TC07474

INCOME TAX – PAY AS YOU EARN - NATIONAL INSURANCE CONTRIBUTIONS – Intermediaries Legislation – IR35 – Personal Service Companies (PSC) - s.49 of the Income Tax (Pay As you Earn) Act 2003 (ITEPA) – Determinations under Regulation 80 of the ITEPA Regulations 2003 – Provision of IT consultancy services - notional or hypothetical contracts to be constructed –—four links in chain between Mr Alcock, the Appellant PSC (RALC), the agencies (Networkers and Capita) and end clients (DWP or Accenture) – notional contracts of service (employment) or contracts for services (self-employed) - Ready Mixed Concrete Test - four year time limit under s. 34 of the Taxes Management Act 1970 (TMA) - carelessness of Appellant or its adviser under s. 118 of the TMA – extended time limits of six years under s. 36(1) or (1B) TMA – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/08950

BETWEEN

RALC CONSULTING LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE RUPERT JONES
MOHAMMED FAROOQ

Sitting in public at Gateshead Law Courts on 23-26 September 2019

Christopher Leslie, Tax adviser of Tax Networks Ltd for the Appellant

Christopher Stone and Marianne Tutin, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

AMENDED DECISION

Preamble

1. This is an amended version of the decision in this appeal, further to the original version which was drafted on 24 October 2019 but released on 29 October 2019. The reasons for the decision to allow the appeal, set out below, have been amended but the result remains the same. The Tribunal Judge conducted a review of the original version of the decision having received an application for permission to appeal from HMRC dated 19 December 2019. The review was conducted pursuant to Rules 40(1) and Rule 41(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Procedure Rules 2009 because the Judge was satisfied there was an error of law in the adequacy of reasoning contained in the original decision, albeit it was not an error that had been identified in HMRC's grounds for permission to appeal. In accordance with Rule 41(3) each party was given an opportunity to comment on the proposed course of action set out in a decision dated 20 January 2020 and in emails dated 3 February 2020, neither party objected to this course of action.

Introduction

2. This appeal concerns the operation of IR35 or Intermediaries legislation, the purpose of which was explained by Judge Dean in *Jensal Software v HMRC* [2018] UKFTT 271 (TC) at [2]-[3] in the following manner:

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

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

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

3. As set out in the press release issued when IR35 was first introduced in 1999, the concern which the legislation was introduced to prevent, was that it was possible "for someone to leave work as an employee on a Friday, only to return the following Monday to do exactly the same job as an indirectly engaged 'consultant' paying substantially reduced tax and national insurance".

4. However, as Walker LJ emphasised in *R (on the application of Professional Contractors Group Ltd) v IRC* [2002] STC 165, the Intermediaries legislation does not apply automatically where a person acts through a personal service company. He said, at [12] of the judgment, that it does not apply at all unless the relevant person's "self-employed status is near the borderline and so open to question or debate"; the whole regime is "restricted to a situation in which the worker, if directly contracted by and to the client 'would be regarded for income tax purposes as an employee of the client'" as "determined on the ordinary principles established by case law…." This was referred to with approval by Henderson J in *Dragonfly Consultancy Limited v HMRC* [2008] EWHC 2113 (Ch) at [10].

5. It is apparent that IR35 is not restricted in its application only to cases involving artificiality or where there is an intention on the part of a taxpayer to avoid or reduce tax liabilities. For the Intermediaries legislation to apply, there is no requirement for HMRC to allege, nor the Tribunal to be satisfied, that there was any intention on the part of the taxpayer

or notional employer to avoid or reduce tax liabilities whether this would be by creating artificial corporate structures or contracts for services or sham or fraudulent 'self-employment' agreements.

6. The Tribunal's duty is simply to assess the existing contracts between the relevant parties, their operation and all relevant circumstances to construct the hypothetical contract between the individual worker providing a service and their end client. Then the Tribunal is to apply the tests laid down in employment law to determine if the hypothetical contract would be a contract of service (employment) or contract for services (self-employment).

The parties and contractual chains

7. The Appellant, RALC Consulting Limited ("RALC"), is a personal service company ("PSC") of which the sole director and shareholder is Richard Alcock, an IT consultant. During the relevant tax years (6 April 2010 to 6 April 2015), the Appellant contracted separately with Accenture (UK) Limited ("Accenture"), a management consultancy and professional services firm, and with the Department for Work and Pensions ("DWP"), (together the "end clients"), to provide Mr Alcock's services.

8. Those contractual arrangements entered by the Appellant with Accenture and DWP were both four-party chains: Mr Alcock – the Appellant, RALC – agency – end clients (Accenture or DWP). The agency for the Accenture contracts was Networkers Recruitment Services Limited ("Networkers") and for the DWP contract was Capita Resourcing Limited ("Capita") (together the "agencies"). In both cases, there was a written contract between RALC and agency (the "lower level contract" or "LLC") and a contract between the agency and end client (the "upper level contract" or "ULC"). Therefore, the four party contractual chains to be considered in the appeal are Mr Alcock – RALC – Networkers or Capita – Accenture or DWP (the end clients).

9. There was a fifth link in the chain for the contracts ending with Accenture because Accenture was in turn providing services to DWP or Police Scotland. However, the parties are agreed that the Tribunal is not concerned with constructing the hypothetical contracts between Mr Alcock and the fifth link. Mr Stone submitted that the contracts between Accenture and DWP or Police Scotland were high level contracts for the delivery of projects and end products (such as benefits software) rather than for the provision of personal services of individuals. He submitted that the contractual terms of the fifth link would not assist the Tribunal. The Tribunal is satisfied it should concentrate on Mr Alcock's relationship with the end client, Accenture, for whom he was under an obligation personally to perform services.

The decision under appeal

10. RALC has appealed against the decision of HMRC on 8 March 2017 to issue:

a) Regulation 80 (of the Income Tax (Pay As You Earn) Regulations 2003) Determinations in respect of income tax deductible via Pay as You Earn (the "Determinations"); and

b) Notices of Decision under section 8 of the Social Security Contributions and Benefits Act 1992 (the "Notices") in respect of Class 1 National Insurance Contributions ("NICs").

11. The total amount of income tax and NICs payable (not including interest) in dispute is £164,482 and £78,842 respectively. Below is a summary of HMRC's PAYE income tax determinations and NICs Decisions issued on 8 March 2017.

2010-2011 Tax determined £ 11,956.00
2010-2011 NICs due £ 7,658.00 *
2011-2012 Tax determined £ 47,892.00

2011-2012 NICs due £ 25,268.00
2012-2013 Tax determined £33,401.00
2012-2013 NICs due £17,234.00
2013-2014 Tax determined £46,298.00
2013-2014 NICs due £22,351.00
2014-2015 Tax determined £24,935.00
2014-2015 NICs due £13,989.00
*NB. HMRC's Statement of Case conceded that the 2010-2011 NICs Notice was statute time barred because it was not protected.

The issues in the appeal

12. The two issues to be decided by the Tribunal are:

a. whether Income tax and NICs are payable pursuant to the Intermediaries legislation (commonly known as IR35): sections 48 to 61 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") and the Social Security Contributions (Intermediaries) Regulations 2000 (the "SSC(I) 2000 Regulations"). This involves deciding whether the hypothetical contracts between Mr Alcock and the end clients would have been contracts for services and he would have been self-employed or whether they would have been contracts of service and he would have been employed. The burden of proof is upon the Appellant; and

b. whether the Determinations for the 2010-11 and 2011-12 tax years are competent given that they were made more than four years but less than six years after the end of the relevant tax years. Sections 34 and 36 of the Taxes Management Act ("TMA") 1970 apply to the Determinations. In order to fall within the extended time limit of six years pursuant to s.36(1) or (1B) TMA, HMRC has the burden of demonstrating that there was a loss of income tax brought about carelessly by Mr Alcock, RALC or another person (his accountant) acting on his behalf.

13. The precise quantum of tax and NICs assessed in dispute remains at large. During the hearing Mr Leslie, representing the Appellant, indicated he needed to verify the figures involved. Mr Leslie submitted that HMRC accepted Mr Alcock, through the Appellant, had engaged in two other contracts (with Travelvault and Tristec) during the relevant years which were not caught by IR35. Therefore, he needed to check the quantum of the assessments (the Determinations and Notices).

14. In any event, the Tribunal is asked to give a decision in principle on the two issues.

The grounds of appeal and summary of the parties' cases

15. RALC's ground of appeal in relation to the first issue is, in essence, that the Intermediaries legislation does not apply because the hypothetical contracts with the end clients would have been contracts for services and Mr Alcock would have been self-employed.

16. RALC submits that the hypothetical contracts between Mr Alcock and the end clients, Accenture or DWP, which the Tribunal is required by the legislation to construct, would: a) not have contained mutuality of obligation (there was no obligation to provide work, he was only remunerated if work was available); b) there was no or little requirement for personal service by Mr Alcock (there was a generous right of substitution); c) that there would not have been a sufficient right of control by Accenture or DWP over the way Mr Alcock was to work to indicate employment; and d) the other terms of the hypothetical contracts were inconsistent with the contracts being ones of employment.

17. HMRC's case on the first issue is that the Intermediaries legislation did apply to the engagements whereby Mr Alcock worked in the relevant tax years for Accenture and DWP, via Networkers and Capita respectively. In each of those years, RALC agreed to provide the services of Mr Alcock to work full time on long-term engagements, usually at the client site, as part of the client teams delivering substantial IT projects.

18. HMRC submit that the hypothetical contracts between Mr Alcock and Accenture and DWP, which the Tribunal is required by the legislation to construct, would have contained both mutuality of obligation and the requirement for personal service by Mr Alcock (with a highly fettered right of substitution). There would also have been a sufficient right of control by Accenture and DWP over Mr Alcock's work (the how, what, where, and when thereof) and the other terms of the hypothetical contracts would not have been inconsistent with the contracts being of employment.

19. HMRC submit that the engagements with Accenture and DWP that have been assessed as falling within IR35 were Mr Alcock's primary source of income during the relevant tax years. While the Appellant provided the services of Mr Alcock to other organisations, those engagements were ad hoc and short-term (consistent with the contractual restrictions on outside work) and therefore have not been assessed as falling within the Intermediaries legislation. In contrast, Mr Alcock had substantial and regular engagements with Accenture and DWP, which would have been contracts of employment under hypothetical contracts, at the same time as he had occasional self-employed engagements.

20. In respect of the second issue of extended time limits for the 2010-2011 and 2011-2012 tax years, the Appellant's case is that neither Mr Alcock and RALC nor their accountant, Robson Laidler Accountants Ltd ("Robson Laidler") acted carelessly in engaging in the contracts which ended with Accenture. RALC invited Robson Laidler to review an earlier contract in 2008 in respect of provision of Mr Alcock's services to a company named Parity Resources Ltd ("Parity") and onwards for DWP. Mr Alcock was advised in writing by Mr Poole that the contract with Parity fell outside the Intermediaries legislation.

21. Mr Alcock relied on the similarity of the terms of RALC's contract with Networkers (the LLC for the Accenture contracts) to those of the Parity contract which reasonably led him to believe it also fell outside IR35 in line with the previous advice. The operation of his business and any change of circumstances in relation to the Intermediaries Legislation were discussed in his annual review with his accountant, Mr Moran of Robson Laidler in the two tax years in the relevant annual tax reviews. Therefore, RALC contends that the PAYE tax determinations for years 2010-2011 and 2011-12 are out of time because the extended time limits under section 36 TMA do not apply.

22. HMRC's case is that RALC acted carelessly by failing to seek professional advice on the specific and relevant contract with Networkers (providing services for the end client Accenture) and/or Robson Laidler were careless in failing to undertake reviews of the relevant contracts to enable them to provide such advice. The decision to submit the relevant tax returns without applying the Intermediaries legislation was made without any proper consideration of the relevant contractual terms. Therefore, HMRC submit that the PAYE (and NIC) determinations for the earliest two tax years are competent and within the extended time limit available.

The evidence

23. The Tribunal received two bundles of documents and one bundle of authorities. The first day of the hearing was allocated as a reading day. The hearing was completed a day before the five days listed thanks to the assistance and efficiency of both parties'

representatives. They presented their respective cases with care and skill. The Tribunal is very grateful for their help.

24. Witness statements were submitted on behalf of the following who gave live evidence unless indicated otherwise:

a. Mr Alcock;

b. Allan King, Alan Simpson and Jamie Stewart of Accenture (Mr Simpson's statement was read);

c. Janice Hartley and Tim Read of DWP (whose statements were read);

d. Michael Moran and Stephen Poole of Robson Laidler accountants.

25. All the witnesses above gave live evidence on behalf of the Appellant and were cross examined except Alan Simpson, Janice Hartley and Tim Read whose witness statements were read. Mr Simpson's statement provided little additional evidence to that of Mr King.

26. Mrs Hartley and Mr Read ("the pair") did not attend the hearing to give evidence because the Appellant had lost contact with them (they had left DWP and no further contact details were available). The result is that, in practice, HMRC was restricted in its ability to call the pair as witnesses (although there is no property in a witness, they had agreed to give evidence for the Appellant and it was not for HMRC to locate them), or cross-examining them. The Tribunal has therefore carefully assessed the weight to be given to their evidence in the circumstances. A verbatim transcript and a recording of a teleconference in October 2016 between Mr Alcock, Mr Leslie and the pair were admitted in evidence by the Tribunal.

27. Pursuant to the decision of Judge Dean dated 14 June 2019, the witness statement of Mr David Chaplin the CEO of 'ContractorCalculator' was excluded to the extent it expressed opinions or includes non-expert evidence about the Intermediaries legislation, which was in effect the entire statement. No further statement was served on Mr Chaplin's behalf. He did not attend to give oral evidence. Further, the Tribunal had no regard to the documents included in the bundle from ContractorCalculator including the Check Employment Status for Tax (CEST), said to be independent testing conducted by Mr Chaplin in July 2018. These tests analysed the various factors that were submitted to support the Appellant's case.

28. The Tribunal refused to admit into evidence two further sets of emails presented by the Appellant on the first morning of the hearing, 24 September 2019. The emails were between: Mr Leslie and the head of employment at Gattaca Plc (incorporating Networkers) dated 19-23 September 2019; and Mr Alcock and Catherine Smith of Risk & Compliance at Capita dated 18-19 September 2019. The emails stated that there was a right for RALC to provide a substitute during the currency of the Networkers and Capita contracts whose name would not have to be disclosed at the outset. This conclusion was based upon examining the substitution clauses in the contracts in the Networkers and Capita contracts. The representatives of Networkers and Capita could not confirm the timescale for which the agencies and end clients would need to satisfy themselves that the proposed substitute would be suitably qualified and skilled.

29. The Tribunal refused to admit this evidence pursuant to Rule 15 of the Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009. This was because the emails were provided very late and in breach of the Tribunal's earlier directions for the service of evidence. The identity and authorship of the emails was unverifiable and it is not known if the authors were in post at the relevant time or had any familiarity with the particular contracts. The questions asked in the emails by Mr Leslie and Mr Alcock were leading in nature and the weight to be given to the answers would be very little given the absence of the

ability to cross examine the authors or any representatives of the two agencies. There were no witnesses to be supplied from either of the two agencies.

30. Further, as a matter of principle, the evidence should be excluded. The contents of the emails were simply the subjective interpretation of two individuals of the written contract clauses which were to be considered by the Tribunal. The Tribunal should not admit opinion evidence on questions of law it had to determine. Questions of interpretation of the contracts were for the Tribunal to decide. The individuals did not appear to suggest within the emails that they had any experience of the operation of the specific contracts in practice so the emails provided no factual evidence. The emails therefore contained no relevant evidence.

THE LAW

Intermediaries legislation and case law

31. The Tribunal is very grateful to Mr Stone and Ms Tutin for their impressive exposition of the relevant law from which it borrows heavily.

32. The Intermediaries legislation is contained in ss.48-61 ITEPA 2003 and the relevant provisions in the SSC(I) Regulations 2000. The primary provision to be considered is s.49 ITEPA 2003 (there is a materially similar test in reg. 6 of the SSC(I) Regulations 2000, which produces the same result in this case). So far as relevant, s.49 ITEPA provides as follows:

"(1) This Chapter applies where—

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

(b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and

(c) the circumstances are such that—

(i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client, or

…

(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."

[Emphasis Added]

33. The corresponding provision, Regulation 6(1) of the SSC(I) 2000 Regulations provides:

1) [This Part 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 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.

…………………………..

34. There is no dispute that the conditions in ss.49(1)(a) and (b) ITEPA and Regulation 6(1)(a) and (b)are satisfied:

a. Mr Alcock (the "worker" for the purpose of IR35) did personally perform services for Accenture and DWP (the "end clients");

b. In the relevant tax years, Mr Alcock did not have a direct contractual relationship with Accenture or DWP, instead supplying his services under arrangements involving the Appellant (the "intermediary" for the purpose of IR35) and Networkers or Capita respectively.

35. The only issue therefore is whether the hypothetical direct contracts between the end clients and Mr Alcock that the Tribunal is required to construct under s.49(1)(c)(i) ITEPA would be contracts of employment or self-employment. In doing so, s.49(4) requires the Tribunal to have regard to the terms of the contracts forming part of the arrangements (ie. the LLCs between RALC and the agencies and ULCs between the agencies and end clients). If the hypothetical direct contract would be one of employment, the Intermediaries legislation applies and the Determinations and Notices should be upheld, subject only to the issue of competence in respect of the extended time limit assessments.

36. There is a "slight, but potentially significant" difference in the approach for income tax and NICs purposes (although in practice the outcome may be the same) as set out by Henderson J at [17] of *Dragonfly Consultancy Limited*:

(1) The NIC test requires "the arrangements themselves to be embodied in a notional contract, and then asks whether the circumstances (undefined) are such that the worker would be regarded as employed."

(2) On the other hand, the income tax test: "…directs attention in the first instance to the services provided by the worker for the client, and then asks whether the circumstances (widely defined in paragraph 1(4) in terms which include, but are not confined to, the terms of the contract forming part of the arrangements) are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded as an employee of the client." As the Special Commissioner said in that case the income tax test appears, therefore, to require a wider enquiry into what the terms of a direct contract would have been given there is no limitation in the wording to contract terms which are encompassed in the arrangements or the circumstances. However, HMRC did not rely upon the difference in wording so that the Tribunal adopts the arguably slightly wider test in relation to income tax and applies it both to the tax Determinations and NIC Decisions.

37. In *Usetech Ltd v Young* (2004) 76 TC 811, at [36], Park J envisaged that in a straightforward case where there are two contracts in place (between the PSC and the worker and between the PSC and the client), the content of the assumed or notional contracts will be "fairly obvious":

"they will be based on the contents of the second contract between the service company and the end user, but with the worker himself agreeing that he will provide his services to the end user on, as near as may be, whatever terms are agreed between the service company and the end user."

38. Mr Justice Park continued that deciding on the terms of the assumed contracts may be more complicated where, for example, there is an agent in the contracting chain. He noted that in the first instance judgment in *R (on the application of the Professional Contractors Group Ltd and others)* v *IRC* [2001] STC 629 (at page 651) Burton J was of the view that in such a case "all relevant circumstances would fall to be taken into account in determining the contents of the hypothetical contract between the worker and the end user, including the provisions (or the absence of particular provisions) of a contract between an agency" and the end client (see [46] and [47]).

39. The burden of showing that the condition in s.49(1)(c)(i) ITEPA is not satisfied is upon RALC: s.50(6) TMA 1970.

40. The purpose of the Intermediaries legislation was identified by Robert Walker LJ in the Court of Appeal in *R (Professional Contractors Group & Others) v IRC* [2001] EWCA Civ 1945; [2002] STC 165 at [51]: *"to ensure that individuals who ought to pay tax and NICs as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation"*.

41. The legislation requires the Tribunal to do the following:

a. Make findings of fact about the actual terms on which the parties contracted and any other relevant *"circumstances"* for the purposes of s.49(1)(c)(i) and (4);

b. Determine the terms of the hypothetical contracts;

c. Apply the common law tests to determine whether the hypothetical contracts would have been contracts of employment.

42. In making findings of fact about the actual terms, the Tribunal should consider the following:

a. Authoritative guidance on the approach to contractual interpretation is given by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24. In ascertaining the objective meaning of an agreement from the words that the parties have used, the court or tribunal should test rival constructions to determine which is more consistent with business common sense and what the commercial consequences are of the rival constructions: per Lord Hodge at [11]-[12];

b. Specifically, with regards to mutual obligations in a work context, tribunals and courts should adopt a realistic approach to the issue of contractual interpretation, taking into account the practical, financial and other realities of the working relationship: *Pimlico Plumbers v Smith* [2017] EWCA Civ 51, [2017] IRLR 323 per Sir Terence Etherton MR at [113] and Underhill LJ at [140];

c. Tribunals and courts must be alive to the danger that *"armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship"*. A tribunal should adopt *"a sensible and robust view of these matters"*, *"in order to prevent form undermining substance"*: *Consistent Group Ltd v Kalwak* [2007] IRLR 560 per Elias J at [58] and [59], cited with approval in *Autoclenz v Belcher* [2011] UKSC 41, [2011] IRLR 820 per Lord Clarke at [25].

43. In constructing the hypothetical contract:

a. The Tribunal is required to construct a hypothetical contract that did not in fact exist, which will be based upon the terms of the contractual relationship between the intermediary and the client: *Usetech Ltd v Young* [2004] STC 1671 per Park J at [9];

b. Where an agency has been interposed into the contractual chain, the terms of the hypothetical contract will take into account all contracts in the contracting chain, including the terms of a written contract between the agency and client, even if the worker was unaware of its terms: *Usetech* at [43]-[47]. The Tribunal should draw appropriate inferences from the material before it about the terms on which the hypothetical direct contract would have been concluded.

44. There is no relevant statutory definition of employee or employment. The Tribunal is required to apply the common law in this respect. The classic statement on the conditions required for a contract of service is that of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515:

"(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."

45. The third condition in MacKenna J's test is a negative condition, such that if the first two are satisfied, the contract will be a contract of employment, unless there are other provisions of the contract which are inconsistent with that conclusion and of sufficient importance that the Tribunal can conclude that the contract is not one of service: *Ready Mixed Concrete* at 516 to 517; *Weightwatchers (UK) Ltd v HMRC* [2012] STC 265 per Briggs J at [41]-[42] and [111]:

'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.'

46. In *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173, Cooke J approached the question of whether there was an employment contract by examining whether the individual in question was "in business on his own account".

47. In *Hall v Lorimer* [1994] 1 WLR 209, STC 23 the court interpreted the approach in *Market Investigations Ltd* essentially as requiring a multi-factorial exercise rather than a tick box or check list approach.

The first Ready Mixed Concrete condition – mutuality of obligation and personal service (substitution)

48. The first *Ready Mixed Concrete* condition contains a first limb, mutuality of obligation for the worker to perform work offered and putative employer to pay remuneration, which is described as the "*irreducible minimum ... necessary to create a contract of service*":

Carmichael v National Power Plc [1999] 1 WLR 2042 at 2047. In *Usetech* at [60] the Court said:

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

49. A contract is not deprived of mutual obligations because the employee has the right to refuse work or the employer may exercise a choice to withhold work. The necessary focus must be on the question whether there is some obligation on an individual to work, and some obligation on the other party to provide or pay for it: *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 at [55]; *Pimlico Plumbers* per Sir Terence Etherton MR at [113] and Underhill LJ at [139], approved by Lord Wilson ([2018] UKSC 29; [2018] IRLR 872 at [40]).

50. An expectation that work will be provided during a contract which is derived from practice may amount to a legal obligation: *St Ives v Heggarty* UKEAT/0107/08 per Elias P at [26], applied by the EAT in *Addison Lee v Gascoigne* UKEAT/0289/17 at [33]-[35].

51. The fact that Mr Alcock was engaged under a series of contracts and at the end of each one there was no obligation to offer further work outside of those contracts is not a relevant consideration. The question is whether the hypothetical contracts, covering the periods under review, would have been contracts of service: *HMRC v Larkstar Data Ltd* [2009] STC 1161 at [32]. In any event, it is sufficient that there was mutuality of obligation during the term of each contract: *Island Consultants Ltd v HMRC* [2007] STC (SCD) 700 at [11].

52. Further, the mere fact that someone is engaged on a succession of short contracts is not in itself a factor which can usefully be considered in isolation and it must be considered alongside the more general question of whether the worker was in business on their own account: *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 per Cooke J at 187G-188C.

Personal service

53. The first *Ready Mixed Concrete* condition contains a second limb. In order to be an employee, the obligation upon the worker must be to perform the work personally. A far-reaching and genuine right of substitution may negate a contract of employment. Where there is a conditional right of substitution, this may be consistent with personal performance. As it was put by Sir Terence Etherton MR in the Court of Appeal judgment in *Pimlico Plumbers* [2017] IRLR 323 at [84]:

> "…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. …[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)

54. The question is whether there is an absolute and unqualified discretion to withhold consent on the part of the hypothetical employer.

55. In considering the effect of a contractual substitution clause, a tribunal is entitled to ask whether, in reality, the employer was "*uninterested in the identity of the substitute, provided only that the work gets done*": *Pimlico Plumbers* [2018] IRLR 872 per Lord Wilson at [34].

56. The second limb of MacKenna J's first condition on substitution had earlier been considered by the Upper Tribunal in *Weightwatchers (UK) Ltd v HMRC* [2012] STC 265 at [32] – [37] where Briggs J had taken a broader approach to construing a fettered right of substitution.

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

33.At the other end of the spectrum, contracts for work frequently provide that if the worker is for some good reason unable to work, he or she may arrange for a person approved by the employer to do it, not as a delegate but under a replacement contract for that particular work assignment made directly between the employer and the substituted person.

34.The true distinction between the two types of case is that in the former the contracting party is performing his obligation by providing another person to do the work whereas in the latter the contracting party is relying upon a qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he finds a substitute to contract directly with the employer to do the work instead.

35.The second possible relevance of substitution clauses is that, even if the clause is of the latter type, so that the substitute is not performing the contractor's obligation, his right to avoid doing any particular piece of work may be so broadly stated as to be destructive of any recognisable obligation to work. Mr Peacock submitted that the relevant distinction was between clauses providing for substitution only where the contractor was unable to work, and clauses permitting substitution wherever the contractor was unwilling to work, relying upon Tanton and MacFarlane as illustrative of that distinction.

36.I am not persuaded that that is the relevant distinction. It is, in the real world, unrealistically rigid. Take the example of a teacher who is, otherwise, obviously an employee, but whose contract permits her to absent herself, and find a replacement to be engaged for that purpose by her school where, although able to work, she would for understandable reasons rather attend a wedding, or funeral, of a close relative. It would be absurd to treat that sensible provision as incompatible with a contract of employment.

37.In such cases the real question is in my judgment whether the ambit of the substitution clause, purposively construed in the context of the contract as a whole, is so wide as to permit, without breach of contract, the contractor to decide never personally to turn up for work at all. That was indeed held to be the true construction of the relevant clause in Tanton."

[Emphasis Added]

57. Just because Mr Alcock's services were provided to the clients, Accenture and DWP, through employment agencies, there may still be personal service. The statutory requirement in s.49(1)(a) ITEPA that the worker "*personally performs, or is under an obligation personally to perform, services for*" the client. The terms of the contracts between RALC and the relevant agencies, Networkers and Capita respectively, did require Mr Alcock to personally perform the services for Accenture and DWP (subject to the argument that there was a relevant right of substitution). The fact that there is an agency in the contractual chain does not mean that there is no personal service. If it did, no doubt a number of appellate

decisions involving four-party chains (of which *Usetech* is only one example) would have been decided differently.

The second Ready Mixed Concrete condition - control

58. The second condition in MacKenna J's *Ready Mixed Concrete* test concerns an agreement to be subject to the other's control to a sufficient degree. This is a necessary element of an employment relationship, although not determinative: *Ready Mixed Concrete* at 517A; *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, [2001] ICR 819 per Buckley J at [23].

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

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

60. In determining whether the right of control exists to a sufficient degree, the putative employer's right to decide what is to be done, the way in which it shall be done, the means to be employed in doing it, the time and place where it shall be done should all be considered: *Ready Mixed Concrete* at 515F (the 'how, what, when and where' test of control).

61. However, that statement has to be understood in its historical context. In modern working practices, it is not necessary to identify a right of control over how the individual works: *Various Claimants v Catholic Child Welfare Society & Ors* [2012] UKSC 56, [2013] 2 AC 1 per Lord Phillips at [36]; *Montgomery v Johnson Underwood* at [19].

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

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

63. The authorities recognise that absence of control in the case of a skilled worker is not an automatic indicator away from employment (see *Morren v Swinton and Pendlebury Borough Council* [1965] 1 WLR 576). As explained in *Various Claimants v* 30 *Catholic Child Welfare Society & Ors [2012] UKSC 56* per Lord Phillips at [36]:

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

64. The right of control need not be unrestricted. A tribunal should consider whether the putative employer has the right to control aspects of the employment relationship which can be practically controlled. The following passage from *Zujis v Wirth Brothers Proprietary Ltd* (1955) 93 CLR 561 at [37], was quoted in *Ready Mixed Concrete* at 515G and *Wright v Aegis Defence Services (BVI) Limited* UKEAT/0173/17 per Langstaff J at [15]: *"what matters is the 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."*

65. What matters is where the ultimate *contractual* right of control resides, rather than practical day to day control: *White v Troutbeck* [2013] IRLR 286 per Richardson J at [40] and [45], upheld in the Court of Appeal ([2013] IRLR 949); *Wright v Aegis* at [15], [35].

