It is clear that ITV was the most significant client of Canal Street in the two tax years in question, both in terms of revenue and in terms of the proportion of Ms Fospero's working time.

#### ***The nature of work for other clients***

110. As I have mentioned above, Canal Street engaged agents to procure work for Ms Fospero. At times, it engaged different agents for different types of work.

111. During the relevant period, the only television broadcasting work that Ms Fospero undertook was for ITV. Mr Shalit's evidence was that his firm, Roar, sought to obtain more broadcasting work for Ms Fospero in this period but it was unsuccessful in its attempts to do so. That having been said, when the arrangements with ITV came to an end in April 2014, Ms Fospero was subsequently engaged through Canal Street, by other broadcasters for television work. For example, she subsequently appeared on "The One Show" and "Watchdog" for the BBC.

112. Throughout the period since Ms Fospero left the BBC "Look North" programme (in 2004), she has, through Canal Street, undertaken a variety of work, the common theme being some form of performance or presenting element. Outside the field of television broadcasting, Canal Street's clients have engaged Ms Fospero for work, which has included hosting awards ceremonies or conferences, appearing in corporate videos or broadcasts and providing voice-overs for videos and advertisements. This pattern continued throughout the relevant period and after it.

#### ***Contractual arrangements with other clients***

113. In the period in question, although the contracts with other clients were often one-off engagements, Ms Fospero was engaged through Canal Street for repeat work by several other clients in the same period, albeit not with the same regularity as ITV. However, even where Ms Fospero was engaged for repeat work, she did not undertake that work under any arrangement similar to the framework agreements, which set out the terms for future engagements and placed obligations on her and Canal Street between engagements.

114. Mr Goldberg drew to my attention some of the similarities between the provisions of the contracts which Canal Street entered into with some of its other clients (in respect of which HMRC do not seek to argue that the IR35 legislation applies) and the provisions of the framework agreements. He highlighted in particular the lack of any ability on the part of Canal Street to substitute any person other than Ms Fospero to perform the services as a common feature of these agreements.

115. For his part, Mr Tolley highlighted some of the differences between the agreements with other clients and those with ITV during the periods which are the subject of this appeal. In particular he referred to:

- (1) the contractual restrictions in the framework agreements with ITV on doing other work for broadcast on the same day as the programmes on which Ms Fospero was working for ITV;
- (2) the obligations on Canal Street to procure that Ms Fospero did not breach any Ofcom guidelines;

- (3) the obligation on Canal Street to disclose to ITV details of the commercial activities of Canal Street and Ms Fospero and to seek permission of ITV to take on new commercial activities;
- (4) the obligations covering Ms Fospero's conduct outside the performance of the engagements;
- (5) the obligations for Ms Fospero to perform promotional and publicity work if required on days when otherwise she was not engaged under the framework agreements;
- (6) the provisions, which gave ITV a contractual right of control over the performance of Ms Fospero's services.

116. I acknowledge all of these points, although many of these differences can of course be explained by the different nature of the work which Ms Fospero was undertaking for ITV.

### ***Business expenses***

117. There was some discussion of the level of expenses incurred in Canal Street's business. There were expenses incurred.

- (1) Canal Street engaged agents, who were usually paid on a commission basis. Indeed, Canal Street often engaged different agents for different types of work.
- (2) Canal Street incurred expenditure on Ms Fospero's clothes, hair dressing and make-up expenses and purchased her laptop computer and other technical equipment such as Ms Fospero's earpiece which she wore whilst presenting.
- (3) It also incurred the usual expenses of running a company such as costs for company secretarial and accountancy fees.

118. Mr Tolley suggested in cross-examination and in his submissions that Canal Street did not run any serious risk of making a loss from the engagements with ITV: the fee for each engagement was reasonably substantial and the expenses incurred in relation to any engagement relatively limited. Ms Fospero accepted this analysis and also that there was little risk of her not being paid by ITV in relation to any particular engagement.

### **THE HYPOTHETICAL CONTRACT**

119. The next issue that I must determine is the terms of the hypothetical contract which would have existed between Ms Fospero and ITV for the performance of her services for the purposes of section 49(1) ITEPA. The terms of that hypothetical contract must be derived from all the circumstances in which the services were provided, but as a starting position from the terms of the contracts under which they were actually provided.

120. I have set out below a summary of what I regard as the more material terms of the hypothetical contract. It is based on my conclusions regarding the principal terms of the actual contractual arrangements which existed between Canal Street and ITV, which are set out above.

121. My summary is intended to reflect the material terms for the entire period covered by the framework agreements as a whole, that is, from April 2012 to April 2014. It is based primarily on my conclusions in relation to the First Contract, which applied to the majority of the services performed in that period.

122. As I have described, the scope of the April Contract is more limited and its terms differ in some respects from the First Contract and Second Contract. Other than in relation to the engagement types, those differences are not reflected in my summary. However they do not affect my conclusions. The terms of the First Contract and the Second Contract are in most

material respects the same. I have highlighted the key differences at [74] above. Once again, with the exception of the extended definition of engagement types, those differences are not reflected in my summary, but they do not affect my conclusions.

