[2021] JMRC 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

REVENUE COURT

APPEAL NO. 2021 RV 00003

BETWEEN	**JAMAICA INN LIMITED**	**APPELLANT**
AND	**THE COMMISSIONER GENERAL TAX ADMINISTRATION JAMAICA**	**RESPONDENT**

Ransford Braham Q.C. and Carrisa Mears instructed by Braham Legal, Attorneys-at-Law for the Appellant.

Cecilia Chapman-Daley and Gabrielle Warren, Attorneys-at-Law for the Respondent.

Heard: 26th July and 22nd October 2021

Revenue Law - Education Tax - Education Tax Act - Section 5(1)(c)(ix) Income Tax Act - Paths to Employer's liability for Education Tax - Applicability of common law principles in determining whether a contract of service exists in determining liability for Education Tax.

C. BARNABY, J

INTRODUCTION

[1] The Appellant is the operator of a resort and a facility called Ocean Spa (hereinafter called "the Spa"), which is located at the resort. By way of Notice to Employers of Outstanding Tax issued on 25th October 2017, the Appellant was advised of a balance owed by it to the Respondent for PAYE and Education Tax for the year 2015. This additional assessment follows the Respondent's decision

to classify the spa service providers engaged at the Spa as employees of the Appellant who were liable to be taxed on their emoluments, which tax was to be deducted by the employer and remitted to the Respondent. Following the objection process, the Respondent confirmed its decision to classify the spa service providers as employees but tax liability was revised downward.

[2] The Appellant appealed against the Respondent's decision to the Revenue Appeals Division (RAD) which dismissed the appeal. It was found, so far as is relevant, that the spa service providers were engaged under contracts of service. The revised assessment for PAYE and Education Tax were accordingly confirmed.

[3] Any dispute in respect of the revised PAYE assessment was otherwise resolved. The Appellant only appeals the decision of the RAD in respect of the revised assessment to Education Tax in the amount of three hundred and seventy-two thousand one hundred and sixty-eight dollars and sixty-two cents ($372,168.62). Whether or not the spa service providers were engaged under contracts of service or contracts for service retains its place at the core of the dispute.

[4] While I disagree with the approach taken by the RAD in determining the matter, I have nevertheless found that its classification of the contract between the Appellant and the spa service providers as a contract of service is correct. For reasons which appear below, the appeal is dismissed and the decision of the RAD confirmed.

REASONS FOR DECISION

[5] In determining whether or not the spa service providers were engaged under contracts of service and the appropriate approach to the enquiry, it is important to have regard to who and what may be liable for Education Tax.

<u>Who is chargeable</u>?

[6] Section 4 (1) of the **Education Tax Act** (hereinafter called the "ETA") provides that subject to section 6, Education Tax is payable by taxpayers. A "taxpayer", pursuant to section 2 "…*means any employed person, self-employed person or domestic worker and any employer who is required to pay tax pursuant to this Act". The* classes of taxpayers identified in the provision are also defined at section 2 of the ETA thus:

> ***"domestic worker"*** *means a person employed otherwise than for the purposes of a trade or business for the comfort or convenience of a member of a household or in or about a dwelling house or such other premises as may be prescribed in such capacities as housekeeper, cook, maid (including children's maid), laundress, butler, general helper, gardener, chauffeur or other similar capacity;*
>
> ***"employed person"*** *means a person over the age of eighteen and under retirement age gainfully occupied in employment specified in the First Schedule and earning not less than the minimum wage as prescribed under the Minimum Wage Act;*
>
> **"*employer"*** *means any person who has in his employment a person who is required to pay education tax pursuant to this Act;*
>
> ***"self-employed person"*** *means, subject to section 3, a person gainfully occupied in Jamaica who, in relation to that occupation, is not an employed person; …*

[7] Among other things which are not immediately relevant, *"gainful employment"*, pursuant to paragraph 1 of the First Schedule to the Act includes ***"[e]employment in Jamaica under any contract of service or apprenticeship****, written or oral, and whether express or implied."* [Emphasis added].

[8] For its part, section 6 of the ETA imposes an obligation on an employer to pay education tax due from employed persons. In addition to the "employer's tax" paid in respect of his employee, the employer on behalf of and to the exclusion of the employee is also required to pay the tax to which the employee is liable under the Act. In that regard the employer is permitted to deduct, subject to and in accordance with the regulations and not otherwise, the education tax which has been or is to be paid on behalf of the employee from his pecuniary remuneration.

What is chargeable?

[9] The **Education Tax Regulations** found in the Second Schedule to the ETA provides as follows at regulation 2,

> *Subject to the provisions of this Act and these Regulations, education tax shall be paid-*
>
> *(a) by such taxpayers as are specified in the first column of the Appendix (hereinafter referred to as "specified taxpayer") in accordance with the rates specified respectively in the second column of the Appendix; and*
>
> *(b) by taxpayers, being employers, in accordance with the rates specified by reference to specified taxpayers respectively, in the third column of that Appendix.*

[10] It suffices to say that the Appendix provides for two broad classes of "specified taxpayers". Employed and self-employed persons. For the employed person Education Tax is generally, and certainly so far as is relevant here, charged as a percentage of that person's **"emoluments"**. Both an employee and employer portion are paid as Education Tax.

[11] On the other hand, self-employed persons who are not disqualified from being charged Education Tax on account that they earn below the weekly minimum

wage under the **Minimum Wage Act**, are liable to the tax which is charged as a percentage of their **"earnings"**. There being no employer in such a situation, there is no obligation for payment of the Tax by an employer.

