

IR35 not so elementary for (Eamonn) Holmes

Andy Vessey gives his appraisal of HMRC's recent victory in the case of Red, White & Green Ltd

Just under a year from the FTT judgment laid down in the Albatel Ltd (Lorraine Kelly) case, came that of Red, White & Green Ltd (RWG), Eamonn Holmes' PSC. Both broadcasters worked for ITV but suffered different IR35 fates. One of the reasons Ms Kelly escaped IR35 was because the Tribunal considered that ITV was not employing a 'servant', but rather purchasing a product. Could not the same be said for Eamonn Holmes though? After all, this broadcaster and journalist has been plying his trade for many decades and is pretty much a household name.

Background

RWG was incorporated in April 2001 and Holmes is its sole director and majority shareholder.

Holmes started presenting on ITV's 'This Morning' programme from at least 2006 but the direct contracts, between RWG and ITV, that were at stake covered the following periods:

24.07.11 – 20.07.12

01.09.12 – 19.07.13

02.09.13 – 18.07.14

01.09.14 – 17.07.15

During the gaps between the contracts, Holmes continued working on the programme but through a different PSC, Holmes & Away Ltd.

The vast majority of evidence upon which Judge Harriet Morgan based her verdict was taken from the contract wording and notes of a meeting between ITV representatives and HMRC held in March 2015. It appears that all parties accepted ITV's comments, as set out in the notes, as being a true reflection of ITV's view of its relationship with Holmes.

Non-exclusive

Holmes said that he was not "beholden or exclusive" to any one broadcaster and had undertaken a variety of work for television, radio, and online, as well as contributing to magazines and newspapers, hosting corporate events and was also involved in media training.

Between 2011 - 2015 Holmes also worked as a presenter on Sky's 'Sunrise' morning show from 06:00 – 09:00. However, prior to October 2013 it appears that he was working for Sky as a sole trader.

The percentage of income from RWG's various sources for the period under appeal was as follows:

Y/E 30th April	This Morning	Sunrise	Other income
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2012	71.8	↔	28.2
2013	72.8	-	27.2
2014	31.8	54.1	14.7
2015	18.6	80.0	1.6

Although RWG had other revenue streams, ITV would need to know about commercial activities in case of conflict or reputational damage. That ITV did not strictly enforce these provisions did not, according to Judge Morgan, affect the binding legal affect.

Benefits

ITV provided a car for Holmes to travel to and from the studio, clothing for appearances on the programme worth around £5,000– £6,000 a year, reimbursed reasonable travel and ‘other’ expenses, and all necessary insurances.

Personal service

Holmes accepted that ITV wanted only him and that he was not permitted to send a substitute. If he fell ill, then ITV would find someone else and RWG would receive no fee.

Mutuality of obligation (MOO)

Holmes knew from the outset of a contract that there were a minimum number of days he would be required by ITV to work, mainly Friday’s. However, if required to work on other weekdays, this was at ITV’s sole discretion

The contract stated that in the event ITV cancelled any dates and were unable to reschedule for reasons other than Holmes’s unavailability or termination, then RWG would still be entitled to its fee for any cancelled dates.

Even Holmes’s counsel, Robert Maas, accepted that the MOO test was satisfied but disputed that other tests pointed towards an employment relationship.

Control

Maas argued that ITV did not have the sufficient degree of control over his client. Whilst ITV decided what to include in its programme, the order in which items are broadcast, guests to invite on the show and when to take advertising breaks, Holmes role is to take ITV’s ingredients and create an entertainment from them.

Holmes considered his role to be that of “anchor man” bringing his own unique stamp and interpretation to the programme. In his view he controlled the show.

Although a researcher/producer writes a brief which is given to Holmes the night before

the show, the presenter can choose to ignore the research as he brings his own expertise to bear.

The ITV editor confirmed that Holmes would “lead the show” and that Holmes “runs his own ship within the timeframes”. More than any presenter on the show, Holmes will “do his own thing”. Autocue is used sparingly, allowing Holmes to largely ad-lib. Holmes structures the show as he likes and whilst the editor intervenes where there are legal pitfalls or a guest is uncomfortable, Holmes often ignores this advice.

Whilst Holmes said he could refuse to interview someone put forward by the editor, the editor said that would be unreasonable and that he would push Holmes to do it as ultimately the editor had the final say. However, Holmes has influenced what is broadcast and the editor has dropped guests/topics where Holmes has voiced concerns but if the editor really wanted something included then it would be. The editor couldn't recall any time this has happened though.

Despite this the judge was more persuaded by the fact that Holmes was contractually obliged to act in accordance with ITV's editorial remit. She did not believe that the practical difficulties as regards ITV's lack of ability to interfere with Holmes' actions during a live broadcast rendered the relevant obligations and ITV's right to overrule Holmes any less contractually binding.

Whilst the judge did accept that the time and place of broadcast was dictated by the nature of the work, she stated that, under the assumed contracts, ITV could decide on what particular days Holmes was required to present the show and could require him to attend other locations.

Caught by IR35

The cornerstones of employment status, ie personal service but in particular MOO and control were all present which pointed towards an employment relationship.

Judge Morgan found nothing of substance in favour of self-employment which I find surprising.

Eamonn Holmes had 56 days to appeal this decision and unless he does so, then RWG will have to pay over a reported £250K PAYE tax and NIC to HMRC for the years 2011/12 – 2014/15. Given his character, I'd be surprised if he didn't. With the considerable autonomy he has presenting 'This Morning', a different judge may well conclude that ITV does not have the sufficient degree of control over Holmes to make him their 'servant'.

This hearing took place over three days in June 2018, yet it took just over 20 months to release a 72-page judgment. Why?

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