



**TC05943**

**Appeal number: TC/2016/02661**

***NATIONAL INSURANCE CONTRIBUTIONS– employment status –  
whether appellant is an employee or self-employed – s 8(1) Social Security  
Contributions (Transfer of Functions, etc) Act 1999 – appeal dismissed***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MALCOLM TOMLINSON**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ROBIN VOS  
JANE SHILLAKER**

**Sitting in public at Centre City Tower, Birmingham on 2-3 May 2017**

**Mr Gary Rooney of Rooney Tax Services for the Appellant**

**Mrs Savita Mistry and Miss Pallavita Patel, Presenting Officers of HM Revenue  
and Customs, for the Respondents**

## DECISION

### Background

5 1. The appellant, Mr Malcolm Tomlinson, has worked as a glazing salesman for more than 35 years selling mainly conservatories and double glazing. He, and the companies he has worked for, have always understood him to be self-employed.

2. It therefore came as a bit of a surprise to Mr Tomlinson when his new adviser, who he had hired to deal with an investigation into his tax affairs which had started in  
10 early 2013, advised him that he may in fact be an employee.

3. It would be tempting to think that, given the number of cases dealing with exactly this issue which have been decided by various courts and tribunals over the years, it would be relatively easy to come to a conclusion as to whether Mr Tomlinson was in fact an employee or whether, as he had previously thought, he was self-  
15 employed. However, this remains a difficult issue.

4. In this particular case, as in many others, the task is not helped by the fact that there is no written record of the terms on which Mr Tomlinson was engaged by the Window Centre (Solihull) Limited (“WCSL”), the company he was working for during the period in question and that Mr Tomlinson’s evidence and that of the  
20 Managing Director of WCSL, Mr Michael Adderley contained inconsistencies in relation to key areas of the terms and conditions under which Mr Tomlinson worked for WCSL.

5. It is not therefore surprising that, despite two years of discussions and significant amounts of information being provided, Mr Rooney was not able to agree  
25 Mr Tomlinson’s status as an employee with HMRC.

6. Eventually, having decided that the evidence for a change of status was not sufficiently clear, Mr Stuart Hiron, the Status Inspector at HMRC dealing with the case, issued a decision under s 8(1) of the Social Security Contributions (Transfer of Functions, etc) Act 1999 that HMRC regarded Mr Tomlinson as self-employed in  
30 respect of his engagement with WCSL for the period 6 April 2004 to 5 November 2015. It is that decision against which Mr Tomlinson now appeals although both parties agree that the outcome of this appeal may also affect Mr Tomlinson’s liability to income tax.

### The evidence

35 7. We had before us a bundle of documents and correspondence prepared by HMRC.

8. We also had witness statements from Mr Tomlinson, Mr Hirons and Mr Adderley and heard oral evidence from each of them.

9. Generally we found each of the witnesses to be credible and straightforward. Not surprisingly, Mr Tomlinson and Mr Adderley emphasised different points given  
5 Mr Tomlinson's case that he was an employee and Mr Adderley's understanding that he was self-employed. In addition, some of the evidence dealt with events that took place more than 25 years ago where it might be accepted that there may be differences in the recollections of each witness.

10. We also had witness statements from three individuals who previously worked for WCSL. However, they were not present and did not give oral evidence. Their  
10 witness statements were not referred to in Mr Rooney's presentation of Mr Tomlinson's case and, in any event, add little, if anything, to the other evidence we had before us. We have not therefore placed any weight on the evidence contained in these witness statements and Mr Rooney agreed that we should not do so.

15 11. There is no dispute about many of the facts in this case. However, as mentioned above, there are some significant differences in the evidence presented to the Tribunal in relation to some key facts. We therefore start by setting out those facts which are agreed and then go on to discuss the areas where there is disagreement.

#### **Agreed facts**

20 12. We should make it clear that, our reference to agreed facts is shorthand for facts which we have found from the evidence before us and in relation to which there is no dispute. We do not mean to imply that all parties have previously agreed that the facts which we have found are accurate.

25 13. Mr Tomlinson has worked as a double-glazing salesman for more than 35 years for a number of different companies. He has only ever been paid on the basis of commission for successful sales. Until 2013, both Mr Tomlinson and the companies he has worked for have always understood and intended that he should be self-employed and not an employee.

30 14. Mr Tomlinson started working for WCSL in about 1990. The company had been founded by Mr Adderley's father who was still involved in the business but, at that time, the business was being run by Mr Adderley. Mr Tomlinson was the first salesman to be taken on by WCSL.

15. The agreement between Mr Tomlinson and WCSL was verbal. There is no written record of terms and conditions on which Mr Tomlinson was engaged.

35 16. Shortly after Mr Tomlinson's daughter was born in March 1991, he left WCSL as a result of the long hours he was working and set up his own business selling windows. He did not have to give any specific period of notice in order to terminate the engagement.

17. After about 12-18 months, Mr Tomlinson returned to work for WCSL. Again, there is no written record of the terms on which he was taken on but there is no suggestion that they were any different to the terms which had previously applied.

5 18. Mr Tomlinson's main job of course was to sell WCSL's products. He generated his own leads as well as receiving leads that had come to the company direct. Following an enquiry, Mr Tomlinson would visit the customer at their home and take measurements. He would then provide a quote with some suggested designs. If the customer decided to go ahead, he would take a deposit and then pass the job over to WCSL's surveyors who would take detailed measurements which would form the  
10 basis of the final contract with the customer.

19. The quote and the initial contract would be produced on WCSL headed paper and would be signed by Mr Tomlinson on behalf of WCSL.

15 20. WCSL provided training on new products to all of its salesmen. WCSL also engaged a finance company to provide interest free credit to its customers and the finance company provided training to the salesmen as to how to fill in the application forms for the credit. Mr Tomlinson was not required to pay WCSL for this training.

21. Mr Tomlinson provided, and paid for, his own car and mobile phone.

20 22. WCSL provided Mr Tomlinson with stationery, business cards, samples, brochures, an email address and the use of its premises including access to a computer and landline telephone. Mr Tomlinson did not have to pay WCSL for any of this.

25 23. In 2014, WCSL introduced a computerised system for providing quotes and producing contracts. It therefore provided Mr Tomlinson with a laptop loaded with the specialised software required to do this. The software was licensed to WCSL. Although Mr Tomlinson was initially reluctant to use the laptop, he started doing so either in late 2014 or early 2015. Again, Mr Tomlinson was not required to make any payment to WCSL in return for the use of the laptop.

