Case Number: 2200478/2013

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	Respondents
Mr J McCririck		(1) Channel 4 Television Corporation (2) IMG Media Ltd

JUDGMENT ON PRE-HEARING REVIEW

HELD AT: London Central **ON: 3-4 June 2013**

BEFORE: Employment Judge A M Snelson (sitting alone)

On hearing Miss J Eady QC and Mr T Linden QC on behalf of the Respondents, it is adjudged and directed that:

(1) The Claimant was at all material times 'employed' by Highflyer Productions Limited ('Highflyer'), within the meaning of the Equality Act 2010 ('the 2010 Act'), s83(2)(a).

(2) At all material times:
   (a) the First Respondents were a 'principal' within the meaning of the 2010 Act, s41(5), and
   (b) the Claimant was a 'contract worker' 'supplied' to them by Highflyer within the meaning of the 2010 Act, s41(7).

(3) The Claimant was at all material times an 'employee' of Highflyer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006, reg 2(1).

(4) A case management discussion shall be held by telephone at 9.30 a.m. on 19 July 2013, with 30 minutes allocated.

A. M. Snelson

EMPLOYMENT JUDGE 28/6

Judgment entered in the Register and copies sent to the parties on .....

..... for Secretary of the Tribunals

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BETWEEN

Claimant	**and**	**Respondents**
Mr J McCririck		**(1) Channel 4 Television Corporation** **(2) IMG Media Ltd**

REASONS FOR THE RESERVED JUDGMENT ON PRE-HEARING REVIEW SENT TO THE PARTIES ON 28 JUNE 2013

Introduction

1 The First Respondents ('Channel 4') are a public service television broadcaster. The Second Respondents ('IMG') are an independent television production company which specializes in sports programmes.

2 The Claimant has been described as a media 'personality'. He was born on 17 April 1940 and is now 73 years of age. Between 1984 and 31 December 2012 he appeared as a presenter on Channel 4's horse racing programme, prosaically named *Channel 4 Horse Racing* ('the programme'), where he developed his reputation as an expert on all aspects of the betting side of the sport. With effect from 1 January 2013 IMG became the production company charged with producing the programme, replacing Highflyer Productions Limited ('Highflyer'), which had held the contract for the preceding 16 years. At the moment of transition the Claimant ceased to be a member of the presentation team.

3 On 22 January this year the Claimant brought complaints of age discrimination against both Respondents and four senior executives, three employed by Channel 4 and one by IMG. The gist of his case is that he was dropped from the programme because of his age. That allegation is denied.

4 At a case management discussion ("CMD") held on 26 March Employment Judge Lewzey dismissed the claims against the individual Respondents upon Channel 4 and IMG accepting vicarious liability for their actions. She went on to identify the central issues in the case in these terms:

> **1.1 Was the Claimant at any material time a contract worker as defined by section 41, Equality Act 2010?**
>
> **1.1.1 Was he *employed* by [Highflyer] within the meaning of section 83(2)(a) of the 2010 Act?**

1.1.2 If so, was any of the Respondents a *principal* for the purposes of section 41(5) of the 2010 Act and if so, which Respondent?

1.2 Was the Claimant not permitted to work as a presenter on Channel 4 horse racing, or continue to do so, *because of his age*?

1.3 If so was the treatment of the Claimant *a proportionate means of achieving a legitimate aim*?

The Employment Judge directed that the issues at 1.1.1 and 1.1.2 should be considered at a pre-hearing review ('PHR').

5 The PHR came before me on 3 June this year with two sitting days allocated. Miss Jennifer Eady QC appeared for the Claimant and the Respondents were represented by Mr Thomas Linden QC. At the outset I expressed reservations about the appropriateness of the PHR procedure. I drew attention to *Leeds City Council-v-Woodhouse* [2010] IRLR 625 CA. There, the question whether the Claimant was a contract worker for the purposes of the Race Relations Act 1976, s7 was determined at a PHR. Following an unsuccessful appeal by the Respondents to the EAT, the case reached the Court of Appeal. Giving the only substantial judgment, Smith LJ observed (paras 30-31) that unless the case was "clear and simple" it was preferable for the question of employment status not to be "hived off" but to be considered as part of the final hearing. After hearing argument I was persuaded, despite considerable misgivings, that, having regard to all relevant factors including cost and proportionality, the balance came down in favour of proceeding with the PHR. I regarded it as of particular significance that both sides, represented by leading counsel, wished me to do so. My decision should not be interpreted for one minute as suggesting that, faced with the question at the CMD stage, I would have regarded it as appropriate to list a PHR. There is nothing to suggest that Smith LJ's observations were in the minds of the advocates or the Employment Judge on 26 March.

