



TC01695

Appeal number TC/2010/6496

INCOME TAX – EMPLOYMENT STATUS – *share-fisherman – contract of service or contract for services – contract of service – Appeal allowed*

FIRST-TIER TRIBUNAL

TAX

GRAHAM BARNEY

Appellant

- and -

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

Respondents

**TRIBUNAL: MICHAEL TILDESLEY OBE (TRIBUNAL JUDGE)
NOEL BARRETT**

Sitting in public at 4th Floor, City Exchange, 11 Albion Street, Leeds, LS1 5ES on 23 June 2011. The hearing went part-heard with the Tribunal directing that the parties provide their written submissions and replies by 25 September 2011. The Tribunal indicated that it would make its determination by 22 November 2011

Danielle Barney, Legal Executive, for the Appellant

Alan Hall, Presenting Officer, for HMRC

DECISION

The Appeal

1. Mr Barney appealed against an assessment for income tax which increased the amount of tax payable for 2006/07 to £13,372.12, and an amendment to his self assessment return for 2007/08 which increased the tax due to £8,879.56. HMRC issued the assessment and the amendment on 26 August 2009.

2. The question to be determined by the Tribunal is whether Mr Barney was employed (contract of service) or self employed (contract for services) in respect of his engagement as a deckhand/factory hand on the sea-going vessel, the Norma Mary, during the years in question. The parties acknowledged that the Tribunal would not be dealing with the question of quantum which will have to be reconsidered in the light of the Tribunal's decision in this Appeal.

3. The Appeal was listed on 23 June 2011 when the Tribunal heard evidence from the Appellant and from Mr Jonathan Carden and Tracey Jackson for HMRC. Since 2006 Mr Carden as an employee of Marr Management Limited has acted as agent for the owners of the Norma May in respect of crewing matters. Mr Carden has worked in the fishing industry for 23 years and gave evidence on the details of Mr Barney's engagement and work on the Norma Mary, and the fishing industry in general. Miss Jackson was an Inspector of Taxes and joined the Inland Revenue almost 30 years ago. Miss Jackson carried out the investigation into Mr Barney's employment status, concluding that Mr Barney was a self employed share fisherman.

4. During the course of the hearing Mr Barney's niece, Miss Danielle Barney, applied to represent her uncle in place of Miss Rhodes of Pelham Chartered Accountants, who had been handling Mr Barney's tax affairs. Miss Barney was a qualified legal executive. Mr Hall who was presenting for HMRC raised no objections. The Tribunal gave its permission for Miss Barney to act as her uncle's representative.

5. The Tribunal did not have adequate time on the 23 June 2011 to conclude the hearing. The Tribunal decided to go part heard and invited the parties to make their final submissions and replies by writing. The Tribunal reconvened on 14 November 2011 to consider the evidence and submissions. Regretfully the Tribunal missed its deadline of the 22 November 2011 for publishing the decision for which the Tribunal apologises to the parties.

The Facts

Facts Not In Dispute

6. Mr Barney went to sea at the age of 15 and worked almost continuously on fishing vessels for the next 43 years. He first went out on the steam trawlers from Grimsby and then did a spell on the wooden fishing boats before he joined the crew of the Norma Mary around 2000. Mr Barney has not worked since February 2009 which

he puts down to the ongoing dispute about his employment status. Mr Carden denies that this is the case saying it was Mr Barney who refused to work on the new Norma Mary.

5 7. This Appeal concerned Mr Barney's work arrangements on the old Norma Mary which was a UK flagged large deep sea stern trawler operating outside UK territorial waters. The Norma Mary was commonly referred to as a factory ship. The fish caught (except red fish) would be processed, boxed, wrapped and frozen on board, which enabled the Norma Mary to make long sea trips. The Norma Mary was entitled to fish the UK quota in waters around Greenland, north Norway and Iceland and sailed from
10 and docked in either Iceland or Germany. The Norma Mary was normally used for fishing cod and haddock, and occasionally Icelandic red fish. The Norma Mary would carry on fishing until the quota was used up, when it would be kept in dock until the new quota started in the following January.

15 8. Onward Fishing Company Limited ("Onward") owned the Norma Mary until 2008¹ when it was sold on to a company operating as a supply ship in the waters around Africa. Onward originally operated from an office in Aberdeen under the control of a Mrs Norma Smart. In 2006 Onward became part of the corporate group of Samherji, an Icelandic Company, which resulted in the closure of the Aberdeen office with Marr Management Ltd of Hull given the responsibility of running the
20 administration for Onward including the recruitment of crews for the Norma Mary. Samherji holds a 50 per cent share in the ownership in Marr Management.