66. In order to identify whether there is such a right of control, one starts with the contract and if it is present, need go no further. If the contract does not expressly provide for the right of control, *"the question must be answered in the ordinary way by implication"*: *Ready-Mixed Concrete* at 516A; *White v Troutbeck* at [43]. If the genuine contractual right of control to a sufficient degree does exist, it does not matter whether that right is actually exercised: *Autoclenz v Belcher* at [19]; *White v Troutbeck* at [44].

67. There are individuals who possess skills and are required to exercise judgement in the exercise of those skills which is not susceptible to close direction by an employer. It would be an error of law to hold that the individual is not an employee for this reason: see the detailed consideration of this issue in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 (Privy Council) per Lord Griffiths at 384A; *Montgomery v Johnson Underwood* at [19]; *White v Troutbeck* at [42]; and *Wright v Aegis* at [34]-[42].

The third Ready Mixed Concrete condition – other contractual terms consistent with employment or self-employment – and any other relevant circumstances under s.49(1)(c)(i) & (4) of ITEPA

68. Any statement within the actual contracts between the worker, intermediaries and client as to whether the parties intended their relationship to be one of employment will be given minimal, if any, weight in construing the hypothetical contract between the worker and client: *Dragonfly Consulting Limited* [2008] STC 3030 at [55].

69. A clause allowing the individual to carry out additional work, under another contract for services, during the course of, but outside the hours or requirements of, the contracted work is of relevance to the question of employment or self-employment.

70. The context in which the individual earns a living outside of the particular engagement under consideration will therefore be a relevant factor in determining the employment status of that engagement. However, it is perfectly possible for someone to enter into a contract of service at the same time as carrying on a self-employed profession, even if they are in the same sphere of work: *Fall v Hitchen* [1973] 1 WLR 286 per Pennycuick VC at 298C. Therefore, the focus should be upon the terms of the particular hypothetical engagement being considered and whether that would be an employment.

71. However, in the case of someone carrying on a profession or vocation, one factor in determining whether the individual is an employee or in business on their own account may be the extent to which they are dependent upon or independent of a particular paymaster for the financial exploitation of their talents: *Hall v Lorimer* [1994] 1 WLR 209 per Nolan LJ at 218C.

72. The fact that a person may be engaged part-time and earn a substantial part (or even the majority) of her income from other sources does not prevent the engagement being an employment if the terms of the contract under which the engagement is performed permit that conclusion: for example, *Sidey v Phillips* [1987] STC 87 per Knox J.

73. In the context of an appeal concerning the Intermediaries legislation, some terms of the actual contract simply reflect the fact that the actual contract was between two companies rather than between a company and an individual, e.g. the absence of any provision for holiday, sick pay or pension entitlement. As a consequence of the structure of the actual arrangements entered into, this is not a significant factor in determining whether the hypothetical contracts would be contracts of employment: see by analogy *Market Investigations* at 187F-G.

74. Although a number of tests have been developed by the courts to assist in determining whether a contract of service exists, the Tribunal should not adopt a mechanistic or 'check list' approach. Different factors will be of different relevance and weight in each case and so reading across the facts of one case to another will be of limited assistance. Having considered all the relevant factors, the Tribunal should stand back from the detail and make a qualitative assessment of the facts as found: *Hall v Lorimer* per Nolan LJ at 216E-H, approving the views of Mummery J in the High Court in the same case.

75. The process of constructing the hypothetical contract is not an exercise in implying terms, rather, determining the terms of the hypothetical contract is a matter of drawing inferences from the primary material before the tribunal, in particular the written contracts: *Usetech v Young* [2004] STC 1671 per Park J at [36] and [38]. Mr Alcock would not need to have been aware of contractual clauses for them to be included in the terms of the hypothetical contracts i: *Usetech* at [43]-[47].

Summary of the approach to employment contracts and Intermediaries legislation

76. The Upper Tribunal (Tax and Chancery Chamber) has recently considered and summarised the application of the above authorities to the principles of control in employment contracts and IR35 legislation at [36],[46]-[47], [52]-[54], [58]-[59] and [68] of its decision *Christa Ackroyd Media Ltd v HMRC* [2019] UKUT 326 (TCC) on 25 October 2019:

'36. We consider that in constructing the hypothetical contract, the FTT was right to begin with the Contract. However, it was also right not to confine its consideration to the Contract. The FTT clearly had *Usetech* in mind (the Decision refers to it at [13], [143] and [151]) in stating at [151] that the hypothetical contract was "based on" the terms of the Contract. However, *Usetech* cannot be taken as establishing a general proposition that in a situation where, as in this appeal, there are two contracts the hypothetical contract must simply track the actual contract with the service recipient. It should be borne in mind that the comment in *Usetech* was made in the context of distinguishing a situation where there were two contracts with the factual situation in *Usetech*, where there were three. Section 49 explicitly requires the tribunal not to restrict the exercise of constructing the hypothetical contract to the terms of the actual contract, but to assess whether "the circumstances" are such that an employment relationship would have existed if the relevant services had been provided by the individual directly and not via a service company, and section 49(4) provides that "the circumstances…*include* the terms on which the services are provided, *having regard* to the terms of the contracts forming part of the arrangements…" (emphasis added). The FTT therefore proceeded correctly in considering whether the hypothetical contract would have included terms not set out in

the Contract. Indeed, directly contrary to Mr Maugham's submission, before the FTT CAM itself argued (without success) that various such terms relevant to control should be so included: see [152].

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46. …….... The full guidance from MacKenna J, which continues to represent the correct approach to the issue, is as follows:

> "…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."—*Zuijus v Wirth Brothers Pty Ltd* ((1955), 93 CLR 561 at p 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."

47. That guidance was considered and applied in *White v Troutbeck* [2013] IRLR 286, upheld by the Court of Appeal at [2013] EWCA Civ 1171. The approach taken in that case, with which we respectfully agree, was to interpret MacKenna J's guidance as requiring not a formal analysis as to an implied term in the contract but an exercise of contractual construction. The court or tribunal must address "the cumulative effect of the totality of the provisions in the agreement and all the circumstances of the relationship created by it" (per the Court of Appeal at paragraph [38]) and decide whether as matter of construction ultimate control by the recipient of the services exists, notwithstanding the absence of an express provision in the contract.

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52. The FTT's summary of the relevant case law on control is set out at [134] to [141] of the Decision. The parties agreed that this summary was a fair reflection of the relevant principles. At [135] the FTT referred to the statement by the Court of Appeal in *Montgomery v Johnson Underwood* that "some sufficient framework of control must surely exist [in order for employment to exist]". The FTT therefore had this observation in mind in reaching its decision.

53. The question is what the Court of Appeal meant when it referred to the need for "some sufficient framework of control". Mr Maugham's argument amounts to an assertion that Buckley J had in mind contractual mechanics conferring on the recipient of the services a method of enforcing control over the individual during the continuing performance of those services and throughout the continuance of the contractual relationship. It is not clear to us whether the assertion is that such mechanics must facilitate control during the real time performance of the services; we assume not, since by definition an appraisal process operates primarily after the event, making its absence largely irrelevant to day-to-day control.

54. In any event, we do not consider that Buckley J was addressing the granular mechanics of control in this context. In the first place, there is no discussion which would indicate that particular performance tools such as appraisals or line managers were material. If the passage is read as a whole, the point being made is simply that set out in *Humberstone v Northern Timber Mills* and cited in *Ready Mixed Concrete*, namely that what mattered in determining control was not the practical exercise of day-to-day control and whether "actual supervision" was possible, but "whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions". That point is made clear in *White v Troutbeck*, where the Employment Appeal Tribunal (at paragraphs 40 to 42) expressed the question as whether the owner of an estate who left a servant in charge of a property "retained the right to step in and give instructions concerning what was, after all, their property", pointing out that the delegation of day-to-day control did not mean that the owner had "divested himself of the contractual right to give instructions to them".

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58. Citing various FTT decisions as support, Mr Maugham argued that since control which applies to employees and non-employees alike cannot be "a touchstone of employment", control over Ms Ackroyd imposed in order to comply with the BBC Editorial Guidelines could not be relevant to control for employment purposes.

59. In this appeal, Mr Maugham's argument on this issue probably amounts to an assertion either that the obligations imposed on Ms Ackroyd under Clause 9 of the Contract are not relevant to control because of the BBC's reasons for imposing them, or that because the BBC's obligations under the Guidelines applied in relation to content provided by all content providers, they were not properly part of the relevant context in considering ultimate control. We do not accept either argument. Mr Maugham argued (as part of his central submission that the FTT had erred in implying ultimate BBC control) that in Clause 9 the parties had "traversed the territory" of the Guidelines and reached agreement about the restrictions to be imposed on Ms Ackroyd under the Contract. He did not challenge the FTT's conclusion (at [151(7)]) that those restrictions would follow through into the hypothetical contract. We see no rational basis on which then to ignore those restrictions in considering the control issue. In relation to the context applying to the consideration of the implication question, we consider that the FTT would have been wrong to leave the Guidelines out of account because of their potential application to other service providers.

……..

67. We agree that, in so far as the FTT was relying on *Dragonfly*, that reliance was misplaced. The relevant passage from *Dragonfly*, which in fact restates a principle set out in *Ready Mixed Concrete*, is concerned with the weight to be given to any explicit statements contained in the actual contract between the parties as to the legal status of the relationship which they intend to create (or, more usually, avoid).

68. However, we consider that for other reasons the FTT was right to afford this statement little weight in constructing the hypothetical contract. First, the relevant factual situation in this appeal is quite different 5 to that in *Usetech*. Second, and contrary to Mr Maugham's submission, the wording of section 49 does not require a consideration of the subjective intentions of the parties prior to the services being provided, but rather an objective consideration of the terms on which the services "*are"* provided. Third, even assuming that the FTT was accepting Ms Ackroyd's evidence as an accurate statement of her intent, that evidence records that she would not have entered into a contract under which the BBC "would" control her, but as we have described above the most important issue is not whether the BBC *would* in practice control Ms Ackroyd, but whether they *could* do so. Finally, it begs the question of what Ms Ackroyd meant by "control"; there was no evidence to suggest that she was referring to each relevant aspect and nuance of the control test for employment purposes.

Regulation 80 and the applicability of Discovery under section 29 of the TMA

77. It was initially argued on behalf of the Appellant that both the Regulation 80 Determinations for income tax and Section 8 Notices for NIC were "*discovery assessments*". However, by the conclusion of the hearing it was accepted that:

a. The only 'competence' issue affecting the Notices is the 6-year time limit in s 9(1) of the Limitation Act 1980 to commence an "*action to recover any sum recoverable by virtue of any enactment*". The provisions of the TMA are simply not relevant;

b. The only competence issue affecting the Regulation 80 ITEPA Regulations 2003 Determinations is whether HMRC can show that the extended time limit conditions were satisfied under s. 36 of the Taxes Management Act 1970 ('TMA'). A Determination is not also required to satisfy the conditions in either s.29(1) or s.29(3) TMA.

78. Regarding s.29(3) TMA, this Tribunal is bound by the decision of Briggs J (as he then was) in the Upper Tribunal in *Weight Watchers (UK) Ltd v HMRC* [2012] STC 265. At [16]-[17], he determined that the conditions in s.29(3)-(5) TMA do not apply to Determinations.

79. As to s.29(1) TMA, the FTT (Judge Morgan) very recently addressed the question of whether the discovery condition applies to Regulation 80 Determinations in *Paya and others v HMRC* [2019] UKFTT 583 (TC), released on 17 September 2019. The FTT concluded, at [657], that s.29(1) is not in issue in Regulation 80 Determinations. This Tribunal agrees that Judge Morgan was correct for the reasons she gave.

80. Put simply, Regulation 80 of the ITEPA Regulations 2003 provides:

'80 Determination of unpaid tax and appeal against determination

(1) This regulation applies if it appears to [HMRC] that there may be tax payable for a tax year under regulation [67G[, as adjusted by regulation 67H(2) where appropriate,] or] 68 by an employer which has neither been—

(a) paid to [HMRC], nor

(b) certified by [HMRC] under regulation [75A,] 76, 77, 78 or 79.

……………………..

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

(a) the determination were an assessment, and

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

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

81. Effectively, Regulation 80(5) provides for the TMA to be applied to Regulation 80 Determinations but with necessary modifications. There is already a threshold test imported into Regulation 80(1) – 'if it appears to HMRC…there is tax payable…..which has neither been paid to HMRC…..' before a Determination can be made. Application of a differently worded test for discovery assessments is provided in section 29(1) of the TMA:

'29(1) If an officer of the Board or the Board discovers, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

……

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.'

82. The requirements for making a discovery assessment under the TMA are inconsistent with the requirements imposed upon to HMRC to make a Regulation 80 Determination and thus need to be modified by not being applied. As Judge Morgan stated in *Paya* at [657]:

'Our view is that the decision in *Weight Watchers* is not determinative of the question of whether s 29(1) TMA applies. As Mr Peacock said, Briggs J decided the different question of whether the conditions in s 29(4) and 29(5) applied. We do not see that it follows from his conclusion on that point that s 29(1) itself necessarily does not apply. However, on a purposive construction of regulation 80(5), looked at in the overall context of that regulation, we consider that it is highly unlikely that it is intended to apply to deem a determination to be an assessment for the purposes of s 29(1) TMA. Regulation 80(1) contains its own threshold requirement for HMRC to be able to make a determination; namely, that it "appears" to an officer that there is a shortfall of tax. As Mr Tolley noted, it would be most odd for regulation 80(5) then to impose in effect a different threshold requirement by reference to whether an officer "discovers" an insufficiency of tax.'

Extended time limit and Carelessness

83. Sections 34 and 36 of the TMA provide in so far as relevant:

34 Ordinary time limit of [4 years]

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, [an assessment to income tax or capital gains tax may be made at any time [not more than 4 years after the end of] the year of assessment to which it relates.]

36 [Loss of tax brought about carelessly or deliberately etc]

[[(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

……………………………………………..

(1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.]

84. Accordingly, the only issue regarding the competence of the Determinations for the 2010-11 and 2011-12 tax years which were made in March 2017 (more than 4 years later but within six years) is whether HMRC are able to demonstrate that the conditions for extending time in s.36 TMA are satisfied. Relevantly, HMRC must show that the loss of income tax was "*brought about carelessly*", either by Mr Alcock, RALC, or by another person acting on its behalf such as Robson Laidler: see ss.36(1) and (1B) TMA.

85. Section 118(5) TMA defines what it means to bring about a loss of tax carelessly: "*For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation*".

86. As the Upper Tribunal found in *Atherton v HMRC* [2019] STC 575 at [59]-[61], this section has the effect that the Tribunal is not required to consider the general law of causation. In particular, it is not required to ask what would have happened if the taxpayer or its adviser had taken reasonable care, or whether the loss of tax was brought about by the lack of care. The condition in s.36(1) TMA will be satisfied if the Tribunal finds that the taxpayer or its adviser failed to take reasonable care to avoid the loss of tax.

87. The honesty of Mr Alcock or the Appellant is not a relevant consideration as to whether they took reasonable care; nor does HMRC need to show a link between the alleged carelessness and error(s).

88. The fact that HMRC decided not to issue penalties for careless behaviour to Mr Alcock or the Appellant does not prevent HMRC from establishing that the test in s.118(5) TMA is satisfied.

The Facts

89. The Tribunal finds the following facts on the balance of probabilities indicating its reasons for making any findings where matters are in dispute.

Incorporation of RALC and early year contracts to September 2010

90. Mr Alcock worked as an employee for Accenture from September 1998 until March 2008, when he left to provide his services via RALC. DWP had been a client of Accenture and Mr Alcock had worked on DWP engagements whilst at Accenture. He started his first engagement with DWP through a contract between RALC and an agency, Parity Resources Limited ("Parity"), in May 2008.

91. Mr Alcock's witness statement explained his background and reasons for setting up RALC in the following terms which the Tribunal accepts as fact:

'Background and RALC Incorporation
19. I graduated from Newcastle University in 1998 with a BSc in Computing Science.

20. In September 1998 I took a graduate position with Andersen Consulting, which later became Accenture, specialising in system architecture and large scale system delivery.

21. In 2007 as a 3rd year Accenture manager and having been unsuccessful in a promotion attempt to Senior Manager I decided it was time to leave and set up my own consultancy firm. I had several reasons for doing so:
a. I was spending an increasing amount of time doing internal Accenture work in order to support my promotion prospects. Whilst valuable to Accenture I could be investing this time in my own enterprise;
b. Spending so much time on internal work gave me less time to do what I enjoyed – solving clients' problems;
c. I was unable to choose my own clients and roles – not least because making a fuss and asking to move roles/clients could harm promotion prospects;
d. The financial rewards could be substantial without Accenture taking a significant proportion of the daily charge-out rate. I could charge my time at 75% of Accenture's day rate and still make significant profit.
e. I had seen former colleagues take this approach and successfully grow their businesses to include several clients and employees.

22. I was also well aware of the risks of leaving employment:
a. I would be leaving a safe environment with high degree of job security;
b. I/my Company would have to cover the time-cost of rectifying any mistakes;
c. I/my Company would be financially exposed in the event of any contractual/commercial dispute;
d. Any non-chargeable periods would be at my/my Company's cost of downtime, unlike in employment where Accenture would pay me even if there was a slump in client work;
e. My/my Company's costs would increase to cover accountancy, insurance, IT etc;
f. Absence such as holiday, sickness etc would be at my/my company's expense;
g. I would have increased workload due to running a business, keeping business records, administration and returns to Companies House and HMRC;
h. As an employer (RALC now has 2 employees in addition to me) I would be responsible for feeding the hungry mouths of others, which brings additional pressure of generating work and income streams.

23. Having weighed up the costs I concluded that the risks were worth the reward and decided to proceed.

24. As the Company was never intended to remain a "*one-man-band*" I did not want to use my name as the company name. Instead I opted for the 'tag' I had used as a developer in the early days of my career, "*RALC*".

25. Having thoroughly researched the process, advantages and disadvantages, risks and costs of doing so, I incorporated RALC Consulting Ltd on 4th Jan 2008 and began looking for potential leads.

26. I also registered the domain "*ralc.co.uk*" and built a website advertising the various programme delivery and solution architecture services RALC would offer.

27. I left Accenture at the end of March 2008, however RALC was still without its first contract. It was proving a lot more difficult, and stressful, than I had anticipated to find contracts despite my career record.

28. On 16th May 2008 I engaged Robson Laidler LLP (now Robson Laidler Ltd) in Newcastle to provide RALC Consulting with accounting and payroll services. I met with Michael Moran my principle accountant to discuss the nature of the business. He advised that once finalised, I should have my contract/engagement reviewed to understand the IR35 position.'

92. Mr Alcock went on to describe RALC's contract engagement with Parity prior to the contracts in question:

DWP – Employment Support Allowance – Delivery Assurance
32. On 19th May 2008 I started my first client engagement through RALC. This was a 6 month contract with DWP on the Employment Support Allowance ("ESA") programme via their agency Parity Resourcing Ltd.
33. The programme was based in Preston and I was unable to negotiate DWP reimbursing travel and subsistence costs for travel to Preston. As a result, RALC incurred these costs.
34. Following Robson Laidler's recommendation, on 5th Jun 2008 after 2.5 weeks in the role, I met with Stephen Poole from Robson Laidler's Tax department to review the contract and the working arrangements. Following this meeting, Stephen performed a review of the engagement finding that on balance it lay outside of IR35.

93. The Parity contract came to an end on 4 April 2009 but RALC took on another contract between April 2009 and September 2010 where the end client was DWP as Mr Alcock explained:

40.After a 2 week search, an opportunity emerged in a different part of DWP, the Change Programme, based in Blackpool.
41. I was unable to negotiate the same rate as the ESA programme, instead accepting a lower rate of £585 per day, but offsetting travel and boarding costs by getting DWP to agree reimbursing travel and accommodation costs and, as the programme was only just starting, a 12 month term. The contract base was set to Newcastle in order to facilitate expense reimbursement.
42. As this contract was exactly the same Capita framework contract and the working arrangements were the same I concluded that there was no requirement to commission a further IR35 contract review.
43. In April 2010, RALC was offered a 6 month extension to the contract in order to see out the delivery of the Change Programme. The terms of this contract were exactly the same as the original contract.
44. Due to the birth of my first child I exited the contract 3 weeks early on 18th September 2010 and was not paid.

The relevant contracts in issue – 8 November 2010 to 14 February 2015

94. For the relevant tax years, RALC entered into the following contracts to provide Mr Alcock's services to:

a. Accenture, via Networkers, from 8 November 2010 to 20 July 2012 and 22 October 2012 to 28 April 2013 (the "first contract") which ended early in January 2013. During the course of this engagement, he worked on an Accenture project with the DWP. He received a daily fee of £760, which increased to £830 from 22 October 2012;
b. DWP, via Capita, from 4 March 2013 to 7 December 2013 (the "second contract"). He received a daily fee of £650;

c. Accenture, via Networkers, from 16 December 2013 to 14 February 2015, (the "third contract"). During the course of this engagement, he worked on an Accenture project with Police Scotland. He received a daily fee of £750.

95. Arranged chronologically, the contracts with which this appeal is concerned are:

Contract	Start date	End date	Client	Daily fee
First	8 November 2010	20 July 2012	Accenture	£760

Up to 20 January 2012 the work programme to be delivered was DWP Automated Service Delivery (ASD) and contract title role was System Delivery Integration Manager
Up to 20 October 2012 the work programme to be delivered was DWP Personal Independence Payment (PIP) and contract title role was Client-side Delivery Assurance Lead

Contract	Start date	End date	Client	Daily fee
First	22 October 2012	28 April 2013	Accenture	£830

The work programme to be delivered was DWP Universal Credit (UC) and contract title role was Agile Delivery Factory Manager

Contract	Start date	End date	Client	Daily fee
Second	4 March 2013	7 December 2013	DWP	£650

The work programme to be delivered was DWP Universal Credit (UC) and contract title role was Senior Suppliers Manager

Contract	Start date	End date	Client	Daily fee
Third	16 December 2013	14 February 2015	Accenture	£750

The work programme to be delivered was Police Scotland i6 Programme and contract title role was Design Consultant

Accenture engagements – the first and third contracts

The first contract – November 2010 to April 2013 ending in January 2013

96. The first contract is comprised of a lower level contract ('LLC') between RALC and Networkers dated 8 November 2010 with nine renewal schedules ending on 28 April 2013 (but brought to an end early in January 2013) and upper level contracts (ULCs) between Networkers and Accenture dated 26 May 2010 and 30 April 2012.

97. The first contract involved the provision of Mr Alcock's services as a 'System Delivery Integration Manager' to Accenture. The description of the services was later amended to 'PIP - Client Side Delivery Assurance Lead' and then 'Universal Credit Agile Delivery Factory Manager', as the nature of the project with DWP evolved. In essence, Mr Alcock was working on the delivery of the IT system concerning various state benefits at DWP.

98. In more detail the first contract involved a series of engagements with Accenture between November 2010 and January 2013 with the ultimate client or beneficiary being DWP.

99. Mr Alcock described it in the following terms in his witness statement which the Tribunal accepts as reliable and finds as fact:

Accenture Automated Service Delivery Programme – System Delivery Integration Manager (Delivery Assurance)
54. After a few weeks unpaid/downtime due to paternity leave, in about October 2010 I approached Accenture regarding work they were doing with DWP on a new programme, named Automated Service Delivery.

55. The programme was based between Newcastle and Blackpool but I was unsuccessful in negotiating with Accenture who would not reimburse RALC for travel expenses to Blackpool. Thus RALC incurred these costs.

56. Accenture were performing a client-side delivery assurance role to help DWP with the delivery of the components built by multiple suppliers; Accenture, HP and Atos.

57. Due to the short term commercial arrangements between Accenture and DWP, the role could only be contracted in 3 month increments. This obviously carried additional risk to RALC and I negotiated a higher rate of £760 per day to account for that.

58. It should be noted that regularly during this period, the new contract extension was not signed on time. However to ensure ongoing good relations with Accenture and their client I continued to work outside of contract, at risk, until it was signed. In total this engagement lasted 15 months.

………………….

Accenture DWP Personal Independence Payment Programme – Client-side Delivery Assurance Lead

63. In January 2012 I became aware of a new programme Accenture were doing with DWP to replace Disability Living Allowance with Personal Independence Payment (PIP).

64. I approached Alan Simpson, the Accenture lead responsible for that programme and secured a role to provide delivery assurance to DWP.

65. As with the previous role, this was to manage the dependencies between the various suppliers engaged on the programme. In this case it was IBM, Curam, HP and Atos.

66. This programme was also based between Newcastle and Blackpool but again I was unable to negotiate Accenture reimbursing travel costs to Blackpool with RALC incurring those costs instead.

Accenture – DWP Universal Credit Release 2 – Agile Delivery Factory Manager

67. In October 2012 as the PIP role came to an end, I approached Allan King regarding a potential engagement with Accenture on the DWP Universal Credit Programme (UCP).

68. Similar to the previous engagements, this role was to co-ordinate the development activities for multiple suppliers, in this case Accenture, IBM and HP. However, in this case it was not just a delivery assurance role (i.e. assuring the delivery activities of others), but also RALC was responsible for assigning and monitoring development tasks across the multi-supplier team.

69. It is important to note that the only management function I performed was in relation to the tasks/activities of those teams. I would meet daily (part of the agile methodology) with the development teams to assess progress and take remedial action by reducing scope, extending ‘sprint’ timescales and assigning tasks.

70. At no point during this did I have any responsibility for the individuals themselves. Any pastoral care, HR matters etc would be dealt with by the respective supplier leads on the programme. In Accenture’s case this was Allan King.

71. After only 2 months in this role, HM Cabinet Office did a review of the programme and pushed for Release 2 of UCP to be stopped due to increased focus on implementing Release 1 on time. This was an extremely political and contentious move and several weeks of debate and options analysis followed.

72. While this discussion took place and with no firm decision, I decided to continue to support the programme at RALC's risk and continued to work into January 2013. I was hopeful that the decision would be overturned, that Accenture would have their contract extended and that RALC would be rewarded with a new contract. Unfortunately this did not happen and ultimately RALC stopped work and was not paid for around 10 days of my effort. The contract was brought to an end in January 2013.

The third contract – December 2013 to February 2015

100. The third contract is comprised of a LLC between RALC and Networkers dated 16 December 2013 with a schedule to 24 October 2014 (and two renewal schedules to 30 December 2014 and 14 February 2015) and the same ULC between Networkers and Accenture dated 30 April 2012.

101. The third contract involved the provision of Mr Alcock's services as a 'Test Lead' as set out in the schedule, although the services provided were later described as 'Application Delivery Consultancy' in the renewal schedules – ie. Design Consultancy. This included co-ordinating the activities of the Accenture design team on this project to deliver an IT system to Police Scotland.

102. Mr Alcock described how the contract came about and was put into effect in his witness statement in the following terms, which again the Tribunal accepts as reliable and finds as fact:

Accenture – Police Scotland i6 Programme
117. In January 2014 I was invited by Accenture to take up a contract role on their programme with Police Scotland, i6.

118. The programme was predominantly based at Police Scotland headquarters in Glasgow. This was necessary as it relied on workshops and meetings with active police officers that were not full-time assigned to the programme. It was not possible for those Police Scotland staff and officers to attend workshops in Newcastle where Accenture and RALC were both based.

119. The combined Police Scotland and Accenture design team was approximately 30 people. Although in the role I had to co-ordinate the tasks across the Accenture team, the Chief Inspector responsible for design would have to agree to any activities involving Police staff.

120. It should be noted that whilst I did co-ordinate the task assignments for the Accenture staff on a day to day basis, I could not move Accenture staff between roles and had no performance-related, pastoral care or other responsibility for Accenture's resources.

121. My responsibilities were to break down the design into appropriate activities, plan those activities along with Accenture and Police team members and then manage the plan. In addition, I engaged in some of the design workshops themselves with input from Police Scotland staff to design the application.

122. Once the functional design (e.g. screens and application workflow) was completed, my focus turned to the technical design aspects including designing the operational reports that the system would provide.

123. During this phase following a review from some Oracle Business Intelligence Enterprise Edition (OBIEE) experts we identified that the design activity for this was more complex and time consuming than had been allowed for in the plans.

124. Although I have some OBIEE knowledge I did not have the capacity to take on the additional work and figured a subject matter expert would be able to help us recover the delays to the plan.

125. RALC identified a suitable independent OBIEE consultant, Lee Rorison, from my network and sought recommendation from a trusted mutual connection who had worked with him before.

126. After speaking to Lee and agreeing a rate of £480 per day, on 13th November 2014, I negotiated with Jamie Stewart, the Accenture technical lead to bring him in almost immediately to resolve the issue at a rate of £530 per day, allowing for a RALC margin of £50 per day.

127. Unfortunately despite setting up draft contract and a RALC email account for Lee, he announced on 20th November 2014 that he had accepted a higher rate for a role elsewhere.

The Accenture Contract terms – LLC, RALC-Networkers – ULC, Networkers-Accenture

103. For the first and third contracts the LLCs consisted of contracts between Networkers and RALC dated 8 November 2010 (continuing to 28 April 2013 but brought to an end in January 2013) and 16 December 2013 (continuing to 14 February 2015). Each contract was supplemented by multiple schedules and renewal schedules (nine schedules for the first LLC contract averaging three months in duration and three schedules for the third LLC contract averaging five months in duration).

