



TC04006

Appeal number: TC/2010/04539

INCOME TAX: *status of worker–contract of service (employment) or contract for services – held to be self employed.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EMS (INDEPENDENT ACCIDENT MANAGEMENT SERVICES) LTD Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE CHRISTOPHER HACKING
MR ROLAND PRESHO**

Sitting in public at Bradford on 6 February 2012 and Leeds on 7 July 2014

The Appellant was represented at the hearing in Bradford in February 2012 by its specialist tax accountants, Matt Boddington and Sian Wood of Accountax Consulting. There was no appearance by or on behalf of the Appellant at the subsequent hearing at Leeds in July 2014 but the tribunal did have the benefit of written submissions by the Appellant’s representatives on its behalf.

Alan Hall, a Case Presentation Officer, appeared for the Respondents on both hearing dates.

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DECISION

Concerning the appeal

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1. This appeal concerns the status of a worker, Darren Makings, in relation to work carried out by him for the Appellant over a period of time extending from 6 April 2002 to 5 April 2007.

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2. It is the Respondents' case that Mr Makings was at all times during this period an employee of the Appellant so that it became responsible to deal with the deduction of tax and National Insurance contributions from remuneration paid to Mr Makings under the Income Tax (Pay as You Earn) Regulations 2003 (the regulations).

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3. The Appellant says that Mr Makings was an independent contractor responsible for his own tax and National Insurance contributions. He was not and had never been an employee of the Appellant. It was, contends the Appellant, for him to submit his self assessment returns to the Respondents and to pay any tax/NI contributions which might be due. He had done this.

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4. The Respondents had, on 26 June 2008, issued to the Appellant, Notices of Determination under Regulation 80 of the regulations for the years ended 5 April 2003 to 5 April 2007 inclusive as well as Notices of Decision under Section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 covering Class 1 National Insurance contributions for the period from 6 April 2002 to 5 April 2007.

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5. What was at issue between the parties was the essential nature of the relationship between the Appellant and Darren Makings. Was Mr Makings, as the Respondents contended, an employee or was he as the Appellants say, an independent contractor engaged not under a contract of service but one who provided services under a contract for services?

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History of the appeal

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6. Before addressing the arguments concerning this issue something does need to be said about the way in which this appeal came to the tribunal and about the fact that the Appellant was not represented at the hearing in Leeds in July this year (2014).

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7. That this proceeding has been so protracted is regrettable. This situation has arisen as a result of a number of factors including genuine attempts by the parties to try and agree the matters in dispute, some difficulty in securing documentary evidence from the Appellant, the ill health of the Appellant's director Colin Parker and the availability of judicial hearing time.

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8. Mr Parker was not well at the date of the adjourned hearing in July 2014 and had asked for a further adjournment on that account. However he had been able to attend the hearing in February 2012 when he had given evidence both by way of a

written witness statement and in person to the tribunal. Mr Hall on behalf of the Respondents had taken the opportunity to cross examine Mr Parker and indeed also Mr Makings. The evidentiary phase of the hearing had been completed so that the hearing in July this year was limited to submissions by both parties.

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9. By the time of the July hearing the Appellant's representatives, Accountax Consultants had withdrawn from the representation of the Appellant in the appeal but had previously submitted their written reasons in support of the view that Mr Makings was not an employee but was engaged as an independent contractor.

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10. It was in these circumstances that the tribunal, conscious of the need to dispose of the appeal in a manner which is both just and fair to the parties and recognising its obligations in this respect under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, decided to proceed with the hearing. In the event this involved a review of the evidence taken at the earlier hearing, reviewing the written submissions made by Accountax on behalf of the Appellant and receiving formal submissions from Mr Hall and listening to arguments advanced in support of the position taken by the Respondents.