[12] *"Emoluments"* is defined at section 2 of the ETA to mean

> *… any emoluments assessable to income tax pursuant to paragraph (c) of section 5 of the Income Tax Act (other than annuities, pensions, superannuation or other allowances payable in respect of past services in any office or employment of profit and such other categories of emoluments as may be prescribed) being emoluments from which income tax is deductible pursuant to the Income Tax (Employments) Regulations,* ***whether or not tax in fact falls to be deducted therefrom****; …*
>
> [Emphasis added]

[13] It appears to me that by including the words emphasized in the definition of *"emoluments"* under the ETA, and in providing that *""tax" means the education tax imposed by this Act and includes all penalty and interest that are or may be added to a tax under this Act',* the legislature created two (2) distinct paths to education tax liability for one who engages the of profit services of another. They are:

(i) As an employer of an employed person under a contract of service or apprenticeship; or

(ii) As "the employer" of "the employee" who provides "personal services" in accordance with section 5 (1) (c) (ix) of the ITA.

For convenience only, I will address the paths to liability in reverse order.

Paths to Education Tax Liability

- ***Section 5 (1) (c) (ix) Liability (Path 2)***

[14] So far as is relevant, section 5 (1) (c) of the ITA prescribes that

> *Income tax shall, subject to the provisions of this Act, be payable by every person at the rate or rates specified hereafter for each year of assessment in respect of all income, profits or gains respectively described hereunder –*
>
> *(a) …*
> *(b) …*
> *(c) all emoluments, whether in the form of cash, benefit or kind, arising or accruing to any person or any member of his family or household by reason of his office or employment of profit, including the full cost of providing the benefit or kind (such as a rent, uniform or laundry allowance):*
>
> *Provided that –*
>
> *(i)…*
>
> *(ix) where under the terms of a contract or arrangement any Person (hereinafter in this section called "the employee") is under an obligation to render personal services to another person (hereinafter in this section called "the employer") whether on his own behalf or on behalf of a company, and -*
>
> *(A) the employee is subject to, or to the right of, supervision, direction or control by the employer as to the manner in which he renders those services; and*
> *(B) the remuneration for the services would not, apart from this paragraph, be treated as emoluments,*
>
> *then the relevant services shall be treated as duties of an office or employment of profit held by the employee*

> *and the income arising or accruing therefrom shall be treated as emoluments of that office or employment, and accordingly, the employer shall deduct from the remuneration the income tax payable.*

[15] The other provisos at paragraph (c) are not relevant to the instant enquiry but generally provide, whether by way of exception or inclusion, how "emoluments" are determined in particular circumstances. To the extent relevant, section 2 of the ITA also provides that

> *"emoluments" includes, in relation to any office or employment of profit –*
>
> *(a) all salaries, fees, wages, all provision or payment, as the case may be, in respect of living or other accommodation, entertainment, utilities, domestic or other services and other benefits, perquisites and facilities whatsoever (whether or not similar to any of the foregoing and whether in money or otherwise); and*
>
> *(b) without prejudice to the provisions of section 13, all sums paid to any person by an employer in respect of expenses whether reimbursable or not; …*

[16] "Personal services" is defined at section 2 of the ITA to include *"services of a professional, clerical, technical, administrative of managerial nature."*

[17] The RAD determined that section 5(1)(c)(ix) is the starting point in this jurisdiction when determining whether an individual is an employee or independent contractor (paragraph 62 of the Notice of Decision). Consequently, it criticised the Appellant for having relied heavily on the common law without regard to the statute. I find that the RAD erred in these regards.

[18] It is my judgment that the proviso at paragraph (c) (ix) of section 5 (1) is in the nature of a "deeming provision" in that it allows for the provision of "personal services" to be treated as duties of an office or employment of profit; for the income arising or accruing therefrom to be treated as emoluments of the office or employment; and permits deduction of tax by "the employer" where the following circumstances exist.

(i) A person is under an obligation to render personal services to another person (who the section terms "the employer"), whether on his own behalf or on behalf of a company, pursuant to a contract or agreement; and

(ii) The provider of the personal services (who the section terms "the employee") is subject to the supervision or to the right of supervision by "the employer" as to the manner in which the services are rendered; and

(iii) Remuneration for the provision of the personal services would not be treated as emoluments "*apart from the provisions of [section 5(1)(c)(ix)]"*.

[19] It appears to me that in enacting the provision the legislature aimed to capture for tax purposes, those relationships which would not otherwise qualify as employment relationships at common law on account of insufficient "mutuality of obligation", one of the irreducible minimum legal requirements for a contract of employment. As will be seen later, this particular common law requirement gives rise to some difficulty where there are engagements under which personal services are provided, there is remuneration and a right to and/ or the exercise of a sufficient degree of control but the engagement is not continuous, or there is no obligation on the contracting parties to provide or accept work as appropriate. Rather than a replacement for the well-established common law principles for determining the existence or otherwise of a contract of employment, the provision

is in my judgment a statutory response to a difficulty created by the approach at common law, for tax purposes.

[20] Accordingly, it is my judgment that where there is a contract of employment the proviso at paragraph (c) (ix) of section 5 (1) of the ITA is not triggered.

