

[2009] UKFTT 65 (TC)
TC00006

*Income tax – PAYE determinations – status – whether flying instructors
employees or sub-contractors – the latter
National insurance – whether flying instructors employed earners – no*

THE SPECIAL COMMISSIONERS

SHERBURN AERO CLUB LIMITED

Appellant

- and -

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

Respondents

Special Commissioner: JOHN CLARK

Sitting in public in London on 9-13 February 2009

Sarah Thomson of Accountax, Chartered Tax Advisers, for the Appellant

**June Kennerley of HM Revenue and Customs Local Compliance Appeals Unit for the
Respondents**

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DECISION

1. This appeal concerns an employment status dispute. Sherburn Aero Club Limited (“SAC”) has appealed against income tax determinations under Regulation 80 of the
5 Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) and Notices of Decision of National Insurance Contribution liability under s 8 of the Social Security (Transfer of Functions) Act 1999.

The facts

2. The evidence consisted of two bundles of documents, part of the second bundle
10 not being agreed. In addition, a copy of the current version of SAC’s “Flying Order Book” was handed up during the course of the hearing. Witness statements were provided by Jonathan Anderson, Michael Butler, Janet Coster, Brian Payne, Christopher Stringer and Adrian White on behalf of SAC and by Paul Rogers, Kevin Sleight and David Turner for the Respondents (“HMRC”). All the witnesses gave oral
15 evidence; there was no cross-examination of Mr Rogers.

3. From the evidence, including the brief statement of facts not in dispute, I find the following facts. I deal with certain other evidence, including disputed evidence, later in this decision.

The status review

4. Mr Sleight, an Employer Compliance Officer with HMRC, carried out a pre-
20 arranged visit to SAC on 7 February 2005. SAC was represented at the meeting by Mr Skelton, responsible for SAC’s payroll, and by Roger Levy, who was a part-time accountant for SAC and had at that time been in post for only a few months. In the course of the meeting, Mr Sleight concluded that employment status might be an
25 issue, and asked various questions concerning the terms on which flying instructors were engaged by SAC.

5. Mr Sleight referred the case to Mr Rogers, a Status Inspector with HMRC. Mr Sleight received from Mr Levy a copy of HMRC’s note of the meeting with various
30 comments. Mr Sleight then wrote to some of SAC’s past and then current flying instructors with a view to discussing the terms of their engagements with SAC. He interviewed one instructor, Mr Guppy, by telephone, and met two others, Mrs Evans and Mr Turner. Mr Sleight passed on the information to Mr Rogers. On 15 August 2005 Mr Rogers wrote to Mr Levy at SAC setting out his conclusion that the flight
35 instructors were employed in respect of their engagements with SAC for the period from April 1999 to the date of his letter.

6. SAC referred the correspondence to their accountants, Child & Co. In the course of the subsequent exchange of correspondence, Child & Co pointed out that the question of the flying instructors had been the subject of correspondence on three
40 previous occasions, with the Inland Revenue in 1989 and 1996, and with the Contributions Agency in 1998, and that none of this correspondence had considered re-categorisation to be appropriate.

7. HMRC were unable to trace correspondence relating to 1989 and 1996, but did obtain a copy of a report by the Contributions Agency. Mr Rogers stated in a letter to Child & Co dated 28 April 2006 that: “There is no indication in any part of the report that the status of the Flying Instructors was considered at all.”

5 8. On 30 May 2006 Child & Co sent Mr Rogers a letter enclosing a copy of the Contributions Agency’s letter to SAC dated 25 September 1998, an exchange of letters between Inland Revenue York 2 District dated 18 April 1996 and SAC dated 23 July 1996, and a letter from Inland Revenue York 2 District dated 7 November 1989. The Contributions Agency letter stated: “Part-time flying instructors are
10 correctly being treated as self-employed and this can continue so long as the conditions are as reflected in the letter dated 7 November 1989 issued by the Inland Revenue.” The 1996 correspondence did not establish status, but referred to the 1989 letter. The 1989 letter set out certain facts relating to the instructors, and concluded on the basis of those facts that the flying instructors could be accepted as self-employed.

15 9. In his letter dated 22 June 2006 Mr Rogers accepted, in view of the correspondence supplied, that the flying instructors should be treated as self-employed until 15 August 2005, the date of his letter of opinion on their status.

20 10. Despite further correspondence and discussions, no agreement was reached between SAC and its advisers and HMRC as to the status of the flying instructors. On 12 October 2007 Mr Sleight wrote to Mr Levy at SAC enclosing Determinations under Regulation 80 for the years 2006-06 and 2006-07, and Notices of Decision in respect of the liabilities for National Insurance Contributions.

25 11. Notice of appeal against the Notices of Decision and Determinations was given on SAC’s behalf by Accountax on 26 October 2007. Appeals in respect of certain individuals were subsequently withdrawn. (There were differences between the list of individuals provided by Accountax and the list set out in Ms Kennerley’s skeleton argument; I refer to this below.)

Terms of engagement

30 12. Flying instructors might approach SAC to see whether they could be added to the list of approved instructors, or in some cases (such as that of Mr Turner) SAC might approach them to see whether they would like to become an approved instructor. In order to be added to the list, an instructor had to be interviewed by the Chief Flying Instructor (“CFI”). The purpose of the interview was to check the instructor’s ratings, ie what forms of instruction that individual was qualified to give, and also to check
35 whether he or she was able to carry out the task of instructing those seeking relevant forms of flying qualification. If the CFI considered that an individual was suitable, details would be passed to the Board of SAC, which would in most cases accept the CFI’s advice. Approval showed that the instructor met the standards required.

40 13. Some of the instructors had written contracts setting out the terms of their engagement, but some did not. During 2008 (ie after the period covered by the present appeals) instructors were provided with written contracts. In more than half of those cases, the instructor and SAC signed an “Addendum” indicating the parties’ view that

the new contract was a true reflection of the way they had worked together previously, and reiterated in written form the relationship which had always existed. (I comment below on the effect of such documents.)

5 14. Instructors provided instruction in aircraft owned by SAC. An individual wishing to have flying lessons had to be a member of SAC. Instruction was offered on the basis of a single charge made by SAC for the composite service of the use of the aircraft and the provision of the instruction. Lessons had to be booked through SAC; the “student” would contact SAC’s “Flight Desk” to request a lesson. A member of the Flight Desk staff would then arrange for the hire of an aircraft and also for the booking of a “slot” with an approved instructor.

15 15. Instructors notified SAC in advance of the dates and times when they would be willing and available to provide instruction. It did not follow that a particular instructor would then be asked to work on each of those days. The instructors would check with the Flight Desk to see whether there was any work. The system was flexible.

20 16. There was also flexibility for the instructors. Having previously given notice of availability, an instructor could change his or her mind. This could be notified to the Flight Desk in advance, or up to the day when the instructor had been expected to give a lesson. Instructors might cancel and so become unavailable due to sickness, bad weather or because they considered that there was insufficient work to make it worth their while to travel to SAC’s airfield. SAC did not impose any sanction on instructors for cancelling, even if this was at very short notice. Mr Butler, who was SAC’s Flight Centre Manager, did however acknowledge that if an instructor frequently cancelled and proved to be completely unreliable, the only sanction available to SAC would be to stop using the services of that instructor.