24. WCSL also provided Mr Tomlinson, free of charge, with some shirts bearing the company logo.

30 25. Mr Tomlinson's only remuneration was the commission which he received. WCSL produced a price list for its products. Mr Tomlinson could give customers a discount of up to 25% on the listed price without affecting his commission. The headline rate of commission was 10%.

35 26. Mr Tomlinson could give customers a higher discount (up to 30%) but in those circumstances his commission would be reduced. It was not however the whole of the additional discount which would be deducted from the commission and so part of the reduction would be borne by the company as well as by Mr Tomlinson. If a discount of more than 30% was proposed, this would need to be approved by WCSL.

27. Mr Tomlinson's commission would also be reduced or clawed back in three other circumstances:

(1) if there was a problem with the job which resulted from an error made by Mr Tomlinson;

5 (2) if the customer failed to pay; and

(3) if the customer cancelled the job.

28. Mr Tomlinson's commission would not be reduced if there was a problem with the job due to an error made by somebody else (for example the surveyors).

29. Each month, Mr Tomlinson would submit a commission claim form for the previous month listing all of the orders which had been placed and in respect of which he believed he was entitled to commission. The claim form would also show the value of the order and the amount of the commission to which he believed he was entitled. The claim form would be reviewed either by the sales manager or by Mr Adderley. Sometimes some adjustments would be made to the amount of the commission claimed.

30. Payment was normally made about four weeks after the claim form was submitted although in some cases this could be six or seven weeks if it was a particularly busy period and neither the sales manager nor Mr Adderley had got round to verifying the claim. On some occasions when payment was delayed, a payment on account was made.

31. Mr Tomlinson has never received holiday pay, sick pay or any pension contributions from WCSL.

32. Until mid-2002, WCSL paid Mr Tomlinson a regular weekly advance payment against his commission entitlement of less than £250.

25 33. During the period in question, Mr Tomlinson spent approximately two days each week in WCSL's showroom. Whilst he was in the showroom, he would deal with enquiries received by telephone as well as customers coming into the showroom. The customers coming into the showroom might be new customers but might also be existing customers wanting to make payments or complaints. He would deal with all of these customers even if the job was being handled by one of the other salesmen.

34. In addition, Mr Tomlinson performed administrative tasks whilst in the showroom such as receiving post which arrived whilst he was there and directing visitors to other parts of the business such as the accounts department or the commercial side of the business (as Mr Tomlinson only dealt with the domestic part of the business).

35. WCSL had employed a sales manager since about 2000. The first sales manager, Mr Courtney, introduced a showroom rota for the salesmen.

36. When Mr Tomlinson first joined WCSL, he spent more time in the showroom as he and Mr Adderley were the only salesmen. The company was small and only had a few people working for it. Mr Tomlinson was therefore willing to muck in and performed other tasks such as helping to unload deliveries received at the showroom.

5 37. There was no limit as to how much holiday Mr Tomlinson could take. However, absences would initially be kept track of on a holiday chart on the wall of WCSL's office. At some point after the appointment of a new sales manager in 2009 (Martin Lewis), Mr Tomlinson started to complete holiday request forms which were countersigned by Mr Lewis.

10 38. Mr Tomlinson carried out approximately half of his paperwork/administration at home and the remainder either in WCSL's showroom or office.

39. Mr Tomlinson received his leads from a number of sources, including:

(1) existing customers who he had already dealt with;

15 (2) new customers who had specifically been recommended to Mr Tomlinson;

(3) customers who telephoned or visited the showroom whilst Mr Tomlinson was present; and

20 (4) leads allocated to Mr Tomlinson by the sales manager as a result of enquiries generated from WCSL's own marketing including people who had seen the company's vans driving around and responses to advertisements placed in the local press.

40. Mr Tomlinson has appeared in a number of adverts in local newspapers placed by WCSL alongside Mr Adderley, Mr Lewis and other salesmen.

25 41. Mr Tomlinson was required to provide his services personally and could not provide a substitute as any substitute would not have the requisite training in respect of WCSL's products and the credit offered through the finance company engaged by WCSL.

### **Facts in dispute**

30 42. The disagreement (or in some cases differences of emphasis) between Mr Tomlinson and Mr Adderley relate mainly to the extent to which WCSL had control or supervision of Mr Tomlinson and his activities.

35 43. The first point relates to Mr Tomlinson's presence in the company's showroom. Mr Tomlinson says that he was required to spend time in the showroom in accordance with the rota whether he wanted to or not. He referred to the fact that the majority of his leads do not arise as a result of the time he spends in the showroom in support of this.

44. Mr Rooney produced a schedule showing 60 live leads for Mr Tomlinson during a sample three month period together with information about the source of those leads. From this, he argues that 95% of Mr Tomlinson's leads do not result from his presence in the showroom. This conclusion was reached by comparing the  
5 dates Mr Tomlinson was in the showroom with the date shown on the schedule (taken from WCSL's computers) as the date of the lead in question and then looking at the source of the leads for those dates where a lead was recorded on a day when Mr Tomlinson was in the showroom.

45. In his evidence, Mr Tomlinson did however explain that it is not only the  
10 enquiries where the lead source is shown as "showroom" which might come to him whilst he was in the showroom. For example, telephone enquiries where the lead source is shown as "directories" or "vans" or "advertisement" might also come to Mr Tomlinson if he happened to be in the showroom when the relevant individual telephoned WCSL.

46. We also had no evidence that the "lead date" shown on the schedule with which  
15 we were provided was the date on which the customer made the initial enquiry. Indeed, we note that none of these dates on the schedule are a Saturday or Sunday which we were told were the busiest days in the showroom. This suggests to us quite strongly that the lead date shown in the schedule is the date somebody at WCSL got  
20 round to putting the information into the company's computer and not the date of the original enquiry.

47. Mr Adderley confirmed in his evidence that the majority of Mr Tomlinson's leads were allocated by the company rather than being received by him direct although this to some extent conflicts with the schedule provided by Mr Rooney.