[21] In this appeal, for reasons which will be disclosed subsequently, I have found that the spa service providers were under an obligation to render personal service to the customers of the Spa on behalf of the Appellant, and was at minimum, subject to the right of supervision, direction and control by the Appellant in the manner in which the contracted services were rendered. Additionally, there is no dispute that they received remuneration for the services supplied by way of commission. In these premises I would have found the Appellant liable for Education Tax pursuant to section 5(1)(c)(x) had I determined that there was no contract of employment. As it emerges however, I am of the view that the spa service providers were engaged under contracts of service which renders resort to this path to liability unnecessary.

- ***Liability pursuant to a Contract of Service (Path 1)***

[22] The appeal to the RAD was determined pursuant to section 5 (1) (c) (ix) of the ITA and that was the focus of the Appellant's challenge. It was contended on its behalf that common law principles for the classification of contract were inapplicable and that the requirements of section 5 (1) (c) (ix) of the ITA had not been met. It is my view however, that common law principles are in fact relevant and that upon those principles there was a contract of service between the Appellant and the spa service providers.

[23] As stated previously, a person engaged under a contract of service, whether written or oral, whether expressed or implied and who is not excluded from liability on account of a territorial, age or minimum wage limitation, is liable to Education Tax under the ETA. The Tax is calculated as a percentage of the

"emoluments" of his or her employment. There is no dispute in respect of the spa workers' engagement in Jamaica or of them having met the qualifying age requirements for the payment of Education Tax. The issue is whether they were engaged under a contract of service.

[24] An Ocean Spa contract dated 19th October 2016 (hereinafter called "the Contract") was supplied by the Appellant in an effort to demonstrate that the spa service providers were engaged as independent contractors under contracts for service. It is expressly stated at clause 9.1 of the Contract that *"[d]uring this Agreement the contractor [or spa service provider] shall be an independent contractor and not the servant, employee and/or agent of the resort."* It is well settled however that the label given to a transaction by the parties is not conclusive of what the transaction is.

[25] Both parties cited **Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance** [1968] 2 QB 497, 515-517 where the "control test" was propounded by Mackenna J. The approach taken there recommends itself and accordingly I reproduce the dicta extensively. It is this,

> *… whether the relation between the parties to a contract is that of master and servant is a conclusion of law dependent upon the provisions of the contract. If the rights conferred and the duties imposed by the contract are such that the relation is that of master and servant, it is irrelevant that the parties who made the contract would have preferred a different conclusion…*
>
> *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.

I must now consider what is meant by a contract of service.

As to (i). 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: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.

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. [(1955) 93 C.L.R. 561, 571]*

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.

The third and negative condition is, for my purpose, the important one, and I shall try with the help of five examples to explain what I mean by provisions inconsistent with the nature of a contract of service.

(i) *A contract obliges one party to build for the other, providing at his own expense the necessary plant and materials. This is not a contract of service, even though the builder may be obliged to use his own labour only and to accept a high degree of control: it is a building contract. It is not a contract to serve another for a wage, but a contract to produce a thing (or a result) for a price.*

(ii) *A contract obliges one party to carry another's goods, providing at his own expense everything needed for performance. This is not a contract of service, even though the carrier may be obliged to drive the vehicle himself and to accept the other's control over his performance: it is a contract of carriage.*

(iii) *A contract obliges a labourer to work for a builder, providing some simple tools, and to accept the builder's control. Notwithstanding the obligation to provide the tools, the contract is one of service. That obligation is not inconsistent with the nature of a contract of service. It is not a sufficiently important matter to affect the substance of the contract.*

(iv) *A contract obliges one party to work for the other, accepting his control, and to provide his own transport. This is still a contract of service. The obligation to provide his own transport does not affect the substance. Transport in this example is incidental to the main purpose of the contract. Transport in the second example was the essential part of the performance.*

(v) *The same instrument provides that one party shall work for the other subject to the other's control, and also that he shall sell him his land. The first part of the instrument is no less a contract of service because the second part imposes obligations of a different kind: Amalgamated Engineering*

Union v. Minister of Pensions and National Insurance. [1963] 1 W.L.R. 441, 451, 452; [1963] 1 All E.R. 864.

I can put the point which I am making in other words. 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.

[26] In **Montgomery v Johnson Underwood Ltd** [2001] IRLR 269, mutuality of obligation and control were said to be irreducible minimum requirements for a contract of service or employment at common law. This is incontrovertible. The Learned Editors of **Halsbury's Laws of England** (5th edn, 2014) vol 39, at para 4 go on to say that in addition to these requirements, in determining whether a contract of employment exists depends upon a balance of all other factors of relevance including:

[i] the method of payment; [ii] any obligation to work only for [the] employer; [iii] stipulations as to hours; [iv] overtime, holidays etc; [v] arrangements for payment of income tax and national insurance contributions; [vi] how the contract may be terminated; [vii] whether the individual may delegate work; [viii] who provides tools and equipment; [ix] and who, ultimately, bears the risk of loss and the chance of profit.

[27] It is my own view that many of these considerations may properly be regarded as indicia of control or are matters to be taken into account in determining whether other provisions of the relevant contract are inconsistent with a contract of service. In that regard and consistent with the approach recommended in **Ready Mixed Concrete,** I will first consider whether the two irreducible common law minimum requirements for a contract of service exist and then proceed to

consider whether the other provisions of the Contract are inconsistent with such a contract.

[28] A number of authorities were cited in argument before me. I thank Counsel for their industry and express my appreciation for being permitted the latitude to refer to just a few of them in these reasons for decision.

Mutuality of Obligation

[29] Contrary to the Respondent's submission that there is no dispute as to the existence of mutuality of obligation, it is in fact the Appellant's contention that mutuality of obligation is insufficient in the circumstances of the case. I find myself unable to agree with the submission of the Appellant however.