6 I heard oral evidence from the Claimant and Mr Stuart Cosgrove, Channel 4's Director of Creative Diversity. Both gave evidence by means of written statements. In addition to witness evidence I read the documents to which I was referred in the agreed two-volume bundle. I also had the benefit of Miss Eady's opening note, chronology, cast list and written closing submissions and Mr Linden's opening skeleton argument.

The Issues

7 The issues which I was asked to decide did not correspond exactly with those identified by Employment Judge Lewzey at the CMD. The reason was that Miss Eady had been instructed in the meantime and, no doubt on her advice, the Claimant had given notice in correspondence of an intention to adjust his claim against IMG to argue that he was employed by Highflyer, that there was a 'relevant transfer' from Highflyer to IMG on 1 January 2013 and that accordingly he transferred (or was entitled to transfer) to IMG on that date, pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'). I pointed out that (subject to the outcome of the PHR) the change of case would need to be formally pleaded, but Mr Linden took no pleading point before me and

both sides were content to proceed as if the claim form had already been amended.

8 Accordingly, the two PHR issues as between the Claimant and Channel 4 remained those identified by Employment Judge Lewzey. I will call them the 'employment' point and the 'principal' point. As between the Claimant and IMG the question for me was whether, at the material time, the Claimant was an employee of Highflyer for the purposes of TUPE ('the TUPE 'employment' point').

The Applicable Law

9 The 2010 Act, s41 prohibits discrimination by principals against contract workers (subsection (1)). It also includes these provisions:

> **(5) A "principal" is a person who makes work available for an individual who is –**
>
> **(a) employed by another person, and**
> **(b) supplied by that other person in furtherance of a contract to which the principal is a party …**
>
> **…**
>
> **(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in sub section (5) (b).**

By s 83(2) it is provided that:

> **"Employment" means –**
>
> **(a) employment under a contract of employment, a contract of apprentiship or a contract personally to do work …**

10 By TUPE, reg 2 it is enacted that:

> **(1) In these Regulations –**
>
> **…**
>
> **"employee" means any individual who works for another person whether under a contract of service or apprentiship or otherwise but does not include anyone who provides services under a contract for services and references to a person's employer shall be construed accordingly.**

11 For the purposes of the 2010 Act, the parties were in agreement that the contract between the Claimant and Highflyer required him personally to do work. There could be no question of a substitute appearing on the programme in his stead. The central issue was whether the Claimant was in 'employment'. Mr Linden submitted that he was not. Rather, he was in business on his own account.

12 According to *Harvey on Industrial Relations and Employment Law* the concept of 'employment' under the 2010 Act is to be approached in this way (L[553]):

> **Broadly speaking the definition applies to those who are (in the loose sense) employed as opposed to being entirely independent contractors. The self-employed can fall within the definition provided they undertake to perform their work personally.**

13 Domestic authorities have tended to place particular emphasis on the 'dominant purpose' of the contract in question (see e.g. *Mirror Group Newspapers Limited-v-Gunning* [1986] ICR 145 CA). In *James-v-Redcats (Brands) Limited* [2007] ICR 1006 EAT, Elias J considered an appeal on the meaning of the term 'worker' under the National Minimum Wage Act 1998. His judgment includes interesting, albeit strictly *obiter,* remarks on the meaning of 'employment' for the purposes of the anti-discrimination legislation. He observed (para 53) that although under the anti-discrimination code there is no express exclusion of those operating a business undertaking and contracting with a customer (*cf* the definition of worker under the national minimum wage Act 1998, s54 (3)), the 'dominant purpose' test has been used to effect such an exclusion. It is only if the dominant purpose of the contract is the provision of personal services that there is 'employment' for the purposes of the anti-discrimination legislation. At para 59 the learned judge continued:

> **… the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependant work relationships, or is it in essence a contract between two independent business undertakings? The test does not assist in determining whether a contract is a contract of service or for services … Its purpose is to distinguish between the concept of worker and the independent contractor who is in business on his own account, even if only in a small way.**

14 In *Jivraj-v-Hashwani* [2011] ICR 1004 SC, the Supreme Court considered the concept of 'employment' in the context of a complaint of discrimination based on religion or belief. It was held that an arbitrator was not 'employed' under a contract personally to do work. Giving the principal judgment, Lord Clarke JSC implicitly approved the observations of Elias J in the *Redcats* case already cited (para 37). He noted the domestic authorities but warned that they must be read with caution because they do not focus on the requirement for employment under a contract of employment or apprentiship *or a contract personally to do work.* To that extent the UK case-law ignored the EU perspective necessary for a proper construction of the legislation. The Community jurisprudence demonstrated that dominant purpose was "not the test, or at any rate not the sole test" (paras 35-36). On the other hand, applying it may assist the Tribunal to reach the right conclusion on the facts of a particular case (para 39).