104. The first schedule for the first contract LLC between RALC and Networkers described the initial nature of Consultancy Services to be provided as 'System Delivery Integration Manager' and the first schedule for the third contract LLC provided the nature as 'Test Lead'.

105. The name of RALC's Nominated Resource was Richard Alcock and the client was Accenture in each. The LLCs provided the Site Address as Newcastle upon Tyne and Blackpool or Newcastle. They defined the contract period and dates.

106. The notice period for early termination was specified in the first eight schedules to the first LLC contract as 30 days notice. In the final renewal schedule for the first LLC contract (from 22 October 2012 until 28 April 2013) it stated that: 'This Agreement may only be terminated by NWI [Networkers] giving to the Consultancy [RALC] thirty days-notice. This Agreement may not be terminated early by the Consultancy and shall remain in force for the period unless terminated early by NWI.'

107. The schedules to the third LLC contract gave the notice period for early termination of NWI (Networkers) giving to the Consultancy (RALC) not less than 30 days-notice and the Consultancy giving to NWI not less than sixty days-notice.

108. The schedules to the LLCs specified the daily fee payable and stated 'Additional hours must be agreed in advance in writing by the Client. NRS [Networkers] shall not be liable to pay for overtime not authorised by the Client' [Accenture]. The agreed expenses would be 'as per the Client's travel and Expenses policy'.

109. The terms of the LLCs between RALC and Networkers for the first and third contracts were identical and provided the following clauses on personal service or performance, sub-contracting and assignment (but not explicitly substitution):

'2.3 The Consultancy's [RALC's] obligation to provide the Consultancy Services in the course of the Assignment shall be performed by such member or members of the Consultancy's employees, officers or representative as the Consultancy may consider appropriate, subject to the prior approval of the Client [Accenture]. The Consultancy shall be entitled to assign or sub-contract the performance of the Consultancy Services in the course of the Assignment provided that NRS [Networkers] and the Client [Accenture] are reasonably satisfied that the assignee or sub-contractor has the required skills, qualifications, resources and personnel to provide the Consultancy Services to the required standard and the terms of

any such assignment or sub-contract contain the same obligations imposed by this Agreement.'

110. In terms of mutuality of obligations – the LLCs stated at Clause 12.7:

'Upon the expiry of the Assignment, howsoever arising, NRS [Networkers] shall not be obliged to offer and the Consultancy [RALC] shall not be obliged to accept any further assignments, contracts, engagements, projector services of any type whatsoever.'

111. The LLCs included the following on the intention of the parties:

'Clause 5.4 Nothing in this Agreement shall render any member of the Consultancy's staff or any Nominated Resource [Mr Alcock] an employee of either NRS [Networkers] or the Client [Accenture]. The Consultancy shall ensure that none of its staff or any Nominated Resource hold themselves out as employees of either NRS or the Client.

Clause 12.1 The consultancy acknowledges to NRS that is services are supplied to NRS as an independent contractor………

Clause 12.2 This Agreement is not intended by the Parties to constitute or give rise to a contract of service or an employment contract.

Clause 12. 3 Neither the Consultancy nor any Nominated Resource shall be entitled to receive from NRS or the Client sickness pay, holiday pay, long service leave or any other similar entitlement.'

112. In terms of control, Clause 2.6 & 5 of the LLCs provided:

'2.6 Save as otherwise stated in this Agreement, the Consultancy shall be entitled to supply its services to any third party during the term of this Agreement provided that this is no way compromises or is to the detriment of the supply of its services to the Client.

……………..

5.The Consultancy agrees on its own part and shall procure that any nominated Resource(s) agrees as follows:

……

5.1.2 To comply with any statutory or other reasonable rules or obligation including but not limited to those relating to health and safety during the Assignment……

5.1.3 To provide the consultancy Services at locations in the UK as may be required by the client.

5.1.4 Not to sub-contract or assign to any third party any of the Consultancy Services which it is required to perform under the Assignment except in accordance with clause 2.3

…..

5.1.9 to keep up-to date and accurate Time sheets, fully endorse on a weekly basis by the appropriate Client manager, and submitted promptly each work.

5.1.10 to work overtime at weekends or on public holidays in circumstance where the completion of an Assignment becomes time critical.

……

5.2 If the Consultancy is unable for any reason to perform the Consultancy Services during the course of an Assignment the Consultancy [RALC] should inform either the appropriate manager of the Client [Accenture] or NRS [Networkers] by no later than 10.00am on the first day of incapacity.

5.3 The Consultancy shall have reasonable autonomy in relation to determining the method of performance of the Consultancy Services in the course of the Assignment but in doing so it shall co-operate with the Client and comply with all reasonable and lawful instructions within the scope of the Assignment made by the client…..

……

5.7 The Consultancy shall use best endeavours to ensure that the Nominated Resource(s) is provided for such hours as are necessary to perform the Consultancy Services in the course of the Assignment……..'

113. Clauses 8.1 & 8.4 of the LLCs on termination referred to the schedules set out above and stated:

'8.1 This Agreement shall commence on the Effective Date and shall continue until the date specified in the Schedule(s)…..

……….

8.4 The Consultancy acknowledges that the continuation of the Assignment is subject to and conditioned by the continuation of the contract entered into between NRS and the Client………

…'

114. The multiple schedules to each of the LLCs were silent as to the agreed working hours, but did specify a duration for each contract (on average three months for the first LLC and five months for the third LLC).

115. The agreements could be terminated if Mr Alcock was unable to attend work for more than one week and could not provide a replacement acceptable to the client (clause 8.3.6 of the LLCs).

116. As set out above, upon the expiry of an assignment, there was no longer an obligation to provide or accept any further work (clause 12.7, LLCs).

The ULCs – Networkers and Accenture

117. There were two ULCs between Networkers (the Supplier) and Accenture – the first dated 26 May 2010 (applying to the first LLC contract) and the second dated 30 April 2012 (applying to the first and third LLC contracts). The second ULC was stated to be in respect of payroll contractors but there was nothing within its terms that suggests that it did not apply to the contract between RALC and Networkers.

118. In terms of personal service, the first ULC made clear that Accenture retained authority of the selection of the worker (clauses 2.4-2.5 & 2.9 of Schedule 1 to the first ULC):

'2.5 The Representative [of Accenture] shall review and approve or reject any proposed Contractors and the Supplier [Networkers] shall be informed which (if any) proposed Contractors are required for interview.

……

2.9 Following interviews, the Representative will confirm to the Supplier which (if any) proposed Contractors are required to provide services by issuing a Work Order to the Supplier…….'

119. Schedule 2 to the second ULC was identical schedule 1 to the first ULC in the wording of clauses 2.4, 2.5 and 2.9.

120. There was no explicit right of substitution provided in the first ULC but the second ULC of 30 April 2012 included in Clauses 4.7 and 4.8 a limited right of substitution to Networkers based upon Mr Alcock's inability to work and subject to Accenture's approval:

'4.7 The Supplier [Networkers] shall make available and maintain continuity of service in respect of the Individuals who shall be responsible for the provision of the Services for the duration of the Assignment. The Supplier's services in the course of the Assignment shall be performed by such Individuals as the Supplier may consider appropriate, subject always to prior approval of the client [DWP or Police Scotland]. The Supplier shall not substitute any Individual (unless he is unable to continue for reasons such as illness, holidays or termination of employment or engagement with the Supplier) except with Accenture's prior written consent.

4.8 If an Individual is unable to provide the Services due to illness or injury, the Supplier shall advise Accenture of that fact as soon as reasonably practicable, and where appropriate, but only with the consent of Accenture, arrange for the Services to be provided on a temporary basis by an alternative, but no less well qualified, Individual.

4.9 If at any time during the performance of the Services, Accenture considers that the performance or conduct of any Individual is unsatisfactory…. Accenture shall have the right to require the Supplier to remove the Individual from the Assignment immediately, without notice, at no cost to Accenture, and shall have the option to terminate the Assignment or request the Supplier to replace the Individual……..'

121. In terms of control, the first ULC provided at paragraph 3.4 and second ULC at paragraph 4.4 as follows:

'3.4 The Supplier agrees that it shall procure that all Contractors shall:

3.4.1 possess the necessary competence, capability, qualifications, expertise, and any authorisation considered necessary by Accenture or required by law or any professional body for the Assignment;

3.4.2 work at any business Unit requested by Accenture;

3.4.3 keep up to date and accurate Time sheets fully endorse on a weekly basis…….

3.4.4 work overtime, at weekends and / or on public holidays in circumstances where the completion of an Assignment becomes time critical…..

3.4.5 comply at all times with all relevant regulations and standards issued by Accenture……

……..

3.4.8 agree in writing not to provide the same or similar services to a competitor of Accenture of a period of 6 months following termination of the Assignment, where specifically requested by Accenture in a Work Order; and

3.4.9 when providing services to any client(s) of Accenture, comply with all applicable policies and procedures of that client, including but not limited to internal requirements relating to the submission of time-sheets.'

122. In terms of the intentions of the parties, the First ULC at clause 5.1 acknowledged that the Supplier (Networkers) and contractors (RALC and Mr Alcock) were engaged as independent contractors. 'Nothing in this Agreement shall be deemed or construed to create a joint venture, partnership, or employee/ employer relationship between Accenture and either the Supplier's employees, workers, agents, sub-contractors, or any Contractor(s) for any purpose including but not limited to, withholding for the purpose of social security,

income tax, or entitlement to vacation, insurance, retirement or other employee benefits.' This was replicated at paragraph 7.1 of the Second ULC.

The Tribunal's assessment of the Accenture contract terms - Mutuality of Obligation and Personal Service

123. The Tribunal is satisfied that the contract terms did not provide an explicit and absolute obligation for Mr Alcock personally to perform any services on behalf of Accenture and for Accenture to provide work and pay for those services during the course of each assignment.

124. Mr Alcock was named as the *"nominated resource"* to provide the services (Schedules to the LLCs). However, there was a right to sub-contract or assign RALC's or his services with the client's approval (the approval of Networkers or Accenture - see clause 2.3 of the assignment). Therefore, he could also send a substitute to provide the services in the course of an assignment. However, this right was fettered. The LLCs specified that Accenture was required to approve the selection of a worker, and both Networkers and Accenture had to be reasonably satisfied that any replacement had the *"required skills, qualifications, resources and personnel"* to provide the services (clause 2.3).

125. Accenture could require Networkers to remove a worker if their "*competence, capability, qualifications [and] expertise"* was deemed unsuitable (clause 3.5 of first ULC, 4.5 of the second ULC).

126. If Accenture requested a replacement contractor, they must have *"suitable experience and competence"* and any such replacement was subject to Accenture's approval (clause 3.8 of the first ULC and 4.9 of the second ULC). The agreement could be terminated immediately by Accenture if a worker or their replacement was deemed unsuitable (clause 3.8 of first ULC and 4.9 of the second ULC).

127. In terms of mutuality of obligation, there was no express contractual obligation upon Accenture to provide work on each working day during the course of an assignment. There was an explicit term that there was no obligation to offer further work on the expiry of the assignment. For the reasons set out below, the Tribunal does not accept HMRC's submission that the long history of Mr Alcock's work for Accenture as an employee and operation of the contract in practice led to an expectation that Mr Alcock would be provided with work by Accenture every business day during the course of an assignment, unless agreed otherwise, such that it crystallised into a legal obligation.

128. In essence this is because the Tribunal accepts Mr Alcock's evidence generally and the specific submission on his behalf that there was no binding expectation, guarantee or accepted contractual right for him to be offered a minimum of work during the course of the contract. The Tribunal is satisfied that all parties (Mr Alcock, Networkers, Accenture, DWP and Police Scotland) realised the contracts could be cancelled at any time during their course if DWP or Police Scotland decided to stop, postpone or abandon the projects (and it is inevitable that Networkers and Accenture would have followed suit in relation to the provision of services from RALC /Mr Alcock). Indeed, the first contract with Accenture (with the fifth link of DWP) was terminated early in January 2013 three months before it was stipulated to come to an end in April 2013.

129. While there was mutuality of obligation in the broad sense that if Mr Alcock was offered and performed the work, the end client was obliged to pay him, this is no more than explained in *Usetech* at [60] to be an indicator of either employment or self-employment. If Mr Alcock worked, there was a contractual right that he would be paid. However, as set out

above, there was no contractual guarantee or right to be offered a minimum of work from the end client– only a non-binding hope or expectation.

130. Further, and of equal importance, Mr Alcock was not contractually obliged to accept the work offered by Accenture. While it is likely to have been commercially unwise for him to have rejected work, because he may not have been offered further work within the contract or offered any further contracts as a result, Mr Alcock had the right to refuse the offer of work at any point during the course of the contracts. The fact that Mr Alcock did not refuse work offered in practice during the course of the contracts, does not help identify the right which Mr Alcock held, in the absence of any contractual term obliging him to accept work. The fact that he accepted work throughout the contracts did not crystallise an expectation into a contractual obligation to accept work for the same reasons set out above.

131. The contractual terms on control were complex.

132. RALC was required to provide Mr Alcock's services at such locations in the UK as Accenture required (clause 5.1.3, LLC; clause 3.4.2, ULC). The first contract specified that the site addresses were in Newcastle and Blackpool from 8 November 2010 to 20 July 2012, and Warrington from 22 October 2012 to 28 April 2013; the second contract stated that the site address reverted to Newcastle. Mr Alcock could work at his own premises, but only where it was necessary for the proper performance of his services (clause 12.6, LLC).

133. As indicated above, working hours were not expressed in writing. However, any *"additional hours"* had to be agreed in advance in writing with Accenture (Schedule, LLC). This implies that the services were to be provided during core business hours. Mr Alcock was obliged to work overtime, at weekends or on public holidays when completion of an assignment became time critical (clause 5.1.10, LLCs; clause 3.4.4, ULC), and any other hours which Accenture requested (clause 5.7, LLCs). RALC was also required to ensure a timesheet was completed and signed each week (clause 6.1, LLC; clause 3.4.3, ULC). Payment for fees was made weekly in arrears and expenses would be paid in line with Accenture's policies (Schedule, LLC).

134. In respect of the provision of service, RALC had *"reasonable autonomy in relation to determining the method of performance"* but was required to *"co-operate with the client and comply with all reasonable and lawful instructions"* of Accenture (clause 5.3, LLCs).

135. Further, the first ULC required Networkers to ensure that RALC would comply with:

a. all reasonable instructions, including in respect of health and safety, and security policies (clause 3.3.18) and clause 4.3.19 of the second ULC;

b. all guidelines, rules and policies regarding the use of Accenture equipment and facilities (clause 3.3.20) and clause 3.3.21 of the second ULC;

c. all relevant regulations and standards issued by Accenture, including policies relating to equal opportunities (clause 3.4.5) and clause 4.4.5 of the second ULC;

d. Any policies and procedures of Accenture's clients (clause 3.4.9) and clause 4.4.9 of the second ULC.

136. RALC was entitled to provide its services to other third parties during the course of each assignment, provided this *"in no way [compromised] or [was] to the detriment of the supply of its services"* to Accenture (clause 2.6, LLCs).

137. The LLCs and ULCs expressed the intention of the parties not to create a contract of employment (clause 12.2, LLCs; clause 5.1, first ULC). There was no provision for enhanced benefits, such as holiday pay or pension entitlement.

138. The LLC and ULC could be terminated if either party gave notice of four weeks or thirty days respectively (clause 8.2, LLCs; clause 9.3, first ULC). Networkers and Accenture could terminate the LLC and ULC respectively with immediate effect in certain circumstances, including if Mr Alcock was found guilty of any serious misconduct (clause 8.3, LLCs; clause 9.2.3, ULC).

139. RALC was subject to a restrictive covenant and non-solicitation clause in that, following the completion of an assignment, Mr Alcock could not without consent:

i. Work for a competitor of Accenture (for a period of twelve months in the LLC: clause 2.5; and six months in the ULC: clause 11.2);

ii. (Seek to) induce any personnel to leave Accenture for a period of six months (clause 5.1.11, LLC; clauses 11.2-11.4, ULC).

Assessment of the first and third Accenture contracts based upon their operation in practice and evidence given

140. The operation of the first and third contracts in practice and evidence of Mr Alcock in cross examination is dealt with, at length, below in the discussion section.

141. However, it is worth noting at this stage the evidence of Mr Alcock and Mr Stewart (of Accenture) in cross examination in relation to the attempted provision of a further worker on the third contract.

142. Mr Alcock accepted that in proposing Lee Rorison, the OBIEE specialist, to Accenture to work on the third contract for Police Scotland in November 2014, he was not sub-contracting part of his own role. It was not part of his role to make the suggestion; rather, it was Accenture's responsibility to ensure that the work was completed, which they did by making alternative arrangements when Mr Rorison was not available.

143. Mr Stewart confirmed that during the technical phase it was identified that the work required for one of the modules, utilising Oracle Business Intelligence Enterprise Edition (OBIEE), would require more effort that had been estimated and planned for. With Mr Alcock having no additional capacity, he proposed that RALC bring in an OBIEE specialist to complete this work. After agreeing the rate, start-date and terms for the sub-contractor Mr Stewart agreed to Mr Rorison joining the programme and asked Mr Alcock to organise the contract. Unfortunately, before contracts were in place, Mr Alcock informed him that the sub-contractor had decided to take a role elsewhere. As RALC did not have anyone else immediately available and there was insufficient time to identify a replacement, the team was re-organised and the work re-planned to accommodate the additional effort required.

The second contract – the DWP engagement – March to December 2013

144. The second contract is comprised of a LLC between RALC and Capita dated 5 March 2013 with accompanying schedules. Schedule 1 runs from 4 March 2013 to 24 August 2013 and two Assignment schedules run from 25 August 2013 and 24 November 2013 to a final term ending date of 7 December 2013. For each of the term end dates the schedules read 'The Contractor will make all reasonable efforts to complete provision of the services by [25/08/2013, 24/11/2013 or 07/12/2013]'.

145. In the schedules to the LLC RALC agreed to provide Mr Alcock's services as a 'Senior Suppliers Manager'. The role he undertook was similar to that of the Accenture project with DWP: he was involved in managing and co-ordinating the delivery of the IT system of Universal Credit at DWP.

146. The ULC is between Capita and DWP dated 6 November 2008.

147. Mr Alcock explained in his witness statement, which the Tribunal accepts as reliable and finds as fact, how the contract came about in March 2013 after he had earlier stopped work on the Accenture-DWP Universal Credit Programme ('UCP') engagement in January 2013 (first contract) and when he started looking for new opportunities:

77. Due to increased scrutiny and pressure on DWP to deliver UCP Release 1 on time, I was approached by Paul MacPherson, DWP UCP IT Director, to provide support as an independent consultant (i.e. not tied to DWP or any of his suppliers) in ensuring that all of the outstanding activities to be performed by the various parts of DWP and its suppliers were completed in an efficient, complementary way in order to deliver the programme on time.

78. The IT strand of the programme was based in Newcastle and so there were not regular location-related expenses. However the contract did allow for DWP to reimburse RALC for any travel related expenses outside of Newcastle.

79. I signed the contract with DWP/Capita on 4th March 2013.

80. For the first 8 weeks of this engagement, until the system went live in April 2013, much of the work took place in a "War Room" set up in a Hewlett Packard supplier building in Newcastle.

81. Paul MacPherson, the supplier leads and I worked together during this period, inviting the various supplier and DWP teams (e.g. Test, Security, Implementation) in to the room to plan, discuss progress, resolve issues etc. This intense period of activity was all about safely landing the UCP on time and as a result I regularly worked long hours but per the contract only charged in the standard working day.

82. During this 8-week phase my role was to work with the supplier and DWP teams to identify potential issues that could impact the planned go-live and to put in place solutions or mitigations. I co-ordinated these activities across the various supplier and DWP teams.

83. As I was to be supporting the live system after go-live, part of the activity I undertook during this phase was to meet with the DWP live support teams to agree how much of the service they would support immediately after go-live. It was apparent that they would not be resourced or ready to take on the UCP service immediately.

84. Ashton was the first area to pilot the new UC benefit. Ashton was serviced by Bolton benefit centre which was therefore to be the first to support UCP. As I would be supporting the live service after go-live it was important that I met with the operational staff in Bolton to ensure that they had everything they needed to run the service (e.g. IT equipment, knowledge etc) as well as to build a working relationship with them. During this period I led them through an activity to define the processes that we would follow to report and resolve live incidents as they occurred.

85. Although the work I conducted was part of Paul MacPherson's area of accountability, I operated with autonomy and within the scope of my role. Paul did not tell me when I needed to travel, who I needed to meet, what I needed to discuss etc. However I did provide regular feedback to him on the progress made and my view on the readiness of the benefit centre.

86. During this period I did attend some meetings/calls when Paul MacPherson was unable (e.g. due to a competing engagement). Whilst the term 'deputy' has been used by HMRC in relation to this, it is important to note that I was simply there to report and receive information. At no point was I empowered to make strategic decisions nor could l assume his responsibilities or accountabilities (e.g. financial control, people matters, business decisions, supplier contracts, etc).

87. Once the UC system went live in April 2013, my role was to co-ordinate the reporting, investigation and resolution of live issues as they occurred. This involved setting up daily calls with DWP operational and supplier teams and managing a list of live issues.

88. Due to the nature of the live service running 24 hours per day, I was always on call and always contactable so that I could respond should an issue occur even during the overnight batch.

89. Regardless of hours worked in a day I would charge a professional working day and if there was a period of significant additional hours then I would try to balance that myself by doing fewer hours on other days. On balance however, I worked many more hours than the contracted minimum – this was necessary to achieve the desired outcome.

90. HM Cabinet Office had set up its own delivery capability, Government Digital Services (GDS), and with Treasury backing was effectively grabbing large government programmes across a number of departments.

91. Almost immediately after go-live, Paul MacPherson became heavily embroiled in complex discussions in London on how these 2 programmes could co-exist.

92. Shortly after the UC Go-Live, Paul MacPherson announced that he was seeking employment outside of DWP and that he was talking to a number of DWP's suppliers. As a result, to avoid any conflict of interest, he removed himself from the programme.

93. With Paul MacPherson distancing himself from the programme almost from the point of go-live, I was left with the live service.

94. I attended a daily call with Janice Hartley, Tim Read and the other UCP directors at which I gave an update on the status of the live service and any issues. I raised any new issues that had occurred, the options for dealing with them and any associated risks. I made recommendations on course of action. However decisions, usually a balance of risk (e.g. DWP reputational risk) and time would always be made by the DWP management team led by Janice Hartley and Tim Read. Once a decision was made I would then work with the suppliers and DWP operations staff to implement
fixes and re-test.

95. It is worth noting that I was only ever present for a small portion of the daily calls. As an external contractor it was not appropriate for me to be present for the discussion of other internal DWP business.

96. My recommendations were made based on a combination of my experience, my observations of the issue as well as inputs from the suppliers and DWP business operational staff. There was risk of mistakes being made in any of these aspects and for DWP to make bad decisions as a result with potential damage to DWP delivery timescales, DWP reputation, the integrity of the live service and/or payment of DWP customers claims. RALC carries extensive insurance to indemnify it of any
liability arising of such eventualities.

97. During this phase, when there were no face-to-face meetings required, I regularly worked from RALC Consulting office premises in Newcastle or from home. This was possible due to the distributed teams (e.g. Janice and Tim in Leeds; DWP operations in Bolton; IBM, HP and Accenture live support teams in their own offices in Manchester, Newcastle and London).

98. In August 2013 with the UC system still encountering regular issues, RALC was invited to extend to November 2013 with a view to getting to a stable live service and handing over to DWP's regular service management and support teams.

99. In October 2013 with the live service stable and new incidents low in volume, I started working with DWP's Service Management teams to in preparation for handing over the service to them. This work took place in DWP building in Blackpool where those teams were based.

100. In November 2013, many months after Paul MacPherson's departure, a new UCP IT Director, Craig Eblett, was appointed. However Craig was immediately engaged in the Cabinet Office discussions in London and was only in the HP office a couple times during the remainder of my engagement. Craig did not get involved in the running of the live service.

101. On 18 November 2013 I travelled to London to meet with Travel Trade Consultancy, a travel business that assists travel operators in managing their ATOL licencing. TTC were launching a new business, Travel Vault, and were in the process of commissioning a software application to support the business. I met with the management team and discussed what they were trying to achieve and made recommendations on how they approach it and how RALC could help.

102. During this London visit I continued to support the DWP UCP dialling into conference calls and making calls to individuals (as evidenced by call records) to ensure that issue resolution activities continued. I did not need to inform DWP that I was making the trip to London. As I worked during this period I charged the time to DWP. This trip has been fully explained to HMRC with supporting vouchers and an analysis (from paragraph 6.21 onwards in the letter to HMRC 10 October 2017).

103. In late November a request was made by Janice Hartley to extend RALC further as the service management teams did not feel that they were ready to adopt the systems fully. Whilst this was being discussed, RALC continued to support the live service at risk. Unfortunately a decision was ultimately made not to extend RALC's engagement. DWP extended the contract by 2 weeks to cover the period that RALC had worked at risk, but the engagement was ended with immediate effect.

104. The timing of this could not have been worse as it was immediately before Christmas when the market is traditionally very slow. However this uncertainty is one of the risks faced by small businesses.

The Contract terms of the second contract – RALC-Capita, LLC and Capita-DWP, ULC

The LLC between RALC and Capita on 4 March 2013

148. In respect of the LLC – the contract dated 4 March 2013 between RALC and Capita signed for Capita on 5 March 2013 and by Mr Alcock for RALC on 10 March 2013 - Schedule 1 described the Assignment Role as 'Senior Suppliers Manager' and the assignment description was:

'Application Development Requirements (ADRs)

Approval Submissions (eg MCATs)

Weekly reporting at IT Control Board

Input to / Production of weekly Hotspot Report

IT Risk Register

Assured IT Plans

Assure weekly IT spend submissions

Business Case submission for TI costs'

149. Mr Alcock was named as the Consultant with the Contractor's (RALC's) point of contact being Paul Macpherson. The Client was named (wrongly) as the Department of Health but corrected in the renewal (Assignment Schedule Part 1) as DWP.

150. In respect of the LLC between RALC and Capita, other than the schedule, the body of the contract contained the same clauses as were considered by Judge Dean in *Jensal Software v HMRC* [2018] UKFTT 271 (TC) (where she allowed the Appellant's appeal and found the hypothetical contract to be one of self-employment).

151. Clause 3.5 of the LLC addressed personal service (substitution or provision of an alternate) in the following terms:

'3.5 The Contractor [RALC] may use an alternative named Consultant in place of the Initial Consultant [Richard Alcock]as named in Schedule 1 provided that:

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

152. Clause 4.6 allowed for an absence of personal service by its reference to subcontractors and employees of the Appellant Contractor:

'The Contractor [RALC] shall ensure, through the term, that neither it nor any of its affiliates or any subcontractors, employees or persons to who the contractor make payment in relation to the services has in place any arrangement involving the use of any scheme to avoid UK tax by diverting income of a UK resident individual to a non-UK resident company…of the payments made under this Agreement, ….This clause shall apply where liability for a UK tax and National Insurance Contributions would exist were the UK resident person to be employed directly by Capita / Client [DWP] and whether or not the Contractor is based in the UK.'

153. Clause 14 provided for the ability of the Appellant Contractor to assign and/or sub-contract the services:

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

14.2 The Contractor shall be entitled to subcontract elements of the Services to third-party contractors provided that the Client and Capita are satisfied that the sub-contractor possesses the necessary skills, expertise and resource to perform those elements of the Services and Contractor keeps Capita fully and effectively indemnified against any reasonable costs, claims or expenses that may be incurred by it or the Client as a result of the use of such subcontractors including the reasonable cost of all instruction (necessitate by the subcontracting) for the sub-contractor.'

154. Clause 13.2 of the RALC/Capita LLC contract addressed mutuality of obligation and reads as follows:

'13.2 Neither Capita nor the Client [DWP] is under any obligation to offer work to the Contractor and the Contractor is under no obligation to accept any work that may be offered. No party wishes to create or imply any mutuality of obligation between themselves either in

the course of or between any performance of the services or during any notice period. Capita is not obliged to pay the Contractor at any time when no work is available during this agreement.'

155. Clauses 4.3 and 13.1 of the LLC stated that all parties intended to create a self-employed relationship:

'4.3 For the avoidance of doubt, neither the Contractor nor the Consultant shall have any direct contractual relationship with the Client.

………………

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

156. Clause 3.1 of the LLC addressed control - the Appellant RALC, had a reasonable degree of autonomy as to how the services were carried out as set out in Clause 3.1 of the Appellant/Capita contract:

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

157. Clause 3.4 of the LLC stated that the rules applicable to DWP employees are not extended to contractors:

'3.4 The Contractor agrees on its own part and shall procure that the Consultant [Mr Alcock] agrees:…

3.4.2 to engage in the provision of Services at the times and / or for the total number of hours or days as agreed with Capita or Client as reasonable for the proper performance of the Services;

……….

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

158. In relation to control of undertaking other work during the currency of the LLC, clause 3.6 provided:

'3.6 The Contractor is entitled to seek, apply for and accept contracts to supply goods and services other parties during the currency of the Agreement provided always that there is no material diminution in the standard of performance of the Services and provided that the Contractor does not breach any of the terms of this Agreement in doing so.'