[30] While there is no dispute that the spa service providers were paid for work done at the Spa, the Appellant argues that mutuality of obligation means more than an obligation to pay for work done. There must generally be an obligation on the employer to provide work and for the employee to do the work. Among other authorities, the Appellant relies on the decision of the House of Lords in **Carmichael and anor. v National Power Plc.** [2000] IRLR 43.

[31] In that case the appellants were casual, part time guides at a power station and were paid for such services. They worked on invitation, when they were available and chose to work. At issue was whether the appellants were employed under contracts of employment and entitled to the written particulars thereof pursuant legislation, when they were not engaged as guides. In dismissing the appeal their Lordships found as the industrial tribunal did, that there was no mutuality of obligation giving rise to a contract of employment when the appellants were not engaged as station guides. There was no legal obligation on the power station to provide them with work and they had no corresponding obligation to perform work. The Lord Chancellor determined that when engaged as guides the appellants may well have been employed but they would only be able to succeed

in the appeal if the engagement created an employment relationship when they were not so engaged.

[32] Reliance is also placed on **Clarke v Oxfordshire Health Authority** [1998] IRLR 125. Mrs. Clarke worked for the health authority's "nurse bank" as a staff nurse and was not entitled to guaranteed or continuous work. She did not have fixed or regular work hours and was offered work if and when an appropriate temporary vacancy arose at any one of the hospitals within the defendant's area. When she did work she was paid an hourly rate in accordance with a scale which rose by annual increments, but had no entitlement to pay when she did not work, or holiday pay or sick leave. **PAYE**, national insurance and contributions to the health services' superannuation scheme were deducted from her pay.

[33] An industrial tribunal held that while there were factors which pointed towards Mrs. Clarke being an employee, in the absence of mutuality of obligation between her and the authority, she was not engaged under a "contract of employment" within the meaning of the *Employment Protection (Consolidation) Act 1978.* The term was defined to mean *"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing*". Accordingly, she was unable to pursue a claim for unfair dismissal. On appeal to the **EAT** it was determined that she was engaged under a global contract of employment notwithstanding the lack of mutuality of obligation between engagements. On challenge to the Court of Appeal it was held that the **EAT** had erred in concluding that there was a "contract of employment" as defined in the legislation as such a contract cannot exist where there are no mutual obligations subsisting over the entire duration of the contract.

[34] While the various obligations of parties to a contract may take the form of express terms, as seen in **Bauman v Hulton Press Ltd** [1952] 2 All ER 1121 they may also arise by implication. Among other relief, the plaintiff who was a journalist and photographer sued the defendants for damages for wrongful dismissal following their decision to terminate his retainer on one month's notice. The

defendants were publishers of a weekly periodical and had engaged the plaintiff under a contract where he received a retaining fee and payment for work done; was required to offer his "ideas, stories, and so on" to the defendants first; was to be available to undertake the defendants' commissioned work at all reasonable times; and was restrained from accepting commissions from other weekly British periodicals. The plaintiff was found to be clearly subordinate to the commands of the defendants and bound by the terms of the contract. Accordingly, it was held that the plaintiff was engaged under a contract of service which was only determinable after reasonable notice of six months and was entitled to damages for loss of salary and remuneration in consequence of the defendants' breach of the contract of employment. In the course of so finding it was determined that in order to give business efficacy to the parties' agreement it must be implied that throughout its duration, the defendants were obliged to give the plaintiff a reasonable amount of work to earn that which the parties must have contemplated. This was on the basis that the plaintiff was required to hold himself in readiness to go where the defendants sent him.

[35] On the foregoing authorities, the status of the spa service providers when they were not rendering services at the Spa come on for consideration in determining whether there was sufficient mutuality of obligation.

[36] The Spa Manager was the sole witness for the Appellant and the court is therefore without an account of the spa service providers relative to the nature of their interactions with the Appellant or it's Spa Manager.

[37] The Appellant relies on the following in urging the court to conclude that there was insufficient mutuality of obligation.

(i) The spa service provider is not precluded from providing services to other persons;

(ii) there is no obligation on the Appellant to provide work to the spa service provider;

(iii) there is no penalty if the spa service provider does not make herself available to render spa services;

(iv) the Appellant is only obligated to pay the spa service provider for services rendered;

(v) the contracted spa service provider may delegate, albeit subject to the approval of the Appellant;

(vi) there is no limit as to the amount of vacation a spa service provider may take; and

(vii) there is no vacation pay.

[38] Admittedly, there is no express clause in the Contract which obliges the Appellant to provide work for the spa service providers, who are entitled to render services elsewhere in periods they were not engaged at the Spa. The ability to work elsewhere is circumscribed however. It is *"…so long as the rendering of such services do not interfere and/or conflict with the contractor's obligations to the resort and/or the requirements which the resort may have of the contractor",* pursuant to clause 10.1. Among the obligations of the spa service provider is the requirement to provide minimum service at the Spa *"…for a minimum period of 3 work days per week, of duration of 8.5 hrs. Per (sic) day, with one (1) hour break per work day, as instructed by the manager"*, in accordance with clause 3.1.1.

[39] There is no prescription as to the days within any week that the spa service provider must render the minimum service, and perhaps more significantly, no maximum period of service is imposed. As a practical matter it is therefore entirely conceivable that a spa service provider could be called upon to provide service on each day that the Spa was open.