123. In my view, the material terms of the hypothetical contract would be as follows:

- (1) The hypothetical contract would set out the terms on which Mr Fospero would perform services as a presenter of programmes for ITV, if and when she was offered work by ITV and she agreed to perform that work.
- (2) It would set out the types of services that could be requested by ITV and which could be performed by Ms Fospero based on the engagement types set out in the April Contract (i.e. solely as a guest host presenter) for the period from 23 April 2012 to 2 September 2012, as set out in the First Contract for the period from 3 September 2012 to 31 December 2013, and as set out in the Second Contract for the period from 1 January 2014 to 30 April 2014, together with the agreed rates of pay for each engagement type.
- (3) It would record that ITV anticipated being able to offer a minimum number of days work during the term. However, there would be no guarantee of any work and no obligation on Ms Fospero to accept any work.
- (4) During the term of the hypothetical contract, if ITV offered Ms Fospero any work, and Ms Fospero accepted that offer:
  - (a) Ms Fospero would be obliged to perform the work personally (without the right to provide any substitute);
  - (b) ITV would be obliged to pay for the work performed by Ms Fospero at the agreed rates for each type of engagement;
  - (c) Ms Fospero would be required to perform the services at locations to be determined by ITV and at the times determined by ITV, although the place of work would normally be at ITV's studios;
  - (d) Ms Fospero would be entitled to her reasonable travel expenses and an allowance for styling and clothing;
  - (e) ITV would have full editorial control over any programme and, during the presentation of the programme, Ms Fospero would have to follow the reasonable requests of her executive producer;
  - (f) Ms Fospero would agree to assign to ITV all intellectual property rights in any of the programmes in which she was involved.
- (5) During the term of the hypothetical contract:
  - (a) Ms Fospero would have no contractual rights (over and above those rights granted by statute) to be paid for absence caused by sickness, holiday or maternity;
  - (b) Ms Fospero would be required to perform her services in accordance with the Ofcom guidelines not to do anything which would breach the Ofcom guidelines;
  - (c) Ms Fospero would have to seek permission from ITV (not to be unreasonably withheld or delayed) before engaging in any new commercial activities;
  - (d) Ms Fospero would agree not to engage in some non-work activities (such as dangerous sports);

(e) Ms Fospero would agree not to perform on television programmes produced by other broadcasters which were to be broadcast at or about the same time as the programmes for which she was engaged by ITV.

(6) The hypothetical contract would be terminable by ITV immediately for cause, but would not otherwise be terminable by either party.

124. The hypothetical contract would therefore, as in the case of the actual arrangements between Canal Street and ITV, provide a framework within the actual engagements would be performed. It would also, throughout its term, place obligations on Ms Fospero irrespective of whether or Ms Fospero was actually engaged by ITV under it.

#### **WOULD MS FOSPERO HAVE BEEN REGARDED AS AN EMPLOYEE?**

125. I must now turn to the final issue: if Ms Fospero had provided her services directly under a contract with ITV would she have been regarded as an employee of ITV for income tax purposes?

#### **The parties' submissions in outline**

126. I have had the benefit of extensive submissions from counsel for both parties. I have sought to address their detailed submissions in the course of my discussion of the issues below, but I have first attempted to summarize the main points in their arguments as it will assist my explanation.

127. Before doing so, I should, however, set out some points which have either been agreed or conceded and which framed the parties' submissions.

(1) First, the parties agreed that the IR35 legislation does not contain a definition of employment. Whether Ms Fospero should be treated as "employee" of ITV by virtue of s49(1)(c) ITEPA has to be determined by reference to case law concepts of employment. There is no place in the analysis for any reference to statutory definitions of "worker" or "employment" in other legislation, such as the definition of "employment" in s83(2) of the Equality Act 2010.

(2) Second, although Mr Goldberg cast some doubt on the usefulness of the test in practice, both parties referred to and framed their arguments by reference to the essential elements of an employment contract as set out by McKenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497 ("*Ready Mixed Concrete*") at page 515C-D. That test (which I have set out in full at [134] below) requires: (i) mutuality of obligation in relation to the obligations to perform work; (ii) a requisite degree of control by the putative employer; and (iii) that the other provisions of the contract are not inconsistent with a contract of employment.

(3) Third, Mr Tolley, for HMRC, conceded that the three framework agreements that had been entered into between Canal Street and ITV would not be regarded as contracts of employment if they had been entered into directly between Ms Fospero and ITV. A hypothetical contract between Ms Fospero and ITV based on those agreements would not be sufficient, of itself, for Ms Fospero to be regarded as an employee of ITV. Instead, he founded his submissions on an argument that the individual engagements accepted by Canal Street pursuant to those framework agreements would, if undertaken by Ms Fospero under arrangements based on the framework agreements, have resulted in Ms Fospero being regarded as an employee of ITV in relation to those specific engagements.



### ***Ms Fospero's submissions***

128. Mr Goldberg, on behalf of Ms Fospero made the following submissions.

(1) As regards the application of the test in s49(1)(c), although the burden of proof was on the appellant on this issue, it was sufficient for him to raise a doubt as to whether Ms Fospero would have been regarded as an employee under the hypothetical contract. Sub-paragraph (i) of s49(1)(c) ITEPA only applied if Ms Fospero would have been regarded as an employee of ITV; it was not sufficient that Ms Fospero might have been regarded as an employee.

(2) Mutuality and control are essential parts of the test which must be fulfilled in all cases. They are not part of the other factors which must be taken into account as the third part of that test (*Jennifer Lee Montgomery v Johnson Underwood Limited* [2001] EWCA Civ 318, [2001] ICR 819 at [27]-[28] (“*Montgomery*”).

(3) There is insufficient mutuality of obligation to establish a contract of employment in the present case.

(a) HMRC had accepted that a hypothetical contract based on the three framework agreements could not of itself give rise to a contract of employment. There was no mutuality between the specific engagements: ITV was not required to provide work and Ms Fospero was not required to accept work that was offered.

(b) Although it was possible for individual engagements to involve sufficient mutuality to give rise to a contract of employment in some circumstances (see *McMeechan v Secretary for State for Employment* [1997] ICR 549 (“*McMeechan*”), *Cornwall County Council v Prater* [2006] EWCA Civ 102, [2006] ICR 731 (“*Prater*”), the lack of mutuality of obligation outside the individual engagements was usually indicative of self-employment. In support of this point, Mr Goldberg referred me to various cases including: *Quashie v Stringfellow Restaurants Limited* [2013] IRLR 99 (“*Quashie*”), *O’Kelly and others v Trusthouse Forte plc* [1984] QB 90 (“*O’Kelly*”), *Secretary of State for Justice v Windle and Arada* [2016] EWCA Civ 459, [2016] ICR 721 (“*Windle*”), and *Davies v Braithwaite* [1931] 2 KB 628.