25 9. Mr Barney first worked on the Norma Mary in 2000. Back then he heard on the grapevine that a job was available on the ship. Mr Barney telephoned Mrs Smart who gave him the job of deckhand/factory hand. There was no formal interview or recruitment process and no requirement on Mr Barney to provide references. Mrs Smart previously knew Mr Barney since he had worked on one of her other vessels some years earlier. Mrs Smart told him the time of sailing and that a taxi and flight had been booked in his name to take him to the Norma Mary in Iceland.

30 10. Mr Barney worked on the Norma Mary for the next eight years, and had no other jobs during that period. After the Norma Mary was sold Mr Barney sailed twice on the Odra, which was another vessel owned by Samherji. Mr Barney ceased working for Samherji in February 2009.

35 11. The sailings on the Norma Mary normally lasted for six to ten weeks at a time, although it could be short as one week or as long as 14 weeks. At the end of each sailing Mr Barney would fly home at the expense of the vessel owner for seven to ten days before being flown back. Occasionally he would stay on when the Norma Mary ended her sailing to help with repairs and servicing for the vessel for which he received a daily rate of between £80 to £100. The owner always made and paid for Mr

¹ Boyd Line part owned the Norma Mary until 2004 when its share was bought out by Onward. Throughout this decision the Tribunal uses the word owner of the Norma Mary which refers to Onward but includes Samherji from 2006.

Barney's travel arrangements between his home and the port in which the Norma Mary was docked.

12. Throughout the eight years Mr Barney was engaged as a deckhand and factory hand. The terms of his engagement were not put in writing, and there was no letter of appointment. Once aboard the Norma Mary Mr Barney signed the articles or crew agreement which was required under the Merchant Shipping Acts, and gave details of his next of kin. The articles did not constitute either an employment contract or contract for services.

13. The Norma Mary normally sailed with 24 to 26 men who included the Skipper, First Mate, Second Mate, Boson, engineers and deckhands. The crew consisted of several nationalities. The Skipper, however, was always Icelandic supported by British First and Second Mates. Mr Carden suspected that the Skippers were *Samherji Men*, and later said that they were employees of Samherji².

14. The crew was organised into two *watches*, six hours on and six hours off, with 14 men on any one watch. Mr Barney's duties on the watches were to haul, shoot and mend the nets, and to work in the factory filleting and packing fish. Mr Barney took his instructions from one of the officers, normally the Second Mate who would tell him at the beginning of each watch the nature of his duties that day.

15. The Skipper through his officers instructed the deckhands as to when to haul and shoot the nets. The owners decided when the Norma Mary sailed, the areas where the fishing would take place and when repairs to the vessel happened. The owners determined the length of the sailing and told the Skipper when the vessel would return to shore. The Skipper took the decision of where the fishing actually took place. The crew outside the officers had no say in respect of these matters.

16. Mr Barney was told what do whilst on board. He was not able to change the rota and not in a position to refuse work. Mr Barney believed that if he disobeyed the officer's instructions he would be sacked and not taken on for future trips. Mr Barney did not require ongoing supervision of his work because of his experience in the fishing industry.

17. The owners provided the vessel, associated machinery and nets. They also supplied Mr Barney with a knife, overalls, hair net and an apron for the work in the factory. Mr Barney provided his own wetsuit for work on deck which included jacket, trousers and boots. The owners gave Mr Barney a hard hat which was required for the fishing duties. The owners also supplied Mr Barney with his food at no cost whilst on board.

18. There was no substantial disagreement between the parties in respect of the above facts, although they held different standpoints regarding the significance of those facts

² Mr Hall for HMRC challenged the accuracy of this statement. The notes of evidence record Mr Carden stating that the Icelandic Officers were employees selected and appointed by the directors of Samherji (see para 20 of Mr Hall's reply).

for the disputed issue. The Tribunal now considers those facts which were contested between the parties.

Disputed Facts

5 19. Mr Barney contended that he had a continuous nine year engagement with the owners, and during that time he never worked on another vessel under different owners. Mr Barney stated that after finishing a trip onboard he held an expectation that he would be automatically taken on for the next trip provided he had performed his duties on the previous trip. Mr Barney was not able to put forward another person in his place, if he could not go on a fishing trip.

10 20. Mr Carden disagreed with Mr Barney's interpretation of his expectation of continuous work. Mr Carden stated that Mr Barney was engaged on a trip by trip basis with no obligation on either the owners or Mr Barney to maintain the arrangement beyond the particular trip. Mr Carden cited the example of when Mr Barney did not work on the Norma Mary between the end of August 2006 and 19 January 2007. Mr
15 Carden said that fishermen usually rang the office on the off chance for work. Marr Management did not advertise for jobs or recruit.