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11. The decision to deal with the matter in this way was, for the tribunal, made easier in knowledge of the fact that there was no dispute between the parties as to the essential facts on which the appeal was based. This was not an appeal in which it was necessary to any material extent to test the evidence of the parties. There was no question of credibility at issue. The evidence of neither Mr Makings nor Mr Parker had been put in issue. The Respondents case was based entirely on its view of the law as applied to the facts. It was on those same facts that the Appellant contended for its contrary position.

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The facts

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12. As there is no dispute about the facts these will be dealt with in narrative form as having been accepted by the tribunal.

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13. The Appellant (EMS) is a company engaged in recovering damaged or otherwise immobilised motor vehicles from around the country. It does this on behalf of insurance companies. These vehicles can then be assessed (if this has not already been done) and decisions made by the insurers as to what is to be done with them.

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14. Mr Parker had known Darren Makings for over 20 years. He had employed him in 1990 for a period of time working in a scrapyards which he (Mr Parker) owned. Mr Makings moved on however to work for a number of other businesses. The tribunal was told that Mr Makings established his business, DKM Services, in around 1996. In the early days of the business Mr Makings drove for a number of businesses including A.C. Autos, Richard Wilson and EMS. It is understood that as DKM Services he now works for a number of companies.

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15. It is not disputed however that during the time material to this appeal DKM Services relied on the work it was given by EMS to the exclusion of all other former business contacts.

5 16. In 1990 Mr Parker had major back surgery which meant that EMS needed the services of a driver. Mr Parker contacted Mr Makings and offered him some work driving for EMS. In his statement Mr Parker says:

10 *“The arrangement was ad-hoc, starting with a day or two here and there as the need arose. This was a self employed arrangement. Darren did not have any written contract with EMS at that time, nor does EMS have a written contract with Darren’s business now – other than the invoices Darren submits”*

15 17. As time went on EMS was in a position to offer more work to Mr Makings and did so. The manner in which Mr Makings was commissioned to do work was informal. There was no written agreement. Mr Parker would contact Mr Makings either by telephone or directly (in person) to inform him of vehicles which needed to be picked up from locations around the country.

20 18. Single vehicle pick-ups could be managed by Mr Makings using his own recovery vehicle (a van and trailer). If multiple vehicles were required to be collected then Mr Makings would use the EMS recovery vehicle which could carry up to 6 vehicles. Mr Makings now has a double trailer and can pick up 2 vehicles if needed.

25 19. The more local collections were, however, generally dealt with by an employee of EMS, Steve Bland. Mr Makings was used when more distant collections were called for.

30 20. If Mr Makings was unable for one reason or another to accept a recovery task EMS would use either another driver not employed by it or a firm Paragon Motors which undertook such collection assignments.

35 21. Mr Parker states in his evidence that he estimates that around 35% of the firm’s recovery work is dealt with by Steve Band with about 50% subcontracted out to Darren Makings. The remainder goes to other firms.

40 22. Mr Makings was paid an hourly rate of £7.00 until January 2011 when he asked for an increase following which he received a rate of £8.50 per hour. The original rate of £7.00 had remained in place for 8 years.

45 23. Payment of Mr Makings invoices was made on presentation by BACS transfer. The invoices were raised by Mr Makings in arrears and it was often two months before payment was made. In his evidence Mr Parker states that he could check the invoices against the tachograph in the vehicle but he did not usually do this. It is clear to the tribunal that Mr Parker trusted Mr Makings.

24. When Mr Makings used his own recovery vehicle, Mr Parker had an informal arrangement with Mr Makings that either some additional hours could be added to the invoice to cover fuel used or he might be given “surplus” diesel from recovered vehicles in lieu of payment.

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25. Expenses incurred in connection with the recovery of vehicles were charged to an EMS credit card which Mr Parker had given to Mr Makings. This is a further clear indication of the trust which Mr Parker placed in Mr Makings.

