FIELD COURT TAX CHAMBERS

IR35 and employment law[1]

A surprising decision from the employment tribunal

I have often referred to the interminable stream of cases concerning TV presenters and their service companies where the tribunals have had to consider the application of the intermediaries legislation in ITEPA 2003 ss 48–61. This can result in the income from the work of the presenter being chargeable to tax on the basis of a notional contract between themselves and the TV company.

This applies, broadly, if the contract between the service company and the TV company would have been an employment if a similar contract had been entered into by the individual directly with the TV company.

HMRC and the taxpayer have each had mixed success. The result of the conflicting cases is that the whole subject is highly confused, and nobody really knows where they are. Both sides will often have solid judicial support for their view – so the outcome will always be uncertain.

With all those cases in mind, it is interesting to read the Employment Appeal Tribunal case *J Varnish v British Cycling Federation UK* [2020] EAT/0022/20/LAV. The question was whether Jessica Varnish, a professional cyclist with the GB Cycling Team, was an employee of the British Cycling Federation, or a worker, within the meaning of the Employment Rights Act 1996. The Employment Tribunal concluded that she was neither, and so did the Employment Appeal Tribunal.

There was a clear difficulty here in establishing an employment relationship because Jessica Varnish did not do very much for the British Cycling Federation; she was mainly training in the hope of achieving success in international competitions. She received a non-repayable means-tested grant from UK Sport, a public body which provided funding for the British Cycling Federation. However, the analysis is not quite so clear when you look further into the facts.

It was established that a high degree of control was exercised over her activities by the British Cycling Federation – which is a classic pointer to an employment. It was also said that she received no money from the British Cycling Federation. However, that would seem to be equivocal because the British Cycling Federation paid for her travel and accommodation expenses, provided coaching, equipment, facilities and medical services, and provided her with the opportunity to go to a training camp in Australia in 2012. To say that she did not receive any money from the British Cycling Federation is perhaps an oversimplification.

The tribunal also said that her agreement with the British Cycling Federation was a contract where services were provided to Jessica Varnish, not the other way round. Again this seems arguable because she had clear responsibilities under the agreement to train with the British

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team, enter specific competitions, wear team clothing, follow all reasonable directions of the British Cycling Federation and not engage in any personal commercial work or media appearances without their written consent – failing which she was subject to disciplinary procedures.

The arguments were obviously not straightforward but there was a good deal in this case which under other circumstances may well have resulted in a finding of an employment.

It is perhaps a little surprising that the Employment Appeal Tribunal concluded that the facts were ‘wholly inconsistent with the contract of employment.’

It will be interesting to see what the tax tribunals make of this reasoning in due course when it is inevitably cited in an IR35 case.

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