48. As we have said, the schedule covers 60 leads over a period of about three  
25 months. 31 leads either came from existing clients or from recommendations (i.e. direct to Mr Tomlinson) or from the showroom (which Mr Tomlinson in his evidence confirmed represented leads which would have come to him as a result of his presence in the showroom). This figure does not include any of the telephone enquiries which  
30 could either have come to Mr Tomlinson direct because he answered the telephone when he was in the showroom or could have been allocated to him because the telephone call was taken by somebody else and then given to the sales manager to allocate to the salesman.

49. Our conclusion from the evidence we have is that, whilst the number of leads  
35 received by Mr Tomlinson as a result of his presence in the showroom was not his main source of business, it represented a significant minority of the leads he received and certainly more than the 5% figure suggested by Mr Rooney.

50. Mr Tomlinson referred to the rota for manning the showroom and gave  
40 evidence that the purpose of this was to ensure that there was always one of the salesmen in the showroom. His belief was that if a salesman refused to do showroom duty, he would not be working for WCSL for very long.

51. Mr Tomlinson did however say in a meeting with Mr Hiron on 4 August 2014 that he would like to spend more time in the showroom as this is one of the places where he generates leads but that he has to balance the time that he spends in the showroom with the time that he spends visiting customers and producing quotes. Mr Tomlinson's explanation for this at the hearing was that, at the time of that meeting, he did not appreciate that far fewer of his leads came from the showroom than he had previously thought. This was only demonstrated when Mr Rooney prepared the analysis based on the schedule we have previously mentioned.

52. Mr Tomlinson also gave evidence that, as far as he was concerned, he was required by WCSL to do the additional jobs which he carried out whilst he was in the showroom. He described himself as an "unpaid receptionist".

53. As further evidence that he was subject to WCSL's control as far as the showroom duties were concerned, Mr Tomlinson mentioned the fact that he took 6-8 weeks off work at the beginning of 2016 as a result of the death of his wife. When he returned to work, he asked to go back on the showroom rota but the company refused to allow him to do this.

54. Mr Adderley's evidence as to Mr Tomlinson's presence in the showroom was rather different. He said that there was no agreement as to the amount of time Mr Tomlinson should spend in the showroom and, indeed, that there was no requirement for him to be there at all.

55. On the contrary, Mr Adderley told us that all of the salesmen wanted to spend time in the showroom and that the reason the rota had been introduced when Mr Courtney became the sales manager was that they had a problem with there being too many salesmen in the showroom at any one time. The showroom is relatively small and so would quickly become crowded if there were too many people there. In addition, it would be intimidating for the customers if there were too many salesmen. Mr Adderley described the competition for being in the showroom as a "feeding frenzy".

56. In order to avoid this and to give everybody a fair chance, the rota was introduced about 15 years ago and, according to Mr Adderley, was agreed between the salesmen and was not imposed on them by WCSL.

57. According to Mr Adderley, it would not matter if Mr Tomlinson did not do any showroom duty as there were other salesmen as well as employed sales staff (including those working on the commercial side) who could cover the showroom if necessary.

58. We were told that the rota was dropped about four years ago (shortly after HMRC started their enquiries). Mr Tomlinson confirmed however that, although there was no written rota, it continued in practice as all the salesmen knew which days they were supposed to be there and kept track of it in their diaries. According to Mr Adderley, the rota has now been reintroduced.



59. The question as to the time spent in the showroom is closely linked with another area of dispute which is whether Mr Tomlinson was required to book holiday.

60. There is no doubt that Mr Tomlinson was expected to let WCSL know if he was going to be on holiday. As we have found, this was originally done through a holiday planner which was on the wall of the company's office. Mr Tomlinson's evidence was that he could not take holiday if it clashed with holidays which had already been put on the holiday planner by another salesman as it was important that there was always someone available to man the showroom.

61. After Mr Lewis became the sales manager, Mr Tomlinson says that he was required to complete a holiday request form. We were shown an example of the holiday request form covering some holidays in May and June 2013. This is signed by Mr Tomlinson and countersigned by Mr Lewis. The form is clearly designed for employees as it refers to employees in a number of places and also an annual holiday entitlement.

62. In his evidence, Mr Tomlinson confirmed that the holiday request form was a way of telling people that he was going to be away. He also confirmed that he had never had a request for holiday refused. His explanation was that the holiday request form was all about WCSL making sure that the showroom was manned by a salesman at all times.

63. Mr Tomlinson also accepted in his evidence that there was no limit on the amount of holiday he could take. However, he could not earn anything if he was not working and so there was an incentive not to take too much time off.

64. Mr Adderley confirmed this. He also said that Mr Tomlinson ran his own diary, that he could come and go as he pleased and work whatever hours he wanted to work.

65. As far as the holiday request form is concerned, Mr Adderley's evidence is that there was no requirement for self-employed salesmen to fill this in and that the form is only for employees. He could not explain why Mr Tomlinson had felt it necessary to fill in the holiday request form and described it as a mistake on the part of Mr Tomlinson. He did however accept that it was important for WCSL to know if a salesman was going to be away.

66. We have carefully considered all of the evidence on these issues, both written and verbal and we find (on the balance of probabilities) the following facts:

(1) There was no legal obligation on Mr Tomlinson to spend any particular amounts of time in the showroom. He and the other salesmen spent time there because it suited them as this was one of the ways in which they generated leads, hopefully resulting in sales and therefore commission.

(2) As a result of this, there was however an expectation (but no more than that) on the part of WCSL that the salesman would spend time in the showroom.

(3) We accept Mr Adderley's evidence that the original purpose of the rota was to ensure that there were not too many people in the showroom at any one time.

5 (4) However, we also find that another purpose of the rota, the holiday planner and the holiday request form was to ensure that there would be a salesman present in the showroom at all times.

10 (5) We do not make any finding as to whether Mr Tomlinson's relationship with WCSL would have been terminated had he refused to spend time in the showroom given our finding that he spent time in the showroom because he wanted to do so rather than because there was a legal obligation on him to do so. Clearly, the relationship between Mr Tomlinson and WCSL was one of mutual benefit in the sense that, if Mr Tomlinson was successful in generating sales for WCSL, he would earn a commission and the company would make a profit. On the basis of what we have heard, we are inclined to think that, if WCSL believed  
15 that Mr Tomlinson would continue to generate sales without spending time in the showroom, the arrangement would have continued on that basis with WCSL making arrangements to man the showroom in some other way as described by Mr Adderley. However, as we say, we do not make a specific finding to this effect as the point does not arise.