10 26. Mr Parker says that he left the arrangements for collection of the vehicles to Mr Makings to arrange. If he needed to, Mr Makings had access to the secure EMS yard where he could pick up the large vehicle recovery unit at out-of-hours times, often very early in the morning (4.30 a.m.). Complying with drivers hours rules was left to Mr Makings to ensure which, as an experienced driver, he was able to do.

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27. Neither the order of collection or the route to be taken were stipulated by EMS. Such matters were left entirely to Mr Makings. Mr Parker states in his evidence that although the arrangements between EMS and Mr Makings were informal in nature he has

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“absolutely no doubt that Darren is self employed. Darren has been self employed for many, many years and he does business with other firms. As a self-employed person it is up to him whether he wants to accept work from us, and he is totally free to come and go as he pleases.”

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28. Mr Parker points out in his witness statement that, unlike EMS employee Steve Bland, Darren Makings provides his own hi-vis(ibility), boots and protective clothing. Mr Makings does not receive employee benefits such as holiday pay or sick pay, access to a pension scheme and a personal accident policy as does Mr Bland nor does Mr Makings enjoy annual pay reviews. Training, licensing and insurance costs relating to Mr Bland are met by EMS. Mr Makings has to deal with all such matters himself.

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29. In his witness statement Mr Makings substantially confirms Mr Parker’s evidence concerning the essentially independent nature of his business relationship with Mr Parker and EMS. He says that over the years he has worked for 7 different clients. In addition to confirming that the hourly rate agreed for his services for EMS is now £8.50 he adds that he makes an overnight charge of £15 where this is called for.

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30. Mr Makings states that he is currently undergoing further vehicle licensing training to secure his ‘Drivers CPC’, a qualification which will become compulsory this year. He is doing this at his own cost. In 2007 he obtained a Class I HGV qualification. This cost him £2,500 which he again paid for himself as this is considered to be an asset in securing additional driving business. In 1998/99 Mr Makings had spent a similar sum to obtain his Class II HGV licence enabling him to drive larger vehicles to the benefit of his business.

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31. Mr Makings says that he enjoys the freedom which being self employed allows him. He has made his own pension arrangements and has an accident and sickness policy. This is, he says, something he did when first becoming self employed in the 1990's. Mr Makings has plans to grow his business with the purchase of a lorry when he has completed his CPC qualification.

32. It emerged from a meeting held in April 2007 between representatives of the Respondents and Mr Makings that on occasion when returning to the EMS premises part way through the working day EMS would usually ask if Mr Makings could do some "yard work" so that a full day's pay was earned. This might include grass cutting, vehicle cleaning or other similar unskilled work. He would also often be asked to do work around the yard on a Friday if he had worked from Monday through to Thursday driving. Mr Makings would also frequently cut the grass and tidy up the EMS site without additional payment of any kind. These arrangements were, said Mr Makings informal. Asked about this Mr Parker confirmed that Mr Makings worked without additional pay on these tasks.

33. As indicated above there is no real contention as to the facts concerning this appeal. The Respondents say that viewed broadly the arrangements described satisfy the necessary indicia pointing towards an employer/employee relationship. The Appellant says that the facts and the law suggest that Mr Makings was, at the times material to this appeal, an independent contractor.

25 *The legal arguments.*

34. It is not in dispute that the burden of proof is, in this appeal, on the Appellant to show that Mr Makings was at all material times an independent contractor working under a contract for services and not as an employee. That is the effect of Section 50(6) Taxes Management Act 1970 and Regulation 10 of the Decisions and Appeal Regulations following the Regulation 80 assessments and Section 8 Decision made by the Respondents on 26 June 2008.

35. It is also not disputed between the parties that the question to be resolved is one which is of mixed fact and law.

36. A number of authorities were placed before the tribunal. The Respondents referred to the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 AER 433 in which Mackenna J proposed that a contract of service exists if three conditions were fulfilled. These were stated thus:

- (i) The servant agrees that in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
- (ii) He agrees expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

(iii) The other provisions of the contract are consistent with its being a contract of service

5 37. A more general test was proposed by Cooke J in *Market Investigations Ltd v Minister of Social Security* [1969] 2QB 173 in these terms:

“Is the person who has engaged himself to perform these services performing them as a person in business on his own account?”