15 The discussion about dominant purpose was not central to the Supreme Court's decision in *Hashwani*. At an earlier point in his judgment, Lord Clarke identified the source of the protection from religious discrimination as the Framework Directive of 2000 and the seminal decision of the Court of Justice in *Allonby-v-Accrington and Rossendale College* (*Case C-256/01) [2004] ICR 1328.* At para 26 he cited passages from the judgment in *Allonby,* including the following:

> **66. The term "worker"… cannot be defined by reference to the legislation of the member states but has a Community meaning. Moreover, it cannot be interpreted restrictively.**

> **67 … there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration …**
>
> **68 … It is clear from [the Article 141(2) definition of "pay"] that the authors of the Treaty did not intend that the term "worker" … should include independent providers of services who are not in a relationship of subordination with the person who receives the services …**
>
> **69 … the question whether such relationship exists must be answered in each particular case having regard to all the factors and circumstances by which the relationship between the parties is characterised.**
>
> **70 Provided that a person is a worker … the nature of his legal relationship with the other party to the employment relationship is of no consequence …**
>
> **71 The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker … if his independence is merely notional, thereby disguising an employment relationship …**

The key holding was that an arbitrator, given his 'quasi-judicial' role, was not in a position of subordination to, or under the direction of, the parties, which, as *Allonby* demonstrates, are essential features of an 'employment' relationship (paras 40-41).

16 Miss Eady submitted, and Mr Linden did not disagree, that the *Allonby* concept of the 'worker' is applicable here: someone 'employed' under a contract of service or apprenticeship or a contract personally to do work under the 2010 Act is a 'worker' under Community jurisprudence.

17 On the 'principal' point, my attention was drawn to *Jones-v-Friends Provident Life Office* [2004] IRLR 783, a decision of the Court of Appeal of Northern Ireland decided under Article 12 of the Sex Discrimination (Northern Ireland) Order 1976, legislation in comparable terms to the 2010 Act, s41. The facts are unimportant for present purposes, but the judgments are valuable. Lord Carswell LCJ said this:

> **13. Article 12 was designed to prevent an employer from escaping his responsibilities under anti-discrimination legislation by bringing in workers on sub-contract … In my opinion Article 12 should receive a broad construction …**
>
> **...**
>
> **17. The purpose of Article 12 is to ensure that persons who are employed to perform work for someone other than their nominal employers receive the protection of the legislation forbidding discrimination by employers. It is implicit in the philosophy underlying the provision that the principal be in a position to discriminate against the contract worker. The principal must therefore be in a position to influence or control the conditions under which the employee works. It is also inherent in the concept of supplying workers under a contract that it is contemplated by the employer and the principal that the former will provide the services of employees in the course of performance of the contract. It is in my view necessary for both these conditions to be fulfilled to bring a case within Article 12.**

Nicholson LJ agreed that it was necessary to give the Article a broad interpretation.

18 I was also taken to the *Woodhouse* case (already cited). There the Claimant sued Leeds City Council for racial discrimination based on treatment alleged to have been applied to him by an employee of the Council. The claim was brought under the contract worker provisions of the Race Relations Act 1976, which did not differ materially from the 2010 Act, s41. The Council challenged the jurisdiction of the Tribunal to entertain the claim, relying on the fact that the Claimant worked for an 'arm's length management organisation' which was independent of the local authority. On that basis, it was submitted that he was not 'supplied' under the agreement between his employer and the Council. The Employment Judge and the EAT held that the applicable provision should be broadly construed and that, having regard in particular to the fact that the work was done for the Council's benefit, the Claimant came within the contract worker protection. The Court of Appeal dismissed the Council's appeal. Smith LJ observed (para 22):