[40] In fact, this reality is borne out on the evidence of the Spa Manager that notwithstanding the provision that a spa service provider is required to provide a minimum number of hours per week, there may in fact be weeks when a spa

service provider may have a full or light schedule of appointments and other weeks none. While the spa service providers are permitted to provide spa services elsewhere, priority is to be given to the Appellant in scheduling.

[41] Further, while the spa service providers are able to make over the benefit and/or burden of the Contract to a third party through assignment, transfer, sub-contracting or in any other manner, that could only be done with the "*prior written consent"* of the Appellant pursuant to clause 14.1.

[42] It is my view that in agreeing to the foregoing terms in particular, the spa service providers are required to hold themselves in readiness to provide at least the minimum service under the Contract so long as the Contract subsisted. The corresponding obligation being that the Appellant would provide work to the spa service providers to enable them to meet their obligations as to minimum service in order to have continuity of service at the Spa. Consequently, notwithstanding the absence of an express contractual term that the Appellant was obligated to give the spa service providers work and a corresponding obligation on the spa service provider to work, I find that in order to give business efficacy to the Contract those terms must be implied. It is the existence of the mutual obligation around the availability to provide services when not engaged at the Spa which distinguishes the spa service providers under the Contract from the definitively part-time and casual station guides in **Carmichael** and the nurse in **Clarke** who was engaged if and when an appropriate temporary vacancy arose.

[43] It is in all these circumstances that I find that there is mutuality of obligation between the spa service providers and the Appellant during the subsistence of the Contract, even when the former were not rendering services at the Spa.

Control

[44] It is the Appellant's position that it does not exercise a sufficient degree of control over the spa service providers to satisfy this second irreducible minimum requirement of a contract of service. I disagree.

[45] According to Mackenna J in **Ready Mixed Concrete**, "control" for the purposes of a contract of service will exist where a service provider

> *… 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… [it] 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*

This followed his earlier remark that it is the right to control and not its exercise which is relevant. The pronouncement was in response to the complaint that the Minister, in determining that the contractor was engaged under a contract of service, had failed to consider that if someone from the appellant company had instructed him on how to drive his truck or deliver concrete, the contractor would have told them to mind their own business and that nobody had ever instructed him.

[46] In **Montgomery v Johnson Underwood Ltd,** a decision relied upon by the Appellant, the court observed that the best guidance in determining whether a contract of employment exists is provided by Mackenna J in **Ready Mixed Concrete** and approved by the Lord Chancellor in **Carmichael**. As to "control", Justice Buckley, after quoting Mackenna J stated thus,

> *McKenna J made plain that provided (i) and (ii) are present (iii) requires that all the terms of the agreement are to be considered before the question as*

> *to the existence of a contract of service can be answered. As to (ii) he had well in mind that the early legal concept of control as including control over how the work should be done was relevant but not essential. Society has provided many examples, from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent. In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment.*

[47] Relying on **Montgomery** and **Professional Game Match Officials Ltd. v Revenue and Customs** [2020] STC 1077 (hereinafter called **"PGMOL"**), the Appellant contends that in providing for termination and in the absence of a disciplinary or grievance procedure, there is no "sufficient framework of control" to give rise to a contract of employment. I do not believe the decision stands for the proposition which the Appellant advances.

[48] The facts of **PGMOL** are that the entity engaged national group referees to officiate certain football matches in their spare time alongside other full-time employment. The revenue classified the engagement as contracts of service but the First Tier Tribunal (hereinafter called "the FTT") determined that they were engaged under contracts for services and were not employees. This was on the ground that there was insufficient mutuality of obligation in the "overarching contracts" under which the referees were engaged as national group referees; and that there was insufficiency of mutuality of obligation and control in the "individual contracts" under which each referee was engaged in relation to a specific match.

[49] The appeal against the decision of the FTT was dismissed by the Upper Tribunal (Tax and Chancery Chamber) (hereinafter called "the UKUT"). In doing so the UKUT had occasion to consider a number of the findings of the FTT, including

that PGMOL did not have a sufficient degree of control during and in respect of the individual engagements to satisfy the test of a contract of service. The FTT had arrived at this conclusion on the basis that sanctioning under the contract was effectively limited to termination. The UKUT determined that the FTT erred in respect of this issue by taking into account irrelevant considerations. Zacaroli J and Judge Thomas Scott stated the matter in this way.

> *[137] The critical question in this case (where the period of the contract ends with the submission of the referee's match report shortly after the final whistle) is whether the absence of an ability to step in to regulate the referee's performance of his core obligation (officiating at the match), or to impose any sanction, until after the contract has ended means that there is not sufficient control.*
>
> *[138] The authorities do not provide direct assistance on this question, and we therefore address it as a matter of principle. We consider that, whether it is referred to as a right to step in or as a framework of control, the test requires that the putative employer has a contractual right to direct the manner in which the worker is to perform their obligations, and that those directions are enforceable, in the sense that there is an effective sanction for their breach. Provided that the right to give directions relates to the performance of the employee's obligations during the subsistence of the contract, it is not to be disregarded because there is no ability to step in and give directions during the performance of the obligations (where the nature of the obligations precludes it) or because the sanctions for breach of those obligations could only be imposed once the contract has ended. The existence of an effective sanction (irrespective of when its impact would be felt by the employee) is sufficient to ensure that the employer's directions constitute enforceable contractual obligations.*
>
> *[139] Accordingly we consider that the FTT, in relying … on PGMOL's inability 'to step in while a referee is performing an engagement at a match', or PGMOL's lack of ability to 'exercise the correlative rights during an engagement', and the fact PGMOL could only impose sanctions (being not*

to offer further engagements or to suspend or remove a referee from the National Group list) after the end of the engagement, took into account irrelevant considerations.