30 17. There had been occasions when instructors had telephoned SAC from home to say that they considered the weather to be unsuitable for flying and therefore they would not be attending. There had also been occasions when instructors had telephoned to find out how many slots had been booked for them for a particular day and, if they thought this an insufficient level of work, cancelling that day’s engagement.

18. If a student cancelled a lesson with less than 24 hours’ notice, the Flight Desk would cancel the flight and the student would be required to pay a “no show fee” of £22. From this sum, £17 would be provided to the instructor.

35 19. If SAC cancelled lessons, for example where there were adverse weather conditions or where aircraft were unavailable, there would be no payment to the instructors for the slots cancelled by SAC. If an instructor actually attended at the airfield in accordance with a booking and flying did not take place on that day, SAC did pay the instructor an “attendance allowance” of £7.50. Students were not charged for loss of flying due to the weather.

40 20. Instructors were paid on the basis of a standardised hourly rate. The actual rate payable depended on the type of instruction being given. Instruction leading to a

5 “PPL” (Private Pilot’s Licence) carried an hourly rate less than that for such qualifications as “Night Rating” or “Instrument Meteorological Conditions”. The hours were calculated as “Hobbs hours”. These were the hours recorded on the Hobbs meter in the aircraft, which showed the time during which the aircraft was ready to fly or was flying. Mr Turner indicated that a slot as shown on the large whiteboard maintained by the Flight Desk was 90 minutes, but with changeover time this would only be 1 hour as shown on the Hobbs meter. Payment was made, again on a standardised basis, for ground-based instruction, except where such instruction was included as a normal part of a flying lesson.

10 21. The instructors were free to work elsewhere, but were not able to advertise such “external” services at SAC’s premises, nor was there any form of advertising for the services which they performed for SAC.

15 22. Instructors had to follow the syllabus laid down by the Civil Aviation Authority (“CAA”). It was desirable to follow through the elements of the course in numerical order, but there was a degree of flexibility available to the instructor, who could decide the precise order for a student’s particular circumstances. Discussions between the instructors and SAC officials, in particular including the CFI, took place in order to evolve best practice in giving instruction to students, as well as to take account of safety considerations. Where there were differences of view, the ultimate decision might have to be left to the CFI. The instructors did not consider that SAC could tell them how to teach the students. However, the instructors accepted that it was desirable to ensure that a student who had been learning with one instructor would receive uniform training if at a subsequent stage in the course another instructor was allocated to that student.

25 23. In common with anyone else using the airfield, instructors were subject to the flying orders set out in the Flying Order Book. The 2008 version (the only version provided in evidence) included the following provision in the “Authorisation” section: “No flights shall take place at Sherburn airfield without permission of the Chief Flying Officer or his nominated deputy.” A further order provided: “All flights that take place under the jurisdiction of [SAC] shall be authorised by the CFI or by a [SAC] instructor.” In practice, instructors authorised their own flights.

Arguments for SAC

24. Ms Thomson raised the following points on the facts:

35 (1) The formal witness statements and oral evidence of the witnesses was to be preferred to HMRC’s notes of meetings;

(2) As to mutuality of obligations, there was no obligation on SAC to offer work to the flying instructors and no obligation on the flying instructors to accept and perform any work, so that there were no mutual obligations to offer and to perform work;

40 (3) In relation to personal service and substitution, although there was no specific substitution clause in the written contract, SAC was willing to

accept a flying instructor who had been checked and approved by SAC, and thus there was an implied right to provide a substitute;

5 (4) The question of “control” could be subdivided into four separate questions. On the issue of “control as to what?”, once an appointment had been booked, it was for the flying instructor alone to decide what work was to be done. With regard to “control as to when?”, the flying instructors decided when they would be available to provide their services by indicating their availability to SAC. The issue of “control as to where?” was dictated by the nature of the job rather than that of the flying
10 instructors, as the runways, fuel and aircraft were situated at SAC’s airfield. In any event, subject to CAA, local and safety restrictions, the instructors could decide where they flew with the students. In relation to “control as to how?”, SAC did not tell the flying instructors how to instruct the students;

15 (5) As to method of payment, financial risk and ability to profit, there was no payment if the weather was unsuitable and the instructor did not attend, nor where the instructor felt unfit to fly. Some instructors raised invoices; others kept records and checked any discrepancies with Mr Butler, the Flight Centre Manager. In either case this ran the risk of delays or errors in
20 payment. There were substantial costs for instructors in maintaining their ability to continue giving instruction, as well as to obtain their qualifications. Certain risks were not in practice covered by insurance. There was limited scope for opportunity to profit, but the instructors could seek more work by giving more available dates to SAC, subject to work
25 being available;

(6) In relation to intention, both SAC and the flying instructors intended their relationship to be one of self-employment;

(7) Looking at other factors, the instructors did not receive holiday pay, sick pay or other “employee style benefits”. SAC had on occasion made
30 cash gifts at Christmas to some instructors; these were not “bonuses”, being nominal amounts unrelated in any way to the instructors’ performance. Some instructors had been provided with jackets embroidered with SAC’s logo, but these were not uniform and the instructors were not required to wear them. The flying instructors provided
35 their own flying and training equipment. It was impractical for them to provide their own aircraft. Ms Thomson emphasised that there was no exclusivity between the parties.

25. She submitted on the basis of the evidence as a whole that there was a clear lack of control, lack of mutuality of obligations and a lack of personal service, that the
40 instructors assumed financial risk, and that the parties intended to have a self-employed relationship.

26. Ms Thomson referred to the factors mentioned by McKenna J in *Ready Mixed Concrete v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515, [1968] 1 All ER at 439-40, which had been described by the Court of Appeal in

Montgomery v Johnson Underwood [2001] EWCA Civ 318 (reported at [2001] IRLR 204) at [23] as the “irreducible minimum for a contract of employment to exist”.

27. Mutuality of obligations referred to an obligation to accept and perform work. HMRC’s argument, that mutuality was established where work was simply
5 undertaken and the worker was paid, confused the true meaning of mutuality with mere consideration flowing under any bargain. This had been corrected by Peter Clark J in *Propertycare v Gower* [2003] UKEAT/0547/03/ZT at [9](3). Ms Thomson referred to the comments of Park J in *Usetech v Young* [2004] STC 1671 at [60], and to mine in *Parade Park Hotel & Another v Revenue and Customs Commissioners*
10 [2007] STC (SCD) 430 at paragraph 86. She argued that the necessary mutual obligations did not exist in the present case.

28. HMRC might argue on the authority of *Cornwall County Council v Prater* [2006] EWCA Civ 102 that it might be possible to have mutuality within specific contracts. SAC did not disagree with this as a broad statement. However, it was necessary to
15 establish whether mutuality did exist in “one-off jobs”. On the facts in the present case, Ms Thomson argued that there was no obligation on the instructors to perform a given flying slot even where they had already indicated that they could do it. SAC understood that the instructors might for any reason withdraw from any agreed engagement. On the basis of the lack of mutuality as part of the “irreducible
20 minimum”, the flying instructors could not be employees.