> **Each case is fact-sensitive; merely because the facts are not similar to a previous case does not mean that they cannot fall within [the section]. The authorities suggest that where the principal and the employer of the applicant are in the relationship of contractor and sub-contractor, the mere fact that the applicant does work under the sub-contractor from which the principal will derive some benefit is not enough to bring the applicant within [the section]. It may well be that, if it can be shown that the principal can exercise an element of influence or control, that will be enough to bring the case within [the section] but that is not to say that influence or control must be demonstrated in all cases. The judge in the present case considered that, due to the extreme closeness of the relationship between the contracting parties, it could properly be said that Mr Woodhouse's work was being done for the council, regardless of the exercise of control or influence. In my view, control and influence are not necessary elements, and it matters not that they have not been demonstrated in the present case.**

19 There appears to be no authority directly in point for the purposes of the TUPE question. Miss Eady drew attention to the Acquired Rights Directive of 2001 which, by article 2.1(d) provides:

> **"employee" shall mean any person who, in the Member State concerned, is protected as an employee under national employment law …**

20 Mr Linden submitted that the definition in TUPE reg 2(1) should be interpreted as confining the protection to those employed under contracts of service or apprentiship or in some other relationship to be construed *eiusdem generis* with those classes of employment. But when I invited him to give examples of such comparable relationships he was unable "on his feet" to do so. Miss Eady submitted that the statutory words "or otherwise" signalled a legislative intention to admit all 'workers' within the protection of TUPE. I will return to this disagreement in my conclusions below.

The Facts

21 The facts essential to my decision, either agreed or proved on a balance of probabilities, are the following.

The contract between the Claimant and Highflyer

22 The earliest relevant contractual document shown to me was the 'Consultancy Agreement' dated 30 January 1997 between Highflyer and the Claimant ('the Agreement'). Despite the date it bears it seems to have been produced in July 1997. The document recites:

> **1 The Company [ie Highflyer] has entered into a contract with [Channel 4] for the provision of televised racing coverage in the United Kingdom.**
>
> **2 The Company wishes to engage the Consultant to provide the services of the Consultant to assist in the Company's performance of the said contract with Channel 4.**

The Schedule to the Agreement, so far as material, reads:

> **1 Duties: Such front-of-camera work as allocated from time to time by the Company including the functions of Commentator/Interviewer/Presenter/ Betting Statistics Analyst**
>
> **2 Number of days required for provision of services: 75**
>
> **3 Payment: £105,000 … per year.**
>
> **4.1 Foreign subsistence/accommodation allowance: £10,000 per year**
>
> **5 Travel Expenses: first class return rail fares**

23 The Agreement stipulated (clause 2.1) that the Claimant's services would be supplied as and when required in connection with the provision of Channel 4 televised racing coverage. They were to include appearances on the *Morning Line* programme which was broadcast on the mornings of race days to preview the afternoon's action. The Agreement was for a fixed term of three years and purported to reserve to Highflyer an 'option' on the Claimant's services for two further periods of twelve months each, such option to be exercised in writing on or before specified dates.

24 Terms governing payment provided for the annual sum of £105,000 to be paid in equal monthly instalments in arrears, upon delivery of an invoice by the Claimant. VAT was payable "if appropriate", subject to submission of a valid VAT invoice. The subsistence/accommodation allowance was declared to be by way of reimbursement for expenses necessarily incurred. There was also a provision for an additional 'fee' of £30,000 payable on or before 1 February in each year in which the Agreement was in existence, save that no such fee was payable for a particular year if the Agreement was terminated, or notice given to terminate it, at any time during that year (clause 3.6).

25 Clause 13 states:

> **It is declared that it is the intention of the parties that the Consultant will have the status of a self-employed person. Also that the Consultant is responsible for all income tax liabilities and national insurance or similar contributions in respect of his fees under this agreement.**

26 In December 1999 the Claimant's commitment to Highflyer increased to 82 days per annum and his remuneration to £150,000, inclusive of the £30,000 'fee', together with sundry expenses and allowances. At this point he took on the additional duty of contributing to the Channel 4 website.

27 In subsequent years the Claimant enjoyed rate of inflation (or better) pay increases.

28 As a result of a substantial cut in their production budget from Channel 4, Highflyer offered the Claimant an extension to the 'Consultancy Agreement' for 2006 at a reduced 'Annual Retainer Fee' (all in) of £90,000, together with accommodation and subsistence allowance and travel expenses, requiring his services on 70 race days per year, including the *Morning Line* programme.