159. Clause 13.3 provided the following on the scope of the work:

'13.3 The Contractor shall not be obliged to accept or perform any work outside the scope of the Services. However because of the nature of the Services, Capita and the Contractor acknowledge that it may be necessary to change the scope of the Services during the currency of the Agreement and that any additional services required may not be include in the Fees. The parties accept that:

13.3.1 any significant addition to the scope of the Services will be valid only if agreed in writing between Capita and the Client, and between Capita and the Contractor; and

13.3.2. the Contactor reserves the right to revise the Fee in the event of any significant increase to the scope of the Services………'

160. Schedule 1 to the LLC provided some control over where Mr Alcock or the Appellant was to work:

'Assignment Location: will be the principal location when the project requires work at a Client Site, but the Contractor [RALC or Mr Alcock] shall be entitled to perform the Services from its own premises when they may be adequately preformed from there with agreement of the Client [DWP].'

161. In terms of financial risk and termination, the DWP could terminate the contract with the Appellant immediately in certain circumstances:

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

2.4 Capita shall have the right to terminate this Agreement for breach forthwith, without liability or cost, in the event that:

2.4.1 the Contractor is at any time in breach of Clause 4.6; or

2.4.2 Capita has good reason to believe that the Contractor is, or will, in future, 25 be in breach of Clause 4.6; or

2.4.3 any competent authority (including, without limitation, Her Majesty's Revenue and Customs) instigates any investigation or brings any charges against the Contractor in relation to the use of a scheme of the type identified in clause 4.6; or

2.4.4 the Contractor is in breach of any warranty or undertaking contained in this Agreement at any time.'

162. Any defective work had to be remedied by the Appellant at its own cost (see clause 3.8 of LLC). Moreover, the Appellant was responsible for certain costs and losses in the event of negligence or breach of contract and was required to hold the necessary business insurance.

163. Clauses 10 and 11 of the RALC/Capita LLC contract set out requirements on the Appellant Contractor relating to indemnity, liability and insurance.

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

165. Schedule 1 to the LLC contract between RALC and Capita set a daily rate of £650 inclusive of expenses etc but exclusive of VAT which should be paid by Capita and, if applicable, the Client (DWP). The Term start date for the provision of RALC's services was 4 March 2013 and the Contract end date 'The Contractor will make all reasonable efforts to complete provision the Services by 24/08/2013'.

The ULC – Capita - DWP

166. In respect of ULC - the DWP framework with Capita - the relevant clauses included the following on personal service (the right of substitution), control and intention of the parties:

'Clause 12.3: The Authority [DWP] reserves the right to interview (either in person, by telephone or otherwise) or to veto any person proposed by the Contractor [Capita] to perform the Services as Interim Personnel [Mr Alcock]. The Authority shall use its own judgement in selecting Interim Personnel but in making its decision shall rely on the Contractor's skill

expertise and experience in the provision of the Service and upon the accuracy of all representations or statements made and the advice given by the Contractor.

Clause 12.4: Interim Personnel [Mr Alcock] assigned to the Authority [DWP] shall be under the supervision and control of the Authority and the Authority shall be responsible for the operational direction, supervision and control of Interim Personnel assigned to the Authority under any Services Order.

Clause 35.5: Nothing in this Contract shall be construed or have effect as constituting any relationship of employer and employee between the Authority and any Interim Personnel provided by the Contractor [Capita] or its Sub-Contractors.'

Assessment of the Contractual terms

167. In terms of mutuality of obligation there was no explicit obligation for Mr Alcock to perform a minimum of services on behalf of DWP and for DWP to pay for any minimum amount services during the course of each assignment. The LLC states that neither Capita nor DWP were under any obligation to offer work to RALC nor RALC to accept any work offered (clause 13.2).

168. HMRC submit that the clause did not represent the full agreement reached between the parties. In particular, HMRC submit the clause has to be read consistently with the following terms:

a. The Schedule to the LLC was silent as to the agreed working hours, but stated a duration for the assignment, from which it can reasonably be inferred that Mr Alcock was required to work every weekday during core hours, unless otherwise agreed;

b. RALC agreed to procure that Mr Alcock would perform the work at the times and/or for the total hours or days agreed with Capita and DWP as reasonable for the proper performance of the services (clause 3.4.2, LLC). Mr Alcock thus agreed to work the number of hours directed by Capita, which indicates he was in fact required to accept work if it was offered;

c. RALC agreed to procure that Mr Alcock would notify Capita or DWP as soon as reasonably practicable (and no later than 10am on the first morning of absence) if he was unable to perform the work for any reason during the assignment (clause 3.4.3);

d. Both RALC and Mr Alcock were prevented from working with or soliciting DWP or its affiliates for the supply of services, unless agreed by Capita, for a period of six months after the termination of the agreement. If DWP approached RALC or Mr Alcock regarding the provision of his services, such an offer was to be refused and Capita informed (clause 9, LLC). It would make little commercial sense for RALC to agree to such terms without being provided with work and remuneration through Capita.

169. The commercial reality is that this was a contract for Mr Alcock to work and not simply a framework contract giving the possibility of future work. The Tribunal accepts that the statement of the parties' intention not to create mutuality of obligations in Clause 13.2 is to carry little weight.

170. However, for the reasons set out below in the discussion section, the Tribunal does not accept HMRC's submission that Mr Alcock's previous engagement with DWP and the operation of this contract in practice also led to an expectation that Mr Alcock would be provided with work by DWP every business day during the course of an assignment, unless agreed otherwise, such that it crystallised into a legal obligation. In essence this is because the Tribunal accepts Mr Alcock's evidence generally and the specific submission on his

behalf that there was no binding expectation, guarantee or accepted contractual right for him to be offered a minimum of work during the course of the contract. The Tribunal is satisfied that all parties (Mr Alcock, Capita and DWP) realised and accepted the contracts could be cancelled at any time during their course if DWP decided to stop, postpone or abandon the project (and it is inevitable that Capita would have followed suit in relation to the provision of services from RALC /Mr Alcock). Indeed, Mr Alcock's first contract with Accenture (with the fifth link of DWP) had been terminated early in January 2013 three months before the contract was stipulated to come to an end in April 2013.

171. This second contract ended in December 2013 and was not extended. Although it was not dealt with in evidence, and the possibility of further work beyond or outside the scope of the current is of minimal relevance, it also appears that the final schedule to the LLC stating Mr Alcock should make all reasonable efforts to complete provision of the services by 07/12/2013 was treated as a fixed end date.

172. Again, just as for the Accenture contracts, while there was mutuality of obligation in the broad sense that if Mr Alcock was offered and performed the work, DWP was obliged to pay him, this is no more than explained in *Usetech* at [60] to be an indicator of either employment or self-employment. If Mr Alcock worked, there was a contractual right that he would be paid. However, as set out above, there was no contractual guarantee or right to be offered a minimum of work from the end client– only a non-binding hope or expectation.

173. Further, and of equal importance, Mr Alcock was not contractually obliged to accept the work offered by the DWP. While it is likely to have been commercially unwise for him to have rejected work, because he may not have been offered further work within the contract or offered any further contracts as a result, Mr Alcock had the right to refuse the offer of work at any point during the course of the contract. The fact that Mr Alcock did not refuse work offered in practice during the course of the contract, does not help identify the right which Mr Alcock held, in the absence of any contractual term obliging him to accept work. The fact that he accepted work throughout the contract did not crystallise an expectation into a contractual obligation to accept work for the same reasons set out above.

174. In terms of personal service, Mr Alcock was named as the consultant to provide the required services (Schedule 1, LLC). He could send a substitute to provide the services in the course of an assignment; however, this right was fettered. The LLC provided that DWP and Capita had to state in writing that they were satisfied the replacement possessed *"the necessary skills, expertise and resources to fulfil [DWP's] reasonable requirements"*. In such circumstances, RALC was required to keep Capita fully indemnified in respect of the use of a replacement and provide them free of charge (clause 3.5, LLC).

175. The ULC gave DWP the absolute right to interview or *"veto any person proposed by [Capita] to perform the services"* (clause 12.3, Section 2, ULC). Capita was also required to remove and replace any individual performing the services who failed to deliver the services to the agreed standard (clause 16.4, Section 2, ULC).

176. In terms of control, Mr Alcock was required to work at DWP's premises as the principal and assignment location when the project required work at a DWP site but was entitled to work from his own premises when the services could be *"adequately performed from there with agreement of [DWP]"* (Schedule 1, LLC).

177. RALC was required to use its best endeavours to submit a weekly signed timesheet, otherwise it was required to submit them within thirty days of the end of the period to which the work related. Payment of fees would be made within ten working days of Capita receiving the signed timesheet and expenses would be paid if agreed in writing by DWP or Capita (clauses 4.5; 5.1-5.3, LLC).

178. RALC was required to provide the services *"with all reasonable care and skill"*. The LLC stated that Mr Alcock had the right to decide *"the appropriate method and manner of performance"* of his work but was required to have *"due regard to the reasonable requests of [DWP]"* and the requirements of the assignment (clause 3.1). However, the ULC made clear that DWP was responsible for the *"operational direction, supervision and control"* of Mr Alcock (clause 12.4, Schedule 2).

179. Pursuant to the LLC, RALC agreed to procure that Mr Alcock would:

a. Not engage in any conduct detrimental to the interests of Capita and DWP (clause 3.4.1);

b. Comply with any rules or obligations in force at DWP's premises insofar as they were reasonably applicable (clause 3.4.5);

c. Furnish Capita or DWP with any documentation or progress reports as may be reasonably requested from time to time (clause 3.4.6).

180. RALC was entitled to work for third parties during the course of an assignment, provided there was *"no material diminution"* in the standard of work and it did not breach the LLC in doing so (clause 3.6, LLC). As with the first and second contracts, the commercial reality is that this clause reduced from the amount of work Mr Alcock could perform for other clients whilst engaged on the assignment.

181. The LLC and ULC said that the parties had no intention to create a contract of employment (clause 13.1, LLC; clause 35.5, Section 2, ULC). There was no provision for enhanced benefits, such as holiday pay or pension entitlement.

182. Capita was entitled to terminate the LLC immediately for any reason by giving notice (clause 2.3); RALC was entitled to terminate the LLC in certain circumstances or for any reason with a period of notice as agreed between parties (clause 2.5).

Operations of contracts in practice

Operation of the Accenture engagements November 2010 - January 2013 and December 2013 to February 2015

183. The Tribunal examines the operation of the contracts in practice in more detail in the discussion section of this decision, in particular by considering Mr Alcock's evidence in cross examination.

184. During the first contract, Mr Alcock worked for Accenture on DWP's Change Programme and Automated Service Delivery with respect to the Personal Independent Payment and Universal Credit benefits. The project consisted of a design phase and test phase in respect of each release of the IT system. Mr Alcock was known to and personally selected for the task by Allan King (an Accenture Managing Director). Mr King's evidence is dealt with below.

185. During the third contract, Mr Alcock worked on a project for the design and delivery of a new IT system for Police Scotland. Mr Alcock's role was to lead the design team, including an operational role coordinating Accenture employees in the team. In this role he was due to an Accenture employee who was on maternity leave, however he did not take on all the roles, responsibilities and obligations of an employee for Accenture (training, HR, management and disciplinary). Further the contract lasted from December 2013 to February 2015, being longer than a simple 'maternity cover'. Mr Alcock reported directly to Colin Campbell (Accenture Programme Manager), who would check the progress of the work undertaken by Mr Alcock and his team.

186. It would not have been acceptable to Accenture if Mr Alcock had simply failed to attend work without notice or carry out the work provided. He was not expected to, nor did he remain on 'standby'.

187. Mr Alcock was expected to personally perform the services, given he had been specifically recruited for his personal skills and expertise. In the event a substitute was provided, Accenture expected to be consulted and have the *"final say"* on the suitability of the replacement, who would have to undergo security clearance. Accenture was not indifferent to the identity of the person performing the work given that it was commercially responsible to its client to resource the work effectively. There was no requirement for Mr Alcock to provide a substitute.

188. In practice, Mr Alcock did not provide a substitute during his engagement with Accenture albeit, towards the end of his third contract, in November 2014, he did suggest that they engage Lee Rorison in circumstances dealt with above.

189. Ultimately, the projects that Mr Alcock worked on were led and owned by Accenture and its clients (the fifth link, DWP or Police Scotland), who made decisions on if and when the projects were delivered. Mr Alcock had to perform his role within the confines of those overarching decisions, but with a fair degree of autonomy as to how his role would be effected.

190. Given his work involved interacting with others regularly, Mr Alcock worked mainly during core business hours and his work was mainly carried out at the premises of Accenture or its clients. He worked from his own premises when he was not required to be at an Accenture or client site, and he had given notice of so doing.

191. Mr Alcock received expenses for any travel and accommodation required outside of the Accenture site at which he regularly worked. He incurred no other significant expenses in the performance of the services.

192. The first contract was terminated early in January 2013: the second phase of the DWP project was put on hold by the government due to issues with the delivery of the first phase. Mr Alcock continued to work on the second phase of the project, even though it was unclear whether Accenture would continue its engagement with DWP. When Accenture's contract did not continue, Mr Alcock was no longer required and he did not receive any payment for two weeks of work he undertook thereafter. However, he was under no obligation to do that additional work 'at risk'. Shortly thereafter, in March 2013, it appears RALC entered into the second contract with Capita to undertake additional work in respect of an earlier release of the IT system.

193. The third contract was terminated in February 2015.

The evidence of Mr King regarding operation of the Accenture contracts

194. Mr Allan King was a managing director of Accenture during the relevant years of the first and third contracts (providing services to DWP on PIP and Universal Credit and providing services to Police Scotland on i6).

195. He provided a witness statement confirming a letter he jointly authored with Alan Simpson and Col Campbell, all of Accenture, to HMRC on 26 May 2016. Mr Simpson also provided a witness statement but was not called to give evidence. The Tribunal accepts Mr King and Mr Simpson's statements and joint letter as reliable and find the contents as facts on the balance of probabilities.

196. Mr King's statement stated that the letter of 26 May 2016 was correct and while Mr Alcock was member of the team, Mr King was aware that Mr Alcock was a contractor and therefore would not have responsibility for activities such as for example, Accenture employee performance evaluation or Accenture HR issues.

197. In his jointly authored letter of 26 May 2016, which is not challenged by HMRC, the Accenture authors stated in relation to Mr Alcock / RALC's personal service and substitution:

'Theoretically other suitably qualified consultant(s) could have been engaged through RALC Consulting if necessary/appropriate……..

The contract provides a right to substitution, but Accenture and its client (DWP or Police Scotland) would have been consulted and would have had final say as to whether to accept a proposed substitute…..

RACL Consulting could have offered a substitute consultant either an independent contractor or an employee of RALC Consulting. Alternatively, a substitute may have been identified by Accenture….

If Mr Alcock was unable to work then a substitute could be prosed by RALC Consulting. As above there was no obligation for Accenture or its client to accept the proposed substitute. Similarly, Mr Alcock was not obliged to provide a substitute. However if he was unable to fulfil the assignment and no substitute was agreed, then the contract between Accenture and RALC Consulting would be terminated.'

198. The letter of 26 May 2016 addressed Accenture's right of control over Mr Alcock:

'Accenture does not have right of control over Mr Alcock. However, there is an expectation that all individuals working on an Accenture client engagement follow the agreed Accenture / client working practices/ methods and work in a manner that supports the programme……….

Project methodologies, structures and ways of working are agreed between Accenture and its client at the beginning of an engagement…..Relevant approaches were discussed with Mr Alcock at the point of engaging RALC Consulting……….

The nature of the work required face to face meeting or workshops with Accenture. Accenture's client or other supplier resources. Therefore to facilitate this, most of the programme work took place at the client (ie DWP or Police Scotland) offices but often meetings were held in Accenture or other supplier premises. Where this was not necessary, Mr Alcock could work from his preferred location………

The nature of the work required interaction with individuals from Accenture, its client or other supplier resources. Therefore most of that work was undertaken during a common set of working hours. The programme plan determined timescales to which the various programme activities were undertaken. Although outcome driven, there was an expectation that Mr Alcock ….would work a professional working day…….

All work on the programme needed to be performed in line with the agreed approach or methodology. This was agreed between Accenture, its client and any other suppliers engaged by the client. If RALC Consulting through Mr Alcock started providing services in a way that was incompatible….then other parties…would entire into dialogue…In the unlikely event that this persisted and Mr Alcock's actions were deemed to inhibit the project then the contract with RALC could be terminated……….

If work performed by RALC Consulting / Mr Alcock had been found to be substandard then the Accenture engagement lead or the client would point out the issues they had identified to

Mr Alcock would be expected to make any necessary changes in order to bring delivery up to the standard of service agreed………..

If such issues risked delaying a programmed milestone Mr Alcock would be expected to make all reasonable measures to avoid or recover that delay, potentially by working additional hours. This would all be subject to discussion with Mr Alcock and would depend on the circumstances……'

Operation of the DWP engagement – second contract - March to December 2013

199. Mr Alcock was engaged to work for DWP on the project to deliver the IT system for Universal Credit Programme (UCP), which was a development of an earlier release he had worked on through Accenture. He was recruited by DWP and selected to provide such expertise because DWP did not have the 'in-house' technology capability. In the first couple months of the engagement from March until no later than June 2013, Mr Alcock reported directly to Paul Macpherson (Senior Civil Servant, Deputy Director DWP), who then left the project some time after April 2013 when it went live before leaving DWP altogether shortly thereafter.

200. Mr Alcock worked with Mr MacPherson, when he was involved in the UCP, on a daily basis to manage the project. Thereafter, for the majority of the duration of contract, where there was no replacement for Mr MacPherson, Mr Alock provided work for the benefit of the DWP Senior Civil Servants, Janice Hartley and Tim Read who were the project director and Deputy Director. Mr MacPherson held a telephone conference call with HMRC in January 2016 in order to explain the operation of the contract. There was a note of the call but no verbatim transcript of the conference. Mr MacPherson did not provide a witness statement and was not available for cross examination. HMRC sought to rely upon the contents of the note of the teleconference.

201. Some of Mr MacPherson's evidence contained in that note is disputed and where is there is a dispute in the evidence the Tribunal prefers the evidence of Mrs Hartley and Mr Read. This is because Mr MacPherson did not provide a witness statement but Mrs Hartley and Mr Read did. His evidence is hearsay and filtered through the medium of an HMRC note taker. Further, during the hearing, the Tribunal had the opportunity to listen to a recording of a telephone conference between the pair, Mr Leslie and Mr Alcock which took place on 28 October 2016. There was also an agreed verbatim transcript of that teleconference. Further still, Mr MacPherson only worked with Mr Alcock for at most three months in early 2013 so had less experience of the operation of the contract then Mrs Hartley and Mr Read who worked with Mr Alcock for the majority of the time.

202. As above, the note of Mr MacPherson's evidence was that there was an expectation that Mr Alcock would be provided with work every weekday during business hours during the course of the assignment. However, Mr Alcock submitted there was no legal guarantee of being provided work as he was aware the project could be cancelled or delayed at any time. He worked closely with Mr Macpherson and the wider team in DWP and the project had 'deliverables' to be achieved. It would not have been acceptable to DWP if he had failed to attend work or carry out the work provided. Mr Alcock was expected to perform the work personally although a fettered contractual right existed for him to provide a substitute, subject to DWP approval. Mr Alcock never arranged a substitute during his assignment on the second contract with DWP so the right was never tested.

203. Mr Alcock's daily work consisted of covering meetings, initially for Mr Macpherson although he did not deputise for him formally, attending workshops, planning work, project risk assessing, attending governance board and planning meetings, and carrying out other

work. However, he did not attend internal DWP meetings. Mr Macpherson, Mrs Hartley and Mr Read ultimately had the authority to give Mr Alcock directions, as any client could, regarding which tasks to carry out but in reality the strategy and direction of the work was formed by a collaborative assessment of the programme needs. The senior civil servants were ultimately responsible for Mr Alcock's work because they were ultimately responsible for the delivery of the projects.

204. HMRC sought to rely on an email sent by Mr Alcock on 22 July 2013 to a broad range of recipients as evidence that he was acting as Mr MacPherson's deputy in his absence, representing his functions and acting as a more junior employee would in a hierarchical structure. Mr Alcock sent an email to a wide range of recipients, both internally within DWP and the other contractors, IBM, HP and Accenture regarding the Universal Credit Pathfinder Key Issue Review. July 2013 was shortly after Mr MacPherson had left the project. The email began:

"All

As discussed with a [lot] of you separately, I would like to convene a daily washup on the highest profile IT issues / defects and associated fixes and manual (business and IT) activity……

The Programme and Business Ops leads are increasingly looking to me, on Paul Mac's behalf, to provide assurance that we are ready to roll out to the next Pathfinder stages and that we have our arms around some of the high profile IT issues…."

205. Mr Alcock accepted that he was invoking Mr MacPherson's name and employed position, after a time he had left the project, in order to coordinate others on the IT strand. The Tribunal accepts that it was no more than would be expected of someone hired to provide an expert IT service which involved coordination in order to complete a project. The email did not demonstrate that his role was in effect to deputise for Mr MacPherson or assume the role of a senior DWP manager.

206. Mr Alcock carried out his work at DWP's premises in Newcastle, although he attended meetings wherever he was required. Mr Alcock did not work from home on the majority of days but at DWP's offices as this is where the critical mass of resources was located.

207. The note of Mr MacPherson's evidence stated Mr Alcock had to obtain DWP's permission to work from home, after advising Mr Macpherson why he wished to work from home and what work he would carry out there. However, the Tribunal accepts Mr Alcock's evidence that in practice he would work where was convenient to the project and he would inform DWP if working from home – it was a matter of being reasonable and there was never any question of any right of control being exercised as matters were worked out by consent. The contract allowed him to work from home if it would affect not delivery of the project. Mr Alcock had some flexibility in his working hours but worked every weekday, mostly in business hours. If Mr Alcock wanted to take any time off for holiday, he would give advance notice to Mr Macpherson but the Tribunal accepts that he did not have to ask for his permission. He was also expected to notify Mr Macpherson if he was unwell.

208. On 28 October 2016 Mr Alcock and his adviser, Mr Leslie contacted Janice Hartley and Tim Read, who had been the Universal Credit Programme Director and Deputy during the period from March 2013 to December 2013 who had ultimate responsibility throughout and particularly when Mr MacPherson left the project in or around April to June 2013. They asked them questions about the operation of Mr Alcock's involvement in the project for the purposes of ascertaining whether he was covered by the IR35 legislation. The Tribunal read an agreed verbatim transcript of the telephone call on 28 October 2016 and listened to the contemporaneous recording.

209. The following salient points were made by Mrs Janice Hartley and Mr Tim Read regarding the operation of the contract with Richard Alcock, which evidence the Tribunal accepts as fact. The Tribunal is satisfied the pair give a more reliable and accurate picture of the operation of the contract than the note of Mr MacPherson's account:

'[Paul MacPherson] moved on from DWP [by the time the UCP went live in April 2013] and moved out of the Department. So Richard [Alcock] continued in a similar role but he wouldn't have had Paul MacPherson and he would have had Tim and I, not on a day-today, hour by hour basis but we- we are the directors responsible for the totality of universal Credit at that point and Richard [Alcock] was involved.

Richard [Alcock] was working on one key of the strands of activity in the technology space….

So if you like there was a Technology strand, there's a business strand, there's a product…..There's lots of different things coming together as part of that overarching programme. Richard's involvement was very much in the sort of technical space, and that's where Paul MacPherson was a technical lead that left the department at the time when Richard was involved from, you know, well throughout his contract really and Paul left in the middle of that.

…….

We would probably describe it as a project based arrangement…..

….

Yes I would think so, yes [between Paul MacPherson leaving and Richard Alcock coming on-board, it was a very narrow short space of time]

It's a quite difficult question to ask and answer [whether the DWP could move Mr Alcock to another project] because we wouldn't have considered doing that. I suspect that we would not have done that because of the terms of arrangements we would have put in place with Richard to begin with, as in we specified a contract for the work on Universal Credit and if we were to try to do it for another price of work we'd have to go through a process of saying this was the work we required.

……

No, I think we would not do that with Richard [just move him on to another project]……..

We had a requirement for certain capability, in the technology areas, which we didn't have in the department. So, Richard was offered that contract on that basis, specifically in relation to Universal Credit…At a point if we no longer have that requirement, that would end….in effect Richard was a 'hired hand' in that respect…

…..

We have delegated some of the accountability to the technology strand of which Richard is a hired hand…..We don't then set the task in detail for Richard. He and the technology strand have some ability to work out how they would do it themselves.

But they know that they are delivering a milestone,……. for example a tested system…for a certain date… I don't detail the individual tasks that will be required…

We don't generally have contractors running a strand on their own at that broader level, and Paul MacPherson would have been the Department lead. But in Paul's absence, for example I was running weekly check points I think around that time….to make sure all the strands are going to deliver their output at the right time…….

Therefore, if Paul wasn't available, Richard would be the person representing the technology strand, giving me an update on his low level deliveries. But we wouldn't be going through what are the tasks have you done. It would be what outcomes have you got to, what test results……

……

We are not saying that he was there to represent Paul's wider responsibilities……So it wasn't a deputy or representative role, it was getting the expert advice on delivery progress…

…….

There would be limits to what we should share with Richard, and we would have things that we would have shared with Paul but not Richard. Richard we would see very much as a person who is tasked with delivery of a certain set of activities. We don't micromanage or detail manage the tasks within those deliveries, but he's clear that he's delivering a set of outcomes as part of the project…..But we would not treat him as an employee in any way, shape or form……

Richard is a part with producing some outcomes…..Richard and other colleagues in technology would have been free to organise and set out the sub tasks of whatever they needed to do in their own way……

We don't micromanage individuals to that level…..We would expect Richard to manage his own time and his own activities within his own plan. There would be key things we would expect him to tip up at. If he was expected to carry forward a representation at a meeting…if he couldn't do that he would probably call and we'd have a discussion about it and we'd find a different way for his presentation….if he had to take personal day off or something like that…..

We wouldn't expect him to go and do another piece of [DWP] work somewhere else…We're really contracting him in our work for this specific piece of work…..

He wouldn't have to seek authorisation about not joining a call…

How you would go about organising that will be down to Richards,…..

It's a day rate……

Richard would submit a time sheet. I think within that day rate so we would see that he was doing a reasonable day most of us were working significantly longer than your standard nine to five days…..

Richard is a senior contractor, we are engaging him to deliver some big stuff, we expect him to organise and manage his work and the people in the team so as to achieve the results……

Richard…..but wouldn't be involved at all in any of this people side of the world, either or performance or hiring and firing or any of that kind of stuff. Richard's really a task person….

In that way he would have no financial accountability either and he could not [make] financial decisions…..

……

[Re termination for any reason] But like all contractors if something was to be done deliberately and with malice and then, I think, we would take quite sever action, absolutely termination……..

We wouldn't go through….the oral and written [warnings if a disciplinary process was required]……

Probably another important distinction which is if they were member of staff we'd have an obligation to try and improve performance, provide adequate training or sort of development opportunities. Where with someone who's a contractor we expect them to come with those skills, that what we are buying in…….

He'd have to have one of our laptops because of security, because of our government secure intranet……

I think we're a bit perplexed because we think Richard is so far away from being an employee, it isn't true, but for HMRC to come and check out with us…….

I suspect [Paul Macpherson] did not understand the nature of the questions he was being asked….and that we use …a different connotation of some of his answers, I would suspect, but it's quite long after the event, but that's what is sound like. The word like 'deputise' [Paul MacPherson] doesn't understand the connotation of you're an employee for that, it does not confer those rights accountabilities that would onto Richard…….'

210. Mr Read and Mrs Hartley confirmed the contents of the teleconference set out above in their witness statements dated 2 October 2018. They each added in their statements that they regarded Mr Alcock / RACL as an independent consultant and not as an employee. Neither witness was available for cross examination as set out above but the Tribunal nonetheless accepts their evidence.

Other contractual terms

211. During the first contract, Mr Alcock was entitled to be provided with equipment, including a laptop, mobile phone and ID pass, by DWP but this was in order to comply with security and compatibility requirements to make his work effective. Along with his timesheets, he submitted claims for expenses.

Other RALC contracts in operation during the relevant years which were not subject to the IR35 Legislation

212. While working on the engagements for both DWP and Accenture, Mr Alcock, via RALC, undertook work for other organisations. However, he was highly financially dependent upon his engagements with Accenture and DWP during this time, consistent with the fact he was working on average a 40-45 hour week on the contracts. There were contractual restrictions that he would only do work outside all three contracts that would not interfere with the quality of the work on each engagement.

213. The summary of his invoices demonstrates that Mr Alcock received 10.3% and 4.1% of his income from work outside of the DWP and Accenture engagements in the 2013-14 and 2014-15 tax years respectively.

214. When Mr Alcock explained his roles and experience in a Linkedin profile, to which the Tribunal returns below, it is described as an integral part of the DWP team but this description was part of a marketing strategy to explain his experience.

215. Mr Alcock explained that during the relevant years under enquiry by HMRC he engaged in and performed two other contracts. The existence and performance of these contracts were not subject to challenge by HMRC but accepted to be self-employed contracts for services falling outside of the Intermediaries legislation. Mr Alcock described them as follows in his witness statement which the Tribunal accepts as fact:

Tristec – Business Development Support

73. In December 2012 RALC was approached by another, slightly larger consultancy, Tristec, who required support in assessing and bidding for a business opportunity with Sage Group PLC.

74. A call-off contract framework was put in place between RALC and Tristec to allow RALC to support Tristec in such activities without having to negotiate contracts each time.