20 67. Another question on which there was disagreement and which again goes to the issue of what control over Mr Tomlinson was exercised by WCSL is the question as to whether Mr Tomlinson was required to follow up all of the leads allocated to him by the sales manager.

25 68. Mr Tomlinson's evidence was that he thought he would be dismissed if he did not follow up the leads that were allocated to him and that the only time he did not follow up those leads was where he did not have time to do so. The leads would then be returned to the sales manager and would be allocated to a different salesman. He also observed that it was fairly obvious that work would dry up if he persistently refused leads.

30 69. Mr Adderley's evidence on the other hand was that there was absolutely no obligation on Mr Tomlinson to accept the leads which were allocated to him and that he had refused leads on numerous occasions. No specific details were however given.

35 70. We are not satisfied that there was any legal obligation on Mr Tomlinson to follow up leads which were allocated to him. There appears to have been an expectation on both sides that leads would be followed up but, in our view, this is as a result of the fact that it is in the interests of both parties for the leads to be followed up and not because there was a legal requirement that Mr Tomlinson should do so. The fact that he was able to hand back leads if he decided he was too busy to deal with the enquiry is evidence of this.

40 71. We accept that it is likely that, if Mr Tomlinson persistently refused to accept leads which were allocated to him, the arrangement would have come to an end but it

seems to us that that would have been because it ceased being of any benefit to either party rather than that it would give rise to some sort of breach of a legal obligation which would justify dismissal.

5 72. The question also arose as to whether Mr Tomlinson had the ability to work for competitors.

73. Mr Tomlinson told us that this would not be allowed as it would be a conflict of interest and that, in any event, he had no interest in taking business elsewhere as WCSL provided a good product and a good service. He did accept that if he had done so, he would have received a commission from the competitor based on the 10% rate  
10 which is standard in the industry but he told us that this had never happened, that WCSL would be disappointed if it did and that in any event, he would not do it.

74. Mr Adderley on the other hand maintains that there was no restriction on Mr Tomlinson working for WCSL's competitors given that WCSL could not control what Mr Tomlinson did. He did however say that he would not be happy if Mr Tomlinson  
15 had got an enquiry from the showroom or a lead allocated to him by the sales manager and given it to another company.

75. There is no evidence of any legally binding restriction preventing Mr Tomlinson from taking an enquiry to a competitor of WCSL if that enquiry came direct to Mr Tomlinson (for example, a personal recommendation). Whilst WCSL may have been  
20 disappointed if this happened and might have terminated the agreement with Mr Tomlinson as a result, it does not appear from the evidence before us that they would have had any claim against him for having done so.

76. The position is no doubt different in relation to leads allocated to Mr Tomlinson by the sales manager as it is clear that both parties considered such leads to "belong"  
25 to WCSL.

77. Having said this, it is clear from Mr Tomlinson's evidence (which was not contradicted by Mr Adderley) that, although he might legally be free to take leads generated personally elsewhere, there was an expectation that he would not do so. He also mentioned that he was aware of cases where salesmen who had done this (which  
30 he referred to as "double bagging") had been dismissed. We do therefore find that there was an expectation held by both parties (but not a legal obligation) that Mr Tomlinson would only provide his services to WCSL and not to any competitors.

78. Another small point on which there was some disagreement was the extent to which Mr Tomlinson was expected to wear shirts with the WCSL logo and which had  
35 been provided to Mr Tomlinson by the company.

79. Mr Tomlinson's evidence was that short sleeved shirts with the company's logo (both polo shirts and smarter shirts) had been provided by the company, that there was an expectation that he would wear them and that he did in fact do so in the summer (although not in the winter given that the shirts had short sleeves).

80. Mr Adderley's evidence on the other hand was that Mr Tomlinson had been provided with two of the smarter shirts (not the polo shirts) at Mr Tomlinson's own request, that he almost always wore his suit for work and that he did not wear the shirts on more than a dozen occasions in total in Mr Adderley's presence.

5 81. Even on the basis of Mr Tomlinson's evidence, it is clear to us that there was no requirement for Mr Tomlinson to wear the shirts. Mr Tomlinson was not very specific about how often he wore the shirts, saying only that he wore them in the summer rather than the winter. On the basis of the evidence we have heard, we think it is more likely than not that Mr Tomlinson did wear the shirts occasionally but not  
10 very often.

82. We have set out the facts in a fair amount of detail as it will be apparent from the comments made in the cases we refer to below that in determining whether an individual is an employee or self-employed, each case depends very much on its own facts.

### 15 **What is the test for employment or self-employment**

83. This appeal is against HMRC's decision that Mr Tomlinson was self-employed during the relevant period for the purposes of national insurance contributions.

84. Section 2 of the Social Security Contributions and Benefits Act 1992 distinguishes between an employed earner and a self-employed earner. An employed  
20 earner is someone who is employed under a contract of service and a self-employed earner is (broadly speaking) anybody else who is gainfully employed. The question we have to answer therefore is whether Mr Tomlinson was employed by WCSL under a contract of service.

85. A contract of service (under which an individual is an employee) is often  
25 contrasted with a contract for services (where the individual in question is self-employed). Although the authorities give general guidance on the factors to be considered in determining whether an agreement constitutes a contract of service or a contract for services, it is clear that the question can only be answered by examining all of the facts of the case. Nolan LJ in the Court of Appeal in *Hall v Lorimer* [1994]  
30 1 W.L.R. 209 [at 216] specifically approved of the comments made by Mummery J in the same case in the High Court [1992] 1 W.L.R. 939 [at 944] where he said:

35 "This is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is  
40 not necessarily the same as the sum total of the individual details.

Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.”

86. In conducting this exercise, many of the cases take as their starting point the tests set out by Mackenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions & National Insurance* [1968] 1 All ER 433 [at 439-440] for the existence of a contract of service:

“A contract of service exists if the following three conditions are fulfilled:

10 (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  
15 make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.”

87. Other cases place more weight on the test suggested by Cooke J in *Market Investigations v Minister of Social Security* [1969] 2 Q.B. 173 [at 184-185]:

20 “... the fundamental test to be applied is this: ‘Is the person who has engaged himself to perform these services performing them as a person in business on his own account?’ If the answer to that question is ‘yes’, then the contract is a contract for services. If the answer is ‘no’ then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list  
25 can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors,  
30 which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an  
35 opportunity of profiting from sound management in the performance of his task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive,  
40 and a person who engages himself to perform services for another may well be an independent contractor even though he

has not entered into the contract in the course of an existing business carried on by him.”