29 In 2008 the Claimant's days were cut to 55 and the annual payment reduced *pro rata* (although Highflyer passed on "an RPI increase from Channel 4", which was applied to the diminished figure). In addition, he managed to negotiate a separate 'top-up fee' and a '5% per cent cost of living allowance', both of which appear to have been paid (directly or indirectly) by Channel 4. Highflyer were also liable for the usual accommodation and subsistence allowance and travel expenses.

30 In December 2008 Mr Kevin Lygo, Channel 4's Director of Television and Content, wrote to the Claimant explaining that the £20,000 'top-up fee' (which he referred to as a 'stipend') paid in 2008 could not be repeated in 2009. The Claimant wrote back accepting the change as "fully understandable".

31 In 2010 the Claimant's race days were cut to 40 and his remuneration fell to £40,000 plus accommodation and subsistence allowances and travel expenses. The annual payment included, as before, the *Morning Line* appearances and up to 30 afternoon shows (i.e. programmes on which the races themselves were covered). The 2010 terms remained unchanged throughout 2011 and 2012.

32 Under "Positive Obligations of the Employer and the Consultant" (references in several places to the 'Employer' suggest that the document was based on a model for a triangular agreement involving the Company, an end user and a 'Consultant' and was carelessly proof read), my attention was drawn to clause 5.5, under which the Consultant warranted and agreed that he would:

> **5.1 Perform such duties and carry out such orders and instructions given to him by the Company under this Agreement;**
>
> **5.2 Comply with and abide by all rules and regulations made by:**
>
> **5.2.1 … the Company and/or Channel 4 for the conduct of the Company's business;**
>
> **5.2.2 the authorities at the race courses at which he is required to render his services;**
>
> **5.3 Be available for and if so required attend all conferences, discussions and rehearsals prior to the said television broadcasts of Race Meetings as and**

> **when reasonably required by the Company. For the avoidance of doubt, days referred to in this subclause which are worked do not count towards the number of days specified in the Schedule and will not entitle the Consultant to any further remuneration;**
>
> **…**
>
> **5.5 Not without prior written approval of the Managing Director of the Company appear in sound or vision in any transmission of the BBC or any horse racing programme produced by any third party …**

33 In later versions of clause 5.5, a proviso was added permitting the Claimant to offer his services to any third party provided that his doing so did not give rise to a conflict of interest or prevent him from fulfilling his obligations under the Agreement.

34 In the case of the 2008 Agreement, the Claimant deleted most of the text of clause 5.5, so that the restriction on working for third parties without written approval applied only to BBC racing broadcasts. The contract as amended was signed by both parties.

35 The copy of the Agreement for 2010 was incomplete. The missing page would have contained clause 5.5. It was put to the Claimant that he had amended clause 5.5 and had withheld disclosure of that part of the document (apparently for fear of it being seen as tending to support the view that he had contracted with Highflyer as an independent business rather than in the subordinate role of a person 'employed'). The Claimant told me that he could not account for the missing page. On the evidence I do not feel able to make the finding which Mr Linden invited me to make. Nor do I share his view as to the significance of any amendment that may have been made to clause 5.5 in the 2010 Agreement.

36 Mr Linden also drew attention to the fact that clause 5.1 of the 1997 Agreement was not reproduced in the 2006 document or thereafter. The Claimant was however, still bound to render the services identified in the Schedule, as specified by prior notice (necessarily from Highflyer).

Operation of the contract

37 With regard to appearing on other television programmes, the Claimant told me that his practice was to approach Highflyer to establish if there was any objection. There never was. He also said that if in doubt he would approach Channel 4 "out of courtesy". In 2012 he consulted Mr Jamie Aitchison, Channel 4's Editor, Live Sports, in connection with an invitation to appear in an advertisement for a bookmaking company. Mr Aitchison gave Channel 4's approval but made suggestions designed to avoid the risk of the Claimant's independence being, or appearing, compromised.

38 It was common ground that day-to-day editorial decisions affecting the Claimant were for Highflyer. On the other hand Channel 4 had "the ultimate say". In practice the Claimant had little contact with executives of Highflyer or their counterparts at Channel 4.

39 The Claimant was publicly associated with Channel 4. At press conferences he would introduce himself as "John McCririck, Channel 4". He told us that members of the public pointed him out as "that bloke from Channel 4 Racing". He wore a Channel 4 badge. On one occasion a public comment by him resulted in a letter from solicitors threatening libel proceedings against Channel 4. This caused Mr Andrew Thompson, Channel 4's Head of Sport, to write to Highflyer requiring that in future any planned comment of a similar sort be discussed in advance with Channel 4's Legal & Compliance Department. Channel 4 were more than content to present the Claimant as part of the horse racing 'team'. So, for example, following the reduction of his hours in 2008, they prepared a 'statement against enquiry' containing suggested answers to be given in response to any press enquiry, including, "Mac will remain part of the mix".