(4) The nature of control that was relevant for the purpose of the test was contractual control. ITV had no more control over how Ms Fospero performed the services than ITV would have had over any other presenter, whether or not that presenter was an employee. The level of control exercised by ITV was not therefore indicative of the arrangements being characterized as employment.

(5) The other indicative factors derived from the case law pointed conclusively towards Ms Fospero being regarded as self-employed. Ms Fospero was in business on her own account; the performance of services for ITV was simply a part of that business, which was in existence before the relationship with ITV and continued after it. Ms Fospero was not integrated within ITV’s business. She was treated very differently from permanently engaged staff: she had no employment rights, she provided her own clothes and she did her own research. The engagements were irregular and short, which was indicative of self-employment.

### ***HMRC's submissions***

129. Mr Tolley’s submissions for HMRC were, in summary, as follows.

(1) Mr Tolley challenged Mr Goldberg's submission on the burden of proof. The burden was on the appellant to establish its case. The usual standard of proof applied. So the appellant had to establish on the balance of probabilities that a hypothetical contract between Ms Fospero and ITV would not have been a contract of employment.

(2) The framework agreements provided a framework within which each engagement was performed. Although a hypothetical contract based on the framework agreements would not be sufficient of itself to be regarded as a contract of employment, there was sufficient mutuality within the separate engagements themselves to ensure that each specific engagement was performed pursuant to a contract of employment: Ms Fospero accepted the work, she then performed the work and ITV paid for the work when it was performed (*Revenue and Customs Commissioners v Larkstar Data Ltd* [2009] STC 1161 and the Employment Appeal Tribunal ("EAT") decision in *James v Greenwich London Borough Council* [2007] ICR 577 ("*James*"), which was approved by the Court of Appeal [2008] ICR 545).

(3) ITV had control of all relevant aspects of the performance of the services under the terms of the agreements. For this purpose, it was contractual control that mattered (see the EAT decision in *White and another v Troutbeck SA* [2013] IRLR 286 ("*White*") which was approved by the Court of Appeal [2013] IRLR 949). It was sufficient that those contractual controls existed. It was not necessary for ITV to show that it had exercised its contractual rights provided that the contractual rights were genuine.

(4) If mutuality and control existed, it was only necessary to take into account other factors to the extent that they were not consistent with the arrangements giving rise to a contract of employment. The other facts and circumstances surrounding Ms Fospero's relationship with ITV were not inconsistent with a contract of employment. Ms Fospero did not take any financial risk in relation to the arrangements; there was no real possibility of her making a loss in relation to the arrangements with ITV. A presenter of the programme was an integral part of the service provided by ITV. Ms Fospero was a part of ITV's business and not in business on her own account in relation to the engagements with ITV.

## **Discussion**

### ***The burden of proof***

130. I will briefly address the parties' submissions on the burden of proof.

131. The burden of proof in this appeal is on the appellant, Canal Street. The burden is on Canal Street to demonstrate that the assessment is not correct.

132. The assessment in this case is based on an assertion that the requirements of s49(1)(c)(i) ITEPA are fulfilled, that is, that the circumstances are such that, if the services in question were provided under a contract directly between Ms Fospero and ITV, Ms Fospero would be regarded as an employee of ITV. It is for Canal Street to demonstrate that that statement is not correct. The standard of proof is the balance of probabilities. I can see no merit reformulating that question.

133. That is not to say that the statutory formulation of the question is of no import. Mr Tolley stressed in his submissions that there was no motive requirement attached to the statutory test; he was not required to show that Canal Street, Ms Fospero or ITV entered into the arrangements with the purpose or intention of avoiding liabilities to income tax or NICs or that the arrangements involved any degree of artificiality. I agree. However, it is clear that the statutory formulation is designed to limit the scope of IR35 to those circumstances in which, but for the

particular configuration of the contractual arrangements that have been adopted, the worker in question would have been regarded as an employee of the client. There is support for this approach in the judgment of Walker LJ in *R (on the application of the Professional Contractors Group Ltd) v Inland Revenue Commissioners* [2001] EWCA Civ 1945, [2002] STC 165 (at [12]) and the judgment of Henderson J in *Dragonfly* (at [14]).

### ***The essential elements of a contract of employment***

134. As a starting point, I have been referred by both parties to the essential elements of a contract of employment as set out in the judgment of McKenna J in *Ready Mixed Concrete*. He described the essential elements of a contract of employment as follows (at page 515C - D):

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

135. I will address the individual elements of this test in due course. I should first refer to the submissions of the parties in relation to the general application of the test.

136. In relation to the test expounded by McKenna J, Mr Goldberg noted that, whilst the third part of the test contemplates that a court or tribunal is required to have regard to all relevant factors, the court or tribunal must first determine that the first and second criteria set out by McKenna J, mutuality and control, are met (see the decision of the Court of Appeal in *Jennifer Lee Montgomery v Johnson Underwood Ltd* [2001] EWCA Civil 318; [2001] ICR 819 per Buckley J at [28]). The point was not particularly contested by Mr Tolley and I have adopted that approach. However, as I discuss later in this decision notice, there are questions as to whether various aspects of mutuality are relevant at the later stage.

137. Mr Tolley advanced two propositions that require consideration at this stage:

(1) first, the first part of the test, which is often referred to as a requirement for “mutuality of obligation”, is simply a hurdle which is designed to ensure that the contractual arrangements in question are of a nature which puts them in the employment field whereas the second part of the test, that relating to control, determines whether or not a contractual arrangements constitute employment or not;

(2) second, the third part of the test is essentially a negative condition; where it is shown in relation to a particular contract that the first and second parts of the test (mutuality and control) are met, then the contract will be a contract of employment unless, viewed as a whole, there is something about its terms which places it in another category.