29. Where a person had a right to use a substitute and was not obliged to perform the work personally, the requirement for personal service had not been fulfilled and McKenna J’s first pre-requisite for a contract of service would be absent. Although the flying instructors usually performed the services themselves, this did not negate
25 the existence of their right to provide a suitable substitute. The important issue was the existence of such a right, rather than the extent to which it was actually used. Ms Thomson referred to the decision of the Special Commissioner in *First Word Software Ltd v Revenue and Customs Commissioners* SpC 652, [2008] STC (SCD) 389 at paragraph 61.

30. In relation to control, Ms Thomson referred to McKenna J’s second test in *Ready Mixed Concrete*. She argued that there was insufficient control by SAC over the flying instructors to amount to a master/servant relationship. In *Staples v Secretary of State for Social Services* [1985] (unreported) it had been held that although the hotel had had control as to what was cooked, it did not have control as to how the chef
35 cooked the food. She contended that the most significant factor when considering control was the “how”. The importance had also been highlighted in *McManus v Griffiths* [1997] STC 1089 and in *Castle Construction (Chesterfield) Ltd v Revenue and Customs Commissioners* [2008] SpC 723, [2009] STC (SCD) 97.

31. SAC acknowledged that the flying instructors were subject to certain external
40 regulations such as those imposed by the CAA. However, these regulations were necessary for legal and safety reasons and did not amount to SAC having control over the flying instructors. Ms Thomson referred to the comments of the Special

Commissioner in *Lewis t/a MAL Scaffolding v Revenue and Customs Commissioners* [2006] STC (SCD) 253 at paragraph 49.

5 32. Control was part of the irreducible minimum required to create a contract of employment. Ms Thomson submitted that the required element of control was missing in the present case.

10 33. An alternative approach had been developed in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173; this was to ask whether the person in question was “in business on his own account”. This test was not universally approved. Ms Thomson submitted that the majority of the relevant factors fell in favour of SAC. Whether this test was used, or the more fundamental test of identifying the pre-requisites of a contract of service, in either case the flying instructors could not be said on the balance of probabilities to be employees of SAC under contracts of service. Applying the approach set out in *Hall v Lorimer* [1994] STC 23, looking at all the personal factors and painting a picture from the
15 accumulation of detail, it was possible to be self-employed when all that the individual provided was specialist skills and no equipment.

20 34. SAC accepted that the appeal could not succeed simply on the basis that the parties wanted a self-employed relationship. However, the intention of the parties was relevant. This had been confirmed in *Express and Echo Publications v Tanton* [1999] IRLR 367. A mere label would not change the nature of an agreement. In *Massey v Crown Life Assurance Co* [1978] 2 All ER 576 the Court of Appeal had indicated that in cases of doubt it was open to the parties to stipulate what the legal situation between them should be.

25 35. Ms Thomson acknowledged that some factors might not help SAC’s case. The flying instructors did not have sophisticated business organisations or premises, nor did they provide the aircraft. She submitted that in the context of the irreducible minimum these factors were of very limited significance. They were not engaged to provide aircraft, but to provide instruction. The longevity of the relationship between some of the instructors and SAC proved nothing.

30 36. Looking at the relationship as a whole, she submitted that it should be determined as one of a contract for services; the flying instructors were not “employed earners” working under a contract of service. The appeals should be allowed and the Notices and Determinations discharged.

Arguments for HMRC

35 37. Ms Kennerley referred to the onus and standard of proof. The onus of proof rested with SAC to show that the Determinations and Decisions should be varied, and the standard of proof was the balance of probabilities.

40 38. A key question in determining whether or not an individual was an employee was whether the contract was one of service rather than one for services. The courts had adopted an approach of considering all the factors relevant to the status issue and

weighing up the factors pointing towards the existence of a contract of employment and those which pointed away from such a contract. This had been considered in cases such as *Carmichael v National Power plc* [1999] 4 All ER 897, [2000] IRLR 43, and *Ready Mixed Concrete*. HMRC submitted that in such an approach, the presence or absence of any one factor was not conclusive, as the decision depended on the combined effect of all the relevant information.

39. Ms Kennerley considered the tests applied by the courts. She referred to the three conditions identified by McKenna J in *Ready Mixed Concrete*. The first contained two elements, the respective contractual obligations between the parties and the requirement that the work must be performed by the worker personally (although McKenna J had commented that a limited or occasional power of delegation might not be inconsistent with a contract of service). The approach had subsequently been approved by Buckley J in the Court of Appeal in *Montgomery v Johnson Underwood*, and previously by the House of Lords in *Carmichael*. Cooke J in *Market Investigations* had added the “in business on his own account” test, subsequently approved by the Court of Appeal in *Hall v Lorimer*. In *Warner Holidays Ltd v Secretary of State for Social Services* [1983] ICR 490 it had been held that neither the intention of the parties nor the test of control over the form and mode of execution of the work were conclusive factors in determining the contractual relationship between the parties for the purposes of liability for social security contributions; the various elements making up the contract had to be looked at in aggregate to arrive at a proper determination of the parties’ relationship.

40. In examining the factors relevant to the question whether there was a contract of employment, the courts had been concerned not only with the written terms of a contract (if a written contract existed) but also, where the written contract did not represent the whole bargain or where one or more terms had been varied, with the practical circumstances of the relationship between the parties. Such circumstances were important in examining those factors, as the terms of the contract could be express or implied from the parties’ actual conduct.

41. It had been held that a declaration by parties to a contract that a worker was to be self-employed should be wholly disregarded, and not merely treated as inconclusive, if the remainder of the contractual terms governing the realities of the relationship showed that it was one of employer and employee. It had been held by the Employment Appeal Tribunal in *Redrow Homes (Yorkshire) Ltd v Buckborough and Sewell* [2008] UKEAT/0528/07/LA that a court could find that a contractual provision could be disregarded where in reality neither party intended the contract (or relevant provision) to be effective or to constitute an effective obligation between them.

42. SAC had declared that the instructors were engaged on a self-employed basis. However, HMRC contended on the evidence that, whatever the intention of the parties, the instructors were in fact employees of SAC.

43. In relation to mutuality of obligations, Ms Kennerley had set out detailed submissions in her skeleton argument. However, HMRC were content to accept the analysis set out in my decision in *Littlewood (trading as JL Window and Door*

Services) and another v Revenue and Customs Commissioners [2009] STC (SCD) 243.

44. The requirement for personal service had been set out in the first of McKenna J's conditions in *Ready Mixed Concrete*. In certain circumstances the courts had held a
5 genuine right to substitute another worker in one's place to indicate self-employment, as in *Express and Echo Publications v Tanton*. However, in the *Redrow* case Burke J in the Employment Appeal Tribunal had referred to Elias J's conclusion in *Consistent Group v Kalwak* [2007] IRLR 560 that as a matter of law a limited or occasional right
10 of substitution was not inconsistent with the existence of an obligation to perform work personally. Ms Kennerley submitted that this was consistent with the judgment of Henderson J in *Dragonfly Consultancy Ltd v Revenue and Customs Commissioners* [2008] STC 3030. She submitted that on the evidence the instructors had no right of substitution and were required to give personal service.