40 The reduction in the Claimant's hours in 2008 was at the behest of Mr Thompson and other senior figures at Channel 4. The decision resulted in the Claimant angrily confronting Mr Thompson in January 2008. Mr Linden relied on the episode as tending to show a business-to-business relationship rather than one which cast the Claimant in 'subordinate' employment. It was this confrontation and Mr Thompson's fear that the row might become public which caused Channel 4 to acquiesce in the arrangement to pay the £20,000 'top-up fee' (ultimately re-negotiated up to £21,000).

Termination

41 In March 2012 Channel 4 secured extended rights to UK horse racing coverage, including the 'Crown Jewel' events such as the Grand National and Royal Ascot.

42 Following a tender process IMG won the contract to produce the programme with effect from 1 January 2013.

43 At meetings in September and October 2012 between Channel 4 and IMG there were discussions about, among other thing, 'on screen talent' and who should be used to present horse racing on Channel 4 in 2013 and thereafter. In the course of these conversations it was decided that the Claimant would not figure at all after the end of the Highflyer contract. This development is explained in the amended grounds of resistance, para 43, which refer to concerns about his s "exaggerated" style and tone, his "combative" manner and capacity to offend, his "more recent celebrity status" and, generally, the perception that he did not portray a positive impression of the sport of horse racing and would be liable to turn away the wider television audience which Channel 4 was hoping to attract. The genuineness of this explanation is not for me. What was not in question is that the decision that the Claimant should cease to appear on the programme was Channel 4's.

The relationship between Channel 4 and IMG Media

44 I was shown several agreements between Channel 4 and Highflyer governing the delivery by the latter to the former of annual television production services. These required Highflyer to procure the services of "Key Personnel".

These individuals had been identified in advance by Highflyer and included the Claimant. Channel 4's liability to make payments to Highflyer was conditional upon (a) their having approved a comprehensive list of the cast, contributors and production personnel to be engaged in the production of the programme and (b) Highflyer having secured the exclusive services of all presenters, race readers, commentators and other contributors for all periods for which they were required. The agreements also reserved to Channel 4 the right to request the removal of any person whose performance or conduct, in their reasonable opinion, was or had been unsatisfactory or unprofessional or who was judged not to be competent or to be disruptive. Upon such a request, Highflyer was obliged promptly to remove the individual concerned.

Other activities

45 In May 2004 the Claimant entered into an agreement with Attheraces Limited by which he agreed to provide services as a television presenter and website columnist for 50 days per year at an annual rate of pay of £100,000. The television appearances were on the dedicated horse racing channel called Atthe races. The rate of pay increased to £150,000 the following year, although the number of contracted days fell to 45. As between the Claimant and Attheraces, it was agreed that he would act as an independent contractor and be responsible for his own tax and national insurance contributions. As the Channel 4 work diminished, Attheraces became the Claimant's largest single source of income.

46 Also in the field of horse racing, the Claimant wrote a column for the Sun newspaper, for which he received a payment of £30,000 per annum. This payment was made by a bookmaking company which had advertising prominently displayed on the same page as the Claimant's piece.

47 Over time the Claimant has succeeded in developing a career as a general 'celebrity'. He has invested in marketing to this end. He has an agent through whom some of his work is sourced. In evidence he agreed that his Channel 4 racing earnings in 2011 represented only about 20% of his total income. Much of the balance came from personal appearances and after dinner speeches, radio and television appearances, advertising and endorsements. Some of these activities are particularly lucrative. He was said to have been paid £45,000 for appearing on the *Big Brother* 'reality tv' show.

48 The Claimant produced accounts for the years to 5 April 2011 and 5 April 2012. In the former year, he declared turnover of just over £194,000 against which he set off expenses of over £148,000, leaving £46,000 as taxable income, presented in his tax return as self-employed earnings. Among the expenses was a modest salary paid to his wife. He told me that she provided a range of services to support him including driving him to and from race meetings, writing correspondence, managing his paperwork and similar activities.

49 The Claimant rendered VAT invoices in accordance with the Agreement (with Highflyer). No doubt he set off against his VAT liability any VAT on business-related expenditure.