138. I will examine each of these propositions in turn.

139. In support of the first submission, Mr Tolley refers to the decision of the EAT in *James* and to the passage from the judgment of Elias J (as he then was) at [16]-[17]:

“16. The authorities do not speak with one voice as to precisely what mutual obligations must be established. The relevant cases were analysed carefully by Mr Justice Langstaff in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 at paras 19–23. As he points out, sometimes, the employer's duty is said to be to offer work, sometimes to provide pay. The critical feature, it seems to us, is that the nature of the duty must involve some

obligation to work such as to locate the contract in the employment field. If there are no mutual obligations of any kind then there is simply no contract at all, as *Carmichael* makes clear; if there are mutual obligations, and they relate in some way to the provision of, or payment for, work which must be personally provided by the worker, there will be a contract in the employment field; and if the nature and extent of the control is sufficient, it will be a contract of employment.

17. In short, some mutual irreducible minimal obligation is necessary to create a contract; the nature of those mutual obligations must be such as to give rise to a contract in the employment field; and the issue of control determines whether that contract is a contract of employment or not.”

140. He also referred me to the decision of the EAT in *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471 (“*Stephenson*”). The relevant passage is found at [11] to [14]. At [14], Elias J said this:

“The issue whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work as available is irrelevant to the question whether a contract exists at all during the period when the work is actually being performed. The only question then is whether there is sufficient control to give rise to a conclusion that the contractual relationship which does exist is one of a contract of service or not.”

141. Those passages tend to support Mr Tolley’s submission, but they must be taken as qualified by a later statement of Elias LJ (as he then was) in *Quashie*. In his judgment in that case, Elias LJ says this at [14].

“On reflection, it is clear that the last sentence of paragraph 14 [in *Stephenson*] is too sweeping. Control is not the only issue. Even where the work-wage relationship is established and there is substantial control, there may be other features of the relationship which will entitle a tribunal to conclude that there is no contract of employment in place even during an individual engagement. *O’Kelly* and *Ready Mixed* provide examples.”

142. Perhaps rather inevitably, these passages begin to trespass on the question of the nature of mutuality that is required to exist in order to meet the first part of McKenna J’s test in *Ready Mixed Concrete*, to which I will turn shortly. However, it is clear from this statement that the concept of control, while important, is not determinative of the issue as to whether or not there is a contract of employment, it is also necessary to consider the other features of the relationship to decide whether a contract of employment exists.

143. That brings me to the second of Mr Tolley’s preliminary submissions, which was that the third part of the *Ready Mixed Concrete* test is a negative condition. It is not the case that, having applied the first two parts of the test and found that the relevant contract meets the necessary requirements to be regarded as a contract of employment, the tribunal should engage in a balancing exercise which gives equal weight to all of the other relevant factors before determining whether or not the relationship in question is a contract of employment. Rather, if the first two parts of the test point towards a contract of employment, the arrangement should be regarded as such unless there are other relevant factors which point to an alternative conclusion.

144. In this respect, Mr Tolley referred to the judgment of Briggs J in *Weight Watchers (UK) Ltd v Revenue and Customs Commissioners* [2012] STC 265 (“*Weight Watchers*”). Briggs J said this at [41] to [42]:

“41. There is in my judgment no real tension, let alone incompatibility, between *Ready Mixed Concrete* on the one hand, and *Narich* and *Stephenson* on the other. McKenna J described the third condition at [1968] 2 QB 497, 516 as a negative condition. At page 515 he had summarised it as a condition that:

“the other provisions of the contract are consistent with its being a contract of service.”

Taken together, those two parts of his description mean that the substance of the third condition is that the terms of the contract, taken as a whole, should not be inconsistent with it being a contract of service. The first, second and fifth examples of the application of the third condition which he gives on page 516, and the passage on page 517 which I have already cited fortify that conclusion.

42. Putting it more broadly, where it is shown in relation to a particular contract that there exists both the requisite mutuality of work-related 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 which places it in some different category. The judge does not, after finding that the first two conditions are satisfied, approach the remaining condition from an evenly balanced starting point, looking to weigh the provisions of the contract to find which predominate, but rather for a review of the whole of the terms for the purpose of ensuring that there is nothing which points away from the prima facie affirmative conclusion reached as the result of satisfaction of the first two conditions.”

He reiterated that conclusion at [111].

145. I accept that Mr Tolley’s submission in this respect. The statement of Briggs J in *Weight Watchers* is clear and I am bound by it. I simply note at this stage that this statement leaves open the question as to what is the “requisite” level of mutuality of work-related obligation and what is the “requisite degree” of control.

### ***Mutuality of obligation***

#### *Case law*

146. The first part of McKenna J’s test in *Ready Mixed Concrete* is often referred to as a requirement for “mutuality of obligation”. He explained this factor at page 515E:

“There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one’s own hands or by another’s is inconsistent with a contract of service, though a limited or occasional power of delegation may not be...”

147. This requirement poses little difficulty in the context of a continuing relationship in which the putative employee works continuously over a given period. But it poses greater difficulty in cases of temporary or casual engagements where a person works intermittently for the putative employer.

148. I have been referred by the parties to a large number of authorities on this issue. I do not intend to embark on an extensive review of them all. From my review of the cases, it would appear that the most complete statement of the principles which should be applied in these circumstances is to be found in the judgment of Elias LJ in the Court of Appeal in *Quashie*.

149. That case involved an unfair dismissal claim brought by a lap dancer, Ms Quashie, at one of the clubs run by Stringfellows. On a preliminary issue, the Employment Tribunal found that Ms Quashie was not engaged under a contract of employment. The EAT allowed her appeal, but the Court of Appeal reversed the EAT's decision.

150. Elias LJ set out the principles which should be applied in these cases. He said this at [10] to [12]:

**“10.** An issue that arises in this case is the significance of mutuality of obligation in the employment contract. Every bilateral contract requires mutual obligations; they constitute the consideration from each party necessary to create the contract. Typically an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to keep the relationship in place until it is lawfully severed, usually by termination on notice. But there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed: see the decisions of the Court of Appeal in *McMeechan v Secretary of State for Employment* [1997] IRLR 353 and *Cornwall County Council v Prater* [2006] IRLR 362 .

**11.** Where the employee working on discrete separate engagements needs to establish a particular period of continuous employment in order to be entitled to certain rights, it will usually be necessary to show that the contract of employment continues between engagements. (Exceptionally the employee can establish continuity even during periods when no contract of employment is in place by relying on certain statutory rules found in section 212 of the Employment Rights Act.)