88. These cases set out the general approach which we must follow and some of the factors which we should take into account. Other cases have identified further factors which should also be taken into account. Indeed, as explained in *Hall v Lorimer*, we must look at the overall effect of all of the details.

89. Finally, we bear in mind that the burden of proof is on the appellant to show that he was engaged under a contract of service (i.e. as an employee) and was not self-employed.

### 10 **Examining the detail – painting the picture**

90. Mr Rooney put forward a number of factors in support of his argument that Mr Tomlinson was an employee during the relevant period and not self-employed. He also referred to factors which, based on other cases which have been decided, could be relevant to the overall consideration as to whether or not Mr Tomlinson is an employee but which in this particular case he suggested were either neutral or were outweighed by the factors which pointed towards employment.

#### *Control*

91. Mr Rooney relied heavily on WCSL’s control over Mr Tomlinson and referred to the following factors (based on Mr Tomlinson’s evidence but not necessarily reflecting the facts which we have found based on all of the evidence before us):

(1) Mr Tomlinson was required to attend the showroom at various times in accordance with the rota and, when at the showroom, was required to carry out all sorts of duties and not just talking to customers in order to generate leads. His attendance at the showroom was not (according to Mr Tomlinson) voluntary.

(2) Most of Mr Tomlinson’s leads come from WCSL or from marketing activities undertaken by WCSL. These leads are allocated by the sales manager and there is an expectation that the leads will be followed up.

(3) Whether the explanation for the showroom rota is to ensure that people are in the showroom on particular days or to make sure that they are not in the showroom on particular days (so that it does not get too crowded), this shows that control is being exercised by WCSL as to when or where Mr Tomlinson does his work.

(4) Mr Rooney accepts that WCSL does not tell Mr Tomlinson how to sell. However, it does dictate the contractual parameters within which Mr Tomlinson must work as well as the form of all of the paperwork used by Mr Tomlinson.

(5) Mr Rooney also accepts that Mr Tomlinson has some discretion over when work is done (for example, visits to customers). However, he refers to the

decision of Cooke J in *Market Investigations* who found [at 739] that the fact that the taxpayer in that case “had a limited discretion when she should do the work was not inconsistent with the existence of a contract of service”.

5 (6) Mr Rooney also submitted that the fact that Mr Tomlinson was required to undergo training at WCSL’s premises was also evidence of control being exercised by the company over Mr Tomlinson’s activities.

92. More generally, in relation to control, Mr Rooney referred to the decision of Mackenna J in *Ready Mixed Concrete* in support of an argument that the level of control needed in order for there to be a contract of service is not all that great where  
10 the judge observed [at 440] that “the right need not be unrestricted”. He also made the point that Mackenna J appeared to accept [at 442] that actual supervision was not necessary and that a contract of service can still exist, even if the control is relatively light touch.

93. Miss Patel on behalf of HMRC on the other hand argued that the work done by  
15 Mr Tomlinson was essentially voluntary in the sense that he could do as much or as little work as he wanted and that WCSL therefore had no control over what he did. The hours he worked she said were dictated by client needs and not by the company’s instructions. For example, Mr Tomlinson made his own appointments and managed his own diary.

20 94. Miss Patel also argued that the question as to where Mr Tomlinson carried out his work was either dictated by the needs of the customer or his own choice and not by the company. Clearly, Mr Tomlinson would need to visit the customer at home in order to take initial measurements and produce a quote. As far as administration was concerned, Mr Tomlinson chose to do approximately half of this at home and half at  
25 the company’s premises. He could have done it all at home or could have done all of it at the company’s premises.

95. Miss Patel submitted that there was clearly no control over the way in which Mr Tomlinson carried out his duties as he was providing his own skilled services as a  
30 salesman. She did not set much store by the additional work done by Mr Tomlinson when he was in the showroom as, in her view, these tasks were minimal compared to his main role as a salesman.

96. Miss Patel submitted that the cases show that the element of control should be given different weight according to the scenario. In this case, she suggests that control is less important. In any event, her view is that very little control was  
35 exercised by WCSL.

97. As far as the showroom duties and the holiday arrangements are concerned, Miss Patel argued that these are not evidence of control by WCSL. On the contrary, she said it is clear that Mr Tomlinson generates leads from being in the showroom and therefore has an opportunity to increase his profits. He accepted in a meeting with  
40 HMRC that he would like to spend more time in the showroom. The fact that he has to notify WCSL when he is proposing to be on holiday is not, in Miss Patel’s view,

surprising. If a customer were to get in touch with WCSL while Mr Tomlinson is away, the company would of course need to be able to tell the customer what the position was.

5 98. It is clear from the comments of Mackenna J in *Ready Mixed Concrete* that a contract of service cannot exist without some degree of control over the worker.

99. There was much discussion during the hearing of Mr Tomlinson's presence in WCSL's showroom and the requirement that he should give the company notice of his holidays.

10 100. We have found as a fact that Mr Tomlinson was not under a legal obligation to man the showroom but that he wanted to do so (as did the other salesmen) in order to generate leads. As a result of this, there was an expectation on the part of the company that he would spend some time in the showroom.

15 101. We have also found as a fact that the purpose of the holiday requests was to notify the company when Mr Tomlinson would be away and to ensure that at least one of the salesmen would be available for showroom duty every day.

102. In a loose sense, this does show that WCSL exercised some control over Mr Tomlinson's activities although it does not amount to legal control given our finding that Mr Tomlinson was not obliged to spend time in the showroom and could take as much holiday as he liked.

20 103. The other factors suggested by Mr Rooney as evidencing control by WCSL over Mr Tomlinson do not take us very much further. The provision of leads to Mr Tomlinson by the sales manager and the expectation that leads will generally be followed up could be evidence of control but again, could simply be explained by the fact that it is in the interests of both parties for Mr Tomlinson to follow up the leads  
25 allocated to him. As with the showroom duties, we have found that there was no legal obligation on Mr Tomlinson to follow up those leads and, indeed, he did not do so if he did not have time.

