

resolve the dispute was set out in the case stated and the appended correspondence. It related to only one aspect of her financial affairs, and to a period of only three tax years ending in April 2000, the best part of a decade ago. Viewed objectively, as it had to be, the infringement of her privacy was very limited both in time and in extent. Nor was there anything inherently sensitive or embarrassing about the information disclosed. The case was about routine expenditure of relatively small amounts of money in fulfilling the training obligations of her past employment as a specialist registrar. It was hard to see how anybody could reasonably criticise her for her involvement in the present litigation, or how it could possibly lessen the professional esteem in which she was held by her patients, colleagues and superiors, if they knew that she had successfully challenged the Revenue's refusal to allow the deductions. The taxpayer's concerns about her personal vulnerability, and her wish to avoid publicity of any kind, naturally attracted sympathy, but little weight could be attached to those factors.

Chancery Division.  
Judgment delivered 19 June 2009.

## FIRST-TIER TRIBUNALS

### Wright v R & C Commrs

The taxpayer exercised sufficient control over workers supplied to main contractors to give rise to a conclusion that the contractual relationship agreed to exist was one of a contract of service.

#### Facts

The taxpayer was a trader who contracted on a subcontract basis to undertake particular aspects of building work for main contractors (mainly groundwork); the workers were engaged on a flexible basis under which they could be terminated, and could cease work, broadly without notice; they were paid only for hours or periods of days actually worked; they received no pay in the event of illness, or when on holiday or when absent for any other reason, and all the workers provided CIS cards such that they were paid net of the 18 per cent or 20 per cent required to be deducted under the constructors' industry scheme in respect of the workers' potential liability to income tax.

Revenue and Customs raised assessments under reg. 49 of the *Income Tax (Employments) Regulations* 1993 and s. 8 of the *Social Security Contributions (Transfer of Functions, etc.) Act* 1999 on the basis that the taxpayer's workers were employees. The general commissioners allowed an appeal by the taxpayer. HMRC then appealed to the High Court on the ground that the general commissioners had misdirected themselves as to the legal test to be applied. Lewison J allowed HMRC's appeal ([2007] BTC 596). He

remitted the case to the general commissioners with a direction that they should find the relevant facts in relation to whether the workers worked under the control of the taxpayer, and that they should then reach their decision in response to those findings of fact. He referred to authorities, largely involving agency workers, as indicating that if control was not exercised by the contracting counter-party that HMRC alleged to be the employer, but by a distinct main contractor, the conclusion, on the facts, could well be that the workers were not employees. The general commissioners remitted the case to the special commissioners.

#### Issue

Whether the workers engaged by the taxpayer had been rightly classified as employees for income tax and NIC purposes.

#### Decision

The First-tier Tax Tribunal (Howard M Nowlan) (dismissing the appeal) said that the High Court had remitted the case in order to ascertain whether the taxpayer had sufficient rights of control over the workers to justify the conclusion that they were his employees.

On the evidence it was plain that the workers were controlled by the taxpayer and not by the main contractor and accordingly the workers were employees of the taxpayer.

It was clear that the taxpayer's business was to perform groundwork services on a subcontract basis for main contractors, and in performing that work the taxpayer used his own workers and controlled them. Just as in the case of *Castle Construction (Chesterfield) Ltd v R & C Commrs* (2008) Sp C 723, it was clear in this case that main contractors performed the role of project managers and coordinators, and they often subcontracted everything from groundwork to scaffolding, bricklaying, joinery, plastering, plumbing work, electrical installations, tiling and decorating to others. It was not the case that those other entities or traders were simply supplying workers who worked entirely in the business of the main contractor. Those suppliers would be performing their respective trades under contract to do so with the main contractor, or, so far as was material in this case, the taxpayer was performing the trade of doing the groundwork on a subcontract basis.

The reality was that in a case of this nature the control exercised by the main contractors was essentially to coordinate the various subcontractors, and to make it clear to each subcontractor what had to be done in accordance with the building plans, and in what order different jobs had to be done. In the performance of their various subcontract roles it was each subcontractor who exercised the control that was

material for tax and employment purposes, and the overall coordination seemed to be fairly irrelevant to the tax and employment tests.