[140] Separately, we consider that the FTT also erred … in concluding that, if an issue emerged between the commencement of the contract and the match day itself, there was no control 'during an engagement' because PGMOL's only remedy was to terminate the contract altogether. In such a case, PGMOL would be stepping in during the period of the contract. The sanction of terminating a contract is one that can only be exercised, by definition, during the continuance of the contract even though the effect of the sanction is to bring it to an end...

[50] It is clear from the preceding dicta that the effectiveness of a sanction as a control mechanism is not dependent on when its impact is felt by the employee but in its sufficiency in ensuring that an employer's directions constitute enforceable contractual obligations.

[51] The Spa Manager gives evidence that there is no disciplinary procedure in place for the spa service providers in the event the Appellant is dissatisfied with their work; and that notwithstanding the provision in the Contract for minimum hours of work each week, there is no penalty imposed on a spa service provider who does not make himself or herself available for those hours.

[52] On the Contract either party may terminate on provision of two (2) weeks' notice but the Appellant only is further permitted to terminate without prior notice on a number of bases. Clause 13.1(a) in particular provides that where the spa service provider *"[c]omit[s] any breach, **which the resort in its sole discretion deems to be serious or persistent**, of any of her obligations hereunder and of the rules and regulations of the resort as determined from time to time",* the Appellant may terminate without prior notice. The Appellant is permitted to determine rules and regulations from time with which the spa service providers

were required to comply and would be at pain of being terminated if the Appellant and the Appellant alone deemed the breaches to be serious or persistent.

[53] In these circumstances I find that although the sanction of terminating the Contract for serious and persistent breaches would bring the Contract to an end, because it can only be exercised whilst the Contract subsists, it is not to be discounted as a factor of control, notwithstanding the absence of grievance or disciplinary procedures. That being said however, the right to terminate would not be conclusive of control and is but one factor which must no doubt be considered.

[54] It is the Spa Manager's evidence that while she was trained in massage therapy she has never practiced and so has no experience in administering the services offered by the Spa. She does not supervise their work, give directions as to the manner in which they administer spa services, which is at the spa service provider's own discretion, nor does she dictate the specialist service they provide at the Spa. She goes further to say that the spa service providers are not monitored by her or by the hotel and that she does not appraise their performance. It is also her evidence that her duties at the Spa are administrative and include opening and closing the facility, preparing sales reports and budgets, scheduling appointments, ordering and receiving products, and maintaining inventory. Services provided are recorded by her to process payment and the records of the spa service providers are inspected to ensure they accord with her records, only for the purpose of paying commissions for work done. We have only her evidence in these regards but unchallenged as they are I am compelled to accept it. The authorities make it clear however that it is not the exercise of control which is determinative of the issue but the right to exercise it to a sufficient degree. This assumes added significance when there is no evidence from the party who actually provides the service under the contract which falls to be classified.

[55] The substance of the Contract is the provision of spa services at the Spa. Although the Appellant contends that the Spa is operated by the Manager who has no responsibility for supervising the work of the spa service providers, it is my judgment that the Appellant had a right of control to a sufficient degree over their performance of the contracted services.

[56] In addition to the framework for control presented by the termination clause previously discussed, it is the Appellant who provides the place at which the spa services are rendered; the uniforms to be worn by the spa service providers whilst on the premises of the resort; the supplies and products used to perform the contracted services; and supplied the customers to whom the services were provided, which customers had contracted with the Appellant and not the spa service providers, for the spa services. Contractually a meal is also provided by the Appellant in the event service is being rendered around a meal time, and the spa service providers are also permitted to consume non-alcoholic beverages at the Spa while at the resort, for the purpose of providing the contracted services. It is the evidence of the Spa Manager that in reality, and notwithstanding the provision in the Contract in respect of a meal, lunch is not provided to the spa service providers except for one individual who negotiated for it as part of his commission structure.

[57] The spa service providers are also obliged to render services for a minimum period of three work days per week with one (1) hour break per day as instructed by the manager of the Spa. I have already concluded that it is to be implied as a term of the Contract that the spa service provider is required to hold herself in readiness to provide services at the Spa. The consequence of this is that the spa service provider's ability to organize her own time is reduced so long as the Contract remains in force. That ability is also further reduced when she is engaged at the Spa where the duration and timing of her break is determined other than by herself. It appears to me that if a spa service provider was truly in business on her own when rendering services at the Spa as the Appellant

contends, she would have the liberty to determine for herself the duration and timing of any breaks she wishes to take.

[58] Under the Contract a spa service provider who is desirous of proceeding on vacation is required to give the Spa Manager at least two (2) weeks' notice of her unavailability to render service on account of vacation. The vacation is to be taken at a time satisfactory to the Appellant, although it is to be arranged in accordance with the expressed preference of the spa service provider "whenever possible". Again it is the interest of the Appellant and not the spa service provider which assumes primacy in the allocation of time for the provision of the contracted services.

