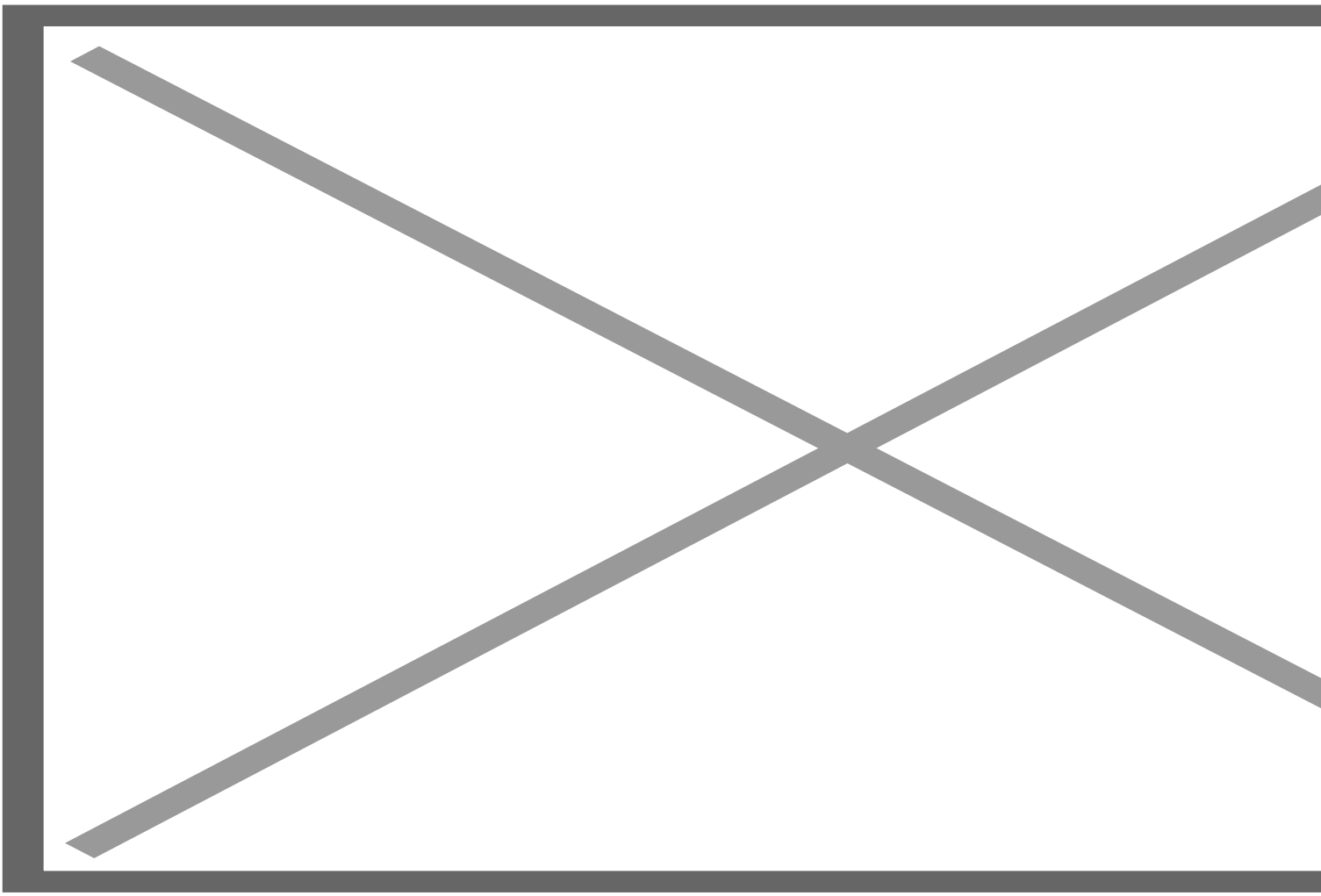
# Pictures at an exhibition gallery

Employment Tax | Management of taxes



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*Keith Gordon* looks at a case which considers the employment status of educational staff engaged by the National Gallery

## Key Points

## What is the issue?

As readers might remember, the National Gallery announced a reorganisation in late 2017 which sought to sever (and then re-establish) the connections with their educators, some of whom had been providing services to the Gallery for many years. The educators commenced legal action for, *inter alia*, unfair dismissal and failures to consult properly on redundancy.