**12.** In order for the contract to remain in force, it is necessary to show that there is at least what has been termed “an irreducible minimum of obligation”, either express or implied, which continue during the breaks in work engagements: see the judgment of Stephenson LJ in *Nethermere (St Neots) v Gardiner* [1984] ICR 612, 623, approved by Lord Irvine of Lairg in *Carmichael v National Power plc* [1999] ICR 1226, 1230. Where this occurs, these contracts are often referred to as “global” or “umbrella” contracts because they are overarching contracts punctuated by periods of work. However, whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee. This was the way in which the employment tribunal analysed the employment status of casual wine waiters in *O'Kelly v Trusthouse Forte plc* [1983] ICR 728, and the Court of Appeal held that it was a cogent analysis, consistent with the evidence, which the Employment Appeal Tribunal had been wrong to reverse.”

151. In this passage (at [10]), Elias LJ accepts the possibility that, in appropriate circumstances, a casual or temporary worker who undertakes a series of separate engagements for the same putative employer may be engaged under a contract of employment in relation to each separate engagement even where there are no ongoing contractual obligations between the parties between the engagements. This conclusion is supported by the decisions in two cases to which he refers, *Prater* and *McMeechan*.

152. In *Prater*, the appellant, Mrs Prater, had worked for the county council as a home tutor to pupils who were unable to attend school. The council offered work to Mrs Prater on a pupil by pupil basis under arrangements which differed from pupil to pupil both in terms of the number of hours of teaching per week that was required and the period over which Mrs Prater was engaged (which ranged from a few months to several years). There was no obligation on the council to offer work to Mrs Prater and no obligation on Mrs Prater to accept any particular engagement. Nevertheless, the arrangements existed for over 10 years (*Prater* [8] to [12]).

153. Mrs Prater sought written particulars of her employment. The council argued that she was not an employee. The Employment Tribunal found that Mrs Prater was employed by the council. The EAT dismissed the council's appeal and the EAT's decision was upheld by the Court of Appeal.

154. In response to an argument that there was no mutuality of obligation involved in arrangements where a worker undertook engagements without any guarantee of further work or the obligation to accept further work if it was offered, Mummery LJ said this at [32] - [33].

“32. It will be necessary to examine the authorities cited by Mr Heppinstall [counsel for the council] in order to see whether, as he contends, they establish his proposition that mutuality of obligation within each separate contract is insufficient to create a contract of service if, after the end of the contract, there is no continuing or further obligation on the Council to offer more work or on Mrs Prater to accept more work.

33. In my judgment, the authorities do not support the Council's argument for a degree of mutuality of obligation over and above the mutual obligations existing within each separate contract, namely the obligation on Mrs Prater to teach the pupil and the obligation on the part of the Council to pay her for teaching the pupil, whom they continue to make available for teaching by her.”

155. He concluded at [40(5)]:

“Nor does it make any difference to the legal position that, after the end of each engagement, the Council was under no obligation to offer her another teaching engagement or that she was under no obligation to accept one. 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. That was all that was legally necessary to support the finding that each individual teaching engagement was a contract of service.”

156. Longmore LJ reached the same conclusion (*Prater* [43]).

157. There is therefore authority in *Prater* in support of Mr Tolley's submission that, in appropriate circumstances, there can be sufficient mutuality of obligation within the individual engagements in order for contractual arrangements to be regarded as a contract of employment. There is further support for that proposition in the Court of Appeal decision in *McMeechan*, a case relating to the position of agency workers (per Waite LJ at page 563H to page 564B) to which Elias LJ also refers in the passage which I have cited from his judgment in *Quashie* (*Quashie* [10]).

158. Elias LJ goes on (*Quashie* [12]) to point out that, in other cases, the fact that there is no overall or umbrella contract which continues in existence between the separate engagements may, depending upon the circumstances, justify an inference that a casual or temporary worker

is not engaged under a contract of employment but should be properly regarded as an independent contractor.

159. The leading cases in this category to which Elias LJ refers (and to which I was referred by the parties) are *O’Kelly*, which relates to the engagement of banqueting staff on a regular but casual basis by the Grosvenor House Hotel, and *Carmichael*, a case which concerns the engagement of guides at nuclear power stations.

160. In both of those cases, the facts as found were that, even if there was an expectation that further work might be forthcoming, the putative employer was under no obligation to offer further work beyond the specific engagement and the worker was under no obligation to accept further work if it was offered. In each case, the court (the Court of Appeal in *O’Kelly* and the House of Lords in *Carmichael*) refused to disturb a decision of the Industrial Tribunal that the relevant worker was not engaged under a contract of employment. In each case, the Industrial Tribunal reached its conclusion on the grounds that there was no or insufficient mutuality of obligation between the parties for the arrangements to give rise to a contract of employment (see Ackner LJ in *O’Kelly* where he refers to the decision of the Industrial Tribunal (at page 106A) and Lord Irvine’s description of the reasons given by the Industrial Tribunal for its decision in *Carmichael* (at page 2045F)).

161. The point is also made by Underhill LJ, giving the only reasoned judgment in the case of *Windle*. This case concerned the status of interpreters engaged by the courts and tribunals service on an engagement by engagement basis. The interpreters in question brought a race discrimination claim against the Ministry of Justice. As a preliminary issue, the tribunals and courts considered whether or not the interpreters were in employment as defined in s83(2) of the Equality Act 2010. The lack of mutuality of obligation between the separate engagements was a significant factor in the Employment Tribunal reaching a conclusion that the interpreters were not employed under such a contract. The EAT allowed the claimants’ appeal, but the Court of Appeal reversed the EAT’s decision and found that the absence of mutuality between the engagements was a factor which could shed light on the nature of the relationship whilst the engagements were being undertaken by the interpreters.