[59] Clause 3.1.2 further stipulates that the spa service providers are to follow the schedule provided by the Spa Manager and *"administer the services only as determined by the resort".* Pursuant to clause 3.1.3,

> *During the periods spent in the spa, the [spa service provider] shall attend to the requirements of any customer who may require the aforementioned services* ***and such other customers as the manager may require****.*
>
> [Emphasis added]

[60] While the evidence is that the spa service providers were free to decide their specialisation, it is the Appellant who determines the services which are administered at the Spa. An approved list of services appears in Schedule 2 of the Contract and there is no evidence of the spa service provider being permitted to deviate from the list in rendering service to the customers of the Spa. The spa service provider is also mandated to attend to the customers who require the approved services or such customers as the manager requires to be served.

[61] It is clear from the foregoing that the Appellant controlled, in all material respects, the market conditions in terms of location, customers, the products used and the services offered, as well as the rules of engagement. I accept that the Appellant

through the Spa Manager could not tell the trained and highly skilled spa service providers how to render spa treatments, she being without the relevant experience, but as seen in **Bauman**, that does not prevent a finding that there is a sufficient degree of control. In the result, although the spa service provider is required to faithfully and diligently perform her duties under the Contract with proper professional skill, I find that there is a right to a sufficient degree of control of them by the Appellant in these regards.

Whether the other provisions are inconsistent with a contract of service

[62] While commonly referred to as the "control test", Mackenna J made it abundantly clear that although necessary for the existence of a contract of service, control is not always sufficient and that the most important part of the enquiry is whether the provisions of the contract as a whole are inconsistent with a contract of service. To that end, a judge who is tasked with classifying a contract may take into account factors other than control. On consideration of the list of examples used by Mackenna J to explain what is meant by the other provisions not being inconsistent with a contract of service, it appears to me that provisions called to aid in arguing inconsistency with a contract of service must be sufficiently important to affect the substance of the contract under consideration.

[63] There are a number of factors which courts have regarded as evidence of a contract for service which have been helpfully identified by K. Brearley QC and Selwyn Bloch at Chapter 2(1)(c)(ii) of their work **Employment Covenants and Confidential Information: Law, Practice and Technique** (4th edn, Bloomsbury Professional 2018). Five of these factors are implicated at this stage of the enquiry, there being no question that it is the Appellant who is responsible for providing the space, products and supplies to the spa service providers to enable them to render the contracted services. They are:

(i) the ability to send a substitute;

(ii) the ability to work for other businesses;

(iii) payment by commission;

(iv) tax status [and the absence of certain benefits]; and

(v) the responsibility for financial risk.

- ***Ability to substitute***

[64] Where a party under a contract has an unfettered right to send a substitute to provide the service he contracted to provide, that is usually regarded as a strong indicator that the contract is a contract for service. This is on account that personal service is at the heart of a contract of service so that in its absence the contract is to be regarded as something else. After addressing a number of authorities which concerned whether the right of substitution was inconsistent with an undertaking to provide personal service, beginning with **Ready Mixed Concrete,** Sir Terrence Etherton MR in **Pimlico Plumbers Ltd and another v Smith** [2017] ICR 657 at paragraph 84 gave the following helpful guidance.

> *I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly,* ***a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional.*** *Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that*

> *entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example**, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance**.*
>
> [Emphasis added]

[65] Clause 14.1 of the Contract provides that *"[t]he contractor shall not assign, transfer, sub-contract or in any other make over to any third party the benefit and/or burden of this agreement without the prior written consent of the resort."* There is no clause in the Contract which qualifies in any way the scope or exercise of the discretion by the Appellant. It is therefore my view that the right to substitution under the Contract is possible only with the Appellant's prior consent which it has an absolute and unqualified discretion to withhold. This is consistent with personal performance of the contract by the spa service provider.

- ***Ability to work for others***

[66] An unrestricted ability to work for others is inconsistent with a contract of service. If there is restriction which is expressed or implied, whether or not it is inconsistent with a contract of service will depend on the circumstances of the case. Clause 10.1 of the Contract states,

> *The contractor shall be entitled to engage in services of similar type to those rendered by her at the resort on her own account or in partnership or association with or as the servant or independent contractor of any other person outside the periods spent at the resort,* ***so long as the rendering of such services does not interfere and/or conflict with the contractor's obligations to the resort and/or requirements which the resort may have of the contractor.***
>
> [Emphasis added]

[67] There is a restriction on the face of the foregoing clause, the effect of which is that the spa service provider is permitted to exercise the ability in a manner that does not interfere with the provision of service at the Appellant's Spa. When combined with the requirement to give minimum weekly service to the Appellant which impliedly requires the spa service provider to hold herself in readiness to render personal service, she is restricted in a real sense in organizing herself to provide services to others outside the Spa. Consequently, I do not find that the provision at clause 10.1 in the circumstances of this case is inconsistent with a contract of service.

- ***Payment solely by commission***

[68] As accepted by the Respondent and as appears on the Contract, the spa service providers are paid solely by commission, having regard to the services rendered and is calculable as a percentage of the price of the service provided. While payment by commission solely generally points to an engagement under a contract for service, the Respondent relies on **Hobbs v Royal Arsenal Co-operative Society Ltd** (1930) 23 BWCC 254 where it is said to have been held that payment by commission alone is not inconsistent with a contract of service. A copy of the authority was not supplied. Notwithstanding the absence of this authority which would have positioned me to assess the reason for that decision, having regard to my earlier finding that it is an implied term of the contract that spa service providers are required to hold themselves in readiness to render personal services at the Appellant's Spa on days and times when they were not in fact at work there; and that the Appellant had a corresponding obligation to offer work to enable them to at least meet the minimum service requirement for each week, I do not find that payment by commission solely is inconsistent with a contract of service. It is my view that where there is sufficient mutuality of obligation, the significance of the manner in which the remuneration is paid is reduced when classifying the contract as one which is "of" or "for" service.