50 It was the Claimant's unchallenged evidence that he was entirely straight-forward with his accountant and that his accounts and tax returns were all prepared and presented in accordance with the professional advice which he had received.

Miscellaneous

51 The Claimant told me that it was the norm in the media world for people undertaking work of the sort which he performed for Highflyer to be treated as self-employed. I heard no independent evidence to substantiate or gainsay that evidence.

Analysis

The claim against Channel 4: (1) the '*employment' point*

52 Mr Linden submits that the Claimant was running a business. The business was John McCririck. John McCririck was a media product, deployed in a range of commercial activities, some in the field of horse racing and betting and some not. One cannot, he submits, sensibly differentiate between the Channel 4 horse racing work and any of the other activities. Of course, said Mr Linden, the contracts into which the Claimant entered all involved him providing his services personally. But he did so at arm's length as part of a business, not in the dependant and subordinate role of an 'employed' person. The wide diversity of work undertaken, the relatively small proportion of income attributable (by the end at least) to Channel 4 racing, the tax and national insurance arrangements made and all the other circumstances pointed, said Mr Linden, to the Claimant having operated as a business.

53 Attractive as Mr Linden's submissions are, I do not accept them. It seems to me plain that, in 1997, the Claimant was 'employed' by Highflyer. He was integrated into the Highflyer operation to fulfil the Channel 4 contract. And he was in a position of subordination. The fact that he could command a substantial income and that Highflyer, and more particularly Channel 4, were anxious to retain his services does not prevent the relationship being one of subordination. The contract with Highflyer does not have the appearance and characteristics of a deal between two independent business undertakings (to adopt the language of Elias J in *Redcats*). The Claimant signed terms which yielded significant control over him to Highflyer and, ultimately, Channel 4. The fact that, on air, little could be done to prevent him from saying what he wanted does not detract from the relationship being one of subordination. Nor does the fact that he, a forthright individual, did not shrink from giving Mr Thompson a piece of his mind when his days were cut. The *Allonby* concept of subordination is, self-evidently, not confined to workers of low status or to modern-day Uriah Heaps. It is about power and authority. A surgeon is no less 'employed' by a hospital trust by virtue of the fact that he is a senior individual of high status who cannot be told, even by the Chief Executive, how to go about his work in the operating theatre. He is bound by the terms of his employment and his salary depends on his fulfilling them. The Claimant's subordination is well illustrated by his powerlessness to prevent the steady erosion of his role as a Channel 4 racing presenter.

54 For these reasons, there is, in my judgment, no sound basis for characterising the Claimant as an independent contractor in business on his own account when he contracted with Highflyer in 1997. Nor can I accept that the growth of his career as a media 'personality' resulted in a change in his status vis-à-vis Highflyer. If he was employed by them in 1997, why should he not be regarded as so employed in 2012? How did he have ceased to be employed at some indeterminate point during the 16 years? The fact that he added other strings to his bow as the scale of the Highflyer job diminished does not, in my judgment, begin to justify the surprising notion that the legal relationship between the two changed. That appeared to be the logic of Mr Linden's submission, in which he stressed the importance of looking at the Claimant's position at the key moment, namely 31 December 2012.

55 Mr Linden rightly acknowledged that an individual may concurrently perform certain jobs or activities in the context of an employment relationship and others not. How could giving an after-dinner speech or appearing on a 'reality tv' show be seen as 'employment'? Of course neither could. But the fact that the Claimant undertook such activities does not, in my judgment, preclude the view that, for the purposes of his main activities (or some of them), such as the Highflyer contract, he was 'employed'.

56 Countless authorities (including *Allonby*) make it plain that the 'label' which the parties attach to their relationship cannot be determinative of the legal status of the individual concerned. But in any event I do not see that to classify a person in an agreement as 'self-employed' is inconsistent with his being 'employed' as a 'worker.' That designation may be intended only to make it clear that the agreement does not constitute a contract of service. Nor do I attach particular significance to the income tax and national insurance arrangements to which I have referred. They appear to be consistent with the 'label'. As Miss Eady pointed out, there is no inconsistency between being 'self-employed' for tax purposes and being 'employed' within the meaning of the 2010 Act.

57 Applying the *Allonby* criteria to the facts, I find that they point firmly in favour of the Claimant on the employment point. Having stepped back to review the case in the round, I am satisfied that he was and remained at all material times 'employed' by Highflyer under a contract personally to perform work.