75. Between 2012 and 2014, RALC provided such support to Tristec on a number of opportunities as well as interviewing and assessing potential Tristec candidates for suitability for such roles. HMRC decided not to pursue IR35 as it was low risk.

……………….

Travel Trade Consultancy – Travel Vault

105. Fortunately, following the proposal to Travel Vault, I was asked to provide them with consultancy in line with my proposal. This included further visits to their London offices and dialling into a number of conference calls with their software vendor and its legal advisors. HMRC decided not to pursue IR35 as it was low risk.

RALC's general business practices

216. Mr Alcock also provided evidence as to RALC's general business practices in his witness statement which the Tribunal accepts:

Business Premises

128. In March 2009 RALC took on business premises in Newcastle. This was in the form of office space and an adjacent workshop space in which the uConstruct venture could be based.

129. The office space was used for the collaborating on the development of the ARIA and uConstruct software products. This also provided a workspace for when I was not on client site – initially this was because I had no office space at home, but even after moving house in 2011 it provided a quiet space to conduct business away from the distractions of a young family.

130. As the uConstruct venture had not progressed RALC moved into a neighbouring unit without the workshop space in order to mitigate costs.

131. However in November 2015 RALC further expanded into adjacent space that became available in order to provide the workshop space in preparation for the launch of uConstruct.

Business & Record Keeping

132. To assist Robson Laidler's accounts preparation and for me to monitor profitability, forecast corporation tax and VAT liabilities, I keep comprehensive records (in an Excel Workbook of spreadsheets) which comprise of:-

a. Bank Account: Details every transaction in and out of Company current account as well as categorising by Income Type or Expense Type

b. Barclaycard Account: that shows balance of corporate credit card immediately before and after tax year end

c. Savings Account Interest: Details any interest earned on corporate savings account

d. Barclays Business Loan: Payment Details of BarclayLoan which was taken out to procure IT equipment (laptop, network server) required for uConstruct development as well as to resolve cashflow issue as a higher than expected Corporate Tax bill had resulted in risk of not being able to cover monthly costs (e.g. accountancy, software subscription costs, company phone, reimbursement of business expenses such as taxi).

e. Director Payment & Salary Summary: Summarises individual Salary and Director payments, grouped by Financial Year

f. Business Expense: Details every business expense (ex and inc VAT) and method of payment (company current, company credit or personal current). This included travel related costs such as hotel accommodation.

g. VAT Return: Summarises values from each VAT Return

133. For instance on or about 14 October 2013 RALC paid for marketing. This consisted of a writer to publish a professional summary on the business connectivity platform
"LinkedIn" which was part of the Web Presence and Business Profile. That cost of £500 was recorded in the company accounts for 2013-14, it was grouped under Administrative Expenses. In the RALC Consulting Ltd Excel Workbook the expense is recorded in:
• Bank Account Detail: in column A refers to "Business Expense: Marketing" and in column AG refers to "Prof Fees"
• Business Expense Detail: column F refers to "Business Expense: Marketing – CVRighter", column O refers to payment method of "Corporate Current" and column P refers to expense type of "Marketing".

RALC Independence
134. Since RALC Consulting Ltd was incorporated in 2008 I have always been regarded as an independent consultant and not as an employee of any of the organisations I have worked with.

135. The roles I have taken with Accenture and DWP have all been outcome based, most of which involved delivery assurance. On occasions my role has included task management, however, I had no client staff management responsibilities outside of assigning tasks, quality and assuring delivery.

136. When contracting through DWP or Accenture I was not treated as an employee. I was not subject to, nor did I take part in performance management process of those organisations.

137. When on client's premises and to expedite access, I was given a temporary contractor colour-coded security pass to display, with restricted access and also this distinguished me from employees. Furthermore, I was not invited to client's internal events such as communication sessions, Christmas parties, and away days etc for the staff of those organisations.

138. I did attend project-related status meetings but never internal "account" meetings in which, for example, Accenture would discuss new opportunities with clients such as DWP or across their Public Service business.

217. The only caveat on Mr Alcock's evidence is that he accepted that the Linkedin page was in his personal name and there was no page created for RALC. The Linkedin page only mentioned RALC briefly and historically and gave the impression that Mr Alcock had been part of the DWP when delivering the various projects. However, the Tribunal accepts Mr Alcock's evidence that this was a marketing device to promote himself personally as potentially clients would be less likely to search for companies with which to contract but individuals and if Mr Alcock marketed RALC, his profile would be likely to be lost amongst larger corporate contractors.

218. Finally, Mr Alcock provided evidence (which the Tribunal accepts) as to the degree of control that in practice he and RALC were subject to from the clients during the operation of relevant contracts:

Control - Where
139. As part of the client work RALC has undertaken, it has often been necessary to travel to the project base, or to where a critical mass of people were based in order to conduct face to face meetings and workshops.

140. It is not the case that this demonstrates control by the client over RALC but simply that in order to conduct the work that RALC had been contracted to perform, it was more efficient or in some cases only possible, from certain locations.

141. Should the contract base location change or the role required significantly more travel then originally agreed, I/RALC would be under no obligation to accept that change.

142. For example, I selected the Universal Credit Release 1 role in part because it was based in Newcastle and my wife was expecting our 2nd child. If that project had been moved to London, as was conceivable, given the Cabinet Office discussions, then I would not have accepted that change for two reasons: (i) impact on family life; and/or (ii) excessive travel-related costs (e.g. expensive train journeys and hotel accommodation).

Control - What
143. Similarly if the role I was contracted to undertake was to change, or I was asked to work on a different programme, I/RALC had a contractual right to decline/refuse that change.

144. If the change was material, but acceptable, then RALC would contract separately for that piece of work.

Control - When
145. If I wished to take time off I did not have to ask permission of the client in order to do so. I also have never entered forecast absences onto a "holiday tracker".

146. However, I am acutely aware that successful businesses run on relationships and have always tried to act reasonably and to support RALC's clients where possible. I would therefore warn the client of any planned unavailability. Should a client inform me that this would cause a problem (e.g. coinciding with a go-live event) then I would try to alleviate the problem by taking reasonable measures such as re-scheduling, making myself available for calls whilst on leave or performing a detailed handover of key information or processes to the client.

147. Similarly if I was taken ill and had intended to be doing client work then I would inform the client and any individuals I had scheduled to meet as soon as practicable in order to avoid inconveniencing them and putting the programme at risk.

Control - How
148. I am an experienced IT professional with 20 years of experience in the industry. Through RALC I help clients deliver complex IT change projects applying my knowledge and experience to break down problems, identify solutions and plan delivery of those solutions.

149. Therefore clients do not need or want to instruct me on how to perform this work. The client's role in this arrangement is to frame the role - identifying the problem space in which I am to be engaged - and to provide relevant information about the parties involved (e.g. their roles, any potential issues/politics etc), the parameters in which the programme is being delivered (e.g. the high level plan, methodology etc) and to provide a point of escalation should significant issues arise or decisions be required.

150. I would like to add that I have always endeavoured to operate RALC Consulting well within the law. I have resisted any temptation to engage in dubious accounting practices aimed at reducing tax liability, such as umbrella companies, contractor loans or offshoring.

151. RALC Consulting is a genuine commercial business and I have never acted as or been treated as an employee of clients; I believe the evidence produced including the DWP teleconference call on 28 October 2016 and the Accenture letter of 26 May 2016 is testimony to this.'

Evidence concerning carelessness – from Mr Moran and Mr Poole

219. Mr Stephen Poole of Robson Laidler accountants gave evidence about his IR35 review and advice to Mr Alcock on RALC's contract with DWP / Parity in 2008. He provided a witness statement and gave oral evidence which the Tribunal accepts.

220. Mr Poole stated that in relation to RALC's 2008 contract with Parity, he found that on some measures such as control of work, bearing of own costs, right to substitution, termination arrangements, indemnity and insurance and freedom to work for others and lack of holiday pay or sick pay there were grounds to consider RALC's Parity contract to look like a contract of self-employment absent the company. On the factors such as the day rate of pay, length of contract and the ownership arrangements for intellectual property weakened the case.

221. On balance Mr Poole advised that the DWP/Parity contract fell outside of IR35. That advice was communicated to Mr Alcock in a written opinion.

222. Mr Poole's opinion on 5 June 2008 noted two strong indicators of self-employment, among others simply described as indicators, in the following terms:

'Control of work

The contract does not set out a supervisory framework or mechanism to control the work. It would appear therefore that you are free to carry out the work how you see fit…so long as standards of quality are maintained. ….This is a strong indicator of self employment…..

1.6 Bear your own cost of errors.

The contract states that you will put right errors in your work at your own expense. This is a strong indicator of self employment.'

223. Mr Alcock gave evidence that he relied on this advice and the similarity of the Parity contracts to the relevant LLC Networkers (Accenture) contracts in 2010 and 2011 when deciding they too fell outside the IR35 legislation and did not require him to receive further or separate advice or expert consideration of the new contracts. The Tribunal is satisfied that this evidence is reliable and that this was his honest belief at the time. However, he did accept that the Parity contract did contain the two clauses above that were not replicated in the contracts under consideration in the appeal.

224. Nonetheless the Tribunal is satisfied that the Parity and Networkers contractors were otherwise broadly similar and HMRC did not seek to identify any other significantly different clauses in the two contracts. Further, HMRC's case on the control of 'how' a skilled IT contractor works is not said to be a weighty indicator of self-employment. The costs of remedying errors clause was not found in the Networkers and RALC LLCs in the relevant years but was to be found in clause 3.8 in the later Capita and RALC LLC for the second contract in March 2013.

225. Mr Moran, Mr Alcock's accountant at Robson Laidler, had recommended Mr Alcock and RALC to obtain IR35 advice from within the firm before entering the Parity contract. Mr Moran gave evidence that while he did not deal with IR35 as he had no expertise, he also relied on Mr Poole's opinion in relation to the Parity contract in 2008. RALC had notified Robson Laidler shortly after winning its first contract in 2008 and Mr Moran advised Mr Alcock to have that contract and the working arrangements reviewed by the firm's tax specialist in their tax department, Mr Poole who had reviewed the contract and was of the opinion it was outside of IR35.

226. Following that opinion Mr Moran conducted yearly account and tax reviews with Mr Alcock / RALC at the end of 2010 and 2011 to discuss Mr Alcock's personal and RALC's company accounts and any other accountancy matters.

227. Mr Moran had a checklist for each of the topics he would want to discuss with Mr Alcock at the yearly review which would include asking Mr Alcock about PAYE compliance. This topic would encompass asking about Mr Alcock / RALC's IR35 position and whether anything had changed. Mr Moran and Mr Alcock would discuss the nature of the work and working arrangements that Mr Alcock / RALC was undertaking. Based on the information provided in these discussions both Mr Moran and Mr Alcock were of the view that there had been no material change in the work performed by RACL such that would warrant a full review of the contracts with Networkers (Accenture), so no further contract review had been conducted.

228. While there is no documentary evidence to support Mr Moran's oral evidence that IR35 was discussed with Mr Alcock, the Tribunal accepts it was mentioned at the annual reviews but only briefly. IR35 is not referenced in the Robson Laidler WIP report until after HMRC's enquiries were opened, nor is IR35 referenced on Mr Moran's annual 'checklist' provided to the Tribunal. Nonetheless the Tribunal is satisfied that Mr Moran's evidence that discussion of IR35 fell under the heading "PAYE compliance" in his checklist is reliable. Mr Moran accepted that there were a number of other matters that would be subsumed under this heading. Mr Moran also accepted that he had no detailed knowledge of IR35. Nonetheless, the Tribunal is satisfied he must have had enough understanding of the issues and implications such to recommend obtaining the specialist advice from Mr Poole.

229. As the Tribunal has accepted, the discussion of IR35 was limited to enquiry by Mr Moran of the nature of the work that Mr Alcock was undertaking through RALC and not the contractual terms. Accenture was RALC's principal client from November 2010 and onwards. Inevitably Mr Moran would have been aware that Mr Alcock was doing work for a different client than under the Parity contract. This is mitigated to some extent because the end client of the Parity contract was DWP and while the end client of the Networkers contract was Accenture, the fifth link (the ultimate beneficiary of his services) was also DWP. Nonetheless, the fact that there were different agencies involved in the contractual chain was apparent to Mr Alcock and should have been to Mr Moran. The Tribunal is satisfied Mr Alcock and Mr Moran only briefly considered the possibility that the contractual terms could be materially different between the Parity and Networkers contracts, and whether a detailed contractual review should take place to advise whether IR35 applied.

230. When Mr Alcock engaged Armstrong Campbell, his tax advisers prior to Mr Leslie of Tax Networks, to assist in dealing with HMRC's enquiries, the absence of a professional review of the contracts was identified as an issue. Mr Alcock rightly accepted in cross examination that he had deliberately lied to HMRC in a letter suggesting that he had had all the contracts personally reviewed at the time they were agreed, when this only happened retrospectively. It appears that Armstrong Campbell communicated these instructions by saying that a business entity test was *"undertaken to assess risk on each contract engagement"*.

HMRC's submissions

231. Mr Stone, counsel for HMRC, was a powerful and robust advocate. He made skilful oral and written submissions with the assistance of his junior, Ms Tutin.

232. The Tribunal hopes it does no disservice to them in summarising the submissions as follows.

233. Mr Stone submitted that in the relevant tax years, RALC agreed to provide the services of Mr Alcock to work for Accenture and DWP, via Networkers and Capita respectively, full time on long-term engagements, usually at the client site, as part of the client teams delivering substantial IT projects. Mr Alcock was engaged because of his personal skills and

experience, and both Accenture and DWP wanted him and would not have been willing to accept another to do the work. The reason for contracting through RALC was Mr Alcock's choice, but the clients were interested only in the person.

234. Mr Alcock was engaged to do roles that he had performed whilst an employee of Accenture (e.g. Design Team Lead), and roles which were otherwise performed by Accenture employees or DWP employees (e.g. Design Team Lead and System Delivery Integration Manager, and heading the Universal Credit IT Strand respectively). The way that he performed the roles, as well as the way that he was treated by and interacted with others on those teams was substantially the same.

235. The differences that Mr Alcock and Mr King were able to identify, namely the lack of pastoral line management responsibilities, need for insurance and lack of paid holiday, all flow from the corporate structures that were actually in place. Once removed, as they would be when considering the hypothetical contracts, what remains looks very much like employments with Accenture and DWP.

Hypothetical contracts

236. In determining the terms of the hypothetical contracts, Mr Stone submitted that the Tribunal must have regard to the terms of the actual arrangements in place. There was no written contract between RALC and Mr Alcock, although there must have necessarily been a contractual relationship entitling RALC to control the services of Mr Alcock, in order for RALC to be capable of complying with the terms of its contracts with Networkers and Capita.

237. Mr Stone therefore invited the Tribunal to conclude that a contract of employment must be implied between RALC and Mr Alcock as a necessity.

238. Mr Stone submitted that the hypothetical contract between Accenture and Mr Alcock would have included the following material terms:

a. Mr Alcock would have been engaged under two contracts matching the duration of the first and third contracts entered into between Networkers and RALC;

b. Accenture would be contractually obliged to provide work to Mr Alcock each weekday during business hours and he would be personally obliged to undertake the work, subject to agreement e.g. as to holidays;

c. Accenture would pay Mr Alcock a daily fee in return for the provision of those services, which would be paid weekly in arrears, plus the reimbursement of travel and accommodation expenses;

d. Mr Alcock could provide a replacement to perform the services, subject to the absolute right of Accenture to approve such a replacement;

e. Within the parameters of the engagement, Accenture would have the contractual right to control what work he did;

f. While Mr Alcock would have some say regarding the methodology of work, Accenture and its clients would have final control over the delivery of the projects in respect of which Mr Alcock worked and he would have to comply with any reasonable instructions. To the extent practically possible, taking into account Mr Alcock's skills and experience, Accenture would therefore have the contractual right to control how the work was performed;

g. Accenture would have the contractual right to determine where Mr Alcock would work. The place of work would normally be Accenture's premises in Newcastle, Blackpool or

Warrington, but could include any location in the UK. Mr Alcock could only work at his own premises if permission was given;

h. Accenture would have the right to control when the work was performed. Accenture could require Mr Alcock to work overtime, at weekends and on public holidays;

i. Mr Alcock would have no contractual right (over and above his statutory rights) to be paid for absence caused by sickness, holiday or paternity;

j. Any work undertaken outside of the contracts would be restricted by the need to ensure it did not compromise Mr Alcock's work for Accenture;

k. Mr Alcock would have been subject to a restrictive covenant and non-solicitation clause for at least six months after the termination of his contract of employment with Accenture.

239. Mr Stone submitted that the hypothetical contract between DWP and Mr Alcock would have included the following material terms:

a. Mr Alcock would have been engaged under one contract matching the duration of the second contract entered into between Capita and RALC;

b. DWP would be contractually obliged to provide work to Mr Alcock each weekday during business hours and he would be personally obliged to undertake the work;

c. DWP would pay Mr Alcock a daily fee in return for the provision of those services, which would be paid either weekly or monthly in arrears, plus the reimbursement of travel and accommodation expenses, provided it was agreed by DWP in writing;

d. Mr Alcock could provide a replacement to perform the services, subject to the absolute right of DWP to approve such a replacement;

e. Within the parameters of the engagement, DWP would have the contractual right to control what work he did;

f. While Mr Alcock would have some say regarding the methodology of his work, DWP would be responsible for the operational direction, supervision and control of his work. Further, Mr Alcock would have to provide progress reports on any projects. To the extent practically possible, taking into account Mr Alcock's skills and experience, DWP would therefore have the contractual right to control how the work was performed;

g. DWP would have the contractual right to determine where Mr Alcock would work. The place of work would normally be DWP's premises. Mr Alcock could work from his own premises only if he explained the business need to do so and obtained permission from DWP;

h. DWP would have the right to control when the work was performed by directing the number of hours to be worked by Mr Alcock;

i. Mr Alcock would have no contractual right (over and above his statutory rights) to be paid for absence caused by sickness, holiday or paternity;

j. Any work undertaken outside of the contracts would be restricted by the need to ensure there was no material diminution in the standard of work and there was no breach of contract in doing so;

k. Mr Alcock would have been prohibited from engaging in any conduct detrimental to the interests of DWP.

Application of common law

240. Mr Stone submitted that under each of the hypothetical contracts, there would have been the requisite mutuality of obligations between the parties. As an integral member of the

team delivering the relevant IT projects, Mr Alcock would have been expected to attend and be provided with work every weekday for the duration of each contract, unless agreed otherwise in advance for e.g. for holiday. In return, he would have received a daily fee for performing the work. The fact that Mr Alcock was engaged under a series of assignments and at the end of each one there was no obligation to offer further work is not relevant to determining whether there was mutuality of obligations during the course of the hypothetical contracts.

241. There would have been a requirement for personal service. The purpose of each contractual arrangement was for Mr Alcock to perform the services; Accenture and DWP were not indifferent to the identity of the person performing the work. While Mr Alcock had the contractual right to provide a replacement, this was subject always to the absolute right of Accenture and DWP to approve any such replacement. In other words, Mr Alcock could not have decided simply to not attend work and send someone else in his stead.

242. As to the issue of whether Accenture and DWP would have 'sufficient control' under the hypothetical contracts for them to be contracts of service, it is accepted that Mr Alcock would have had some autonomy as to precisely how he performed the contractual role. This is consistent with the fact that he was recruited precisely for his skills and expertise and was expected to exercise the same. However, as to how he worked, he would have been subject always to the right of Accenture and DWP to direct him. His work would have been reviewed to ensure the project was progressing as anticipated and he would have provided regular updates. Mr Alcock was required to work within the confines and parameters set by Accenture and DWP and work as part of their teams, with a level of autonomy equivalent to those he was working alongside or for whom he was deputising, rather than providing to those companies the services of an outsider.

243. Mr Stone submitted that what matters is where the contractual right of control lies. Both Accenture and DWP would have had the ultimate right to require Mr Alcock to comply with any instructions regarding the operation and delivery of the project. They also would have been able to control the location at which Mr Alcock worked (usually the premises of Accenture, or its clients, and DWP) and the hours which he worked (core hours during the weekdays with some overtime as may be required in accordance with the demands of the project).

244. Therefore, he submitted that the first two criteria of the *Ready Mixed Concrete* test would be satisfied.

245. Mr Stone further submitted that the other terms of the hypothetical contracts would be positively consistent with their being contracts of employment. As to whether Mr Alcock would have been in business on his own account, Mr Alcock placed much emphasis in his witness statement on the consulting services provided to other organisations during the relevant tax years. However, he would have only been able to carry out such work insofar as it would not have interfered with his work for Accenture and DWP. He would have been substantially financially dependent upon his engagements with Accenture and DWP and marketed himself as an integral part of these organisations.

246. Even if Mr Alcock was regarded as self-employed when providing consulting services to other organisations through RALC, the hypothetical contracts with Accenture and DWP lacked the normal indicia of self-employment. In particular, Mr Alcock would not have been able to increase his profit as he was paid a daily fee for the number of days worked, in the expectation of him working normal business hours and not being able to work more efficiently or profit from the engagements. There was no significant risk of making a loss under the contracts given that his expenses would have been reimbursed (with DWP's

consent in their case). Due to the regular payment of the fee and identity of his engagers, Mr Alcock would have faced no real risk of late payment or bad debt. Nor was Mr Alcock required to invest in significant equipment or other resources to perform the engagements.

247. Mr Stone submitted that the lack of any contractual right to payment for absences caused by holiday, sickness or paternity is a neutral factor given that:

a. The first, second and third contracts are contracts between limited liability companies. Any lack of contractual provision merely reflects the fact that the contract was made between companies;

b. Mr Alcock would in any event have been entitled under the hypothetical contracts to statutory benefits in respect of holiday, sickness and paternity leave and pay if he was a worker of Accenture and DWP;

c. The lack of any enhanced benefits is not a pointer away from employment.

248. Mr Stone submitted that stepping back from the details of the contracts, the picture that emerges of the hypothetical contracts is one of full-time engagements with Accenture and DWP for the duration of each of the contracts, which were substantial. Mr Alcock was expected to operate as an integral member of the teams in delivering the particular projects. In the performance of those functions, he was subject to the same degree of practical control as that of an employee of Accenture or DWP. This is typified by the period in which Mr Alcock provided maternity cover during the third contract - DWP (Police Scotland) contract, i.e. a direct replacement for an employee, but it applied in the other assignments too.

Extended time limit assessments - carelessness

249. Mr Stone submitted that the determinations and notices were competent and within time having been made within six years because section 36 of the TMA applied because Mr Alcock and his advisers had acted carelessly in bringing about a tax loss. A loss of tax is brought about carelessly by a taxpayer or someone acting on its behalf "*if the person fails to take reasonable care to avoid bringing about that loss*": s.118(5) TMA.

250. He submitted that if the Tribunal found that IR35 applied to the Accenture engagements in the 2010-11 and 2011-12 tax years, it will have found that there was a 'loss of tax'. If so, the second issue arises of whether either RALC or a person acting on its behalf, i.e. Robson Laidler, failed to take reasonable care to avoid bringing about that loss of tax: ss 36(1), 36(1B) and 118(5) TMA.

251. He submitted that RALC failed to take reasonable care to avoid bringing about the loss of tax because although it requested a review of the original contract that it entered into in 2008, it completed its tax returns for the relevant tax years without seeking professional advice on the application of IR35 to the terms of the new contracts that it entered into with Networkers (Accenture) for DWP. Further or alternatively, its advisers were careless in failing to undertake contract reviews in respect of the engagements with Networkers (Accenture) for DWP in the 2010-11 and 2011-12 tax years.

252. Mr Stone submitted that HMRC would rely upon the following facts, derived from the evidence heard, as demonstrating that both RALC, acting through Mr Alcock, and Robson Laidler, acting through Michael Moran, were careless:

253. Mr Alcock received an assessment in May 2008 of whether the contract to provide his services to DWP, via RALC and Parity, was caught by IR35. The opinion, whilst brief, highlights the importance of the contractual clauses in assessing whether IR35 applied.

254. Mr Poole accepted that a review of the relevant contractual terms was essential in order to carry out a proper assessment of the application of IR35. Further, in the case of the Parity contract he understood there to be no discrepancy between the terms of the contract and how it was expected to be operated in practice.

255. Mr Poole said that he had a lengthy meeting with Mr Alcock to explain the application of IR35. Although no notes have been disclosed, it can be inferred that Mr Poole would have explained the importance of the contractual terms. In any case, Mr Alcock accepted that he was aware of their importance.

256. It was submitted that Mr Alcock failed to take reasonable care because he was contracting with a different client, through different entities, and knew the importance of the contractual terms to the application of IR35, and yet failed to obtain a professional review of the new contracts. To the extent that he did any review of the contracts himself, he failed to identify relevant distinctions: in particular, the clauses relating to the right of control and requirement to bear the cost of errors, which Mr Poole had identified in his opinion as "*strong indicators*" of self-employment, which were different in the Networkers contract.

257. The carelessness of Mr Alcock's failure to obtain a professional review of the Networkers contract is demonstrated clearly by the fact that when he engaged Armstrong Campbell to assist in dealing with HMRC's enquiries, they advised him that the failure to obtain a professional review was a "*weakness*". Mr Alcock chose to address this weakness by deliberately lying to HMRC in a letter suggesting that he had had all the contracts personally reviewed. It appears that Armstrong Campbell repeated that lie by saying that a business entity test was *"undertaken to assess risk on each contract engagement"*.

Conclusion

258. For the reasons given above, Mr Stone invited the Tribunal to dismiss the appeals for all years and conclude that:

a. The hypothetical contracts between Mr Alcock and Accenture and DWP would have been contracts of employment;

b. For the tax years 2010-11 and 2011-12, RALC and/or its advisers brought about the loss of tax carelessly by failing to seek advice or assess the application of IR35 to the relevant contracts in the relevant years.

Appellant's submissions

259. Mr Leslie, on behalf of the Appellant, RALC, structured his submissions as follows: -

(1) he identified the history of the dispute between the parties;

(2) he made submissions on the three elements of the *Ready Mixed Concrete* test;

(3) he argued that the hypothetical contracts constructed between Mr Alcock and Accenture or DWP would contain expressed and implied terms and take into account relevant circumstances. He concluded that the contracts were ones of self-employment; and

(4) he submitted that neither Mr Alcock nor Robson Laidler had acted carelessly so that the Determinations and Decisions for the first two tax years were out of time.

(1) The history of the dispute with HMRC

260. Mr Leslie submitted that before HMRC's IR35 Opinion letters and assessments (Determinations and Decisions) were sent, there had been a significant level of co-operation from RALC.

261. He submitted that the dispute arose due to HMRC's reliance on the 28 January 2016 telephone notes with DWP's Paul Macpherson ("PM"). Despite three attempts by HMRC, PM did not acknowledge his agreement to those notes. The notes were apparently not critically tested/corroborated by HMRC and the first HMRC IR35 Opinion Letter dated 20 June 2016 (re "DWP") contained numerous references to those notes that RALC regards as factually inaccurate.

262. The second HMRC IR35 Opinion Letter 23 December 2016 (re "Accenture") was heavily reliant on what Accenture stated.

263. On both occasions HMRC did not immediately disclose the information it relied on until after the IR35 Opinion Letters were issued and RALC was not given an opportunity to make representations at the appropriate time.

264. To counter this, RALC arranged a teleconference with DWP Director and Deputy Director Janice Hartley and Tim Read on 28 October 2016 and, after several attempts, eventually obtained the 26 May 2016 Accenture letter from HMRC.

265. RALC's submissions were based on what happened and/or how the arrangements with DWP and Accenture worked by reference to RALC's understanding of what the RALC/Agency contracts permitted. Mr Leslie submitted that to find out how the arrangements worked in practice there was a need to establish the factual matrix within the hypothetical contracts (as stated above) and this needed to be constructed. The submission was that HMRC imported implied terms based on inaccurate and/or uncorroborated facts when compared and contrasted with the key documents produced by the Appellant.

HMRC Note of Telephone Call with Paul Macpherson

266. On three occasions HMRC had attempted to obtain PM's agreement to the content of HMRC's notes but he did not return his signed confirmation. The notes were not agreed and HMRC had not called any witness evidence in support of them.

267. DWP Universal Credit Programme ("UCP") leaders, Mrs Hartley and Mr Read confirmed that PM left shortly after Mr Alcock commenced the second contract.

268. Mr Leslie submitted that the notes of the conference with PM were inaccurate. On closer reading there are reasons to support this. Firstly, Mr Alcock was not PM's deputy and this was verified by the DWP teleconference with Mrs Hartley and Mr Read on 28 October 2016. Secondly, the notes concede to PM having no knowledge of the RALC contract covering clauses such as: absence; substitution; substandard work; termination; disbursements; and exclusivity (see paras 26, 38, 39, 40, 43). The Hartley and Read teleconference call 28/10/2016 made it clear that PM left the UCP early at the start of RALC's contract. Then, Mr Craig Eblett became involved in November 2013 just as RALC's contract was ending. The IT Strand Leader's post was vacated. Richard Alcock was self-organised and autonomous.

269. In conclusion, Paul Macpherson had little dealings with RALC and he clearly did not know the contractual terms RALC operated by. The notes are unreliable.