162. In the context of a submission that the absence of mutuality between engagements was irrelevant in determining whether the claimant was person is an employee in the extended sense permitted by Equality Act 2010, Underhill LJ said this (*Windle* [23]):

“23. I do not accept that submission. I accept of course that the ultimate question must be the nature of the relationship during the period that the work is being done. But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course it will not always do so, nor did the ET so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it in limine runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances.”

163. The definition of employment in s83(2) Equality Act 2010 extends beyond arrangements which are governed by a contract of employment. However, Underhill LJ dismissed the arguments that the decision in *Quashie* was not relevant on the grounds that the definition in



s83(2), in particular sub-paragraph (a), extended to a wider set of circumstances. In his view “the underlying point is the same” (*Windle* [24]).

164. This leads to the question as to the role that this factor should play in the analysis: is it taken into account in determining whether or not the requisite degree of mutuality of obligation exists (in the first part of the test) or is it taken into account in determining whether there are other factors which exist which are not consistent with a contract of employment (in the third part of the test)? This distinction is potentially important if I accept, as I have done, the submission of Mr Tolley that the third part of the test is essentially a negative condition and only applies if there are other factors which are not consistent with the relevant contract being a contract of employment.

165. The passage from Elias LJ’s judgment in *Quashie* where he comments on his decision in *Stephenson* (*Quashie* [14]), to which I refer at [141] above, when taken in the context of his comments in *Stephenson*, to my mind, suggests that the inference that a single engagement is likely to be indicative of self-employment is part of the wider consideration of all the relevant circumstances of the case in the third part of the test in *Ready Mixed Concrete*. The passage from the judgment of Underhill LJ in *Windle* (*Windle* [23]), to which I refer at [162] above, is supportive of this approach.

166. The other cases to which I have referred are more equivocal. As I have mentioned, the tribunals in *O’Kelly* and *Carmichael* reached their decisions on the basis of mutuality of obligation, which suggests that the lack of mutuality between specific engagements was a factor in deciding whether the requisite degree of mutuality exists within the specific engagement. Those decisions were not disturbed by the relevant court. The Court of Appeal in *Prater* distinguishes *O’Kelly* and *Carmichael* on the basis that they were not dealing with the case of a succession of individual contracts for work within each of which there was mutuality of work-related obligation (Mummery LJ, *Prater* [38]). On the other hand, Waite LJ, in the Court of Appeal in *McMeechan*, more clearly deals separately with the issue of mutuality (at page 563F-G) and other factors (*McMeechan* at page 565C-D and page 565G).

167. As the point is most clearly addressed in Elias LJ’s judgment in *Quashie* and Underhill LJ’s judgment in *Windle*, I intend to follow their approach. I will therefore take into account any implications that the lack of mutuality of work-related obligation outside the periods during which Ms Fospero was performing services in relation to a particular engagement as part of my consideration of the third part of the *Ready Mixed Concrete* test.

#### *Mutuality of obligation in this case*

168. This means that I accept Mr Tolley’s submission that, in order to meet the mutuality of obligation requirement in the first part of the *Ready Mixed Concrete* test, it is sufficient, in the context of the current arrangements for there to be mutuality of work-related obligation in relation to the individual engagements which Ms Fospero would perform under the hypothetical arrangements that I have described.

169. For the purposes of meeting this requirement alone, it is not relevant that, at the end of each engagement, ITV would be under no obligation to offer Ms Fospero any further work and that Ms Fospero would be under no obligation to accept any further work. Once Ms Fospero accepted an engagement under the terms of the hypothetical arrangements that I have described, she would be contractually obliged to perform the relevant services and ITV would be obliged to pay the agreed fee. Ms Fospero would be obliged to perform the services personally. She would not be entitled to provide a substitute. If for any reason she was unable to perform the services – whether due to illness or otherwise – she would not be entitled to a fee and it would be ITV’s responsibility to find a substitute presenter for the programme.

170. Consistent with the approach of the Court of Appeal in *Prater*, that is sufficient to meet the mutuality of obligation requirement and to place the arrangements “in the employment field”, as Elias J put it in *James*.

### **Control**

171. I now turn to the second part of the *Ready Mixed Concrete* test, the part that relates to “control”.

### *Case law*

172. In *Ready Mixed Concrete*, McKenna J explained this element of the test at page 515F to page 516A:

“As to (ii). 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.

“What matters is lawful authority to command so far as there is scope for it. and there must always be some room for it, if only in incidental or collateral matters.” - *Zuijs v. Wirth Brothers Proprietary, Ltd.* 19

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.”

173. In this context, I was referred by both parties to the decision of the EAT in *White*. This case concerned the status of caretakers of a property and farm. The EAT found that notwithstanding its lack of day to day control over the performance of the duties of the caretakers, the putative employer retained sufficient rights of control through its contractual rights for the contract to be regarded as a contract of employment (*White* [51]). That decision was approved by the Court of Appeal.

174. There are various points that I take from the decision in *White* (in particular, the passage at [40] to [45]) and other cases to which I was referred and which I have set out below.

(1) Whether or not the arrangements possess the requisite degree of control is in the first instance to be determined by reference to the terms of the contract between them (*Ready Mixed Concrete* at page 516A; *White* [43]).

(2) The key question is whether the putative employer has to a sufficient degree the right of control over the worker (*White* [40]). The fact that a worker has a substantial degree of autonomy over the manner in which the work is done does not mean that the putative employer has divested itself of the right to control (*White* [41]).

(3) All aspects of control are relevant (*White* [42]), but the question is not who exercises day-to-day control but where the ultimate right to control resides (*White* [45]).

(4) The authorities acknowledge that an employment relationship can exist even in relation to skilled workers, the performance of whose services the putative employer is in no position to control and who are employed to exercise their own skill and judgment. This point is illustrated in the Supreme Court decision in *Various Claimants v Catholic Child Welfare Society and Others* [2012] UKSC 56. In that case, Lord Philips said (at [36]):

“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.”