## What does it mean to me?

On the topic of employment status and the related question of IR35, the short answer is ‘watch this space’.

## What can I take away?

In the meantime, advisers should look carefully at their freelancing clientele to ensure that they are not paying too little or too much tax (and National Insurance).

## Background

At the time of writing, I was expecting to report on one of a number of IR35 cases involving TV personalities, whose appeals were heard during the course of 2018. However, despite various rumours to the contrary, nothing emerged by the end of February. However, regular readers will know that I occasionally look beyond tax cases to see other topical developments which might be relevant to tax practitioners. As a result, I have looked at a recent Employment Tribunal decision in the case of Braine v The National Gallery (Case no. 2201625/2018) which also focuses on the status of working individuals.

## Background to the case

As readers might remember, the National Gallery announced a reorganisation in late 2017 which sought to sever (and then re-establish) the connections with their educators, some of whom had been providing services to the Gallery for many years. The educators commenced legal action for, inter alia, unfair dismissal and failures to consult properly on redundancy. These claims which were made in the Employment Tribunal which was required to consider as a preliminary issue whether the individuals were:

- employed under a contract of employment,
- independent contractors in business on their own account, or
- a hybrid status not currently known in the tax context, a ‘worker’ for whom some statutory protections are given.

It is this third category which has seen recent other high-profile litigation such as that involving Uber, Pimlico Plumbers etc.

## Facts found by the Tribunal

The Tribunal (Employment Judge Snelson) noted that most of the facts were not in dispute – the main differences between the parties concerned the legal consequences of these facts. The facts as found were (in summary) as follows.

The claimants were involved in the Gallery’s Education Department which ran a range of programmes and activities including tours and workshops for school age and adult visitors, lectures, courses and live drawing classes. There were also outreach activities.

One of the claimants had been working for the Gallery for over 40 years – amongst the other ‘sample’ claimants, there was a range of experience from 25 to 12 years.

On joining the Gallery, the educators would be trained to follow the Gallery's 'house style' and would then be considered as probationers for the first six months or so. During that period they would receive day passes. However, once they had been observed to have performed satisfactorily, they would then be added to the 'freelance team on a more permanent basis' and receive permanent passes accordingly. Supervision, however, continued beyond the educators' probation periods.

The Tribunal Judge recognised that work patterns would often emerge. He also found that the individuals were reluctant to turn down work and that occasionally work was allocated in a way that other educators might perceive as unfair. However, from a legal perspective he considered that there was no obligation on the Gallery to offer any work; nor any obligation on any educator to accept any assignment being offered.

The Gallery introduced standard terms of engagement in 2002 and these were revised in 2005. In the 2002 version, payment was to be through the payroll (and subject to tax and NIC, accordingly) unless the educators were able to prove self-employed status. By 2005, all educators were to be paid (and taxed) through the payroll. In this regard, it is worth noting that the former Inland Revenue first concluded that the workers should be subject to PAYE back in 1999, although this was not implemented for another five years.

## Applying the case-law criteria

In reaching its decision, the Tribunal (quite properly) considered the 'irreducible minima' of employment as first articulated in *Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (but since endorsed at the highest levels).

In this regard, the Judge quickly concluded that the educators had no right of substitution. No firm conclusion was reached on control – although there were considerable efforts to ensure that the educators adhered to a house style (and, on one occasion, the Gallery told one educator not to use a small canvas as a visual aid). Furthermore, the Tribunal made it clear that educators were required (or at least 'strongly encouraged') to attend team meetings and other out of hours activities. As already noted the educators were always subject to supervision, although the process became less formalised and less rigorous after about 2014.