30 104. Mr Tomlinson's participation in training in respect of WCSL's products and the credit arrangements which could be offered to customers is also some evidence of control being exercised by WCSL over Mr Tomlinson but it is equally clear that if he did not understand the products and how to fill in the credit application forms, he would be less likely to generate sales.

35 105. Although Mr Rooney accepted that WCSL did not exercise any real control over how to do his job, we think that this is to be expected given the nature of the job and Mr Tomlinson's years of experience. He was no doubt engaged precisely because he was a skilled salesman.

106. The fact that Mr Tomlinson could only negotiate within certain parameters without the company's consent and that quotes/contracts were required to be on



WCSL's headed notepaper does however show that WCSL exercised some control over the way in which Mr Tomlinson worked.

5 107. Taking into account all of the facts, we have come to the conclusion that WCSL did exercise sufficient control over Mr Tomlinson in order for there to be the possibility of the existence of a contract of service although, in our view, the level of control which WCSL had in this case was relatively modest and could equally be consistent with a contract for services.

#### *Equipment*

10 108. Mr Tomlinson provides his own car and mobile phone and is not reimbursed for the expenses incurred by him in providing these items. Mr Rooney suggested that he would probably have to provide a car and a phone himself as an employee although we tend to think that it would be quite unusual for an employee to be required to make extensive use of a personally owned car and mobile phone without being reimbursed for the expenses incurred in using those items for the purposes of the employment.

15 109. The equipment provided by the company is relatively minor. Much was made by Mr Rooney of the provision of the laptop with which, Mr Rooney said, Mr Tomlinson could not do his job. However, the laptop was only provided after the end of the period in question and so is not strictly relevant to our investigation.

20 110. Even if it were relevant, we do not consider that the provision of the laptop is a significant factor. We were told that the software on the laptop contains an electronic price list, a system for costing a job based on that price list and the ability to produce the resulting estimate and subsequent contract. The software is bespoke and is licensed to WCSL and not to Mr Tomlinson. On this basis, it seems to us that such software would need to be made available to Mr Tomlinson whether he is an  
25 employee or whether he is self-employed. It does not provide any real indication one way or the other.

30 111. The same is true of the other items identified by Mr Rooney such as brochures, samples, stationary and access to WCSL's premises and associated office equipment. Mr Tomlinson simply couldn't do his job without brochures and samples and would have to be provided whether he was employed or self-employed. The other items are not essential tools needed by Mr Tomlinson to do his job of selling WCSL's products. They are just part of mechanics and administration which result from him doing the job.

35 112. If anything, we think that the provision by Mr Tomlinson of the car and mobile phone would support an argument that he is self-employed rather than employed but given the nature of Mr Tomlinson's job, we do not consider the provision of equipment to be a strong factor either way.

*Financial risk/payment terms*

113. Mr Rooney submitted that Mr Tomlinson has no real financial risk. He accepts that if Mr Tomlinson does not turn up for work, he will not make a sale and will therefore not earn any money. However, he likened this to an employee on a zero  
5 hours contract who would also not earn any money if he did not do any work.

114. Mr Rooney also accepted that there were circumstances in which Mr Tomlinson's commission could be cancelled, reduced or clawed back. In addition, he accepted that Mr Tomlinson would incur some expenses in running his car and paying for his mobile phone. However, in his view, these amounts were trivial. Mr  
10 Tomlinson has given evidence that he drives approximately 6,000 – 8,000 miles a year in total (including personal mileage) and so the costs of running his car would not be all that great.

115. On the other hand, Mr Rooney pointed out that the real financial risk is taken by WCSL which incurs significant fixed costs in providing premises, marketing and  
15 administration.

116. Mr Rooney also argued that Mr Tomlinson cannot profit from sound management in the performance of his task. Mr Rooney suggested that Mr Tomlinson is dependent on leads allocated by the company and in any event is subject to the parameters imposed by the company in his negotiations with potential customers.

117. Mr Rooney referred to the decision in *Hall v Lorimer* where Nolan LJ's conclusion was that the expenses incurred by Mr Lorimer were "quite different in nature and scale from those likely to be incurred by an employee". In that case, the expenses (in 1985/86) were approximately £10,000. We did not have evidence of Mr Tomlinson's expenses but we accept that they would have been significantly less than  
20 this.  
25

118. Mr Rooney submitted that the fact that Mr Tomlinson only receives commission is neutral on the basis that it is perfectly possible for employees to be paid on a commission only basis. He also referred to the fact that, in circumstances where Mr Tomlinson's commission is reduced (for example, as a result of giving a discount of  
30 more than 25%), the reduction in the price paid by the customer is borne partly by the company and partly by Mr Tomlinson which again reduces any financial risk taken by Mr Tomlinson.

119. The fact that Mr Tomlinson at one point received regular payments on account in Mr Rooney's view also points towards employment rather than self-employment.

120. Finally, Mr Rooney referred to the fact that Mr Tomlinson does not submit formal invoices for his work but just a commission claim. If Mr Tomlinson was truly self-employed, Mr Rooney would expect him to issue proper invoices.  
35

121. Miss Patel on the other hand took a rather different view. She said that the fact that Mr Tomlinson only receives commission and only becomes entitled to the

commission when there is a completed order and is at risk of a reduction or claw back of commission if something goes wrong, shows that he is in fact taking a significant financial risk.

122. She pointed out that if there are errors or losses, both parties suffer.

5 123. In Miss Patel’s view, financial risk does not mean that there has to be a possibility of a meaningful loss.

124. She also referred to Nolan LJ’s comment in *Hall v Lorimer* [at 217] that:

“The risk of bad debts and outstanding invoices is certainly not one which is normally associated with employment.”

10 125. In our view, the fact that Mr Tomlinson was paid only on the basis of commission is significant. He could work as many hours as he liked but if he failed to achieve any sales, he would not earn anything. In our view, this is a very great financial risk compared to an employee who is normally paid for the work which he does. That is not to say that an individual who is paid only on the basis of  
15 commission cannot be an employee depending on the other factors of the case but it does tend to indicate that the individual is not an employee.

126. Mr Rooney referred to the decision of the Privy Council in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 W.L.R. 1173 where it was found that the individual in question did not take any significant financial risk. However, in that case, the  
20 individual was a mason whose job was to chisel concrete. He was either paid a piece-work rate or a daily rate for his work. As long as he worked, he would therefore also get paid. This is very different from Mr Tomlinson’s position where he could work all day but get paid nothing.

