

Neutral Citation Number: [2013] EWCA Civ 1926
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL
Thursday, 13th December 2012

Before:

LORD JUSTICE RIMER
LORD JUSTICE MUNBY
and
SIR STANLEY BURNTON

ITV SERVICES LIMITED

Appellant

- and -

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

Respondent

(DAR Transcript of
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**Mr Jonathan Peacock QC and Mr Michael Ripley (instructed by Berwin Leighton
Paisner LLP) appeared on behalf of the Appellant.**

**Mr Malcom Gammie QC (instructed by the General Counsel and Solicitor to HM Revenue
and Customs) appeared on behalf of the Respondent.**

Judgment

Lord Justice Rimer:

1. This is an appeal in which the appellant is ITV Services Limited (“ITV”) and the respondents are the Commissioners for Her Majesty’s Revenue and Customs (“HMRC”). The appeal is against a decision of the Upper Tribunal (Tax and Chancery Chamber), released on 7 February 2012, dismissing an appeal from the First-tier Tribunal (Tax), released on 23 November 2010. The issue in dispute is as to the liability of ITV to pay secondary class 1 national insurance contributions, assessable in reference to earnings of entertainers, in particular actors, engaged by ITV. The issue arises under the Social Security (Categorisation of Earners) Regulations 1978, as amended, the particular provision in point being regulation 2(2), which provides as follows:

“Subject to the provisions of paragraph (4) of this regulation, every earner shall, in respect of any employment described in any paragraph in column (A) of Part I of Schedule 1 to these regulations, be treated as falling within the category of an employed earner in so far as he is gainfully employed in such employment and is not a person specified in the corresponding paragraph in column (B) of that Part, notwithstanding that the employment is not under a contract of service, or in an office (including elective office) with general earnings.”

Paragraph 5A in column (A) reads:

“Employment as an entertainer not being employment under a contract of service or in an office with general earnings.”

Paragraph 5A in column (B), which is what the appeal turns on, reads:

“Any person in employment described in paragraph 5A in column (A) whose remuneration in respect of that employment does not include any payment by way of salary. For the purposes of this paragraph ‘salary’ means payments -- (a) made for services rendered; (b) paid under a contract for services; (c) where there is more than one payment, payable at a specific period or interval; and (d) computed by reference to the amount of time for which work has been performed.”

The argument for ITV was that the 5A conditions set out in column (B) are not satisfied in this case, because the payments made to the entertainers in question did not include “any payment by way of salary”. The basis of the case is that all the conditions in paragraph 5A are not satisfied, in particular, although this is not intended to exclusive, condition (d).

2. The First-tier Tribunal, save with regard to one type of agreement called the “all rights agreement”, rejected that case, holding that in respect of a wide number of sample entertainer contracts that it was required to consider the payments or remuneration paid to the entertainers did include payments by way of salary. The Upper Tribunal, in a judgment delivered by Sales J, upheld that decision.
3. It is against that decision that this second appeal to this court has been brought, one for which I gave permission. The central, if not sole, issue that has been argued before us by Mr Peacock QC, who appears with Mr Ripley for ITV, is that the payments made, or remuneration paid to the entertainers, satisfied neither condition (c) nor condition (d) of paragraph 5A, column (B), inasmuch as it is his submission that on the correct interpretation of the agreements under which the entertainers were retained, the remuneration paid to them was not “computed by reference to the amount of time for which work has been performed”. That submission necessarily involves a consideration both of the correct interpretation of paragraph 5A and a consideration of the sample agreements considered by the First-tier Tribunal.
4. In opening his submissions yesterday, Mr Peacock, after making his submissions in relation to the correct interpretation of paragraph 5A, took us to several sample agreements which were before the First-tier Tribunal, and referred us to provisions of them which he said supported the conclusion that, on their correct interpretation, the conditions of paragraph 5A were not satisfied. In the course of his response, Mr Gammie QC for HMRC, seeking to uphold the decisions of the tribunals below, referred us for the first time to various general agreements, being agreements between the unions and ITV, which he said included provisions that were incorporated into the contracts to which Mr Peacock had referred us. In principle, that suggestion or submission would seem to be correct as a matter of fact, but one finds no discussion of any such incorporation, or the effect of any such incorporation, in the discussion in either of the tribunals below, although it is not, I think, suggested that these general agreements were not also before those tribunals.
5. At that point in the course of Mr Gammie’s submissions, the court expressed some concern as to quite how it was going to proceed. The agreements whose terms are said to be incorporated are of very substantial volume. Mr Peacock had not dealt with the incorporation point, and indeed it is not entirely clear to us that he was ready to deal with it. But, if he was, any such argument would be likely to take a good deal more time than was available for the duration of this hearing. In the event, Mr Gammie having raised the line of argument that he did, there ensued quite extensive discussion with counsel as to the way forward, and amongst the suggestions advanced was that one solution would be for the appeal to be adjourned, so that the parties could seek, so far as possible, to agree which sample contracts they wish the court to consider in dealing with the appeal, and agree so far as they can to what extent those contracts incorporate provisions of the general contracts to which I have referred.
6. The intention is that upon that being done, the appeal would be restored, and we could have arguments addressed to us focused on the particular contracts to which the parties wish to refer, being arguments focused not just on the sample contracts themselves but on the sample contracts including all relevant incorporated provisions. Various other alternatives were put to us as to how we might dispose of the appeal.

The court has, however, come to the conclusion that the only practical way forward is along the lines that I have just indicated, on the basis that the court does not consider that it can come to a satisfactory conclusion as to the interpretation of the relevant agreements without having the whole of those agreements before it, and without also having the benefit of argument on them from counsel on both sides.

7. Accordingly, what the court has resolved to do is to adjourn this appeal, to be restored at a convenient date as soon as possible, and to direct in the meantime that the parties will engage in discussion directed at agreeing an appropriate number of sample contracts for the consideration by the court, and agreeing to what extent those contracts incorporate terms of other contracts, and identifying what those terms are. I would not imagine that the parties will have any difficulty in achieving that. That is the order that the court will make.
8. I will direct that this case is to be adjourned to be listed as soon as possible after 1 March 2013, and I will direct that we three judges will retain the appeal: we have obviously heard substantial argument on it. I will give liberty to either side to apply, if necessary, on paper for further directions, to be referred to me as a single Lord Justice.

Order: Appeal adjourned to a date to be fixed