HMRC IR35 Opinion Letter 20 June 2016

270. The first of two HMRC IR35 Opinion letters was dated 20 June 2016 and listed information HMRC relied on regarding the DWP (second) contract, which included; prior

responses from RALC to a series of fact finding questions supplied on 23/10/2015; the 28 January 2016 telephone note of HMRC's call with the DWP project manager PM; and the Capita Resourcing contract (the second contract LLC) signed by on RALC 10/03/2013.

271. First, whilst HMRC's letter made no mention of RALC's commercially leased offices, although there had been many references to the same including in HMRC's earlier letter dated 18 November 2014 in which they offered to meet Richard Alcock at RALC's offices or home. HMRC's IR35 Opinion did not include consideration of the 'business on own account' test.

272. In the second contract LLC with Capita, clause 3.5 confirms a contractual right of substitution, whilst clause 13.3.1 does not allow RALC to be moved off the scope of the project to a different task. Mr Leslie submitted that here was considerable doubt regarding the accuracy of the 28 January 2016 telephone notes HMRC has relied on. HMRC's general interpretation regarding mutuality of obligations was considered in *Armitage Technical Design Services Limited v HMRC TC/2015/07115* at para 75 where the FTT stated: "…*The mere offer and acceptance of a piece of work does not amount to mutuality of obligations in the context of employment status*."

273. Mr Leslie's submitted that HMRC's reliance on the notes of the telephone call with PM and failure to consider express terms of the contracts were significant omissions.

HMRC IR35 Opinion Letter 23 December 2016

274. Mr Leslie submitted that HMRC's opinion letter of 23 December 2016 regarding the Accenture (first and third) contracts relied on: the Networkers/RALC first contract LLC dated 08/11/2010; HMRC's notes of meeting with RALC 07 December 2016; and "the information supplied by Accenture by written correspondence" (the Accenture letter 26/05/2016). He submitted that the express terms in the contract together with the detailed Accenture letter and the information provided by RALC are not reflected in HMRC's IR35 Opinion Letter.

275. The express contractual clauses of the first LLC relied upon by the Appellant refer to the following: -

Clause 2.3 substitution;
Clause 5.1.2 compliance with statutory rules and health and safety etc;
Clause 5.1.8 identifies Accenture as the end client;
Clause 5.3 RALC as the consultancy having reasonable autonomy;
Clauses 8.4, 8.6 and 12.7 indicating a termination clause and lack of mutuality of obligations;
Clause 12.3 no entitlement to sickness pay, holiday pay, long service leave, etc;
Clause 12.4 No authority to act on behalf of Networkers or Accenture; and,
Clause 12.6 RALC may perform the consultancy services in the course of the Assignment at its own premises.

*(2) The three Ready Mixed Concrete tests - RALC in business on its own accoun*t

276. Mr Leslie submitted that from very early in the IR35 Review, HMRC sent a letter to RALC on 18 November 2014 offering to have a meeting. The letter distinguished between, by proposing to meet at either, RALC's office premises, Richard Alcock's home, or HMRC's offices. A copy of the contracts with photographs showing the RALC commercial offices was provided to the Tribunal.

277. RALC's office was equipped with an IT workstation, professional broadband, conference call facilities, etc which is what one would expect. Premises are considered by HMRC to constitute the normal trappings of business as illustrated in HMRC's Business on own account guidance.

278. Mr Leslie submitted that RALC had made representations to the HMRC. In response HMRC's Internal Reviewer also highlighted that RALC has a commercial web domain http://ralc.co.uk, website and business e-mail richard.p.alcock@ralc.co.uk. RALC had indemnity insurance. RALC also sent HMRC a copy of HMRC Business Entity Tests. It would be inconceivable that an employee would cover such costs.

279. Second, Mr Leslie submitted that HMRC conceded that two of RALC's contracts to provide services to Tristec and Trade Travel (the Travel Vault project) were outside IR35 and this dovetails with the arrangements RALC had in practice as set out below.

280. Third, as to how the arrangements worked in practice, there were further corroborated facts in Tax Networks Ltd's Report on RALC with appendices, which was sent to HMRC 10/10/2017. The Report covers matters such as:

- paragraph 6.21 on page 11 re concurrent work in relation to the "UCP/DWP and TRAVEL Vault Ltd contracts and RALC organising its business activities";
- Accenture confirmed in its letter of 26/05/2016 it did not have a right of control;
- DWP's recorded responses in the teleconference with Hartley and Read on 28/10/2016 are unequivocal and support this example of being self-organised throughout and under no control. Paul Macpherson had little interaction with RALC, RALC was self-organising: DWP was not controlling RALC, RALC did not deputise – no delegation – it was not part and parcel of DWP;
- RALC had independence and operated as an entrepreneurial business mitigating risk, maintaining profitability and operating concurrent contracts".

281. Mr Leslie submitted that in terms of the IT Industry, the work set up and the working arrangements are highly regularised and security conscious. For instance, work is done in accordance with Government Digital Service which is broadly a function for providing IT services to define the development outcomes of each project phase. The Government baseline personnel security standards are another area in the regulatory environment. The Cabinet Office states that these personnel security controls must be applied to people who, in the course of their work, have access to government assets. Every effort must be made to complete the baseline personnel security standard, but where it cannot be applied this must be risk managed and the details recorded for audit purposes.

282. He submitted that it is a normal incident of self-employed contractors and employees alike to be subjected to mandatory regulations and policies: health and Safety, security, programmes of work involving projects with work breakdown structures and Gantt chart terminals/deadlines. The commentary about the same is included in the DWP transcript references. These are not regarded in any way to feature as being master-servant controls in an employment status (or similar hypothetical IR35) test.

283. It is also the clear practice in HMRC guidelines that, where a self-employed contractor is compelled to operate in such a regulated environment, then that is not a factor of "control" because those regulations and policies apply equally to self-employed contractors or employees. HMRC's guidelines about this are clear and unequivocal. This was reiterated in RALC's e-mail to HMRC dated 08 December 2017, vis a vis, as follows: ESM5560 SDC "...being required to comply with statutory requirements like health and safety procedures isn't determinative, as all workers must comply with these." ESM0502 "HMRC's opinion on status should not be influenced by consideration of the worker's rights..."

284. Mr Leslie submitted that the practical realities of a particular working context will be relevant and what appears initially to HMRC to be an employee/employer controlling relationship, may be nothing more than an incident of the IT Industry which is extremely

security conscious – see *Marlen Limited v Revenue and Customs Commissioners* [2011] UKFTT 411(TC); [2011] S.T.I. 2439 at [46-47].

285. Where the same control is exercised over both independent contractors and employees alike, it cannot be the touchstone of employment.

286. In *Datagate Services Limited v Revenue and Customs Commissioners* [2008] STC (SCD) 453 [para 20] the Tribunal found that the client had an ultimate right of control owing to security requirements. However, this was not indicative of an employment relationship; it was a necessary feature of the IT Industry.

287. Paragraph 6.32 of Tax Network Ltd's Report refers to the 26 May 2016 Accenture letter which confirmed that there was a right of substitution and Appendix 5 corroborated that it was a genuine right and is in line with the Networkers contract regarding Accenture as the end client in clause 5.1.8. The Agency (Networkers) contract quoted in HMRC's IR35 Opinion Letter dated 23 December 2016 referred to the substitution clause 2.3. The right of substitution has been corroborated by both Accenture and illustrated by RALC providing a specific example in the Report dated 10 October 2017 submitted to HMRC.

288. In *Express and Echo Publications Limited v Ernest Tanton* [1999] EATRF 98/0528/3 Peter Gibson LJ held that as Mr Tanton's contract had a specific provision to the effect that he could supply a substitute driver, the contract had to be one for services. As a result, the case did not pass the irreducible minimum of mutual obligations as set out in *Ready Mixed Concrete*. Mr Leslie submitted that the right to substitute means that the contract cannot be personal to the contractor. HMRC does not accept that there was a right to substitution due to the Status Inspector's interpretation that it was a fettered right of substitution. In the case of *ECR Consulting Limited v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 313 (TC) at para 40(b) the Tribunal decided on the following: -

> '… It appears that it was immaterial who was appointed, so long as that person had the necessary skills. We do not accept that in reality the substitution clause was in any way fettered as suggested by Mr Burke. On that basis we are satisfied that the hypothetical contract would have to have a valid substitution clause, which could only be found in a contract for services.'

(3) The Hypothetical Contracts

289. Mr Leslie made submissions as to the hypothetical contracts between Mr Alcock, through RALC and Networkers / Capita Resourcing, and the end clients DWP and Accenture.

290. Mr Leslie submitted that, it was debatable whether Richard Alcock provided a personal service to the end clients. RALC was contracted with the agencies and when considering all the circumstances he concluded that the hypothetical contract would be one for services for the following reasons: RALC was not a party to the contract between the Client and Agency. As submitted above, where the parties have entered into formal contracts, the terms of those contracts must be imported into the hypothetical agreement between Richard Alcock and the end clients.

291. Mr Leslie submitted that for the reasons stated above, the substitution clause was not fettered as suggested by HMRC. The expressed terms mean that the hypothetical contract would have to have a valid substitution clause, which could only be found in a contract for services. RALC paid for commercially leased business premises, with broadband, a web domain, business e-mail domain, conference call facilities, etc. The hypothetical contract would have to have a clause, which enabled Mr Alcock / RALC to perform the consultancy services in the course of the Assignment at its own premises.

292. RALC did not represent or act on behalf of the end clients. RALC was not Paul MacPherson's deputy and RALC was not delegated any management responsibilities. RALC does not accept PM had any real control over the way in which Mr Alcock worked. Mr Alcock did not work standard days and it is clear from that the hours he work varied from week to week. That is consistent with a contract at an agreed price, which leaves the contractor to deliver the same, effectively and efficiently. A contract of services would specify a fixed fee and a working week with variable hours and provision to provide variable cover, in case Richard Alcock was indisposed, but there were contracted consultancy services.

293. The termination provisions made it clear that there was no mutuality of obligation on either party to employ the other or work for the other. Tax Network Ltd's Report dated 10 October 2017 demonstrated RALC continued working after the contract ended and took the risk of not being paid. However, RALC eventually secured further work. The hypothetical contract would have to make provision for this. This is not a provision that would be found in a contract of service.

294. Mr Leslie submitted that "painting the picture" including the "business on own account test" RALC was a genuine business and therefore Mr Alcock's services were not caught by the IR35 legislation. The terms of the hypothetical contract between Mr Alcock and the end clients would result in contracts for services (self-employment).

(4) Carelessness - submission regarding the competency and time limits of the Determinations

295. Briefly, Mr Leslie submitted that neither Mr Alcock, RALC nor Robson Laidler had carelessly brought about a loss of tax such that the extended time limits under section 36 TMA did not apply. The Determinations were outside the four-year time limits provided by section 34 of the TMA. An assessment to income tax may be made at any time not more than 4 years after the year of assessment to which it relates (section 34 TMA). An assessment involving a loss brought about carelessly by the person to which it relates may be made at any time no more than 6 years after the year of assessment to which it relates (section 36 (1) TMA). This includes a loss brought about by a person acting on behalf of that person (section 36 (1B) TMA).

296. He relied on the following.

297. On 29 March 2017 HMRC had sent an e-mail to RALC which stated the following: -

> "Regarding the penalty position; as your client took advice I do not intend to charge a penalty, however, when assessing a tax liability, extended time limits apply when the loss of tax was brought about carelessly by the person to be assessed or by another person acting on behalf of that person. I consider that, although I do not intend to raise a penalty on your client for acting carelessly, the accountants acting on your client's behalf acted carelessly and therefore it is necessary for me to assess the liability in line with extended time limits."

298. Mr Leslie submitted that Richard Alcock had a reasonable understanding of the IR35 legislation following his prior review and discussions in 2008 with Stephen Poole CTA from the Tax Department of Robson Laidler accountants, culminating in the balanced opinion and report. He submitted that Richard Alcock was not careless as he had taken advice. Consequently, it was important to consider what was in Richard Alcock's mind when he decided that an IR35 review was not required for later contracts in 2010 and 2011.

299. The Appellant's witness Stephen Poole CTA assisted RALC and Mr Alcock to act as a prudent and reasonable taxpayer. Mr Moran was the Director and principle of Robson Laidler accountants assigned to RALC during the period to which the appeals relate. Each year in December there was a discussion regarding the nature of the work and the working arrangements that RALC was undertaking.

300. From HMRC's commencement of this IR35 Review on 12 September 2014 until the making of the extended time limit tax assessments on 08 March 2017, Mr Leslie submitted that HMRC did not ask questions to establish whether a loss was in fact brought about by a person(s) acting on behalf of RALC as contemplated in section 36(1B) TMA. HMRC had not discharged that burden of proof.

301. In *Alan Anderson v HMRC* [2016] UKFTT 335 (TC) the FTT considered the issue of what suffices as regards proving carelessness on the part of the appellant and whether HMRC had satisfied their burden of proof. Broadly, to establish carelessness HMRC would need to prove that the tax adviser looked at IR35, discovered RALC was inside IR35, but advised otherwise. This had not been proved in light of the tax advice the Appellant sought from the witnesses Messrs Poole and Moran from the Robson Laidler accountancy firm.

302. In *Anderson* the following paragraphs considered the link between behavioural penalties and discovery assessments:

'121. In the context of the penalty provisions, the careless test has been held by the tribunal to require consideration of the conduct which could be expected of a prudent and reasonable taxpayer in the position of the taxpayer in question. For example, in the case of *David Collis v Revenue & Customs* [2011] UKFTT 588 (TC), Judge Berner noted the following at [29]:

"That penalty applies if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer (or other person giving the document) to take reasonable care. We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question"' [emphasis added]

303. This point was expressed at para 61(3) whereby the Tribunal stated what matters is the appellant's state of mind: did he have an honest belief that the contents of the return were correct? - see *Anthony Bayliss v Commissioners for HMRC* [2016] UKFTT 500 (TC05251).

304. Similarly, Mr Leslie relied on the decision in *Hanson v HMRC* [2012] UKFTT 314(TC), in which Judge Cannan said at [21]:

"What is reasonable care in any particular case will depend on all the circumstances. In my view this will include the nature of the matters being dealt with in the return, the identity and experience of the agent, the experience of the taxpayer and the nature of the professional relationship between the taxpayer and the agent." [emphasis added]

305. Mr Leslie submitted that the correct approach in the case is to follow that adopted in *Collis* and *Hanson* of assessing what a reasonable hypothetical taxpayer would do in all the applicable circumstances of the actual taxpayer.

306. He submitted that this follows from the wording of the provision which looks at a failure to take reasonable care by the person in question. The "reasonable care" which should be taken is to be assessed by reference to what a reasonable and prudent taxpayer would do – it is an objective hypothetical standard. But what that reasonable and prudent taxpayer would do is not assessed in a vacuum but by reference to the actual circumstances of the taxpayer in question. He submitted that the same interpretation should apply as regards the use of this term in the discovery assessment provisions. That Parliament chose to use the same term, in each case as further defined as "a failure to take reasonable care", indicates that the same approach is to be taken in both contexts.

307. In this case, therefore, the question is what action a prudent and reasonable taxpayer, in all the circumstances of the Appellant, would have taken to avoid bringing about the "situation", being the asserted insufficiency of tax.

308. Mr Leslie submitted that an assessment of what a reasonable and prudent taxpayer would do must be made in the context of the self-assessment system and the tax rules in place at the relevant time. It is an essential part of a self-assessment system that there is an obligation on a taxpayer himself correctly to include all taxable income and gains in a tax return and account for the tax due on it. He submitted that the hypothetical reasonable and prudent taxpayer can be attributed with an awareness of this obligation and with the need to be mindful to take reasonable steps to fulfil that obligation.' Put broadly, the same approach to carelessness applies in both assessing time limits of discovery assessments (sections 29 and 36 TMA) and the penalty regime (Schedule 24 of the Finance Act 2007).

309. HMRC had explicitly stated no intention to raise penalties on RALC for acting carelessly, as IR35 advice had been sought and RALC had not been considered careless. Following the preliminary IR35 evaluation with Mr Poole, Richard Alcock was reasonably knowledgeable about IR35 and RALC's role in the later contracts. This was in the mind of Richard Alcock who was the driving mind of RALC. When asked every December about IR35 by Mr Moran, Richard Alcock instructed him that there was no requirement for an IR35 review of the contracts as he considered that there was no material difference to the roles/arrangements and RALC's business.

310. Mr Moran was not careless as he raised the point about IR35 every December before finalising his and RALC's annual Return and he was instructed by Mr Alcock who equally was not careless.

311. In the circumstances, Mr Leslie submitted that the Regulation 80 Determinations of tax issued in March 2017 in respect of tax years 2010/11 and 2011/12 were not validly made, they were out of time and not competent. He invited the Tribunal to allow the appeals against HMRC's extended time limit assessments for 2010/11 and 2011/12 on the grounds that they were time barred.

Discussion and Decision

The First issue - applicability of IR35 Intermediaries legislation. In constructing the hypothetical contracts with the end clients, was Mr Alcock employed or self-employed?

312. The first issue is whether the Intermediaries legislation applies and tax and NICs are due under the Determinations and Notices. Deciding the issue requires the Tribunal to construct the hypothetical contracts Mr Alcock would have had with his end clients, Accenture in the first and third contracts and DWP in the second contract.

313. The Tribunal will address each stage of the three conditions laid down in *Ready Mixed Concrete* to determine whether they were contracts of service (employment) or contracts for services (self-employment). The conditions are: (1) mutuality of obligation and personal service; (2) degree of control; and (3) consistency other terms of the contract.

314. The Tribunal not only has regard to the express contractual terms but also the operation of the contracts in practice and all relevant circumstances pursuant to section 49 of ITEPA.

First condition - Mutuality of obligations

Accenture engagement - Relevant contractual terms

315. There was no explicit obligation within the contracts between the RALC-Networkers LLCs and Networkers-Accenture ULCs for Accenture to provide Mr Alcock with any minimum amount of work, nor number of hours or days in total. Nor was there an obligation

within the contracts for Mr Alcock to work on any given day nor for Mr Alcock to make himself available for a minimum amount of work.

316. There was no obligation for him to accept work offered during the course of the contract, he had the right to refuse it. The Tribunal relies on the absence of any other contractual terms which required a minimum of work to be offered by the end client or Mr Alcock to accept any work offered during the course of the contracts. Further it accepts the evidence of Mr Alcock and submissions on his behalf as to how the contract worked in practice.

317. Further, the contracts were time limited by virtue of the schedules to the LLCs (on average for three months set out in the schedules to the LLC for the first contract and six months in the schedules to the LLC for the third contract). There was no obligation for the contracts to be renewed or for the offer of further work upon completion or the end of each schedule. However, when examining the mutuality of obligation, the Tribunal concentrates on the availability of work during the course of the contract rather than the offer of further work upon its completion.

318. When reaching its overall conclusion, the Tribunal does take into account the operation and reality of the contracts was rather different from the plain terms of contractual entitlement. In practice, there was an expectation was that Mr Alcock would make himself available for an average working week during the dates of each contract and renewal schedule and that he would be paid a daily rate for such. This must be weighed in the balance. However, for the reasons set out above the Tribunal does not accept that there was an agreement or guarantee that he would be given a minimum amount of work during the course of the contracts nor that it crystallised into an obligation. Likewise, while there was an expectation that he would accept work offered during the contracts, he was not contractually obliged to do so. He could refuse to accept it, even if to do so would be commercially unwise.

319. Further, the Tribunal accepts the evidence of Mr Alcock on his contractual rights and the submissions made on his behalf that the overarching contracts could be cancelled or the projects postponed at any time such that he had no security that he was guaranteed he would receive a set amount of work during the course of the contract.

320. Mr Alcock agreed in evidence that the parties expected he would work Mondays to Fridays in line with the core business hours of Accenture (or its clients) and DWP. In respect of the Accenture engagement, this was also confirmed by Mr King. Mr Alcock could not provide any examples of him choosing not to carry out work on Mondays to Fridays without having provided advance notice to the client but he did have the right not to work if he gave sufficient notice and it would not interfere with the delivery of the projects in question. It was expected that he would take some holiday.

321. Mr King said it would have been unacceptable to Accenture if Mr Alcock had failed to turn up to work one day without advance notice. Mr Alcock confirmed that the same would be true of DWP. By his estimation, Mr Alcock worked on average 40-45 hours a week on these engagements and 60 hour working weeks were not unusual. If he worked more hours on one day he might work fewer hours on the next to offset it, if this was possible without interfering with the course of the project.

322. There was an explicit obligation in the schedules to the contracts for Mr Alcock to perform a specified role and for Accenture to pay the daily rate for days worked during the

assignment period: see the schedules to the first and third contract LLCs[1] between RALC and Networkers. There was no explicit obligation in the contract terms for Mr Alcock to deliver a specific outcome. However, the purpose and operation in practice of the contracts was indeed for Mr Alcock to deliver specific outcomes as Mr Alcock suggested (and Mrs Hartley and Mr Read confirmed in relation to the DWP engagement).

323. Mr Alcock stated that there would be 'team' outputs and particular milestones to achieve by a certain date with regards to each project, rather than being required to achieve them as an individual. He explained this as follows in cross examination in relation to the Accenture projects for DWP (the first contract):

A…….The reality was - this was when the new government came in and austerity measures were put in place, so none of the supplier contracts were being extended for long periods of time, there was a real concern that some of these programmes might be ditched. So, that was the reason for the relatively short-term incremental extensions to that role. So, the programme, should it remain untouched, had an end date, and a series of milestones between that, which were releases and things like that, at different levels of the systems. But, obviously, there was a concern, not just within Accenture and myself but within the other suppliers, that, actually, they were looking to cut different programmes, there was a real risk it was going to be stopped.

Q. Yes, but whereas other roles, if you are leading a design team and you might have an output that the team has to produce at a given date, and that may shift, but that envisages being the end of that particular role, for the kind of programme management role that you were in, there was no one milestone or end point, it was an ongoing function that you had to continue to monitor and perform the programme management?

A. Correct. There were some short-term outputs, mitigation plans, those sorts of things, and then there was the long-term output, which was successful delivery of all of the system. Obviously, that wasn't just me, that required all the cogs in the machine to work and we were effectively - it's a terrible analogy - but we were effectively the oil between those cogs, making sure that those things did continue to work as expected and that any issues were identified early.

324. The Tribunal is satisfied that the lack of contractual right or express guarantee of any hours or work, or that he was to complete a specific project is significant. It suggests there would be no contractual right for Mr Alcock to claim against Accenture were he not have been offered work during the course of the contracts.

325. Further, while the operation of the Accenture contracts suggests they were project or task based rather than role based (in contrast to the wording of the contracts), Mr Alcock was clear in his evidence that those projects could be cancelled at any time. This indeed happened in January 2013, prior to the final schedule to the LLC for the first contract which ran to 28 April 2013. Accenture terminated his work in December 2012 or January 2013 and the Applicant had no recourse to any entitlement to further pay or to claim for the extant four months of the contract. He worked for 10 further days in January 2013 without payment in the hope of a contract extension but bore the cost of having worked without payment when it did not eventuate.

326. The termination clauses of the RALC/Networkers/ Accenture provided a minimal notice period or termination period of 30 days. However, this clause did not guarantee RALC or Mr Alcock would be a paid 30 day notice period - there was only an obligation to be paid if there was work offered and done. If there was no offer of work during the 30 day termination period, then there would be no payment. In practice, Mr Alcock's contract could

[1] There are no material differences in the contractual terms set out in the LLCs dated 8 November 2010 and 16 December 2013, unless made explicit. References will be made to the former contract only.

be terminated on the spot if there was no work with no guarantee of any further days even within the notice period. Mr Alcock did not sue on the early termination of this final schedule to the first contract, and would not have been entitled to do so. In effect, the contracts provided no security of tenure or work to be provided. The Tribunal has accepted Mr Alcock's submission that he could only work and be paid if work was available which could be cancelled at any time.

327. For those reasons, I cannot accept HMRC's submission that applying a realistic commercial interpretation to the contract and/or as a matter of implication, and/or as a matter of practice and expectation, there was any obligation (i) for Accenture to provide work to Mr Alcock every day during the course of an assignment and (ii) for him to work on those days except by prior agreement, which was said to be the shared mutual understanding.

328. The obligation within the contract to be provided with work cannot simply be inferred from (i) the silence as to the agreed working hours and (ii) the requirement to agree *"additional hours"* with Accenture that Mr Alcock would work for some time at least every weekday during core business hours. Likewise, the other clauses relied upon by HMRC were too remote to imply this eg. if he unable to perform the services, Mr Alcock was required to notify Accenture or Networkers by 10am on the first day of any incapacity, see clause 5.2 of the LLCs;. Mr Alcock was subject to a restrictive covenant during and for a period of six months following the completion of an assignment: see clause 5.1.11 LLCs; upon the *expiry* of an assignment, there was no obligation to provide or accept any further work: see clause 12.7 LLCs. Clause 12.7 of the LLCs provided:

"Upon the expiry of the Assignment, however arising, NRS shall not be obliged to offer and the Consultancy shall not be obliged to accept any further assignments, contracts, engagement, projects or services of any type whatsoever."

329. Clause 15.1 of the LLCs provided:

"This agreement and the duration of the Assignment may be extended by mutual agreement by the Parties signing a renewal Schedule(s) ("the Renewal Schedules(s)")

330. Further, clause 5.7 of the LLCs only refers to minimum hours, if they appeared in the schedule to the contract, in the following terms:

'*The Consultancy shall use best endeavours to ensure that the Nominated Resource(s) is provided for such hours as are necessary to perform the Consultancy Services in the course of the Assignment, and that the Nominated Resource shall not unreasonably fail to provide the Consultancy Services during hours required by the Client for the convenience of the Client and / or the proper performance of the Consultancy Services. Where minimum hours are set out in the Schedule, the Consultancy shall use best endeavours to ensure that Nominated Resource shall be provided for such minimum hours*.'

331. There were no minimum hours specified in any of the schedules to the LLCs – there is only a contract fee payable of the specified sum of money per professional day worked. This indicates that if the end client wanted to guarantee minimum hours or number of days of work, then that's where they would be found. The fact they have been omitted indicates that the end client, Accenture, was not seeking to guarantee any minimum hours or number of days worked. Whilst there might be an expectation of work, there is not a contractual right or obligation. So, in theory, Mr Alcock could be offered and perform zero hours (or number of days) work by the end clients for which he would have no entitlement to be paid any daily fees. Likewise, he was not required to accept any minimum number of hours or days of work

from the end clients. Mr Alcock would not get paid of course, and the client would not be happy if he turned down work, his contract would likely be terminated, but in theory he had the contractual right not to provide any services.

332. On balance therefore, the contractual rights on mutuality of obligation point away from the hypothetical first and third contracts between Mr Alcock and Accenture being contracts of service (employment) but towards being contracts for services (self-employment).

Mutuality of obligations
DWP engagement – the second contract

333. There was no explicit obligation within the contracts between the RALC-Capita LLC and Capita-DWP ULC for DWP to provide Mr Alcock with any minimum number of hours or days of work nor for Mr Alcock to make himself available for a minimum of work. There was no obligation for him to accept work offered during the course of the contract, he had the right to refuse it. In fact, this was explicitly stated at Clause 13.2 of the LLC: 'Neither Capita nor the client is under any obligation to offer work to RALC and RALC is under no obligation to accept any work that may be offered'. While the Tribunal pays little regard to Clause 13.2, to which it returns below, it is entitled to rely on the absence of any other contractual terms which required a minimum of work to be offered by the end client or Mr Alcock to accept any work offered. Further it accepts the evidence of Mr Alcock and submissions on his behalf as to how the contract worked in practice.

334. There was no obligation for the second contract to be renewed and it was time limited by the schedules (lasting on average for three months set out in each of the schedules to the LLC).

335. Further, the LLC between RALC and Capita was not only time limited by virtue of the schedules to the LLC (on average for three months) but subject to Mr Alcock using his reasonable efforts to complete provisions of the services by 24 August, 23 November or 7 December 2013. This suggests the work was task or project based rather than simply fulfilling a role.

336. There was no obligation for the contract to be renewed or for the offer of further work upon completion or the end of each schedule. However, when examining the mutuality of obligation, the Tribunal concentrates on the availability of work during the course of the contract rather than the offer of further work upon its completion.

337. When reaching its overall conclusion, the Tribunal does take into account the operation and reality of the contracts was rather different from the plain terms of contractual entitlement. In practice, the expectation was that Mr Alcock was to make himself available for an average working week during the dates of each contract and renewal schedule and that he would be paid a daily rate for such. However, for the reasons set out above in relation to the Accenture engagements, the expectation did not crystallise into any guarantee or legal obligation that he would be given work for the duration or a minimum period nor that he was obliged to accept any work offered.

338. There was an explicit obligation in the schedules to the contract for Mr Alcock to perform a specified role and services to DWP and for DWP to pay the daily rate for days worked during the assignment period: see the schedules to the contract LLCs[2] between RALC and Capita. There was no explicit obligation in the contract terms for Mr Alcock to

[2] There are no material differences in the contractual terms set out in the LLCs dated 8 November 2010 and 16 December 2013, unless made explicit. References will be made to the former contract only.

deliver a specific outcome. However, the purpose and operation in practice of the contracts was indeed for Mr Alcock to deliver specific outcomes as Mr Alcock suggested and Mrs Hartley and Mr Read confirmed in relation to the DWP engagement. As above, the schedules to the LLC each provided that 'The Contractor will make all reasonable effort to complete provision of the Services by…'.