45. In cases of skilled workers and professionals the factor of control had been found
15 to be less significant in determining employment status, as employees of such nature had to exercise discretion and judgment. In such cases, Ms Kennerley submitted that direct control might not be an appropriate test; she referred to *Wickens v Champion Employment Ltd* (EAT) [1984] ICR 365 and to *Montgomery v Johnson Underwood Ltd*. In *Ready Mixed Concrete*, McKenna J had cited the statement in *Zuijus v Wirth Brothers Pty Ltd* that "What matters is lawful authority to command, so far as there is
20 scope for it." McKenna J had also referred to *Humberstone v Northern Timber Mills*, in which the question was seen to be the ultimate authority over the worker rather than whether there was actual supervision.

46. The power of dismissal or suspension might indicate a relationship of
25 employment. If the "engager" could dispense with the worker's services by giving a certain period of notice, this pointed to a contract of service, as an independent contractor could not be "dismissed"; Ms Kennerley referred to *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 3 All ER 817. HMRC submitted that on the evidence SAC vetted and appointed all of the instructors and similarly had the
30 power to dismiss them, and that this was an indication of a contract of service.

47. HMRC accepted that the flight instructors were highly skilled individuals, but
35 contended that as such "control" might be a less significant factor in determining employment status. HMRC submitted that the evidence showed that the instructors were sufficiently controlled by SAC for their relationship to be consistent with a contract of service.

48. Independent contractors or self-employed people might be expected to provide their own equipment. In the case of the flight instructors the equipment was supplied by SAC, and only incidentals were provided by the instructors. This was an indication of employment.

49. As the control test might not be decisive, particularly in the case of skilled
40 workers who had the discretion to decide how their work should be done, Ms Kennerley submitted that the *Market Investigations* "in business on own account" test

was appropriate. She submitted that on the evidence the flying instructors were not in business on their own account while carrying out their work for SAC. There was little or no evidence of individuals bearing any financial risk or fulfilling any of the other tests mentioned by Cooke J as relevant to the test.

5 50. She referred to *Stevenson Jordan and Harrison v MacDonald and Evans* [1952] 1
TLR 101 in which Denning LJ had contrasted the positions of an employee and an
independent contractor. An employee was employed as part of the business and his
work was done as an integral part of the business. In contrast, the work of an
10 independent contractor, although done for the business, was not integrated into it but
was only accessory to it. She submitted that on the evidence the flight instructors in
carrying out their work for SAC were “part and parcel” of SAC’s organisation.

51. Ms Kennerley argued that the absence of wages or salary and holiday pay was not
conclusive. Where the parties had declared their intention that the relationship should
be one of self-employment, one would not expect to see such payments. On the
15 authority of *Global Plant Ltd v Secretary of State for Social Security* [1971] 3 All ER
385, this did not necessarily preclude the contract from being one of service.

52. HMRC contended that on the evidence the relationships between SAC and the
individual flying instructors met the irreducible minimum requirements for those
relationships to be contracts of service, in that:

- 20 (1) there were contracts between SAC and the instructors;
- (2) the instructors were offered work by SAC and undertook the work for
payment, and that the offer and performance of work for remuneration
constituted a contract between them, thus meeting the mutuality of
obligation test;
- 25 (3) the flying instructors were highly skilled workers yet were subject to
the control of SAC while performing their duties for SAC: this control was
sufficient for the contracts between SAC and the instructors to be contracts
of service;
- (4) the instructors were required to provide personal service;
- 30 (5) the instructors were not in business on their own account when
performing their duties for SAC and bore no financial risk.

53. With the exception of the contrary declaration by SAC, the other relevant
indicators were consistent with the contracts being contracts of service. HMRC
submitted on the evidence that the declaration did not reflect the true relationship
35 between the parties, which was one of master and servant. On that basis, it was clear
from various authorities that the declaration could be disregarded in determining the
instructors’ status. HMRC asked that the Tribunal should find that the flying
instructors were engaged by SAC under contracts of service, and dismiss the appeals.

Discussion and conclusions

54. I first consider the law, on which the parties' views differed, and then the application of the law to the facts.

The law

5 55. The conditions mentioned by McKenna J in *Ready Mixed Concrete* are familiar, but Ms Thomson argued that HMRC had used a different interpretation setting a different threshold. I therefore set out the wording actually used by McKenna J as cited by Ms Thomson:

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

56. The first of these conditions as analysed in subsequent cases has been subdivided into two questions, those of mutuality of obligations and "personal service" (often linked to the right of substitution). Although I dealt with the question of mutuality of obligations at some length in my decision in *Littlewood* at paragraphs 57 to 84, I find
20 it necessary to comment further.

57. In a case where there is not necessarily a continuing relationship, it is open to question how relevant the normal questions relating to mutuality can be. In *McMeechan v Secretary of State for Employment* [1997] I.C.R. 549, [1997] IRLR 353, Waite LJ said (at 569, 360 respectively):

25 "The conditions . . . excluding mutuality of obligation are irrelevant in this context. That is not to say that in the different context of a general engagement they would be without effect. They might there turn out to be of crucial – even decisive – importance. In the circumstances of a specific engagement, however, there is nothing on which they can operate. When it
30 comes to considering the terms of an individual, self-contained, engagement, the fact that the parties are not obliged in future to offer – or to accept – another engagement with the same, or a different, client must be neither here nor there."

58. I concluded in *Littlewood* that in employment status cases, an ongoing relationship
35 is not required. To put this another way, the question is confined to what the relationship is when the worker is actually working for the engager, so that the ability on either side to bring the relationship to an end, or the readiness or otherwise of either party to engage in similar relationships in future, are not relevant questions. However, as I also indicated in *Littlewood*, although the threshold for mutuality in
40 individual assignments is modest, the question of mutuality on its own cannot establish the nature of the contract.

59. Dealing with the second part of McKenna J's first condition, the worker must provide his own work and skill in the performance of some service for the "master", ie the person engaging him. McKenna J further explained that:

5 "Freedom to do a job either by one's own hands, or by another's is inconsistent with a contract of service, although a limited or occasional power of delegation may not be . . ."

60. This view, despite apparently contradictory indications in *Tanton*, has been confirmed in later cases, as Ms Kennerley submitted. In *Redrow*, Burke J referred to the conclusion by Elias J in the judgment of the Tribunal in *Consistent Group Ltd v Kalwak* that as a matter of law, a limited or occasional right to delegate was not inconsistent with the existence of an obligation to perform work personally. In *Dragonfly Consultancy*, Henderson J referred to the cases considered by Park J in *Usetech* and to Park J's conclusion at [53] that the presence of a substitution clause was an indicium which pointed towards self-employment, but had to be seen in the context of all the circumstances. Thus a substitution clause will not always determine the question whether or not the contract is one of employment.