- ***Absence of receipt of pension, vacation leave and sick pay, medical coverage and tax status***

[69] The Appellant also relies on the fact that the spa service provides do not receive a pension, vacation leave pay, sick pay, medical coverage, vacation leave and vacation leave pay in contending that there is no contract of service. I do not find that the absence of any of these benefits is inconsistent with a contract being so classified. While payment during holidays may demonstrate continuity of a relationship between contracting parties when the contractor is not "at work" for example, I do not regard it as sufficiently important to affect the substance of the Contract, the provision of spa services. This is so especially where there is sufficient mutuality of obligation during the subsistence of the contract as I have found to exist here. I arrive at a like conclusion in respect of the other benefits and the obligation on the spa service providers to pay Income Tax, Education Tax, NIS, NHT, H.E.A.R.T and other statutory deductions or contributions which an employer may unilaterally determine to withhold with a view to denying a service provider employment status.

- ***Responsibility for financial risk***

[70] It is well established and accepted that an independent contractor ultimately bears the risk of his enterprise. However, it is contended by the Appellant that the spa service providers are performing business on their own account as operators of small businesses, providing their skill and expertise to different entities at different locations. I do not agree.

[71] The Appellant appears to argue that the Spa is merely an accessory to its business of operating a resort, and that to the extent that the spa service providers are engaged in providing services at the Spa, they cannot be said to be integrated into the business. According to the Spa Manager the Spa services are not a complimentary service for hotel guests and while available to them, the services are also available to others. Even if the spa is not a part of the resort

as contended, the Appellant is in fact one of the two parties to the Contract which I am required to classify. This renders insignificant if not wholly irrelevant the fact that the operation of the Spa is not the Appellant's main business, in determining the appropriate classification of the Contract.

[72] In providing the contracted services to the Appellant's Spa I do not believe that the spa service providers are engaged in business on their own account. They cannot be said, by any stretch of the imagination to bear the risk of the enterprise. With the exception of providing their skill and expertise in the service areas approved by the Appellant, and what I have found is their implied obligation to hold themselves in readiness to provide the contracted service to the Appellant, the spa service providers assume little, if any, of the risks associated with the enterprise and are not involved in its sound management or otherwise.

[73] In addition to the various provisions of the contract which I found to be demonstrative of a sufficient degree of control as to the manner of the provision of the contracted services, a spa service provider is also expressly bound by the rules and regulations of the resort while on property; is required to participate in resort training and meetings; and pursuant to clause 3.1.9, *"[u]se her best endeavors to promote the interest of the resort."* There is also a prohibition on disclosing trade secrets and other confidential information except where otherwise required by law.

[74] While the spa service providers are paid by commission, the rate at which it is calculated is in my view also a strong indicator as to which of the contracting parties ultimately bears the risk of loss or profit.

[75] Prior to 2013 when the Spa Manager was appointed, the Spa was operated pursuant to a concessionaire agreement between the hotel and a Mrs. Jobson under which the Appellant was compensated in sums the equivalent of 25% of income generated by the Spa. Under that arrangement the spa service providers were also paid by commission.

[76] Under the Contract a spa service provider's commission is fixed at twenty-three per cent (23%) of the price of the service provided, excluding GCT. The Appellant therefore retains seventy-seven percent (77%) of the price of the service. While there is no indication of the income earned by the Appellant from the Spa under this arrangement, the disparity between the commission paid and retention by the Appellant is in my view reflective of the Appellant's significantly more substantial investment in the enterprise.

[77] There is no evidence of the spa service provider fixing her price for spa services and while she is allowed to accept gratuities offered, which the Spa Manager says is in contrast to employees of the hotel in respect of whom service charges are included in the price of hotel rooms, she is prohibited from soliciting gratuities for the services provided.

[78] Further, notwithstanding the Spa Manager's evidence that there are no rules which prevent spa service providers from taking the contact information from the Spa's customers and engaging them in services outside of the Spa, clause 3.1.9 requires the spa service provider to *"[u]se her best endeavors to promote the interest of the resort."* With the exclusive remit to determine serious and persistent breaches which allow for termination of the Contract without prior notice, the absence of a specific proscription against enticing customers away from the Spa, thereby reducing the financial return to the Appellant is not regarded as incompatible with a finding that the Contract is a contract of service.

[79] In all the foregoing circumstances I do not believe it can be convincingly said that the spa service provider performs the services at the Spa in business on her own account. She does not provide her own facilities, products and supplies nor does she hire help. In fact, it is the Appellant who appears to have made the significant financial investment in the business and who is responsible for the management of the enterprise through the supply of its Spa Manager. I am therefore unable to find that the spa service provider is engaged in business on her own account as an independent contractor as submitted by the Appellant.

[80] It is in all the foregoing premises that I find that the Appellant has not discharged the burden upon it to prove that the Respondent's classification of the spa service providers as employees of the Appellant and assessment in respect of Education Tax were erroneous. Accordingly, I make the orders below.

ORDER

1. The appeal is dismissed.

2. The decision of the Revenue Appeals Division delivered on the 4th February 2021 confirming the Respondent's assessment in respect of Education Tax is confirmed.

3. Costs of and incidental to the appeal to the Respondent, to be taxed if not sooner agreed.

Carole S. Barnaby
Puisne Judge