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38. Both parties accept that the case law indicates a number of criteria any one of which by itself would not necessarily be conclusive of the relationship of master/servant or independent contractor but which may tend towards a conclusion as to the true nature of the relationship.

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39. In this context consideration was given to the need for mutuality of obligations and the presence of an ‘irreducible minimum of obligation on each side to create a contract of service’ as addressed by Mackenna J in *Ready Mixed Concrete* as well as the more specific factors such as:

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- The extent and degree of control exercised by the putative employer
- The right to employ others to discharge the duties contracted to be performed
- Questions of financial risk
- The obligation to provide equipment
- Employee entitlements/benefits
- Integration as part of the employer’s organisation
- Exclusivity of service(s)

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30 40. The Appellant in its submissions contends that there is insufficient evidence of control by EMS over the way in which Mr Makings performs his work to satisfy this aspect of the test. It has also emphasised the fact that work might be accepted or rejected by Mr Makings and that Mr Makings had the right should he have so decided to send another in his place to undertake the collection of vehicles for EMS. That this
35 was a right which was not in fact exercised is not fatal to the point that the existence of the right is inconsistent with the right of an employer to require personal service by the employee.

40 41. The tribunal is grateful to the representatives of both parties for their diligence in addressing all of these matters by reference to the case law, a full list of the citations of which appears at the end of this decision.

The tribunal’s consideration of the appeal.

45 42. The question of whether someone is employed by another or, alternatively, provides services to that other is one which arises with some frequency. It is clearly a central issue in appeals concerning employment law. Its relevance to tax law as a necessary adjunct to employment is apparent.

43. There is no ‘magic formula’ for arriving at a decision on this matter. What the tribunal has to do is to take account of all of the relevant facts and apply the tests suggested by precedent with a view to forming a view as to the true nature of the relationship between the parties said by the Respondents to be that of ‘master and servant’.

44. The expression ‘master and servant’ is one of some antiquity and its relevance to current employment is questionable. Times have changed so that the sort of control exercised by an employer over his employee has had to be adapted to more contemporary ideas of the way in which the parties should conduct themselves. Even so there are some constant aspects of the relationship and it is to these that we must look to try and discover just what is going on.

45. The enquiry is necessarily a fact driven one. In this respect, as noted above, it is helpful that the facts are essentially agreed.

46. Looking therefore to the signposts provided by case law the first question which needs to be addressed concerns nature of the obligations owed by EMS to Mr Makings and vice-versa. This is the question of mutuality of obligation.

47. In the industrial relations case of *Nethermere (St Neots) Ltd v Taverna and Gardiner* [1984] IRLR 240 Stephenson LJ referred to the following statement of Mackenna J in *Ready Mixed Concrete*:

“There must be a wage or other remuneration. Otherwise there will be no consideration and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill”

and made the following observation:

“There must in my judgment, be an irreducible minimum of obligation on each side to create a contract of service. I doubt if it can be reduced any lower than in the sentences I have just quoted”

48. The Respondents say that this requirement for mutuality of obligation is met as it suffices that each separate contract or assignment undertaken by Mr Makings involved an obligation by the employer to pay for work in return for the work agreed to be done by the worker. Mr Parker agreed with Mr Makings to pay him to collect vehicles. The irreducible minimum requirement is accordingly met.

49. The fact that it is met does not however take us much further as this test (if indeed it is a test) could apply both to a contract of service and to one for the provision of services. In short it is, in this appeal, without more, unhelpful.