61. Ms Thomson, in the same way as her colleagues who have from time to time argued cases before these Tribunals, contended that mutuality and control were the irreducible minimum for a contract of employment to exist. This was based on the comments of Buckley J in the Court of Appeal in *Montgomery v Johnson Underwood Ltd* at [23]. As I stated in *Littlewood*, Buckley J was referring to the judgment of Stephenson LJ in *Nethermere (St Neots) Lt v Taverna and Gardner* [1984] IRLR 240, and there is some uncertainty to what passage or passages from *Ready Mixed Concrete* Stephenson LJ was referring when he said in *Nethermere* at [22]:

25 "There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of services [*sic*]. I doubt if it can be reduced any lower than in the sentences I have just quoted . . ."

62. As Stephenson LJ's judgment continues by examining the question whether there was a lack of mutual obligation, it seems probable that the sentences to which he had been referring were those cited in his previous paragraph, and not the earlier sentences from *Ready Mixed Concrete* set out in the paragraph before (ie the passage reproduced at paragraph 55 of this decision. This would mean that the "irreducible minimum" was not intended to refer to all three of McKenna J's conditions, but only to the "mutuality of obligations" element of the first condition. In particular, this would result in the second, "control", condition falling outside the irreducible minimum.

63. This view appears consistent with the approach of the Employment Appeal Tribunal in *Stuncroft Limited v Havelock* EAT/1017/00, in which, after referring to Lord Irvine's comments in *Carmichael* at [18] as to the "absence of that irreducible minimum of mutual obligation necessary to create a contract of service" and his references in his judgment to *Nethermere* and *Clark v Oxfordshire Health Authority*, Judge Wilkie QC said at [7]:

“Mr Sheldon has taken us to each of these cases which establish the same point, namely that there is an irreducible minimum of mutual obligation required for there to be a contract of employment.”

5 64. Other cases cited to me (including in particular the comment of Lord Irvine in *Carmichael* just mentioned) appear to support the view that the “irreducible minimum” is referring solely to the question of mutuality and does not extend to the other conditions or factors mentioned by McKenna J in *Ready Mixed Concrete*. I accept that there is room for the opposite view, as the comments of Buckley J in *Montgomery* have been followed in a number of subsequent cases. However, and with
10 due deference and respect for that view, I am persuaded that the irreducible minimum is indeed confined to the question of mutuality.

15 65. Although on this view the factors of personal service, control and other provisions of the contract are not part of the irreducible minimum, this does not mean that their importance is in any way diminished; it remains necessary to examine the facts relevant to the particular contract against each of those conditions in order to arrive at a conclusion on its nature, and as shown in later cases following *Ready Mixed Concrete*, it may be necessary to make other enquiries before it is possible finally to determine the question.

20 66. The second condition is often referred to as the control condition. The risk of using this shorthand expression is that it omits the other words used by McKenna J. It is control of a particular type which is in question; the worker “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.” The control must relate to the performance of the service. It must also be of a type, quality and extent to result in
25 the relationship being that of employer and employee.

67. McKenna J explained the control condition in the following way ([1968] 2 QB at 415, [1968] 1 All ER at 440) :

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

He cited the following:

35 “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 Proprietary, Ltd.*

40 68. Thus it is the right of control which matters, and not whether it is actually exercised. On the nature of control, various authorities cited to me make the point put by Cooke J in *Market Investigations* [1969] 2 QB at 183:

“As Lord Parker C.J. pointed out in *Morren v. Swinton and Pendlebury Borough Council* [1965] 1 W.L.R. 576, 582, when one is dealing with a

professional man, or a man of some particular skill and experience, there can be no question of an employer telling him how to do work; therefore the absence of control and direction in that sense can be of little, if any, use as a test.”

5 69. McKenna J’s third condition relating to the other terms of the contract being
consistent with its being a contract of service may require expansion. It may be that
the contract is not written, and the terms of the oral contract must be deduced from the
actual dealings between the parties. Even if there is a written contract, the parties’
dealings may not follow its terms and therefore what must be examined is the contract
10 as varied by those dealings. In other words, it is what happens in practice that matters
in establishing the true nature of the relationship between the parties.

70. Subsequent cases such as *Market Investigations* and *Wickens v Champion
Employment* show that McKenna J’s three conditions may not always be sufficient to
establish the nature of the relationship and thus that other factors may need to be
15 taken into account.

The facts – initial questions

71. The first difficulty is to establish what contracts governed the relationships
between SAC and the flying instructors at the relevant times, namely from September
2005 to 5 April 2007. In relation to the three instructors who gave evidence, namely
20 Mr Anderson, Ms Coster and Mr Turner, there were no contemporaneous contracts
included in the evidence. Mr Anderson had only been an instructor for eighteen
months as at the date of his witness statement (January 2009), so his engagement had
post-dated the period covered by the appeal. Ms Coster and Mr Anderson had signed
contracts in 2008, and both of them, in common with various other instructors, had
25 signed an “Addendum” stating that they were satisfied that the 2008 contract was a
true reflection of the way that they and SAC had worked together previously; they
also stated their agreement that the 2008 contract reiterated in written form the
contract which had always existed.

72. In Mr Turner’s case, his evidence was that there had been no written contract and
30 that the arrangement had been very informal, that SAC would offer him work from
time to time. Although he had never been offered a written contract, he had
discovered by chance that some instructors were offered written contracts. He
obtained a copy of a blank version of such a contract and sent it to Mr Sleight on 21
June 2005, after the meeting between them on 10 June 2005.

73. Although no written contract for Ms Coster was produced to cover the appeal
35 period, she had provided a witness statement for the purposes of an Employment
Tribunal case brought by Mr Turner against SAC. (The implications of his claim are
considered below.) In her witness statement she indicated that she had signed a
contract with SAC which underpinned the flexible relationship that this supported.
40 Thus a written contract for her did exist by May 2007, although there is no evidence
as to its terms.

74. Copies of the blank contract and of one in exactly the same terms signed by
Martin Wood on 15 July 2004 were included in the evidence. Mr Wood was not

among the instructors covered by the Notices of Decision and the Notices of Determination which are the subject of the present appeal. Further, Mr White, the Chairman of SAC, stated in cross-examination that Mr Wood had been given the wrong contract and that this form of contract had been superseded, although he could not specify when it had ceased to be used; this puts in doubt which form of written contract was the appropriate one.

75. Based on certain wording in the latter contract, Ms Kennerley argued that SAC had at some previous stage taken on employed flying instructors. In addition, a blank copy of an employment contract relating to a flying instructor was included in the evidence, immediately following a job specification for the CFI. Ms Thomson maintained that SAC had never employed flying instructors, other than the CFI. I decline to be drawn into this question, as the issue for me is the status of the individuals covered by the Notices of Decision and the Notices of Determination.

76. It is probable that the contract mentioned by Ms Coster in connection with the Employment Tribunal proceedings was in similar terms to that signed by Mr Wood, but I do not consider that there is sufficient evidence to establish that Ms Coster had signed such a contract at some time during the period to which this appeal relates.

77. I do not find that the contracts signed in 2008 assist in establishing the terms of the relationships as they were during the appeal period. Further, I do not consider that the “Addenda” signed by a number of the instructors are of any value in the process of trying to discover what those terms were. A declaration by the parties as to their beliefs and intentions is not sufficient evidence to establish past facts. I therefore disregard the 2008 contracts and the Addenda in arriving at my conclusions.