127. Mr Rooney also mentioned the High Court decision of *Global Plant Limited v Secretary of State for Health & Social Security* [1971] 3 W.L.R. 269 where again it was found that the individual in question did not run any significant financial risk. In that case, the individual was the driver of a JCB and he was paid for each hour he worked. The only risk he took was that there may be times when he could not work because of, for example, poor weather. However, as long as he did work, he would  
30 get paid. This case is therefore more similar to *Lee Ting Sang* than Mr Tomlinson’s position where, even if he did work, he may not get paid.

128. Mr Tomlinson was also subject to other risks. If the customer did not pay, he would not get his commission. As in *Hall v Lorimer*, he was therefore at risk of bad debts and unpaid invoices.

35 129. Whilst a number of cases we were referred to do talk about the risk of making a loss as well as the chance of making a profit as being an indicator of self-employment, it seems clear that this is not a necessary pre-requisite for self-employment and is unlikely to be the case where the occupation does not require the individual to incur significant expenses in order to perform the task in question. Nolan LJ for example

observed in *Hall v Lorimer* that a window cleaner is commonly self-employed and yet it is unlikely that the window cleaner's expenses would significantly exceed those incurred by Mr Tomlinson.

5 130. In *Hall v Lorimer* itself, there was no suggestion that Mr Lorimer was at risk of making a significant loss as opposed to simply making a reduced profit.

10 131. Mr Rooney referred us in another context to the decision of the First Tier Tribunal in *Yurdaer Yetis v HMRC* [2012] UK FTT 753. That case dealt with an individual who, like Mr Tomlinson, was selling windows and conservatories for one particular company. All of the other salesmen were paid on the basis of commission only. Mr Yetis however received a weekly payment of £200 (whether or not he sold anything) plus a smaller commission. Mr Yetis was found to be an employee but there was a clear assumption (without the question being examined in any detail) that those salesmen who were paid on the basis of commission only were properly treated as self-employed.

15 132. It is clear that a significant proportion of Mr Tomlinson's leads came from existing customers and personal recommendations – i.e. leads that were generated himself and not by WCSL. This shows to us that Mr Tomlinson did have the ability to profit from sound management in the performance of his task.

20 133. In addition, he was able to influence the amount of commission he would be entitled to, albeit within the parameters laid down by WCSL. If he was able to negotiate a sale without providing too big a discount, he would get more commission.

25 134. Whilst it would not be impossible for someone who is paid only on the basis of commission to be an employee, our view is that in this case that Mr Tomlinson was taking a significant financial risk in being paid only on the basis of a commission for successful sales. He did have the opportunity to increase his profits by generating his own leads and negotiating better deals and he did incur expenses which would reduce his profits and could in theory result in a loss. In this particular case, we think this is a fairly strong indicator of self-employment rather than employment.

#### *Personal service/exclusivity*

30 135. We have found as a fact that Mr Tomlinson could not provide a substitute which is an indication of employment rather than self-employment.

35 136. Miss Patel submits that this is only one factor and is not decisive. She referred back to what she described as a fundamental test in *Market Investigations* which is whether Mr Tomlinson is in business on his own account. Whilst this is correct, we must still take it into account.

137. We found that Mr Tomlinson was free to provide his services to other companies, as long as this did not relate to leads generated by WCSL itself but that he

never did so. We do not therefore think that this factor provides a strong indication either towards employment or self-employment.

*Mutuality of obligation*

5 138. Mackenna J's first pre-condition to the existence of a contract of service has sometimes been described in other cases as a requirement for a "mutuality of obligation". The requirement is that "the servant agrees that in consideration of wage or other remuneration, he will provide his own work and skill in the performance of some service for his master".

10 139. It is not entirely clear what this means. Some cases have interpreted it simply as a requirement that there must be a legally binding contract; others have interpreted it as requiring an obligation on the employer to provide work or, at least, to pay the employee whether or not work is provided, as well as an obligation on the employee to do the work if it is provided.

15 140. Mr Rooney submitted that there was a requirement on WCSL to provide leads and an obligation on Mr Tomlinson to follow up those leads and that this provided the necessary mutuality of obligation without which there cannot be a contract of service.

20 141. Mr Rooney also suggested that the fact that the fortunes of both WCSL and Mr Tomlinson were inextricably linked by the fact that it was only if Mr Tomlinson made a successful sale that he would earn a commission and the company would make a profit also indicated that there was a mutuality of obligation.

142. HMRC did not put forward any arguments on this point.

25 143. Taken at face value, it is clear that Mr Tomlinson did agree with WCSL that he would provide his own work and skill in the performance of work for WCSL in return for remuneration. We were not referred to any other authorities on this point. We are therefore prepared to assume that the necessary mutuality of obligation exists although if mutuality of obligation in fact requires there to be an obligation on WCSL to provide work and an obligation on Mr Tomlinson to do the work provided, we doubt whether, in this case, those obligations exist.

30 144. We certainly do not consider, on the basis of the evidence before us, that it has been shown on the balance of probabilities that there was an obligation on WCSL to provide Mr Tomlinson with leads (although there probably was an expectation that it would do so). We have found as a fact that there was no obligation on Mr Tomlinson to follow up all of the leads allocated to him and that he was free to pass them back to the sales manager for allocation to other salesmen.

35 145. This is in any event only a pre-condition without which there cannot be a contract of service. It does not on its own indicate that a contract of service in fact exists. This depends on all the other factors.

*Employee type benefits*

146. It is common ground that Mr Tomlinson was not entitled to holiday pay, sick pay or any pension contributions. Mr Rooney's explanation for this was that, until 2013, everybody thought that Mr Tomlinson was self-employed and that it was therefore to be expected that these benefits would not be provided.

147. Miss Patel on behalf of HMRC says that the lack of any employee type benefits is clear evidence that Mr Tomlinson was not an employee. She referred us to a specimen contract of employment used by WCSL which clearly shows that WCSL's employees were entitled to holiday pay, sick pay and the entitlement to join the company pension scheme.

148. In *Market Investigations*, Cooke J dismissed [at 740] the lack of sick pay in that case on the basis that the engagement was for a very short duration. However, in this case, it was clearly expected that Mr Tomlinson's engagement with WCSL would be indefinite and therefore the lack of holiday pay and sick pay is surprising if he is in fact an employee.