*Control in this case*

175. I should now examine the elements of control in the context of the hypothetical contract in this case.

176. It is clear that ITV would determine the nature of the services that would be required through its choice of the type of engagement which Ms Fospero is asked to perform. Ms Fospero could refuse to undertake a particular engagement even if it was offered, but once the engagement was offered, the type of services would be defined.

177. Once Ms Fospero had accepted the engagement, ITV would retain control over the time and location at which the services were performed. Once again, this is not surprising given the nature of the work that Ms Fospero, for the most part, performed. It was inevitable that those services would have to be performed at ITV’s studios at the times of the live broadcasts.

178. ITV would retain editorial control over the programmes. It would decide the format of the programmes, the stories which were run, the running order, and which guests would be interviewed. It would also control and the technical aspects of the programmes.

179. ITV, of course, would have little control over the actual performance of Ms Fospero. Ms Fospero would be required to follow the reasonable directions of the producer. But, in most cases, ITV would not control the words that she actually used or the manner in which she chose to present the programmes; they were, after all, live broadcasts. There would be cases where ITV sought to control the words that Ms Fospero used, for example, those occasions on which she was required to read from a script from the autocue, but equally there would be occasions when Ms Fospero would be presenting without the use of an autocue or any script at all. If ITV disapproved of Ms Fospero’s presentation, it may be able to terminate the framework agreements for cause or, if not, it could simply decide not to offer Ms Fospero any future engagements.

180. These arrangements would be little different from those which governed any other presenter whether employed or self-employed. In truth, they would be no different from those which apply to any other skilled worker who is not susceptible to control in the master/servant sense used in McKenna J’s test in *Ready Mixed Concrete*.

181. Once again, however, it seems to me that ITV would have retained sufficient control over the performance of the services within the individual engagements for the arrangements to be a contract of service provided that the arrangements as a whole are consistent with that conclusion. ITV had a right to control the performance so far as there was any scope for control by ITV. It had the contractual rights to direct to direct what Ms Fospero did and to sanction Ms Fospero for an inadequate performance.

### *Other relevant factors*

#### *Case law*

182. The third part of the *Ready Mixed Concrete* test requires an examination of the other provisions of the contract to determine whether they are inconsistent with the characterization of the contract as a contract of employment.

183. Having given a number of examples, McKenna J explained this element of the test as follows (*Ready Mixed Concrete* at page 516G to page 517B):

“An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.”

184. This approach recognizes that the question of characterization is not simply a question of whether or not the requisite degree of control exists within a work-related contract. When applying the test the tribunal must take into account all relevant factors which govern the relationship between the parties. In *Quashie*, Elias LJ described the nature of the enquiry in this way (*Quashie* [8]):

“8. This approach recognises, therefore, that the issue is not simply one of control and that the nature of the contractual provisions may be inconsistent with the contract being a contract of service. When applying this test, the court or tribunal is required to examine and assess all the relevant factors which make up the employment relationship in order to determine the nature of the contract.”

#### *Other relevant factors in this case*

185. I must therefore review the other relevant factors in this case, taking into account, as I have discussed above, that this third part of the test is a negative condition; the enquiry is to determine whether or not these factors are such that they are inconsistent with a contract of employment (see Briggs J in *Weight Watchers* at [41] to [42] to which I refer at [144] above).

186. The first point that I should address in this context is the nature of the hypothetical contract itself. As I have discussed above, the authorities suggest that the absence of mutuality of work-related obligation between engagements is a factor which can properly be taken into account in determining the character of the relationship between the parties and may tend to indicate “a degree of independence” or “lack of subordination” in the relationship “which is incompatible with employee status” (*Windle* [23] per Underhill LJ) or depending on the circumstances “may justify an inference” that the worker “is providing services as an independent contractor rather than an employee” (*Quashie* [12] per Elias LJ).

187. In Ms Fospero's case – and under the hypothetical arrangements that I have described - there would be no mutuality of work-related obligation between the engagements: Ms Fospero would have no guarantee of work and would be under no obligation to perform work if it was offered. She would be engaged on an assignment by assignment basis. Those assignments would be very short term, many involving only a matter of hours in the studio, albeit some requiring several hours of preparation in advance. Although there would be a hope and expectation of further work under the arrangements, for the most part, when she finished work on a particular engagement, Ms Fospero would have no assurance that she would be offered further work. In this respect, her position would be similar to the banqueting staff in *O'Kelly*

or the guides in *Carmichael* to which Elias LJ refers in *Quashie* at [12]. This is not a case like *Prater*, in which the individual engagements could last for a number of years and once Mrs Prater had agreed to take on a particular pupil she was obliged to fulfil that commitment and the council was obliged to provide work until the engagement ceased.

188. The present case is, however, different from *O'Kelly* and *Carmichael*. In those cases, there was no “overarching” or “umbrella” contract subsisting between the parties between the separate engagements. In this case, under the hypothetical contract, although there would be no continuing work-related obligations, there would be continuing contractual arrangements in existence between Ms Fospero and ITV between the separate engagements which she undertook for ITV. Those arrangements would seek to place restrictions on Ms Fospero’s other commercial activities and also to impose some obligations on Ms Fospero as regards the conduct of her personal life.

189. Notwithstanding these continuing contractual arrangements, in my view, the circumstances of Ms Fospero’s case justify the inference that she would be working as an independent contractor rather than an employee under the hypothetical contract.

190. As starting point, whilst the contractual obligations which existed during the performance of each engagement would be sufficient to meet the second part of the *Ready Mixed Concrete* test, the controls which were exercised by ITV over the production and content of the programmes would have been the same for a regular presenter or a guest presenter and would have applied irrespective of whether the presenter was employed by ITV or not. They were simply a function of the part that Ms Fospero played in the production of the programme.