50. More helpful are the indicators at paragraph 39 above.

Control

51. The question of the employer's control over his employee's activities is one which can operate to give a good indication of whether the 'master and servant' relationship exists. It has been said however that this is less persuasive in the case of professionally qualified employees. What is important is the right to control the employee's activities rather than whether control is actually exercised. There needs to be a sufficient degree of control in order to establish the relationship of master and servant. (See *Ready Mixed Concrete* at page 440).

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52. The evidence indicates that neither Mr Parker for EMS nor Mr Makings regarded themselves as respectively being able to control or being controlled in a way which would suggest employment as opposed to self employment. Mr Parker would ask Mr Makings to pick up one or more vehicles from a designated site in the UK. Mr Makings was quite able to say that this was inconvenient and to decline to undertake the collection. In that event Mr Parker says that he would either ask Mr Bland to make the collection or put the work out to another subcontractor.

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53. The evidence also shows that Mr Parker, having agreed with Mr Makings that the job was his, left the way in which the job should be tackled entirely to Mr Makings. There is very little to suggest that Mr Parker had any control beyond initially agreeing with Mr Makings what needed to be done.

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54. The position in regard to control is best summed up by Mr Makings who in his witness statement says:

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"I like the freedom of self-employment – I can do what I want and start and finish when I want and I am my own boss. If there is work available I am the sort of person who will always want to do it if I can, but I don't have to it is completely up to me"

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The right to employ others to discharge the duties contracted to be performed

54. This aspect is perhaps somewhat academic in that Mr Makings was in effect a 'one-man-band' with no employees to whom the task could be allocated should he have been unable to do the job himself.

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55. In cross examination Mr Makings was asked by Mr Hall whether he had ever sent anyone in his place to do a job. Mr Makings replied "*Not to my recollection*". It might perhaps have been more instructive to have enquired as to whether he would have felt free to send another to do the job had he been in a position to do so. Mr Makings added at a later stage in his re-examination that it would have been difficult to send someone in his place as the person concerned would have had "*to go on the EMS insurance if he did*"

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56. Mr Parker was not asked about this matter. It is difficult to conclude on the available evidence that the matter of possible substitution by Mr Makings supports the Respondent's position. It is at best neutral.

5 *The financial risk*

57. The evidence given by Mr Makings is, the tribunal finds, quite clear on this point. Mr Makings was running a business, one in which he had invested both in terms of equipment (van and trailer) and training (he has spent now well over £5,000 to secure relevant qualifications. He has bought his own safety clothing and equipment.

58. The financial risk of failure of the business is one which is inconsistent with the position of an employee who looks to his employer to carry that risk. It is true that if a business fails then so too does, in all probability, the employment of the employee. The risk referred to is not limited to the possibility of failure however. It is as much concerned with the risk to capital invested in the business which can be at peril if, for example, work dries up. That was a risk which Mr Makings had to assume and for which there was no guarantee by EMS. He also had to carry the risk of customer default. Mr Makings invoiced on a monthly/bi-monthly basis and would rank as an unsecured creditor if his customers were unable to pay him for his services.

The obligation to provide equipment

59. At the times with which this appeal is concerned Mr Makings owned a van and trailer. That trailer could only accommodate one vehicle. Mr Parker's company EMS had a six car and a two car trailer.

60. Mr Makings used his own safety clothing and equipment.

61. The tribunal does not find this aspect to be of any real assistance. If anything it favours Mr Makings slightly in that Mr Bland, who was an employee of EMS was provided with hi-vis, boots and protective clothing whereas Mr Makings was not.

35 *Employee entitlements and benefits*

62. The evidence was that Mr Makings did not enjoy the entitlements and benefits of those who were employed by EMS. He had to arrange his own pension and insurance arrangements. He was paid only when he worked and there was no entitlement to holiday pay or, presumably (although this subject was not investigated), sick pay.