339. The Tribunal is satisfied that the lack of contractual right or express guarantee of any hours or days of work, or that he was to complete a specific project is significant. It suggests there would be no contractual right for Mr Alcock to claim against his client were he not have been offered work. Further, while the operation of the contracts suggests they were project or task based rather than role based (in contrast to the wording of the contracts), the evidence was to the effect that those projects could be cancelled at any time.

340. The termination clauses of the RALC/Capita/DWP contracts provided that there was no minimum nor termination period offered (see Clause 2.3 of the schedule and the schedules). As of right and in practice, Mr Alcock's contract could be terminated on the spot if there was no work with no guarantee of any further days even within the contract period. Mr Alcock would not have been entitled to claim on this final schedule to the contract had his contract been terminated with immediate effect. In word and in effect, the contracts provided no security of tenure to Mr Alcock and the Tribunal has accepted Mr Alcock's evidence that he could only work and be paid if work was available which could be cancelled at any time.

341. Mr Alcock stated that there would be 'team' outputs and particular milestones to achieve by a certain date with regards to each project, rather than being required to achieve them as an individual. For the DWP engagement (the second contract), the Tribunal has accepted the account and set out in the Hartley and Read transcript of 28 October 2016 set out above.

342. Any obligation within the contract to be provided with work cannot simply be inferred from applying a realistic commercial interpretation to the contract and/or as a matter of implication, and/or as a matter of practice and expectation. The Tribunal does not accept HMRC submission that there was a legal obligation (i) for DWP to provide work to Mr Alcock every day during the course of an assignment and (ii) for him to work on those days except by prior agreement. In any event it was not the shared mutual understanding.

343. It cannot be inferred from the silence as to the agreed working hours in the LLC that Mr Alcock was required by contract to work at least for some time every weekday during core business hours. Mr Alcock would perform the services at the times and/or for the total hours or days agreed with Capita or DWP as reasonable for the proper performance of the services: see clause 3.4.2 LLC. If unable to perform the services, Mr Alcock had to notify Capita or DWP as soon as reasonably practicable and by not later than 10am on the first day of absence: see clause 3.4.3.

344. In coming to its conclusion in relation to the DWP engagement (the second contract), as set out above, the Tribunal has little regard to the 'no mutual obligations' clause 13.2 of the RALC-Capita LLC. This states that neither Capita nor DWP were under any obligation to offer work to RALC nor RALC to accept any work offered. Clause 13.2 of the LLC between RALC and Capita provides:

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

345. Notwithstanding this clause, Mr Alcock confirmed in cross examination that Capita had stated it would offer him work by way of the DWP engagement until the end of the assignment. The Tribunal accepts he hoped and even expected that provision of work would continue until the end of the assignment. However, as explained above, the Tribunal is satisfied that Mr Alcock had no guarantee or contractual right as to being given work throughout the assignment nor when the end of the assignment would be. That was entirely a matter for DWP. The first schedule to the LLC lasted from March to August 2013, the second from August to November 2013 and the third only from November to December 2013.

346. Neither taking the schedules to the LLC individually nor collectively was this such a longstanding piece of work that the operation of the contract led to the explicit written terms of the contract having no effect.

347. The intention of the parties is of a little relevance to the Tribunal's ultimate determination but it is at least consistent with the contractual terms. It may not have reflected the operation in practice of the contract but it does not mean the contractual right did not exist had DWP and Capita decided not to have offered RALC work.

348. On balance therefore, the contractual rights on mutuality of obligation, point away from the hypothetical contract between Mr Alcock and DWP being a contract of service (employment). They point towards a contract for services (self-employment).

Conclusion on mutuality of obligations

349. As set out above, in *Usetech* at [60] the Court said:

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

350. It is fair to observe that the essence of Mr Alcock's relationships was that there was no continuing obligation on the part of the Accenture nor DWP to provide work within or beyond the dates specified in the renewal schedules. If DWP or Police Scotland (the fifth links) chose to abandon their projects there was no contractual basis upon which Mr Alcock could demand further work within or beyond the contracts. There was an example of this happening before the end of the first contract with Accenture. While the obligation to provide work beyond the date of the contract is irrelevant, the obligation to provide work within the dates of the contract is highly relevant. I am satisfied that these factors point away from a contract of service.

351. I have accepted that the implementation of existing contractual terms, the operation of the contracts in practice, and the expectation from the manner in which the contracts came about – Mr Alcock seeking to work on delivering specific projects – meant that he was offered and accepted to be paid by the clients to perform substantial projects for each of the clients. It was hoped but not guaranteed that the work and payment would continue throughout the time periods set out in the schedules to the LLCs. However, there was no contractual guarantee nor legal obligation for this to happen. There was only an explicit obligation under the contracts for Accenture or DWP to pay for the work that was offered to and performed by Mr Alcock.

352. The contracts terms between RALC and Networkers or Capita did not make it explicit that there was a mutuality of obligation, a minimum offer of work and payment in return for Mr Alcock's services to Accenture or DWP.

353. While there was mutuality of obligation in the broad sense that if Mr Alcock was offered and performed the work, the end client was obliged to pay him, this is no more than explained in *Usetech* at [60] to be an indicator of either employment or self-employment. If Mr Alcock worked, there was a contractual right that he would be paid. However, as set out above, there was no contractual guarantee or right to be offered a minimum of work from the end clients– only a non-binding hope or expectation.

354. Further, and of equal importance, Mr Alcock was not contractually obliged to accept the work offered by the end clients. While it is likely to have been commercially unwise for him to have rejected work, because he may not have been offered further work within the contract or offered any further contracts as a result, Mr Alcock had the right to refuse the offer of work at any point during the course of the contracts. The fact that Mr Alcock did not refuse work offered in practice during the course of the contracts, does not help identify the right which Mr Alcock held, in the absence of any contractual term obliging him to accept work. The fact that he accepted the work offered throughout the contracts did not crystallise an expectation into a contractual obligation to accept work for the same reasons set out above.

355. Therefore, the Tribunal is not satisfied on balance that sufficient mutuality of obligations did exist between Mr Alcock and the end clients in the notional contracts to establish an employment relationship. Mr Alcock and the Appellant have discharged their burden of proof on the balance of probabilities in establishing a lack of mutuality of obligations sufficient to form an employment relationship with the end clients. Although there was some mutuality of obligations in respect of the requirement for payment if work was done, it did not extent beyond the irreducible minimum in any contract to provide services nor demonstrate the relationship was one of a contract of service.

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

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

357. That there were notional contracts for services is supported by the fact that there was no attempt by Accenture to keep Mr Alcock engaged for the complete length of the first contract, he worked without payment after a project was terminated early, each renewal schedules were each of relatively short duration with no expectation of renewal, the termination periods were minimal or none and provided for no paid notice.

358. Despite the significance of this conclusion, the Tribunal nonetheless considers all the conditions and relevant circumstances pursuant to the authorities of *Ready Mixed Concrete, Hall and Lorimer* and *Market Investigations* in order to test the conclusion.

First condition, second limb - Personal service and substitution

Relevant Contractual conditions

Accenture engagement

359. The Tribunal is satisfied that the contract terms did not provide an explicit and absolute obligation for Mr Alcock personally to perform any services on behalf of Accenture. Within the schedules to the RALC-Networkers LLCs for the first and third contracts, Mr Alcock was named as the *"nominated resource"* to provide the services. The services were to be provided by the contractor, having provided satisfactory references, signing a confidentiality agreement and any medical assessments or security checks: see clause 2.1 of the LLCs.

360. There was a right to sub-contract or assign RALC's or his services with the client's approval (the approval of Networkers or Accenture - see clause 2.3 of the assignment). Therefore, Mr Alcock could also send a substitute to provide the services in the course of an assignment; however, this right was fettered. The LLCs specified that Accenture was required to approve the selection of a worker, and both Networkers and Accenture had to be reasonably satisfied that any replacement had the *"required skills, qualifications, resources and personnel"* to provide the services (clause 2.3).

361. Accenture could require Networkers to remove a worker if their "*competence, capability, qualifications [and] expertise"* was deemed unsuitable (clause 3.5 of first ULC, 4.5 of the second ULC). If Accenture requested a replacement contractor, they must have *"suitable experience and competence"* and any such replacement was subject to Accenture's approval (clause 3.8 of the first ULC and 4.9 of the second ULC).

362. As above, Mr Alcock could send a substitute to provide the services in the course of the Accenture assignments; however, this right was fettered. In particular:

a) Accenture was required to approve the selection of a worker (see clause 2.5 Schedule 1, ULC), and both Networkers and Accenture had to be reasonably satisfied that any replacement had the *"required skills, qualifications, resources and personnel"* to provide the services: see clause 2.3 LLC;

b) The first ULC made no provision for substitution. The second ULC required Networkers to maintain continuity of service in respect of individuals engaged to perform the services. Substitution was only permitted if the individual was "*unable*" to provide the services and then only with the approval or consent of Accenture: see clauses 4.7 and 4.8 of the ULC; and

c) If Accenture ever had any difficulties with the performance or capabilities of the individual, they could require Networkers to remove them: see clause 4.9 ULC.

DWP engagement

363. Mr Alcock was named as the consultant to provide the required services to Capita: see the schedules to the RALC-Capita LLC. However, there was no explicit and absolute requirement for Mr Alcock to perform the services personally.

364. Clause 3.5.1 of the LLC addressed personal service (substitution or provision of an alternate) in the following terms:

"3.5 The Contractor [RALC] may use an alternative named Consultant in place of the Initial Consultant [Richard Alcock] as named in Schedule 1 provided that:

3.5.1 the Client [DWP] and Capita state in writing that they are satisfied the alternative Consultant possesses the necessary skills, expertise and resources to fulfil the Client's reasonable requirements and meet the standards applicable to the Services;
3.5.2 the Contractor keeps Capita fully and effectively indemnified against any reasonable costs, claims or expenses that may be incurred by it or the Client as a result of such

submission or substitution of staff including the reasonable cost of all instruction (necessitated by the substitution) for the substitute named 15 Consultant; and
3.5.3 the Contractor shall, at the request of Capita, provide such alternative Consultant free of charge for such period as Capita may reasonably require so that the Consultant can get up to speed on the Services."

365. Clause 4.6 implied an absence of personal service by its reference to subcontractors and employees of the Appellant Contractor:

'The Contractor [RALC] shall ensure, through the term, that neither it nor any of its affiliates or any subcontractors, employees or persons to who the contractor make payment in relation to the services has in place any arrangement involving the use of any scheme to avoid UK tax by diverting income of a UK resident individual to a non-UK resident company…of the payments made under this Agreement, ….This clause shall apply where liability for a UK tax and National Insurance Contributions would exist were the UK resident person to be employed directly by Capita / Client [DWP] and whether or not the Contractor is based in the UK.'

366. Clause 14 indicated the ability of the Appellant Contractor, RALC, to assign and/or sub-contract the services:

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

14.2 The Contractor shall be entitled to subcontract elements of the Services to third-party contractors provided that the Client and Capita are satisfied that the sub-contractor possesses the necessary skills, expertise and resource to perform those elements of the Services and Contractor keeps Capita fully and effectively indemnified against any reasonable costs, claims or expenses that may be incurred by it or the Client as a result of the use of such subcontractors including the reasonable cost of all instruction (necessitate by the subcontracting) for the sub-contractor."

367. Therefore, Mr Alcock could send a substitute to provide the services in the course of an assignment; however, this right was fettered. In particular:

a) DWP and Capita had to state in writing that they were satisfied the replacement possessed *"the necessary skills, expertise and resources to fulfil [DWP's] reasonable requirements"*. RALC was required to keep Capita fully indemnified in respect of the use of a replacement and provide them free of charge: see clause 3.5 LLC;

b) Further, while Capita did not have an absolute right of veto under clause 3.5.1 of the LLC, DWP had the absolute right to *"veto any person proposed by [Capita] to perform the services"*: see clause 12.3 Section 2 of the ULC between Capita and DWP. Capita was required to remove and replace any individual performing the services who failed to deliver the services to the agreed standard: see clause 16.4 Section 2 ULC; and

c) There was no express reference to substitution in the ULC albeit there would be no need where DWP retained a veto over any interim personnel supplied by Capita.

Operation of contractual terms in practice

Accenture engagement in practice

368. Accenture chose Mr Alcock personally to perform the services:

a) Mr King had known Mr Alcock since around 1998/1999 and knew him predominantly from working together on a DWP engagement;
b) Mr King identified that Mr Alcock would be suitable for the DWP project given his past experience with him;
c) Accenture was interested in obtaining Mr Alcock's services and not those of RALC; and
d) Accenture wanted Mr Alcock to perform the services for as long as was required to maintain continuity of service to the client.

369. In respect of the use of a substitute:

a) Mr Alcock never provided a substitute while providing his services to Accenture, although he did attempt to secure Mr Rorison for Accenture at the end of the third contract, this was not a substitute. Had the need ever arisen, he would not have been required to propose a substitute but could have done.
b) Mr King confirmed Accenture was not indifferent to the identity of the person performing the work: they wanted Mr Alcock.
c) Accenture would have had the final say, along with its client, on approving any proposed substitute – the reason was to make sure any substitute had the level of skills required in order to protect the reputation with the client; and Mr Alcock's understanding of the same was explained in cross examination:

Q. Yes. Accenture therefore had total discretion and the final say about whether to accept or reject a substitute?
A. Yes, contractually, yes.
Q. And of course, practically that fits with the commercial reality that Accenture is putting into a project a senior person on the client's site and it is Accenture's - Accenture has accountability to deliver the project. Its reputation is on the line and it wants to have control over who is going to perform the role, yes?
A. It will want to protect its reputation, as you say, and so it is to be expected that they would want to make sure it's somebody that they could, in this case, put in front of a client that has the right skills, isn't somebody potentially that they've worked before - with before that on paper looks great but is actually terrible (because we all know that people can, you know, manipulate CVs and things like that) So, yes, that protection is in there so they can protect their reputation with the client.
Q. So, this is not one of those cases where the client just wants the work to get done and does not care who does it. It is one of the cases that by the nature of your role as a senior consultant the actual personality is an important factor in your suitability?
A. Yes. It is not a case of providing more bodies to fill a role.

DWP engagement in practice

370. Mr Alcock was expected to perform the work personally, given that he was engaged by DWP due to his *"previous knowledge and relevant experience"* with them.

371. As to the use of a substitute:

a) Mr Alcock never arranged a substitute during his assignment with DWP;
b) Mr Alcock accepted that DWP had the right to veto any proposed substitute. Mr Alcock accepted that the DWP had the ability to say that it was "no"; qne

c) If Mr Alcock had provided a substitute which was accepted by the DWP, it was likely to have only been on a long-term basis.

Conclusion on Personal Service and substitution

372. Mr Alcock did have the contractual right to offer substitutes in all the LLC contracts between RALC and Networkers or Capita but they and the end clients, Accenture or DWP, had the right to refuse to authorise any substitute proposed if they were deemed unsuitable. There could only be substitution, assignment or sub-contracting with the end clients' approval of the suitability of the alternative.

373. More importantly, the ULCs in all the contracts further fettered the substitution rights. The ULCs enabled Accenture to refuse to accept a substitute for Mr Alcock without qualification (there was no obligation to accept any substitute because of the absence of reference to provision of an alternative worker in the Networkers-Accenture first ULC) or unless Mr Alcock was unable to work (set out in the Networkers-Accenture second ULC). The ULC enabled DWP to refuse to accept a substitute for Mr Alcock because it had an absolute unqualified right of veto to accept an alternative (set out in the Capita-DWP ULC).

374. Therefore, while there was a genuine right of substitution, which was never exercised because Mr Alcock personally performed each contract, it was a fettered right subject to the approval of his clients. They had chosen him personally to provide the services. The only example of another person being considered, Lee Rorison, was not to replace Mr Alcock but to assist in delivery of the project.

375. There is a restriction on the substitution clause being used only in specified circumstances, for instance in the event of Mr Alcock's inability to carry out the work in the Networkers-Accenture contract but not in the Capita-DWP contract. By the express terms of the contracts and in practice, if Mr Alcock had simply decided he no longer wished to work on the Capita-DWP project the end client would not likely have given their approval and he would not have been able to exercise his contractual right of substitution unilaterally.

376. The LLCs, if read in isolation, would only give the end clients the right to refuse a substitute if they were deemed unsuitable. However, the ULCs fettered the right of substitution further and gave the end clients a close to unqualified right to refuse to accept substitutes.

377. The Tribunal has applied the dicta of the Court of Appeal judgment in *Pimlico Plumbers*: *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.* The Tribunal is satisfied that, on balance, the fettered contractual rights of substitution would have pointed towards the personal service criterion being satisfied in the notional contracts between Mr Alcock and the end clients. The Appellant has failed to discharge its burden of proof on the second limb of the first condition set out in *Ready Mixed Concrete*.

378. The notional contracts, informed by the ULCs, is more akin to the third and fifth examples of personal service set out by the Court of Appeal at [84] rather than the fourth example:

'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.'

379. But for clause 12.3 of the ULC between Capita and DWP the Tribunal would have found that clause 3.5.1 of the LLC between RALC and Capita made the notional contract fall within the fourth example and outside the scope of personal service. But for the absence of substitution within the first ULC between Networkers and Accenture and clause 12.3 and 12.4 of the second ULC, it would have found clause 2.3 of the LLC between RALC and Networkers would also have made the notional contract fall outside the scope of personal service.

380. However, for the reasons set out above, the Tribunal is satisfied that the fettered rights of substitution points to there being a contractual right of personal service by Mr Alcock in his hypothetical contracts with both Accenture and DWP. This would have pointed towards them being contracts of service (employment) rather than contracts for services (self-employment) but for the Tribunal's conclusion on mutuality of obligations.

Second Condition – Control: what

Relevant contractual terms

Accenture engagement

381. The Tribunal has found that Mr Alcock's assignments for Accenture were identified by but not defined by the role that was described in the contracts:

> (1) From 8 November 2010 to 28 April 2013, Mr Alcock was contracted to provide his services to Accenture on a DWP project, variously as a 'System Delivery Integration Manager', 'PIP - Client Side Delivery Assurance Lead' and 'Universal Credit Agile Delivery Factory Manager' for a daily fee of £760 (later increased to £820): see Schedules to the first LLC between RALC and Networkers;
>
> **(2)** From 16 December 2013 to 14 February 2015, Mr Alcock was contracted to provide his services to Accenture on a Police Scotland project as a 'Design Team Consultant' for a daily fee of £750: see Schedules to the third LLC between RALC and Networkers.

382. Within the scope of the assignments, Mr Alcock was to have reasonable autonomy in relation to determining the method of performance of his service in the course of the assignment but cooperate with the Client and comply with the reasonable and lawful instructions of Accenture: see clause 5.3 of the LLCs. The Tribunal accepts that this contractual term is no more than would be expected of a contractor performing services for a client in order to deliver an outcome, the delivery of a project, rather than to give Accenture control over what work he undertook.

383. The nature of his work was circumscribed by the overall project to be delivered and the deadline for its completion rather than being determined by the nature of his contracted roles. Mr Alcock's roles changed description in the schedules to the first LLCs. This demonstrates that they were specific task based roles rather than a generic management or leadership role – such as team manager or leader - with a wide ambit where control over the nature of the work was within the gift of Accenture.

384. Pursuant to clause 5.4 of the LLCs Mr Alcock was not to hold himself out as an employee of either Networkers or the end client.

385. As above, the Tribunal has found that Mr Alcock's assignments were to deliver pieces of work rather than simply to occupy the specified role so that it was the performance and delivery that controlled the nature of his work rather than the job title. The Tribunal accepts he could not simply be moved from task to task as an employee might – there was no contractual right to do so.

DWP engagement

386. From 4 March to 7 December 2013, Mr Alcock provided his services to DWP as a 'Senior Suppliers Manager' for a daily fee of £650. The schedule to the LLC between RALC and Capita specified the variety of services to be provided with the assignment description set out above. However, the Tribunal is satisfied that the nature of the services was in fact to complete a specific project – namely the 'go live' or IT launch and maintenance of the Universal Credit Programme project taking place in April 2013 and thereafter.

387. Mr Alcock was required to provide his services with all reasonable skill and care and decide the appropriate method and manner of performance of the Services but have due regard to the reasonable requests of DWP: clause 3.1 LLC. This clause did not give the DWP substantial control over the nature of Mr Alcock's work. Clause 3.4.5 states that the rules applicable to DWP employees are not extended to contractors:

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

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

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

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

389. Mr Alcock decided what needed to be done and the timescale in which it should be delivered. Once the proposals were agreed with the DWP, Mr Alcock took responsibility for the work; the only feedback to report to the DWP was progress and products. In that regard Mr Alcock acted in a consultancy capacity to the DWP.

Control: what

Operation of contractual terms in practice

Accenture engagement

390. Accenture and its clients were responsible for the direction of a particular project, which is constructed following discussion. Any changes to the direction proposed by any individual the team would need approval from Accenture and the client. This reflected the nature of delivery of complex tasks by large and differing teams which required integration rather than a contractual right to substantial control over the nature of the work Mr Alcock performed.

391. The Letter from Accenture dated 26 May 2016, stated:

'13) Could Mr Alcock be moved from job to job if priorities changed e.g. was there an overlap between the two projects? If so, would this require a consultation and who made the final

decision? Was Mr Alcock moved from job to job? What situations would you tell Mr Alcock to change to other tasks?

Accenture might ask RALC Consulting/Mr Alcock to focus on other aspects of the programme or change the scope of the engagement. For example, this might be due to an issue arising or Accenture's client changing their priorities and Accenture being asked to respond. This would come down to a discussion around whether Mr Alcock was comfortable with the proposed change and he/RALC Consulting would be under no obligation to accept it. Accenture could not ask Mr Alcock to work on other programmes/client engagements without entering into a contractual engagement specifically for that programme/client and the terms associated with it .'

392. In cross examination it was accepted Accenture could instruct Mr Alcock as to what was required in a given task within the scope of an assignment (although it could not move him to an entirely different project). This was consistent with the fact that someone senior within the Accenture would be responsible and accountable for the delivery of a particular project, a fact which Mr Alcock accepted.

393. Mr Alcock did not have many of the responsibilities or obligations that an Accenture employee would be expected to and did have such as: receipt or provision of training; financial accountability; or HR, pastoral and disciplinary responsibilities for other team members.

DWP engagement

394. Janice Hartley and Tim Read's understanding, accepted by the Tribunal, was that Mr Alcock was part of a team or strand that was providing IT expertise to the overarching Universal Credit Programme. The IT strand who was composed of externals such as Mr Alcock and internal DWP IT members. He was hired with IT expertise to support development of the new Universal Credit System, working as an in-house expert with external suppliers contracted to develop the software. He could be moved between aspects of IT development within the IT strand but he would not have been moved to another part of the project such a project implementation as this was not the skill set he was hired for. He was not moved from the IT strand at any point. There was a Programme plan, with activities and milestones developed by the IT strand – this was the schedule used to monitor progress. Mr Alcock would have been aware of the IT strand plan and the activities to be completed.

395. The Tribunal has not accepted that Mr Alcock acted as Mr Macpherson's 'deputy' by carrying out tasks on his behalf. It is right that Mr Alcock engaged in a range of tasks and he covered meetings, planned work, project risk assessment, attended governance board and planning meetings. However, he did not carry out other work expected of a DWP senior manager. He had no pastoral, management, financial or disciplinary responsibilities for DWP employees.

396. The Tribunal is satisfied for the reasons it set out above that the note of Mr Macpherson's account of Mr Alcock's role is not a fair reflection of the position. Mr Macpherson worked for Mr Alcock for a maximum of three months, he did not author or sign the notes of his account, he did not provide a witness statement and was not cross examined. The Tribunal has accepted that the account provided by Mrs Hartley and Mr Read of the nature of Mr Alcock's role and responsibilities is more reliable. He was a 'hired hand' for a specific project without the management responsibilities of 'in-house' senior or managerial civil servants – financial accountability, management, disciplining and training staff etc.

397. Mr Alcock's email dated 22 July 2013 in which he asked for an update from all interested parties on the project and sought to coordinate work in the absence of Mr

Macpherson was no more than to be expected of a person hired to complete a task which involved a coordinating role.

398. The Tribunal does not accept HMRC's submission that after Mr Macpherson stepped back from his role in around June 2013, Mr Alcock acted in his stead as IT Director, rather than deputising. He continued to perform similar work, but instead ultimately reported to Janice Hartley and Tim Read, rather than Mr Macpherson. The fact he was answerable to DWP IT strand leaders or their DWP seniors did not mean that he was doing anything more than needing to respond to his client's needs. It does not demonstrate control over the nature of his work.

399. Mr Alcock accepted that Mr Macpherson would decide upon the priority of tasks to be completed but that does not demonstrate that DWP had substantial control over what Mr Alcock did. The priority of tasks would be a collaborative decision based on the overall requirements of the project, which while senior DWP managers would have responsibility and could set direction for if needs be, which involved input from all stakeholders.

Conclusion on control: what

400. In conclusion, the Tribunal is satisfied that there was some control over what Mr Alcock performed, the nature of the tasks and services he carried out for his end clients, both as required by the contracts and in practice. However, it was not akin to employees in principle nor the actual comparable employees of Accenture and DWP it was that necessary to provide a good service for his clients. He had a significant degree of autonomy as of right and in practice and could not be moved outside the scope of the work originally agreed without a discussion and agreement and a new contract being negotiated. The degree of control over him by his clients as of right or in practice was not such as to indicate a master-servant or employment relationship.

Second condition - Control: how

Relevant contractual terms

Accenture engagement

401. RALC had "reasonable autonomy in relation to determining the method of performance" but was required to "co-operate with the client and comply with all reasonable and lawful instructions" of Accenture: see clause 5.3 of the LLCs for the first and contracts between RALC and Networkers.

402. RALC was entitled to work for third parties during the course of an assignment, provided there was *"no material diminution"* in the standard of work and it did not breach the LLC in doing so (clause 3.6, LLC).

403. RALC was also required to comply with:

a) Statutory or other reasonable rules or obligations while performing the services: see clause 5.1.2 LLCs; clause 3.3.18 first ULC;
b) Accenture information and guidelines regarding any equipment and facilities provided: see clause 5.1.8 LLCs; clause 3.3.20 first ULC;
c) All of Accenture's applicable rules and procedures: see clause 5.8 LLCs; clause 3.4.5 first ULC; and
d) Any policies and procedures of Accenture's clients: see clause 3.4.9 first ULC.

DWP engagement

404. RALC was required to provide the services "with all reasonable care and skill". Mr Alcock had the right to decide "the appropriate method and manner of performance" of his work but was required to have "due regard to the reasonable requests of [DWP]" and the requirements of the assignment: see clause 3.1 of the LLC for the second contract between RALC and Capita.

405. DWP remained responsible for the *"operational direction, supervision and control"* of Mr Alcock: see clause 12.4 Schedule 2 of the ULC between Capita and DWP.

406. RALC was also required to procure that Mr Alcock would:

a) Not engage in any conduct detrimental to the interests of Capita and DWP: see clause 3.4.1 LLC;
b) Comply with any rules or obligations in force at DWP's premises insofar as they were reasonably applicable: see clause 3.4.5 LLC; and
c) Furnish Capita or DWP with any documentation or progress reports as may be reasonably requested from time to time: see clause 3.4.6 LLC.

Control: how

Operation of Contractual terms in practice

Accenture engagement

407. Accenture stated in the letter of 28 May 2016 that it did not have right of control over Mr Alcock. However, there was an expectation that all individuals working on an Accenture client engagement follow the agreed Accenture / client working practices/ methods and work in a manner that supports the programme. The letter states:

'**6) Does Accenture (UK) Ltd have the 'right of control' over Mr Alcock i.e. the authority of deciding the things to be done, the way in which it shall be done, the means to be employed in doing it, the time when and/or the place where it shall be done"?**

Accenture does not have right of control over Mr Alcock. However, there is an expectation that all individuals working on an Accenture client engagement follow the agreed Accenture/client working practices/methods and work in a manner that supports the programme. Accenture's clients expect that their own people and any suppliers (and sub-contractors) work to Accenture/the clients agreed approaches/standards and follow industry best practice. RALC Consulting were engaged to provide services to Accenture (UK) Limited and, of course, whilst the nature of those services would have been discussed during contract negotiation, ultimately RALC Consulting would be responsible for the delivery of those services.'

408. Mr Alcock was a highly skilled and senior IT consultant, hired for his expertise and expected to work with a large degree of autonomously. Accenture and its clients expected Mr Alcock to perform his services in accordance with the working practices and methods agreed with the client at the outset of a project. Mr Alcock was not able to change these working practices and methods unilaterally however, no one on the projects realistically would do so unilaterally, he might do so in consultation.

409. If he was not complying with the working practices, he could in theory be directed to do so however this never happened in practice as he was entitled to reasonable autonomy and the way in which he worked was to enable the projects to be delivered which was a collaborative and consultative process. It was always in his interest to cooperate and deliver results for the client because he would wish to obtain further work from them in the form of

further contracts. He did so by performing and completing each of his contracts to the satisfaction of his client.

410. In practice, Mr Alcock did not require micro-managing as he was a highly skilled and experienced specialist, as Accenture expected, having worked at Accenture and on their projects for nearly a decade. This is consistent with the fact that Accenture has key deliverables to meet, in respect of which it is accountable to the client, while there was some right of control over individual contractors sufficient to meet those deliverables, the rights would not be required to be exercise in practice. Mr King accepted that the same lack of micromanagement was true of Mr Alcock or the previous Design Team Lead.