The position was quite different where a person's trade or a company's trade was simply to supply workers to work directly in the business of a third party. The agency type of case was quite different from the subcontract case with which this appeal was concerned.

On that basis, it was the control by the taxpayer that was material and coordinating control exercised by the main contractors was not relevant to the control over the taxpayer's workforce.

In fairness to the taxpayer, however, it was appropriate to test the employment question more widely to see whether on an alternative basis the tribunal would arrive at the same conclusion.

The two most significant factors were that the workers were not in business on their own account in the sense of taking risk and of drawing up some form of accounts; and they did work under the control of the taxpayer. Although the workers could leave their assignments without notice, and on the evidence it was plain that the taxpayer considered that he could terminate engagements without notice, the actual working hours appeared to have been fixed. Although the workers were not paid for time-off, holidays, or when ill, there was virtually no flexibility to take time off, even though it was appreciated that they would not be paid when not working. In all the circumstances, even on the 'standing back' approach of looking at all factors generally, the workers in this case were employees.

Furthermore, that conclusion was not inconsistent with the opposite conclusion reached in the *Castle* case. In that case, the vast majority of the workers were experienced bricklayers so that in one sense the workers had a trade or business in that they were all established and professional 'brickies', and there was that constant thread running through all their different engagements. By contrast, in this case, the workers were essentially labourers, and many had no prior experience in the building industry before being engaged. There was thus no sense of them having a wider trade or skill that prevailed over their particular assignment with the taxpayer. Notably in the *Castle* case the trainee bricklayers, as distinct from the experienced men, were always engaged as employees, generally for their first two years of engagement with *Castle*, and the employees, but not the experienced bricklayers who were regarded as self-employed, were ferried to and from site by *Castle*.

In the *Castle* case, the factor that the tribunal had considered more significant than the ability of either party to terminate the relationship without notice was the alleged feature that workers could choose their

hours, and regularly did so. The very reverse appeared to have been the case here. Beyond being taken to and from work by van, the workers appeared to have to work the hours set by the taxpayer, including Saturdays for instance, whether they liked the hours or not.

The reality in relation to 'control' was very different. In a borderline case, it was well established that the intentions of the parties could be of significance. In the present case, it seemed to be the taxpayer who decided that people would be engaged as CIS subcontractors, and they had no choice. In the *Castle* case, there was considerable evidence that this status was intended and desired by both parties to the contracts. All the evidence about a walk-out or a threatened walk-out when *Castle* tried to accept HMRC's claim that the brickies should be employees emphasised that, for several reasons of flexibility, as well as the greater basic pay, the workers positively agreed with *Castle* that the relationship was a flexible one not amounting to employment.

TC 00032

Decision released 20 April 2009.

## McCrae v R & C Commrs

The First-tier Tax Tribunal dismissed the taxpayer's application to bring appeals out of time where she had failed to provide any reasonable excuse for the lateness of the appeals. Further, the tribunal dismissed those appeals which were allowed to go ahead where the taxpayer had not produced any satisfactory evidence to call in question the conclusions reached by HMRC and had failed to discharge the onus of proving those conclusions were wrong.

### Facts

The taxpayer was the owner of a tearoom which she bought in about December 1998. She also owned a number of properties which she bought following receipt of compensation she received in a car accident. When she first acquired the tearoom she appointed her sister as manageress. Her sister was not able to manage the tearoom properly. Adequate records were not being kept. The taxpayer visited the tearoom only at weekends. Most of the staff were casual part-time labour. P11 deductions working sheets for which the taxpayer was responsible were not properly completed. After about seven months, the taxpayer began to attempt to put matters in order. She hired a manageress. She too was not a success and questions of her honesty were raised. The taxpayer eventually sold the tearoom in 2001. No details of the transaction were produced or spoken about in evidence. According to the taxpayer, the purchaser refused to take over any of the staff. The taxpayer said that she left some business records in the tearoom which she had been