149. However, in the circumstances, we think that it is a factor which carries little weight and, as Mr Rooney says, is more indicative of the fact that both parties considered Mr Tomlinson to be self-employed. Clearly, it is consistent with self-employment and does to some extent point in that direction but equally clearly is capable of being outweighed by other factors.

*Part and parcel of the organisation*

150. Mr Rooney placed some emphasis on the fact that Mr Tomlinson was treated as part and parcel of the organisation. It was accepted by Mr Adderley that a customer walking into the showroom would have no way of knowing that Mr Tomlinson was not an employee of WCSL.

151. Mr Tomlinson also had WCSL business cards with his name, mobile phone number and WCSL email address printed on it. The same information appeared on the estimates and contracts provided by Mr Tomlinson to the customers and indeed he was authorised to sign those estimates and contracts on behalf of the company. Mr Rooney suggested that only an employee would be able to sign contracts on behalf of WCSL.

152. On top of this, Mr Rooney drew attention to the fact that Mr Tomlinson's photograph appeared in adverts placed by the company in local newspapers.

153. Miss Patel's response to this was that there was no reason to suppose that a customer would care whether Mr Tomlinson was an employee of the company or whether he was self-employed. Mr Tomlinson confirmed that he had never been asked the question.

154. The issue as to whether a person is part and parcel of an organisation derives from a dictum of Denning LJ in *Bank voor Handel en Scheepvaart NV v Slatford* (No. 2) [1952] 2 All ER 956 [at 971] where he said:

5                    “In this connexion I would observe the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation.”

155. This was not a case dealing with employment status. The question was what was meant by “crown status” and, in that context, who was a “servant” of a government department.

10 156. Mackenna J referred to this case in *Ready Mixed Concrete* and his response [at 445] to Denning LJ’s observation was:

15                    “This raises more questions than I know how to answer. What is meant by being ‘part and parcel of an organisation’? Are all persons who answer this description servants? If only some are servants, what distinguishes them from the others if it is not their submission to orders?”

157. Mackenna J did not answer these questions and did not make a specific finding as to whether the taxpayer in that case was part and parcel of the organisation. However, his work was to drive a cement truck with the company’s name on the side wearing the company’s uniform and so to some extent he was in the same position as Mr Tomlinson in that a third party might well have assumed that he was employed by the company. Mackenna J’s decision was however that he was self-employed and not an employee.

25 158. We agree that Mr Tomlinson would have appeared to the outside world as part and parcel of WCSL’s organisation. However, we do not think it would be unusual for a self-employed salesman to be authorised to sign contracts on behalf of the company. This is not in our view strong evidence of being an employee.

30 159. We think in any event that the most that can be said is that where an individual appears to a third party to be part and parcel of an organisation, that is consistent with being an employee and is a factor to be taken into account in looking at the overall picture.

#### *The intention of the parties*

160. There is no doubt that both Mr Tomlinson and WCSL intended and believed that Mr Tomlinson was self-employed.

35 161. The Master of the Rolls (Lord Denning) said in *Massey v Crown Life Insurance Company* [1978] 1 WLR 676 at [680]:

5 “It seems to me on the authorities that, when it is a situation which is in doubt or which is ambiguous, so that it can be brought under one relationship or the other, it is open to the parties by agreement to stipulate what the legal situation between them shall be. That was said in the *Ready Mixed Concrete* case in 1968 by Mr Justice Mackenna. He said (at page 513) that:

10 ‘if it were doubtful what rights and duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention.’

15 So the way in which they draw up their agreement and express it may be an important factor in defining what the true relation was between them. If they declare that he is self-employed, that may be decisive.”

162. In the First Tier Tribunal in *Remi Ashton v HMRC* [2016] UK FTT 0727, the Tribunal commented [at 59] that:

20 “The substance of the relationship and the intention of the parties is more important than the description of the relationship in documentation.”

163. Clearly, in this case there was no written agreement. However, it is equally clear that the parties intended that Mr Tomlinson should be self-employed.

25 164. Our reading of the comments in *Crown Life Insurance* is that intention is only relevant where a consideration of the other factors does not enable a clear decision to be taken one way or the other – i.e. that, on the facts, the arrangement could be either a contract of service or a contract for services. In those circumstances, the intention of the parties may tip the balance one way or the other. On the other hand, if the only possible conclusion from reviewing the facts is that there is either a contract of service or a contract for services, the fact that the parties intended something different cannot  
30 change this conclusion.

### **The overall effect – viewing the whole picture**

165. We do not believe that this is a case where the details point clearly towards either employment or self-employment. There are factors which support both conclusions.

35 166. In favour of employment, WCSL did exercise some control over Mr Tomlinson’s activities, it provided equipment and support to enable Mr Tomlinson to do his job, he appeared to the outside world to be an employee, there was a negligible chance of Mr Tomlinson making a loss and he had to provide his services personally (he could not provide a substitute).



167. Factors pointing towards self-employment include the fact that he was paid on a commission only basis, he incurred expenses which were not reimbursed, although there was some control exercised by WCSL, he was fairly free to work in the way that he wanted and there was no limit on the time that he could take off, he had no entitlement to holiday or sick pay and he could increase his earnings by generating more of his own leads and negotiating the best possible deals.

168. Standing back from the detail and looking at the overall picture, we tend to think that this shows that Mr Tomlinson was in business on his own account (in the words of Cooke J in *Market Investigations*) and was not an employee.

169. However, we accept that the picture is not a clear one and that this is one of those cases where either conclusion would be perfectly possible. The fact that both parties intended and believed that Mr Tomlinson was self-employed and operated on that basis for almost 25 years, must in this case therefore be decisive.

### **Decision**

170. Mr Tomlinson has not discharged the burden of proof of showing on the balance of probabilities that, during the period in question, he was employed under a contract of service.

171. It follows that, in accordance with paragraph 10 of the Social Security Contributions (Decisions and Appeals) Regulations 1999, Mr Hiron's decision dated 11 November 2015 that Mr Tomlinson was self-employed for the period from 6 April 2004 to 5 April 2015 shall stand good.

172. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it 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.

**ROBIN VOS  
TRIBUNAL JUDGE**

**RELEASE DATE: 12 JUNE 2017**