78. In the absence of reliable evidence linking contracts to the individuals whose status is under examination, it is necessary for me to rely on the evidence given by the witnesses as to the way in which the relationships operated in practice, and to take into account the information given by the instructors interviewed by Mr Sleight.

79. On the question of the extent, if any, to which evidence given by witnesses in the course of this appeal should be preferred to information contained in notes of meetings, I repeat my comments as set out in paragraph 88 of my decision in *Littlewood*. There was correspondence between SAC and HMRC about the matters covered in the notes of meetings between them, and that correspondence can be taken into account in examining the notes. The flying instructors interviewed did in certain cases make written corrections or amendments to the notes. Clearly, the notes had to be summaries of the discussions rather than verbatim records, and they were prepared within a comparatively short time after the interviews had taken place. Thus I consider it appropriate to take them into account, but caution is necessary in the event of a conflict between the notes and the evidence of the witnesses.

Application of tests to the facts

80. For the reasons already given, the “mutuality” condition is met in respect of the individual engagements actually undertaken by the flying instructors, and the choice left to them on their part whether to accept further engagements and the choice on

SAC's part whether to offer them further engagements is not relevant in determining whether the condition was met in relation to the specific engagement. However, the fulfilment of that condition does not decide the nature of the relationship for that specific engagement.

5 81. The "personal service" element of the first condition is also fulfilled. SAC had to
ensure that any person providing instruction to its members had the appropriate level
of qualifications to meet the requirements imposed by the CAA for the training in
question. If an instructor had signed a contract in the form of that signed by Mr Wood,
there was no substitution clause indicating that anyone else could be sent in the
10 instructor's place. Given the requirement to ensure appropriate qualifications, it would
have been necessary to specify in the written contract the obligation on the
contracting instructor to ensure that any substitute had those appropriate
qualifications. I consider it improbable that any oral contract governing such a
relationship would be found to include such a provision. On substitution clauses
15 generally, I share at least some of the doubts expressed by Mr Nowlan, the Special
Commissioner in *Castle Construction*, at paragraphs 74-76.

20 82. There had in practice only been very few cases in which an instructor had
arranged for another instructor to be sent in his or her place, and where this had
happened SAC had made direct payment to the "substitute" instructor. The latter
needed to have been approved by SAC before being asked to provide instruction. The
substitution therefore really amounted to selection of another approved instructor
from the "pool" available to SAC. I am not convinced that this goes as far as to fall
within McKenna J's reference to "a limited or occasional power of delegation", but in
any event I do not view it as a real form of substitution. Ms Thomson made it clear
25 that SAC was not relying on substitution as a main part of its argument. Thus the
absence of real substitution does not affect the conclusion on the "personal service"
condition. The need to ensure appropriate qualification meant that engagements had to
be personal.

30 83. The second condition, relating to control, needs to be sub-divided as indicated by
McKenna J. The first element is the power of deciding the thing to be done. As it
remains within the choice of the flying instructor to decide whether to offer
instruction services on a particular occasion and within the choice of SAC to decide
whether to offer work to the instructor for the particular occasion, this choice is
whether to enter into a contract at all, rather than to decide what is to be done under
35 the terms of any such contract. If the contract is entered into, the agreed form of
instruction is provided. It is open to SAC to request the flying instructor to change the
lesson booking, for example to provide specialist training such as aerobatics, but it is
clear from the evidence of instructors including Mr Turner, as well as the evidence of
Mr Butler, the Flight Centre Manager, that in such event the instructor may decide
40 that the change in the booking puts him or her at a disadvantage so that it is not worth
while attending, with the result that the instructor withdraws from the booking. Thus
SAC is not in a position to dictate to the instructor what work needs to be done.

84. The next element of the control condition is the power of deciding the way in
which the work is to be done. It is clear from the evidence of Mr Anderson and Ms

5 Coster that the syllabus for all flying courses is dictated by the CAA. Flying
instructors can decide the precise order in which the elements of the syllabus are
taught, although clearly the broad overall pattern needs to be followed. The instructors
decide whether the student requires ground briefing for a particular lesson rather than
10 flying on that occasion. SAC is not involved in the process of deciding how the
syllabus should be taught or the extent to which “discretionary” ground briefings
should be given. Best practice is agreed among the flying instructors, and in cases
where the instructors are not able to resolve matters, advice is sought from the CFI. I
do not view the responses of the CFI in such circumstances as amounting to control of
15 the way in which the flying instructors carry out their task. It is simply a way of
resolving a disagreement as to best practice.

15 85. Ms Kennerley relied on the obligations imposed on the flying instructors under
SAC’s rules and the Flying Order Book as indicating control over the way in which
the instructors carried out their work. I do not consider that this is “control” in the
sense referred to by McKenna J. As already mentioned, he was looking at “control in
a sufficient degree to make that other master”. SAC’s rules and the Flying Order
Book applied to everyone using the airfield; SAC was subject to obligations in respect
of flying safety and this responsibility was devolved to the CFI. Rules of general
20 application to everyone, in whatever capacity they were present on SAC’s premises,
cannot be seen as control of the nature being considered by McKenna J. In order to be
taken into account in establishing the nature of the particular relationship, such
control must be a specific feature of that relationship. These general rules are thus of
no assistance in assessing whether SAC had control over the way in which the flying
instructors did their work.

25 86. The contract between SAC and Mr Wood contains one clause obliging the flying
instructor, when in attendance at the airfield but not giving instruction, to “help with
such other club activities as may be reasonably required by the CFI including but not
limited to socialising with club members and visitors including giving advice on
instruction in flying training”. Although this is a minor indication in the direction of
30 some control being exercised by SAC, it is far from clear how many flying instructors
had actually entered into contracts in this form, or whether in practice they assumed
such an obligation. Given this lack of certainty, and applying a test of materiality, I do
not consider that this clause has any significant effect on the conclusion as to control
either of what is to be done or how it is to be done.

35 87. On the question of control of the way in which the work was to be done, I find
that SAC did not exercise control over this element of the flying instructors’ work.

40 88. The next part of the control condition is power of deciding the means to be
employed in carrying out the work. SAC’s Flight Desk was responsible for allocating
the particular aircraft to be used for the lesson. However, the aircraft was simply the
location in which the flying lesson necessarily had to take place, rather than being the
means to be employed in carrying out the work. Other items of equipment such as a
headset, maps and briefing equipment were supplied by the instructor. As the syllabus
was laid down by the CAA, there was no scope for SAC to make any decisions in
relation to it. Thus this element of the control condition is not met.

89. The remaining elements of the control condition are the power of deciding the time when and the place where the work is to be done. In relation to place, there was no choice as to where lessons should start, as this could only be from SAC's airfield. As already indicated, the instructors were able to decide whether there should be a discretionary ground briefing rather than a flight. In the usual event of the lesson involving a flight, it was for the flying instructor to decide on the route to be taken by the student. The instructor did not have complete freedom to decide where to go, as all flights were subject to SAC's rules and to the terms of the Flying Order Book. However, the restrictions did not arise from the terms of the relationship between the instructors and SAC; indeed, they applied equally to the student piloting the aircraft. I find that SAC was not able to control the decision as to place.