58 For completeness, I should add that I have noted the submissions of both sides on the question of 'dominant purpose'. Miss Eady contended that it remained at least as a useful starting-point, and that the dominant purpose of the contract between the Claimant and Highflyer was for him to provide work as a presenter to assist Highflyer to fulfil its obligations to Channel 4. For Mr Linden, the test had no value and, in any event, the true dominant purpose, if relevant, was the production of Channel 4 horse racing coverage. I have not found it necessary to apply the dominant purpose test in reaching my conclusion. Had I done so, I would have agreed with Miss Eady as to how properly to characterise the 'dominant purpose' and that, in accordance with the judgment of Lord Clarke in *Hashwani*, para 39, it tended to support the Claimant's case on the 'employment' point.

The claim against Channel 4: (2) the 'principal' point

59 I have reminded myself of the main principles to be drawn from the authorities cited above. In the first place, the contract worker provisions are to be interpreted broadly. Secondly, absent formal managerial powers, it is necessary to ask whether the (putative) principal was in a position to influence or control the way in which the individual worked. Thirdly, the closeness of the relationship between the employer and the end user may be a relevant factor in deciding whether the individual was 'supplied to' the end user.

60 In my judgment the Claimant falls clearly within the protection of s41. The contract between the Claimant and Highflyer appears to be modelled on a triangular agreement involving a third party. It recites its central purpose of securing the services of the Claimant to facilitate Highflyer's performance of its obligations to Channel 4. Channel 4's power to require Highflyer to replace personnel is eloquent of the closeness of the relationship between the two. And Channel 4's ability to exert influence and control over the way in which the Claimant worked is amply illustrated in my findings of fact above. He was known as a Channel 4 face. Highflyer and Channel 4 presented him as part of the Channel 4 'team'. Channel 4 sought to manage the public relations issues which were expected to arise out of *their* decision to reduce his appearances in 2008. Generally, as I have found, Channel 4 had "the ultimate say". I consider that it is plainly apposite to say that he was 'supplied' to Channel 4 in furtherance of Highflyer's contract with them. That would be my view without authority stressing the need for the legislation to be construed broadly. In the light of the case-law, I am all the less persuaded by Mr Linden's nice argument that Highflyer 'supplied' the programme to Channel 4 but not the Claimant. If that submission were right, it would be hard to conceive of circumstances, other than where the individual is supplied by an employment agency, in which the contract worker provisions would be engaged. The protection is intended to be much wider than that.

The claim against IMG: the TUPE 'employment' point

61 I agree with leading counsel that it would be odd if 'employment' meant different things under the 2010 Act and under TUPE. But I do not think that the law is in such a state of incoherence. I have three reasons. First, the Directive (see para 19 above) is widely drawn. The wording of article 2.1 is not apt to restrict its scope to contracts of service or apprenticeship only. Those 'employed' as 'workers' are also protected under our domestic law. The Regulations must be read compatibly with the Directive. Secondly, although the TUPE legislation is not helpfully drawn, I am satisfied that, even if read without reference to the Directive, the wording of reg 2(1) justifies and dictates the interpretation for which Miss Eady contended, namely that the Regulations apply to 'workers' as well as to those employed under contracts of service or apprenticeship. I am unable to square the words "or otherwise" with the narrow construction which Mr Linden advocated (see para 20 above). The term "contract for services", in context, must be read as confined to the case of an independent contractor in business on his own account. Thirdly, turning from the language of TUPE to the purpose of the legislation, I see no good reason for imagining that Parliament could have intended to exclude

'workers'. There would be no rational basis for doing so given that business transfers by their nature will affect all persons 'employed' in the undertaking or part transferred, whether employees under contracts for services, apprentices or 'workers'. The result would be a system which was not only unprincipled but also impractical. How could the TUPE regime operate effectively if every transfer necessitated a laborious inquiry into whether staff members were employed under contracts of service or 'workers'? For all of these reasons I conclude that, for the purposes of TUPE, 'employment' extends to 'workers'.

Outcome and Further Conduct

62 For the reasons stated, there is no legal obstacle to the Tribunal considering the claims against both Respondents on their merits.

63 A telephone case management discussion will be held at 9.30 a.m. on 19 July 2013 to address the question of amendment and other directions and fix a final hearing.

A. M. Sudlow
28/6
EMPLOYMENT JUDGE

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Reasons entered in the Register and copies sent to the parties on .....

..... for Secretary of the Tribunals