191. Furthermore, the contractual obligations which continued between the engagements would not, to my mind, detract from the inference that Ms Fospero was self-employed. For the most part, they would support the understanding of the aspects of the agreement that I have described at [91] and [96] to [103] above, and would be, in essence, requirements for Ms Fospero to maintain her place on a list of preferred suppliers for use by ITV when, for any reason, regular presenters were unavailable: some of the contractual terms were designed to ensure that ITV’s genuine commercial interests in the programmes would not be jeopardized if they were to engage Ms Fospero in the future (for example, by seeking to ensure that Ms Fospero would not be appearing in programmes produced by other broadcasters that were being aired at or about the same time as the relevant ITV programmes in which Ms Fospero might be involved); others were designed to ensure that Ms Fospero did not disqualify herself from being able to perform the services in the future (for example, by seeking to ensure that Ms Fospero did not breach the Ofcom guidelines); and others were intended to ensure that, as far as possible, Ms Fospero would be fit and able to perform the services if and when she was requested to do so (for example, by seeking to ensure that Ms Fospero did not engage in dangerous activities which, if they led to an injury, might make her unavailable). The manner in which the restrictions on Ms Fospero’s other commercial activities were in fact operated (see [101] above) would place them in a similar category.

192. If Ms Fospero breached any of these requirements, ITV’s real sanction would be simply not to engage Ms Fospero again. They do not, to my mind, detract from the “degree of independence” and “lack of subordination” which the lack of mutuality of work-related obligations between the various engagements would indicate.

193. Furthermore other relevant factors in this case point towards self-employment.

(1) In my view, to use the words of Cooke J in *Market Investigations Limited v Minister of Social Security* [1969] 2 QB 173 at page 184, Ms Fospero was “in business on [her] own account”.

There is a difficulty in applying this type of test in conjunction with the hypothetical approach adopted by s49(1)(c) ITEPA which focuses on the specific arrangements under which the worker is engaged by a particular client. However, in my view, the only practical approach is to consider the arrangements under which the worker, Ms Fospero in this case, provides her services as a whole.

When I do so, it seems to me that the agreements with ITV were just part of that wider business carried on by Ms Fospero through Canal Street in which Ms Fospero undertook various types of presenting work. That business continued before and after the arrangements with ITV. During all of these periods Ms Fospero's agents were seeking and she was undertaking work of various different kinds for different clients.

Mr Tolley highlighted that, in the period in question, ITV was the only broadcaster for whom Ms Fospero was able to obtain work, that the contractual arrangements with ITV differed in some respects from contracts with other clients, and the proportion of Canal Street's income and the proportion of Ms Fospero's working time that was reflected in the arrangements with ITV in that period was very significant.

It is true that ITV was the only broadcaster for whom Ms Fospero undertook television work in the period. However, her agents, Roar, were actively engaged in seeking other broadcasting work for her in the period in question. In the period before the arrangements with ITV, Ms Fospero undertook other broadcasting work for ITV, the ITV group and other broadcasters and in the period after the arrangements with ITV the position was much the same.

The contract with ITV was in some respects quite different from the contracts with other clients in that period. But most of the differences are explained by the fact that ITV was the only broadcaster for which Ms Fospero undertook work in the period and by the nature of the arrangements that I have described above.

It is also true that, in the period in question, ITV was an important client of the business but Ms Fospero's business would not be the first small business that was significantly exposed to a particular client in a particular period.

For these reasons, to my mind, it would be artificial to isolate the relationship with ITV and that period in time from the remainder of the business carried on by Ms Fospero as would be required to meet the test in s49(1)(c)(i) ITEPA.

(2) Canal Street and Ms Fospero incurred costs and expenses in relation to that business. In particular, Canal Street and Ms Fospero engaged agents to source a variety of work from a variety of clients. Ms Fospero purchased and used her own equipment.

Mr Tolley sought to focus on the risks involved in the arrangements with ITV, where there was no real prospect of Canal Street making a loss in relation to the individual engagements and the real risk for Canal Street and Ms Fospero was that there was no guarantee of further work. However, in my view, this point does not take the argument much further. Many a self-employed consultant is in much the same position – the fee for a particular job will often significantly exceed the expenses associated with it because the fee has to reflect a price for the consultant's time – and, once again, the argument concentrates on the individual engagement and ignores the business as a whole.

(3) The clear intention of the parties was that Ms Fospero would not be treated as an employee of ITV. Although Mr Tolley counselled against taking this factor into account, it is not a matter that can be completely dismissed (see, for example, *Quashie* [52], [53]).

ITV had other presenters whom it engaged as employed staff. They were treated very differently from Ms Fospero not only in the structure of their remuneration and benefits, but also in relation to many other aspects of their relationship. Although Ms Fospero's role was an important element in many of the programmes in which she was involved, outside that performance, she was treated very differently from employed staff. Employed presenters were provided with laptops, had ITV email addresses, had workstations or rooms at ITV's studios and were provided with more generous expenses allowances. Ms Fospero had none of these things. Her evidence was, and I accept it, that she would have willingly accepted a permanent engagement if it had been offered to her. It was not, despite Mr Shalit's attempts to secure better terms for her.

194. If I take into account all of these factors, they are inconsistent with a contract of employment. And so, applying the test set out by McKenna J in *Ready Mixed Concrete*, I conclude that Ms Fospero would not have been an employee of ITV if she had been engaged directly under the hypothetical contract with ITV and it is not possible to say that Ms Fospero would have been an employee of ITV if she had been engaged directly under the hypothetical contract with ITV (as required by s49(1)(c)(i) ITEPA).

195. Furthermore, acknowledging some of the shortcomings in that test, which were referred to by Mr Goldberg, and, as invited to do so by a number of the authorities (for example, Mummery J in *Hall v Lorimer* [1992] STC 599 at page 612b), if I stand back from the detailed picture that is painted by all of the facts and circumstances, and view the picture as a whole, I arrive at the same conclusion. In the period in question, Ms Fospero was engaged, through Canal Street, in a separate business, she worked under a series of short-term engagements for ITV, she had no guarantee of further work outside those engagements and ITV had no obligation to provide any work. All of these factors point towards Ms Fospero being regarded as self-employed and not an employee even if she had been engaged directly by ITV.

#### **DECISION**

196. I allow this appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

197. 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.

**ASHLEY GREENBANK  
TRIBUNAL JUDGE**

**RELEASE DATE: 25 OCTOBER 2019**