90. In relation to time, the hallmark of the relationship was flexibility on both sides. Flying instructors notified their availability, and were provisionally allocated "slots" on particular days. However, the work was not guaranteed; SAC might have to withdraw an allocated slot if, for example, the student member cancelled the lesson. An instructor might decide that he or she could not attend on a day for which one or more slots had been booked against that instructor's name. Ms Coster's evidence was that she had had to cancel lessons due to illness; she had had a cold, and was unable to fly due to the effect of pressure changes. She explained that potentially she could at very short notice telephone SAC and say that she could not instruct, but that out of professional courtesy she would not do so in the absence of an appropriate reason such as illness. Mr Butler indicated that instructors did occasionally inform the Flight Desk at short notice that they would not be available; taking 2009 as an example, there had been only half a dozen instances.

91. Mr Turner indicated that there had been occasions when, having been allocated flights of four slots' duration, he had found himself re-allocated to providing a specialist lesson for aerobatics, "tail-dragging skills" or "instrument qualification". This meant that instead of four slots, only one would be allocated to him, and the Flight Desk was not always able to find him other slots to make up an equivalent work-load.

92. The casual nature of these arrangements means that the engagements have to be viewed as a series of short-term engagements rather than as a longer term relationship between each instructor and SAC; the former is the basis on which I have approached the question of mutuality. The decision as to lesson allocation thus becomes a decision as to whether a contract will be entered into in respect of a lesson at a particular time, rather than a decision by SAC as to the time when the flying instructor is to carry out work under the terms of an agreed contract. I do not consider that this amounts to control as to time under the terms of a contract as referred to by McKenna J. My conclusion is not affected by the fact that certain instructors in practice had a relatively long-term relationship with SAC, as that relationship consisted of a series of contracts covering individual engagements.

93. The result of my findings in respect of the various elements of the "control test" is that McKenna J's second condition is not fulfilled in this case. Although I do not consider control to be part of the "irreducible minimum", McKenna J's judgment in

Ready Mixed Concrete makes it clear that in order for a contract to be one of service, the three conditions must all be fulfilled. On this basis, the engagements between the flying instructors and SAC are not contracts of service, and SAC's appeal must be allowed.

5 94. In case my views on control are not upheld, I consider the other tests mentioned in
argument. The first is McKenna J's third condition, that in order to be a contract of
service, the other provisions of the contract must be consistent with its being one of
service. In *MAL Scaffolding*, the Special Commissioner referred at paragraph 42 to the
10 implicit assumption in *Ready Mixed Concrete* and other cases that there was a written
contract with "other terms" in it, and to the need, in the absence of a written contract,
to derive such terms either from verbal (ie oral) agreement or from custom and
practice. Subject to the one provision already mentioned in the "sample" contract
entered into by Mr Wood, I do not consider that anything in that contract is consistent
15 with its being one of service. However, for the reasons already mentioned, I do not
find it proved that the instructors whose relationships with SAC are the subject of this
appeal entered into contracts in this form. It is therefore appropriate for me to
consider whether there is anything in the dealings between the flying instructors and
SAC which would lead to the conclusion that McKenna J's third condition had been
fulfilled.

20 95. One element of the relationship is inconsistent with its being a contract of service;
this is the absence of sickness pay or holiday pay. I do not consider this of itself to be
a particularly strong argument, as the parties had indicated their intention that the
relationship should be one of self-employment, and would be expected to set the
terms on that basis even if, on analysis, it turned out to be a contract of service; this
25 was the position in *Demibourne Ltd v Revenue and Customs Commissioners* SpC 486,
[2005] STC (SCD) 667.

96. As I have mentioned, Mr Turner did not have a written contract with SAC.
Following certain differences of view between Mr Turner and SAC, he decided to
take some time off towards the end of January 2007 to consider the situation.
30 Although Mr Stringer, the recently appointed CFI, attempted to contact him by
telephone, Mr Turner had not felt able to respond. On 9 February 2007 SAC's
Company Secretary wrote to Mr Turner in the following terms:

35 "We write to advise you that your self-employed services as a Sub-Contractor
providing Flying Instructor training with Sherburn Aero Club will no longer
be required.
..."

97. Mr Turner subsequently made an unfair dismissal claim against SAC. Although
preparation was made for a hearing, the matter was ultimately resolved between the
parties on terms which included undertakings as to confidentiality. Mr White
40 indicated that SAC's choice not to go to court had been a simple financial decision.
Mr Turner had been compensated, but Mr White emphasised SAC's view that Mr
Turner had been a self-employed sub-contractor.

98. I do not find SAC's letter to Mr Turner to be consistent with the contract having been one of service. Arguably, given the casual nature of the arrangements between SAC and the flying instructors, it was not strictly necessary for SAC to write to Mr Turner at all; SAC could simply have stopped offering slots to him. It is not clear
5 whether the motive for writing was purely courtesy, or a desire to put on record the decision that no further work was to be offered. The settlement of the unfair dismissal claim cannot be taken as any indication of Mr Turner's status, as no adjudication of the question took place. Thus no assistance can be derived from the dealings between Mr Turner and SAC.

10 99. Ms Kennerley argued that the flying instructors were "part and parcel" of SAC's organisation. She referred to items on SAC's website. The following appeared under the heading "Why choose Sherburn Aero Club?": "We have a staff of highly qualified instructors who operate 7 days a week during the hours of daylight." Under the heading "What examinations are involved?", it was stated: "instruction is available
15 with any one of our qualified instructors . . ."

100. I do not view these statements as giving any indication of the status of the flying instructors. Mr Stringer mentioned in cross-examination that he had travelled on an airline which used staff whom he knew to be self-employed, yet they wore the airline's uniforms and were presented as being airline staff. I accept that it is
20 widespread commercial practice for an organisation to present individuals working for it on an independent self-employed basis as part of that organisation. Thus the statements on the website, as well as the jackets with SAC's logo, do not link the instructors to SAC in terms of their status.

101. I have found nothing else in the evidence relating to the dealings between the
25 flying instructors and SAC which appears consistent with the contracts being contracts of service. I therefore conclude that McKenna J's third condition is not fulfilled.

102. Having considered all three of McKenna J's conditions and found that two of them are not fulfilled, it is not strictly necessary for me to consider other tests.
30 However, I give brief indications of my views.

103. In respect of their engagements with SAC, were the flying instructors "in
35 business on their own account" according to the test in *Market Investigations*? One factor is control, already considered. The next is financial risk. There was no guarantee of any work being available, even where slots had been provisionally booked; the student member might cancel, or slots could be reallocated to allow for specialist training, thus affecting any of the flying instructors whatever the nature of the training which they had initially been booked to provide. Flying could be affected by the weather, but in the light of Lord Widgery CJ's comments in *Global Plant* [19971] 3 All ER at 391, it is doubtful whether loss of potential income due to reasons
40 such as bad weather is the type of financial risk which Cooke J had had in mind in *Market Investigations*.