DWP engagement

411. The Tribunal has accepted Mrs Hartley and Mr Read's evidence that they did not set the task in detail for Mr Alcock. He and the technology strand had some ability to work out how they would do it themselves. They knew that they are delivering a milestone, for example a tested system, for a certain date. They did not detail the individual tasks that would be required. They would not be going through what are the tasks he had done. It would be 'what outcomes have you got to, what test results.' He was not there to represent Mr Macpherson's wider responsibilities. It was 'not a deputy or representative role, it was getting the expert advice on delivery progress.' They did not micromanage individuals like Mr Alcock to that level. They would expect Mr Alcock to manage his own time and his own activities within his own plan.

Conclusion – Control: how

412. The Tribunal is satisfied that Mr Alcock had substantial control in practice, but more importantly, as of right over how he was to perform his services for his end clients, DWP and Accenture. These clients only had some control as of right. Mr Alcock's substantial level of control over how he provided services was guaranteed as a matter of right in his contracts and exercised in practice. While there was some control over how Mr Alcock performed his services, this was necessary to provide a quality of service for his clients and was incident to the nature of IT projects and does not signpost a contract of service above one for services. The work Mr Alcock undertook required security and collaboration to deliver good results. The Tribunal is satisfied that it was not such as to indicate an employee relationship in the notional contracts with DWP and Accenture.

Second Condition Control: where and when

Relevant contractual terms

Accenture engagement

413. The primary site locations for the provision of Mr Alcock's services were set out in the Schedules of the LLC, but RALC was required to provide Mr Alcock's services at such locations in the UK as Accenture required: see clause 5.1.3 LLCs between RALC and Networkers; clause 3.4.2 of the first ULC between Networkers and Accenture.

414. Mr Alcock could work at his own premises, provided it was necessary for the proper performance of his services: see clause 12.6 LLC.

415. Mr Alcock was obliged to work overtime, at weekends or on public holidays when completion of an assignment became time critical (see clause 5.1.10 of the LLCs; clause 3.4.4 of the first ULC) and the hours required by Accenture: see clause 5.7 of the LLCs.

DWP engagement

416. Mr Alcock was required to work at DWP's premises as the principal location. He was only entitled to work from his own premises when the services could be *"adequately performed from there with agreement of [DWP]"*: see Schedules to the LLC between RALC and Capita.

417. Mr Alcock was required to engage in the provision of the services and/or for the number of hours or days as agreed with Capita as DWP as reasonable for the proper performance of the services: see clause 3.4.2 of the LLC. However, there was no minimum number of days or hours to be performed.

418. The hours worked by him varied and the time sheets completed by Mr Wells did not exercise control but were produced for the purposes of budgetary control and payment to the Appellant. Mr Wells did not have to seek permission to take leave as DWP employees were required to do but he did have to give advance notice.

Control: where and when

Operation of Contractual terms in practice

Accenture engagement

419. Mr Alcock and Accenture confirmed their expectation that he would work at its premises or those of its client as this is where the *"critical mass"* of supplier and resources were based. Where this was not necessary, he could work elsewhere. In practice he worked four days out of five at the premises of the fifth link client for Accenture, DWP or Police Scotland. This is because the nature of the work and critical mass required it.

420. On a day to day basis Mr Alcock had flexibility in how the work was approached and the timing of it. However, the nature of the work necessitated working closely with IT supplier and DWP staff and so Mr Alcock generally worked the same core office hours as them (9-5pm 5 days per week). Due to the tight timescales, volume of work and number of activities running in parallel, all parties (suppliers and DWP) needed to be flexible in order to accommodate each other's availability. Mr Alcock typically worked the same core house as his clients in order to maximise interaction with their staff and that of other parties engaged. He would give Accenture advance notice if he wished to take time off for e.g. holiday.

421. Per paragraph 16 of the 26 May 2016 letter:

16) Who decided when the work was to be done e.g. were there set hours or was there flexibility over the hours? Could Mr Alcock decide what hours he worked or was there an expectation Mr Alcock worked a professional working day? If so, were there any requirements laid down e.g. deadlines, timescales and targets in place?

The nature of the work required interaction with individuals from Accenture, its client or other supplier resources. Therefore most of that work was undertaken during a common set of working hours. The programme plan determined timescales to which the various programme activities were undertaken. Although outcome driven, there was an expectation that Mr Alcock (as with all Accenture, client and other supplier resources) would work a professional working day.

422. The nature of the engagements meant that there was significant need to interact with Accenture, DWP and Police Scotland resources often at short notice. The programmes were delivering to timescales agreed between Accenture, DWP, Police Scotland and senior civil service management on behalf of Government. Therefore, the work Mr Alcock performed other engagements was bound by those same timescales

DWP engagement

423. Mr Alcock carried out his work at HP's premises in Newcastle, although he attended meetings wherever he was required. Mr Alcock had to obtain DWP's consent to work from home, which he could do whether it was not necessary to work from DWP's location. He accepted that contractually he could only work at home with the agreement of DWP and that although the visibility that DWP had over his work location diminished after Paul Macpherson's departure, the contractual position remained the same. Mr Alcock accepted that in order to fulfil the role that he was contracted to do, it made sense for him to be co-located with the *"critical mass"* of people.

424. Mr Alcock had some flexibility in his working hours but worked every weekday for some hours (averaging 40-45 hours over the course of a week) during business hours. If Mr Alcock wanted to take any time off for holiday or any other reason, he would have to give advance notice to DWP. He was also expected to notify DWP immediately if he was unwell.

425. Mr Alcock stated in evidence:

Alcock: " I do not think I have ever worked precisely 9 to 5"

Alcock: "It is flexible working within the constraints of a large programme with a large body of people that need to some of the time co-located at consistent hours."

Alcock:" Some days would be much longer and other days would be shorter . So, on a day by day basis, it wasn't necessary that I was there for the full eight hours. If we had been working through an issue the day before and it had been a 12 hour piece of work, then I would effectively reduce the hours for the rest of the week , where it was possible. It wasn't always possible to do that ."

426. Mr King stated:

King: After asking him " Q. In terms of movement from project to project for both employees and contractors, how does that work in practice?" he responded ".......it will be a discussion and whether or not you want to take that on is entirely up to them"

Conclusion on control: where and when

427. On balance, the Tribunal is satisfied that in all the contracts there was a substantial degree of control held as of right by Accenture and DWP over where and when Mr Alcock worked. In practice this was driven by his client's needs to deliver outcomes on time and in an efficient manner and was never tested but the rights existed. This degree of right of control might point towards an employment relationship in a notional contract between Mr Alcock and the end clients. However, for the reasons set out below, it needs to be considered in the context of all the over control rights and the services Mr Alcock was provided.

Overall Conclusion on control

428. The Tribunal is satisfied that the right of control under the terms of the contracts and control exercised in practice by his clients, Accenture and DWP, over what and how Mr Alcock worked points towards a self-employed relationship (contract for services). However, the Tribunal is satisfied that the right of control under the terms of the contracts and control exercised in practice by his clients, Accenture and DWP, over where and when Mr Alcock worked points towards a self-employed relationship (contract for services). The Tribunal has reminded itself that it is the right of control which holds primacy rather than how it was exercised in practice.

429. Nonetheless, the Tribunal does not conclude that the overall balance is neutral in each of the contracts. Assessing the matter qualitatively, by standing back and looking at the overall picture, the Tribunal is of the view that Mr Alcock's significant right of control over what and how he worked for the end clients outweighed their right over where and when he

worked. He was not legally obliged and did not in practice perform all the roles that employees at DWP and Accenture would be required to perform. The end clients' rights of control over 'where and when' Mr Alcock worked were consistent with a contractor delivering project based arrangements rather than demonstrating a master-servant relationship, organisational position or role-based arrangement. The contractual rights of control over where and when Mr Alcock worked were required by the nature and deadlines of the tasks to be completed and the quality of the service to be provided for the end clients than the role or position to be performed or occupied.

Third Condition — consistency of other contractual terms with employment or self-employment – and All Relevant Circumstances

Economic dependence and ability to carry out other work at the same time as the contracts

Relevant Contractual terms

430. Mr Alcock was permitted to carry out other work at the same time as performing services under all three contracts. In principle, this may be a relevant indicator but is not a strong one. An absolute prohibition on working for others during the course of contracts may point toward to employment, but there are contracts for services which include retainers or exclusivity clauses and there are employment contracts which allow for other paid work to be conducted by the employee.

431. In addition to the specific clauses set out below, there were non-compete clauses and clauses protecting Intellectual Property developed or available during the course of the contracts from being used by Mr Alcock during or after the conclusion of all the contracts. These clauses are consistent with Mr Alcock working for a range of other clients during the course of his engagements. Further, these are common clauses found in agency, or consultancy contracts, and are designed to protect the clients' commercial interests. There is nothing unusual about them in this case, and they are not directed to control of Mr Alcock as an employee above being a contractor. The clauses were designed to protect legitimate commercial interests against misuse by employees or contractors.

Accenture engagement

432. RALC was entitled to provide its services to other third parties during the course of each assignment, provided this *"in no way [compromised] or [was] to the detriment of the supply of its services"* to Accenture: see clause 2.6 of the LLCs between RALC and Networkers.

DWP engagement

433. RALC was entitled to work for third parties during the course of an assignment, provided there was *"no material diminution"* in the standard of work and it did not breach the contract in doing so: clause 3.6 of the LLC between RALC and Capita.

Operation of contractual terms in practice

Both engagements

434. During the operation and course of the contracts Mr Alcock worked effectively full-time working weeks for Accenture and DWP. The duration of the assignments ran almost continuously through the relevant tax years except for a few weeks break between the first and second contracts (January to March 2013). During this time, Mr Alcock worked on

average 40-45 hours per week performing the contracts. If he worked more than 8 hours on one day he might work fewer hours the next day to balance this out, if it was compatible with the demands of the project. Mr Alcock confirmed that the operation of the contracts effectively limited him from doing other substantial work during the assignment.

435. Nonetheless, the right existed and was real. Mr Alcock accepted he might have to work up to 60-65 hours when working hardest under the three contracts. Therefore, during the majority of the time when he was working 40-45 hours under the contracts he did have the potential capacity to work an additional 20 hours a week during much of the course of the engagements if he had chosen to work very hard for long periods.

436. Indeed, Mr Alcock undertook consultancy services work for Tristec Ltd and Travel Vault, during the second contract assignment with DWP (March to December 2013) and third contract assignment for Accenture-Police Scotland (December 2013 to February 2015).

437. Mr Alcock supplied many of the invoices in support of his work. He invoiced Tristec for 10 days' consultancy services during June 2013 and 8 days during Q3/Q4 of 2013. He invoiced Travel Vault for 4 days' consultancy services in December 2013. In, the 2013-14 and 2014-15 tax years, he received 10.8% and 4.1% of his income respectively from work outside the Accenture and DWP engagements. It is accepted Mr Alcock was primarily economically dependent upon his engagements with Accenture and DWP during the relevant contracts.

438. RALC has provided no evidence of any income received from other clients in the earlier tax years (during the operation of the first contract) and there is no description of such work in Mr Alcock's witness statement. Mr Alcock worked continuously for Accenture for over 2 years from November 2010 to January 2013; it can be inferred there was no other income before the work for Tristec in December 2012.

439. Mr Alcock's contractual right and ability to work for other clients, which he exercised to a limited extent, points towards self-employment but the economic dependency on the contracts in question points towards employment. On balance, this factor is neutral.

Intention of the parties as set out in the contracts

440. All the contracts provided clauses expressly stating that there was no intention to create, nor did the engagements create, employment contracts between the end clients (Accenture or DWP) and RALC or Mr Alcock. However, as required by law, the Tribunal pays no regard to these express clauses as to the intentions of the parties.

Negotiation of the contracts

441. There is no suggestion other than all the contracts were negotiated and entered into in good faith by both parties. There was equality of bargaining power and Mr Alcock was able to negotiate the daily rate and expenses.

Business on own account

442. There was a perception by Accenture and DWP that Mr Alcock was in business on his own account and was not an employee. This is set out convincingly in the teleconference with Hartley and Read (he was perceived as being 'so far from an employee' and 'a hired hand') and in their witness statements.

443. The same was expressed on behalf of Accenture by Mr King '*Whilst Mr Alcock was a member of the team I was aware that he was a contractor and therefore would not have responsibilities for activities such as for example, Accenture employee performance, evaluation, or Accenture HR issues etc. The responsibility for such activities lay with the*

*Accenture managemen*t'. Mr Simpson's statement read in similar terms '….*whilst Mr Alcock was a member of the team with a high degree of autonomy, he was a contractor and as such would not have responsibilities for Accenture matters such as employee performance and management, or Accenture HR issues etc. The responsibility for such activities lay with the Accenture management team*'.

444. Mr Alcock explained the background to his incorporation of RALC and his genuine intent to start a new business in his witness statement. The Tribunal accepts he was trying to build a genuine business.

445. He explained his creation of a website and email for RALC and Linkedin marketing at paragraph 133 of his witness statement set out above. However, Mr Alcock's Linkedin profile in 2014, explaining his roles and experience at the relevant time in a public forum, only made historic mention of working through RALC. His experience and skills were suggested to be as part of the DWP team based upon the various roles and contract titles he held. He made no mention of being engaged through RALC.

446. Mr Alcock did not seek to market RALC through Linkedin which he suggested was a platform for marketing individuals; he sought to market his own personal talents through the Linkedin page. He indicated that it takes many years to build up a profile as an independent contractor and marketing RALC as a company would have had little utility given the competition in the market. A subsequent Linkedin profile page (from 13 September 2018) does describe him as Senior IT Consultant and Programme Manager and make reference to his projects for Police Scotland via Accenture and for the DWP.

447. Overall, Mr Alcock did not consider himself to be part and parcel of the organisations which were his end clients. More importantly, nor did they perceive him to be. He was contractually obliged not to hold himself out as such even if he had believed he was, which he did not. There were other markers of his contractor status as he set out in his witness statement such as not being part of the clients' internal meetings and holding contractor security passes.

448. RALC leased and paid for its own premises from which he worked with reasonable regularity during the relevant years – he had a young family and did not want to work at home. He also bore his own marketing and some travel expenses, although the marketing expenses were minimal.

449. He bore the cost of his own professional indemnity insurance which he was required by his contracts to hold.

450. Mr Alcock was not involved in any management, pastoral care, HR, training nor disciplinary responsibilities or obligations for any of the teams he worked with in Accenture, DWP or Police Scotland. He had no financial accountability for the teams and did not attend all their internal meetings. Employees of DWP or Accenture would be pressed more in terms of their training, development and the nature of work delegated to them. There were differences in treatment and responsibilities even if he was working on the same subject matter as employees.

451. These factors point away from Mr Alcock holding an employee relationship with the end clients in the hypothetical contracts.

Miscellaneous contractual terms including sick pay, annual leave, holiday pay, pension contributions and termination

452. Mr Alcock was not entitled to sick pay, annual leave or holiday pay or pension contributions under his contracts. This is a neutral factor and the Tribunal pays no regard to it as required by law.

453. The Termination clauses of all the LLCs are important and have initially been considered under mutuality of obligations.

454. The first contract with Accenture was brought to end early in January 2013 when the schedule stipulated it was to run to the end of April 2013. Mr Alcock worked 10 days in January 2013 in the hope the project would be extended (which it was not) for which he was not paid.

455. While he was entitled to 30 days notice under the contract from Accenture (via Networkers) he was not given 30 days notice of the termination. Further, there was no entitlement to be paid for those 30 days and he did not seek to claim for them. As of right and in practice, if there was no work available during the notice period he would not be offered any – there was no obligation from the clients to offer it to him.

456. Accenture demonstrated by their conduct in terminating the first contract midway through the final schedule, its right and its belief that these contracts could be terminated at any time without consequence. That this happened is not consistent with a relationship in which mutuality of obligations or an employer-employee relationship is present. Mr Alcock could not simply be paid for making himself available which an employee would do even if there was no work for them to do.

457. Mr King explained this in evidence:

Q: " In terms of paying both your contractors and employees, what happens when there is no chargeable work to be done? How does that differ between the two?"
A: " So, for contractors fairly straightforward. For us if there's no chargeable work, then it's pretty much it will be a notification that, you know, terminate the contract if it's before the end of that individual's contract ."
A: ".....But if the work dries up, then the contractor will leave Accenture's employment ultimately ."

458. Whilst the schedules to the LLCs provide for a 30 day notice period, Accenture was not contractually obliged to offer Mr Alcock any work. There was no minimum number of hours or days work to be provided under the contract. There were no core hours stipulated. Ultimately, Mr Alcock's end client could simply refuse to offer work for 30 days, and he could not charge them. Mr Alcock could turn up at the offices of Accenture or of its client and make himself available for work, but could not bill for any work, unless some was provided, because he could only invoice for work completed. As Mr King said, the contractor, Mr Alcock, could be terminated immediately. Mr Alcock had no rights or security under the contracts or in practice. Unlike Accenture employees he could not be returned to the 'bench' and be paid while awaiting a fresh assignment.

459. Likewise, in the contract with DWP (via Capita) Mr Alcock was not entitled to any notice period on termination. This second contract was brought to an end and not extended in December 2013. It could be ended at any time within the duration of the contract if there was no work available. If the DWP chose to abandon the projects there was no contractual basis upon which Mr Alcock could demand further work during the course of the contract. In a mirrored fashion, Mr Alcock would have been at liberty to terminate the Capita/DWP contract if he had chosen to with no notice and with no liability.

460. The termination clauses in all contracts point towards self-employment in the hypothetical contracts between Mr Alcock and the end clients. The Tribunal has therefore come to similar conclusions on termination and mutuality of obligation, albeit on different facts, that Judge Dean did when considering the similarly worded Capita contract body (excluding the Schedule) at paragraphs 112 to 116 of *Jensal Software Limited*

461. The Tribunal accepts Mr Leslie's submission on behalf of the Appellant:

'There is a very clear distinction here. And Mr Alcock is clearly self-employed, because he fits the latter sequence of events. He agreed the work to be done, and only that work to be done. Then he got to work, and worked very hard indeed to meet the outcome goals. And then he billed only for the work done. His contract specifically states that he can only charge for work actually completed. And to top it off, in one instance they did cut the project short at a moment's notice, and he was not paid.

There is no question at all that he could charge just for making himself available, and neither was the client obliged to give him work or allocate work – the work has already been agreed upfront.

So since there was no minimum obligation to provide work and no ability to charge for just making himself available, it is clear that the key elements of mutuality, in the work/wage bargain sense, are missing, and therefore he cannot be considered an employee.'

Financial risk: profit and loss

462. The opportunity to profit or make a loss during the contracts is also considered.

Relevant contractual terms

Accenture engagement

463. Payment for fees was made weekly in arrears and expenses would be paid in line with Accenture's policies: see Schedules to the LLCs.

464. RALC was liable to Networkers for any loss, damage or injury resulting from a breach of contract or any deliberate or negligent act etc: see clause 14.1 LLCs. However, it was not liable for any consequential losses: see clause 14.2 LLCs.

DWP engagement

465. Payment of fees was normally made within ten working days of a timesheet being approved by DWP and expenses would be paid if agreed in writing by DWP or Capita: see clauses 4.5; 5.3 of the LLC.

466. RALC was liable to Capita for any loss or damage arising from any death, personal injury or fraud as a result of any negligence in carrying out the services: see clause 10.1 of the LLC. However, it was not liable for any consequential losses: see clause 10.6 LLC.

467. Contract clause 3.8 of the LLC also provided:

'The Contractor shall promptly rectify at its own expense any defects in the Services, provided that such defects are made known to the Contractor in writing prior to completion of the Services or termination of this Agreement for any reason.'

Operation of Contractual terms in practice

Both engagements

468. In respect of RALC's ability to make a profit or loss: Mr Alcock accepted that he would not make a loss. This is given his expenses were generally reimbursed (with the

consent of DWP in their case). Mr Alcock accepted that he was not at any risk of having a bad debt regarding his engagements with Accenture and DWP.

469. There was some opportunity to profit for him from the assignments given his right and the ability to undertake additional work outside of the contract or agreeing paid overtime within the contracts. The fact that long hours on these assignments restricted him from earning significant money elsewhere did not mean there was no opportunity for Mr Alcock to profit – if he had chosen to work extremely hard for longer periods he could have profited further.

470. Mr Alcock confirmed that it was not necessary for him to rent business premises for the purposes of his engagements with Accenture and DWP even though he did. The reasons he (or RALC) rented the premises was to have space to carry out workshops for the uConstruct venture and develop the ARIA application and also to have somewhere outside his home to work.

471. While Mr Alcock was required under the contracts to obtain business insurance, he was at some financial risk, as he would have been mainly liable to the agencies, Networkers and Capita, for any (non-consequential) losses that arose as a result of certain proscribed circumstances such as negligence.

472. Further, in relation to the Capita contract he was at further financial risk - he was liable to rectify defects at his own expense. Any defective work had to be remedied by the Appellant at its own cost (see clause 3.8). Moreover, the Appellant was responsible for certain costs and losses in the event of negligence or breach of contract and was required to hold the necessary business insurance. There was also an administration fee payable of £100 if the Appellant wished to assign the contract. These factors point towards the DWP engagement being a contract for services.

473. Mr Alcock was not required to invest in significant equipment or other resources to perform the engagements. He was given equipment including a laptop by both Accenture and DWP, however this was for reasons of connectivity to the relevant systems and for the security of his work rather than to recompense him for an expense.

474. On balance, the Tribunal considers the opportunity for profit and loss being a mild factor indicating self-employment in relation to Accenture but moderate factor indicating self-employment in relation to DWP.

Conclusion on the first issue – IR35 and the hypothetical contracts

475. The parties accept that the burden of proof rests upon the Appellant in relation to the first issue. The standard of proof is the balance of probabilities which the Tribunal has applied in reaching its findings of fact.

476. In assessing the reliability of the oral evidence, the Tribunal is satisfied that all of the witnesses gave honest accounts to the best of their recollection. The oral evidence provided assistance where the terms of the contracts did not address all relevant circumstances. However, in relation to the minor matters where a difference in recollection arose, the Tribunal accepted the evidence of Mr Alcock, Mr King, Mrs Hartley and Mr Read.

477. When considering all three stages of the *Ready Mixed Concrete* tests and all the relevant circumstances, the Tribunal is satisfied on balance that the hypothetical contracts between Mr Alcock and his end clients, DWP and Accenture, would be contracts for services (self-employment) for all the reasons set out above.

478. The Tribunal has set out in detail above the differences between the DWP contracts and the Accenture contracts and not applied a blanket approach.

479. The contractual rights in the case of the DWP engagement (the second contract) indicate a contract for services (self-employment) in the notional contract with Mr Alcock (see for example the termination without notice clause, the remedying own defects, the lack of mutuality of obligations clause etc) to a greater extent than in the Accenture contracts. The operation of the contract with DWP, as explained by Mrs Hartley and Read, also firmly indicates the same. Nonetheless, it is satisfied on balance that the notional contracts between Mr Alcock and Accenture would also be contracts for services based upon the rights and operation of the contracts - the early termination of the first contract is a good example of this.

480. In each of the contracts, the Tribunal is of the view that although Mr Alcock provided his services for payment, the lack or insufficiency of mutuality of obligation demonstrates the notional contracts to be ones for the provision of services. DWP and Accenture paid Mr Alcock a daily rate for the work carried out in accordance with the agreed rate as invoiced but there was no contractual obligation beyond that. The Tribunal is satisfied that there was no more than an expectation as to the days and hours that would be worked each week and it did not crystallise into an obligation. Mr Alcock would only be paid if he worked with no guaranteed obligation on the part of his end clients to provide him any work during the contracts.

481. While the personal service limb of the Ready Mixed Concrete test was satisfied, it is a necessary but not sufficient requirement for an employment relationship. Further, it was only on the basis of the ULCs that the Tribunal found that the rights of substitution were significantly fettered – these ULCs were not available to nor within knowledge of Mr Alcock but must be considered nonetheless.

482. The Tribunal is also satisfied that, on balance, the degree of control as of right and as exercised by the end clients over Mr Alcock indicates that the notional contracts would be ones for services (self-employment).

483. Finally, the other contractual terms indicate, on balance, (more so in the case of the DWP contract) that the notional contracts would be ones for services.

484. The Tribunal has stood back, applied the three stages of the *Ready Mixed Concrete* test, considered all the relevant circumstances including "painting the picture" and taken into account whether Mr Alcock was in "business on own account", the Tribunal is satisfied the hypothetical contracts with his end clients would be ones for services and therefore not caught by the IR35 legislation.

The hypothetical contracts constructed

485. The Tribunal has weighed up all the evidence and come to the conclusion that the hypothetical contracts between Mr Alcock and each of the end clients would provide as follows:

(1) There would be no mutuality of obligation between Mr Alcock and DWP and Accenture expressly stated in the contract. There would be no obligation for Accenture nor DWP to provide a minimum amount of work (number of days or hours) to Mr Alcock during the course of the contract or thereafter. Mr Alcock had the right not to accept or refuse to accept work from each during the course of the contract. There would be an obligation for both Accenture and DWP to pay Mr Alcock only if work was offered and undertaken.

(2) The termination provisions of each contract would provide for no notice period needing to be given by DWP and 30-days notice by Accenture to Mr Alcock. Notice could be given by either client without reason. There was no entitlement to any paid notice from either client nor would Mr Alcock have the right to claim payment for work done outside of the cancellation of the contract. Therefore the contracts could be cancelled at any time by either client for any reason without financial obligation.

(3) There would be a substitution clause in both the Accenture and DWP contracts but it would be fettered in that each client would have the ability to consider and decide whether to accept substitutes offered by Mr Alcock based on the suitability, qualifications and expertise of the substitute. However, in relation to the Accenture contract, it would be able to refuse to accept a substitute unless Mr Alcock was unable to work. In the DWP contract, it would have a further right of absolute and unqualified right to veto any proposed substitute.

(4) There would be not be any significant control over what work Mr Alcock performed and how he did so within the specific Accenture and DWP's projects for which he was contracted so long as he enabled the ultimate outcome to be delivered in collaboration with their teams. Mr Alcock was to collaborate with the clients to agree the best way in which to deliver those parts of the project for which he or his team was responsible. In the very unlikely event that a dispute arose between the parties which could not be resolved over what and how Mr Alcock's work was to be delivered, this would result in either party terminating the contract rather than any direction by the clients for Mr Alcock to perform work of a nature or in a manner he could not agree to.

(5) Any work for both Accenture and DWP was to be conducted mainly within business hours for an average of 40-45 hours per week but the contract would specify a working week with variable hours and provision to provide variable cover, in case Mr Alcock was indisposed.

(6) Any work for Accenture and DWP was to be conducted by Mr Alcock at the clients' office unless working at home or outside those hours was reasonable ie. did not interfere with delivery of his objectives. Mr Alcock would have to inform his clients of when he was working from home but they could not unreasonably refuse to let him do so.

(7) The hypothetical contract would have to have a clause, which enabled Mr Alcock to perform the consultancy services in the course of each assignment for Accenture and DWP at his own premises when reasonable. Mr Alcock would not be required to but could pay for commercially leased business premises, with broadband, web domain, business e-mail domain, conference call facilities, etc.

(8) Mr Alcock would have to give advance notice to both clients of any holidays or non-working days he was taking but it could not be unreasonably refused.

(9) Mr Alcock was permitted to work for other clients during the course of contracts with both Accenture and DWP so long as this did not interfere with the delivery of his projects within each of their assignments.

(10) Mr Alcock was to have no sick pay, paid holiday or pension entitlement from either Accenture or DWP.

(11) Mr Alcock was not to hold himself as working out for either DWP or Accenture. There was no intention that they be considered his employer. Mr Alcock could not represent, deputise or act on behalf of the clients.

(12) Mr Alcock was to carry his own professional indemnity insurance.

(13) Mr Alcock was not to attend DWP or Accenture internal meetings which were not specific to delivery of the projects in which he was engaged.

(14) Mr Alcock was not to have any responsibility or obligation for training himself or others, HR, pastoral or wider management responsibilities than those necessary to collaborate on projects. He was not subject to nor responsible for disciplinary procedures for either DWP or Accenture.

(15) Mr Alcock had no financial responsibilities, accountability or obligations for either DWP or Accenture.

(16) The contracts for DWP and Accenture would be for fixed terms and based upon delivery of specific projects rather than filling specific job roles or positions.

(17) The contracts with DWP and Accenture would be at an agreed daily rate of pay, which left Mr Alcock to deliver the projects, effectively and efficiently.

(18) Mr Alcock would be liable in certain circumstances in negligence to the Accenture and DWP for errors committed and in relation to DWP he would have to remedy errors at his own cost.

Second Issue – Carelessness and extended time limits

486. In light of its conclusion on the first issue and non-applicability of the Intermediaries legislation, there is no need for the Tribunal to consider the second issue. Therefore, the Tribunal does not go on to consider whether Mr Alcock, RALC or Robson Laidler acted carelessly with regards to the returns for the tax years 2010-2011 and 2011-2012. The Tribunal does not need to consider the lawfulness of the extension of time limits and competence of the Determinations for those tax years.

Conclusion on the appeal and disposal

487. As a result of the Tribunal's conclusion on the first issue, all HMRC's Determinations, decisions and notices are cancelled. The Appellant is not liable to pay the Income tax and NICs assessed by HMRC. The appeal is allowed in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

488. 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.

RUPERT JONES

TRIBUNAL JUDGE

RELEASE DATE: 3 MARCH 2020