To outsiders, the educators were very much part of the Gallery with the ability to take advantage of a number of facilities. They were sometimes required to wear gallery-branded tee-shirts and were included in the staff directory. However, they were clearly distinguishable from other salaried staff: their lack of set hours, holiday pay, paid sick leave and pension benefits. On the other hand, they also worked for other institutions on a declared 'self-employed' basis.

## The Tribunal's decision

It will be noted that the preceding analysis says nothing about mutuality of obligations. This is because the Judge wished to consider separately the questions as to any overarching contractual relationship and the status during individual assignments.

The Judge came firmly down on the side of saying that there was no overriding contract of employment between the educators and the Gallery. This was not affected by the longevity of the relationship in many cases. As the Judge noted, a bank nurse might work at the same hospital year in year out, without there being any suggestion of a change in his or her relationship. Indeed, for such a change to arise, the question that must then be asked is at what stage did the change occur?

On the other hand, that does not address the question about the educators' status during individual assignments (which is going to be HMRC's principal focus). The educators pointed to the level of integration within the gallery. However, the Judge considered that there were too many differences between the educators and the salaried staff: he noted the lack of sick pay (and similar matters) and the fact that the educators (unlike the salaried staff) were free to turn down assignments. Taking a step back, the Judge concluded that the educators could not establish themselves as employees. However, the points that they had relied upon put them squarely in the category of 'worker' (i.e. self-employed but not independent contractors in business on their own account).

## Commentary

The Judge made reference to the 1999 determination by the former Inland Revenue but declined to re-examine it. Part of his reason was that he was deciding a different point (being which of three statuses attached to the educators) whereas the Revenue were focusing on a binary question. In this respect, I think that the Judge's reasoning is slightly adrift. This is because, although it is true that the possible outcomes are inevitably different, the boundary between the two outcomes from a tax perspective is the same boundary as between one of the outcomes in the Tribunal and the other two. On the other hand, the Judge was entirely correct to say, 'It is not my function to review the earlier assessment but to reach my own decision on the different questions and the different evidence presented to me.'

With this in mind, I ran the facts of the case (so far as I was able to deduce them from the judgment) through HMRC's CEST programme. That process was inconclusive. I wonder, therefore, on what basis the former Inland Revenue previously insisted upon individuals being put through the payroll. Nevertheless, the Tribunal's decision is conclusive: the workers are not employees. Therefore, whilst they might have lost their claims, these workers should ask the National Gallery to remove them from the payroll and allow them to be taxed as self-employed individuals, in accordance with the law. I do recognise, however, that practical difficulties could emerge if the Gallery refuses.

As noted by the Judge, the case might proceed further to the Employment Appeal Tribunal and therefore it would be worth keeping a close eye on any developments. In particular, I am sure that HMRC will follow carefully the arguments as to whether each individual assignment constituted a separate employment. Would HMRC consider the Judge's reasons to be sufficient? The pay structure is axiomatically different between permanent and casual staff and, therefore, was the comparison a right one to make? Similarly, is it right to highlight the fact that each assignment is separately agreed upon? (This goes to the heart of many commentators' complaints about CEST which by-passes the mutuality of obligations test.) In my view, whilst the Judge's approach in this one regard could benefit from careful review, it is my view that these are also relevant factors when stepping back and assessing the overall picture. The need to do so was made abundantly clear in the case of *Hall (HM Inspector of Taxes) v Lorimer* [1994] STC 23.

## What to do next

On the topic of employment status and the related question of IR35, the short answer is 'watch this space'. Whilst HMRC might want everyone to run their cases through CEST, it is my view that the results are skewed heavily in favour of HMRC and therefore it is not a reliable tool. Of course, HMRC are bound by the results of it – but tax advisers should strive to identify the right amount of tax payable and not the amount that will keep HMRC at bay.

In the meantime, advisers should look carefully at their freelancing clientele to ensure that they are not paying too little or too much tax (and National Insurance).