104. As already indicated, the flying instructors provided only limited equipment. They did not provide the aircraft, but that was not part of their function. I have already concluded that they did not have the right to provide a substitute. Clearly, they did not provide their own helpers. The question what degree of responsibility they had for investment and management does not appear particularly appropriate for the particular activity in which they were engaged; in this respect, there are some parallels with the position of the workers in *Littlewood*.

105. Cooke J's remaining factor is whether and how far the flying instructors had an opportunity of profiting from sound management in the performance of their task. The only course available to them was to make themselves available to the maximum extent for flying lesson slots, but this was subject to the possibility that the lessons might not take place. They had to ensure that they maintained their qualifications, which meant that they had to incur considerable costs, but in this respect there was no difference between their position and that of an employee in similar circumstances.

106. The flying instructors were free to provide their services elsewhere, but there was only limited evidence of this actually occurring. Given the basis on which SAC charged its members for flying lessons, with a single standard composite charge for each category of lesson, there was little scope for increasing the rates which the instructors charged, and none for setting different rates for individual instructors. At a meeting between the instructors and various representatives of SAC Mr Turner did request consideration of an increase in the rates, but none appears to have been made during the relevant period.

107. The instructors ran the risk of non-payment by SAC; although the form of contract signed by Mr Wood referred to the provision of invoices, most of the instructors appear to have relied on the financial information provided by SAC, checking this against their own records of hours flown and time spent on separately chargeable ground briefings, and discussing any discrepancies with SAC to arrive at correct amounts payable to them.

108. Risk was also relevant in the context of the insurance position. The instructors did not have their own separate insurances. Ms Coster's evidence was that they were covered by SAC's insurance, to which they made nominal contributions. She had investigated the possibility of taking out her own insurance, and found that it would have been prohibitively expensive. She accepted that personal injury cover under SAC's insurance cover for the operation of its aircraft was limited. On the basis of that evidence, it is clear that the residual risk for any loss or injury falling outside the terms of SAC's policy was accepted by the flying instructors. Reliance on SAC's insurance is of course a factor tending to point away from an independent contractor relationship.

109. My view on balance is that the flying instructors were in business on their own account, although in a relatively modest way. They did not need a sophisticated business structure. Some instructors used the hours flown when giving instruction to assist in the process of obtaining further qualifications for themselves, for example as commercial pilots. Ms Coster combined her work as an instructor with a practice as a

self-employed accountant. For instructors carrying out their work as a “sideline”, there was little scope for anything beyond a modest operation. The insurance position, while somewhat inconsistent with the status of an independent business, can be explained by considerations of expense as a proportion of potential earnings from the instructors’ work. Thus I consider that this test is met.

110. In relation to the parties’ declared intention that the relationship should be one of self-employment, Ms Kennerley argued, on the authority of *Ferguson v John Dawson & Partners*, *Massey v Crown Life* and *Demibourne* that such a declaration ought to be disregarded, and not merely treated as inconclusive, if the remainder of the contractual terms governing the realities of the relationship showed the relationship of employer and employee. Ms Thomson contended that the declaration should be taken into account; in *Massey*, Lord Denning MR had indicated that where the situation was in doubt or was ambiguous, it was open to the parties by agreement to stipulate what the legal situation between them should be, and thus the way in which they drew up their agreement and expressed it might be a very important factor in defining what was the true relation between them.

111. On my view of the contractual terms, I do not consider that the present case falls within the category referred to by Ms Kennerley. The position is open to a degree of doubt, and the parties’ declared intention is therefore a relevant factor, as mentioned by Lord Denning MR in *Massey*. Taken together with all the other terms and circumstances, it supports the overall conclusion which I have already reached, that the flying instructors were self-employed and not engaged under contracts of service.

Other matters

112. Although they would only be relevant in the event of my decision being reversed on appeal, certain points arise in connection with the Notices of Decision, the Notices of Determination, and the appeals.

113. The first is the discrepancies between the list in Ms Kennerley’s skeleton argument of the individuals covered by the Regulation 80 Determinations and the Notices of Decision, and the amended schedule enclosed with the letter from Accountax to Ms Kennerley dated 17 September 2008. I have not attempted to resolve these discrepancies, but I do not consider it satisfactory for there to be any possible uncertainty as to the effect and extent of this decision.

114. The second arises from Ms Coster’s evidence that she had not received a copy of the Notice of Decision. The copy issued to SAC dated 12 October 2007 is deficient, in that it refers to “Mr J Coster”. The reason for Ms Coster making this statement was that Ms Kennerley asked her why she had not appealed against the Notice. On the basis that she had not received a copy, this was understandable. On a point of wider importance, there was one copy in the evidence of a Notice addressed to a flying instructor; this had been sent to Mr Sansoni. I do not consider that such Notices make it sufficiently clear to anyone other than a professional adviser that an appeal by the individual is required; it begins: “My decision issued to Sherburn Aero Club is as follows”. It could thus be taken as a copy sent to the worker for information

only. It would be more appropriate for the worker's copy to have a clear note, preferably in bold type, emphasising the need for the worker also to make an appeal in addition to any appeal which may be made by the engager.

Summary

5 115. I hold that the flying instructors engaged by SAC during the period from 15 August 2005 to 5 April 2006 and during the year 2006-07 were engaged under contracts for services and were thus not employees or employed earners. I allow the appeals and discharge the Regulation 80 Notices of Determination and the s 8 Notices of Decision.

10

JOHN CLARK

15

**SPECIAL COMMISSIONER
RELEASE DATE: 30 March 2009**

SC/3133/2008

20 Authorities referred to in skeletons and not referred to in the decision:

Australian Mutual Provident Society v Chaplin [1978] ALR 385
Hellyer Bros Ltd v McLeod and Others [1987] ICR 526
McMenamin v Diggles [1991] 64 TC 286
25 *Barnett v Brabyn* [1996] STC 716
McManus v Griffiths [1997] 70 TC 218
Stephenson v Delphi Diesel Systems Ltd [2002] UKEAT 1314
Brook Street Bureau (UK) Ltd v Dacas [2004] EWCA Civ 217
Bunce v Postworth Ltd trading as Skyblue [2005] EWCA Civ 490
30 *Island Consultants Ltd v Revenue and Customs Commissioners* [2007] SpC 618
Revenue and Customs Commissioners v Wright [2007] EWHC 526 (Ch)
Augustin v Total Quality Staff Ltd and another [2008] UKEAT 343
Autoclenz Ltd v J Belcher and others [2008] UKEAT/0160/08
Parkin v Cattell 48 TC 462
35 *Tombstone Ltd v Raja and another* [2008] EWCA Civ 1444
Humbles v Brooks 40 TC 500
Snowdon v Charnock [2001] STC (SCD) 152
Dass v Special Commissioners and others [2006] EWHC 2491 (Ch)
Consultant Psychiatrist v Revenue and Customs Commissioners [2006] SpC 557
40 *Hinsley and another v Revenue and Customs Commissioners* [2006] SpC 569
Revenue and Customs Commissioners v Decadt [2008] STC 1103
R (oao Bamber) v Revenue and Customs Commissioners