Integration as part of the employer's organisation

63. At first glance it does appear that Mr Makings was in many ways a part of the EMS organisation. He was relied upon as a reliable source of work in the recovery of vehicles throughout the UK. He was undoubtedly respected by Mr Parker as a good

and careful driver who had caused no damage to any of his vehicles. Mr Parker went out of his way to accommodate Mr Makings in a number of ways allowing him to work out a return delivery day doing yard work and allowing him to undertake work on a voluntary basis which was not strictly required to be done by him but which was of benefit to EMS.

64. Despite this Mr Makings' desire to organise his own life and to be free to accept work or not as he wished was respected. To that extent he was outside the organisation. The absence of benefits also marked Mr Makings out as distinct from employees of EMS.

65. It is the finding of the tribunal that whilst Mr Makings was closely in touch with EMS and Mr Parker in particular he was acknowledged to be his own man and a subcontractor albeit one who was close to and trusted by EMS.

Exclusivity of services

66. Mr Parker was clear that he did not have exclusive rights to Mr Makings' services and Mr Makings was equally clear about this. The fact that it does appear that as a practical matter Mr Makings worked almost, if not entirely, for EMS during the period under review does not affect the fact that both parties were free to operate independently outside of the relationship of commissioner and contractor. There is at least a suggestion that on occasion this did happen.

Inconsistent terms

67. The tribunal is required in its assessment of this appeal to consider whether any of the terms of the contract between EMS and Mr Parker might be inconsistent with the existence of a contract of service. (See Peter Gibson LJ *Express & Echo Publications Ltd v Taunton* [1999] IRLR 367 at page 2. From what has been considered above it is plain that the whole way in which Mr Makings related to EMS was at odds with what could be considered a 'normal' contract of service. Mr Makings did what he pleased. The fact that what he did may have pleased Mr Parker is irrelevant.

Decision

68. Mr Hall in his address to the tribunal at the final hearing day correctly summed up the task of both the Respondents and the tribunal as one which, whilst paying attention to the sort of considerations canvassed above, primarily concerned forming a view based on both the facts and the law as understood.

69. What was required was that the tribunal needed to stand back and view the situation in the round. It needed to ask itself whether, having heard all of the evidence, it was able to conclude that Mr Makings was or was not an employee of EMS.

70. The tribunal acknowledges that it is possible that both an engager of services and the party contracted to deliver those services might be of the firm opinion that they were working at arms length such that no question of employment arose whereas in fact, as a matter of law, the position could well be otherwise.

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71. In this appeal however, the tribunal finds that the evidence does support the Appellant's understanding that it was engaging Mr Makings as an independent contractor to undertake the duties required. Clearly both parties believed this. The weight of the evidence supports this and for that reason this appeal is allowed

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72. This document contains full findings of fact and reasons for the decision set out above. Any party dissatisfied with either of the decisions has a right to apply for permission to appeal against it/them pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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CHRISTOPHER HACKING

TRIBUNAL JUDGE

RELEASE DATE: 11 September 2014

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LIST OF CASES CITED:

Bi-Flex Carribbean Ltd v The Board of Inland Revenue [1990] UKPC 35 63 TC 515
Hall v Lorimer [1993] 66 TC 349

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Lee Ting Sang v Chung Chi Keung [1990] UKPC 9

Macfarlane & Anor v Glasgow City Council [2000] UKEAT/1277/99

Market Investigations Ltd v Minister of Social Security [1969] 2QB 173

Cornwall County Council v Mrs Margaret Prater [2006] EWCA Civ 102

Nethermere (st Neots) Ltd v Taverna and Gardiner [1984] IRLR 240

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Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance [[1968]1 All ER 433

Stephenson v Delphi Diesel Systems Ltd [2002] UKEAT 1314

Express and Echo Publications Ltd v Tanton [1999] IRLR 367

Montgomery v Johnson Underwood Ltd [2001] EWCA 98

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Knight v BCCP Ltd [2011] UKEAT 0413

The tribunal was also asked to look at the decision on a pre-hearing review of the Employment Tribunal case no: 76/12FET 1188/12 (*Thomas McGeown and HM Revenue and Customs*)

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