21. The picture painted by the oral evidence was somewhat different from that portrayed by Mr Carden. The actual practice was that before the end of each trip, the Skipper would compile a list of crew members to return for the next trip which was
20 given to Mr Carden who would then contact each crew member on the list by telephone to make the arrangements for the next trip. Mr Carden confirmed that during the period Mr Barney was always on the list of returning crew members. Also it was generally the same crew members who sailed on board the Norma Mary. Mr Carden also explained the reason for Mr Barney not working for the five month
25 period from August 2006 which was that the Norma Mary had exhausted its fishing quota, in which case she could not go out to sea until the following January.

22. The Tribunal finds that the facts of the actual arrangements supported Mr Barney's view of his relationship with the ship owners which was that he had the expectation and guarantee of work on the Norma Mary provided he satisfactorily
30 performed his duties on board. Mr Barney did not have to take action to find work at the end of each trip. He knew that he was on the Skipper's list of returning crew, and that he had simply to await the phone call from Mr Carden. Mr Barney did not work in the five months in 2006 because the Norma Mary did not go out to sea.

23. Mr Barney stated that his remuneration from his work on the Norma Mary was
35 calculated on a percentage of the gross sales of the fish without deduction from each trip. The vessel owners fixed the percentage and was not negotiable. The percentage rate varied between the different grades of staff with the officers receiving a higher fixed percentage than the deckhands. Mr Barney explained that his remuneration took the shape of a fixed payment of £200 per week which the owners sent to his home,
40 and two settlings. Mr Barney believed that the £200 payment was an advance of his wages rather than a retainer.

24. The settlings were paid over in two stages. The first one was made when he left the ship and approximated to 80 per cent of the gross sales of the fish less the advance payments of £200 made during the trip. The second settling took place some six to eight weeks after the end of the trip and represented the balance calculated on the percentage of the actual gross sales of fish. The owners paid the settlings into Mr Barney's bank account, always on time. Mr Barney did not have to issue invoices.

25. When Mrs Norma Smart was responsible for the payroll she sent Mr Barney a payslip in respect of the settlings, bearing an address label entitled *employee name and address* below which was the name of Mr Barney and his address in Grimsby. When Mr Carden took over the payroll, he discontinued the practice of sending out payslips and simply provided the settling sheets to Mr Barney. It was a matter of dispute between the parties whether the settling sheets were sent out regularly. This dispute was not relevant to the issue of employment status but may have some bearing on Mr Barney's incomplete self assessment returns.

26. The heading for the settling sheets gave details of the vessel, the dates when Mr Barney joined and left the ship and the value of the gross sales. There was no indication on the sheets that the gross sales bore deductions. The body of the document supplied information on the specific settling for Mr Barney and the deductions which included the weekly payments of £200 described as advances, other advances, the bond and phone cards. No deductions were made for tax and national insurance.

27. Mr Barney argued that he carried no financial risk in respect of his work on the Norma Mary. He insisted that he was always paid his percentage of the gross sales, and that the £200 advance payment was guaranteed. According to Mr Barney, the £200 would not be reclaimed if there had been a loss. Mr Barney had no essential living costs to pay for on board as the owners provided everything. He asserted that the question of the Norma Mary making a loss was unrealistic because the Skipper would not allow it to happen. Mr Barney stated that he could anticipate his eventual earnings from the settling sheets which were displayed daily on board the vessel.

28. Mr Barney compared his experience on the Norma Mary with that on the wooden fishing boats where the crew would share 50 per cent of the fish sales after deductions of fuel, ice, food and gear. The crew would decide each member's share of the 50 per cent of the fish sales less deductions allocated to the crew..

29. Mr Carden confirmed that the settlings were paid in two stages, and that Mr Barney received a fixed percentage of the gross sales. Mr Carden, however, insisted that the figure given for gross sales in the settlings was net of freight costs. Mr Carden indicated that Mr Barney's remuneration would fluctuate with the profitability of the fishing expedition.

30. Mr Carden disagreed with Mr Barney's characterisation of the £200 as a guaranteed payment. He pointed out that the owners had an arrangement with crew members that they could ask for a *sub* or weekly cash advance ranging from £30 to

£200 per week which was normally sent to their home. Mr Barney was always granted the maximum advance payment.

5 31. Mr Carden stated that it was highly unlikely that the Norma Mary would make a loss on a fishing trip. He explained that at the time in question fishing quotas and prices for fish were good and that Norma Mary would fish until the quota was exhausted.

10 32. Mr Carden could only recall one occasion when the fishing from the Norma Mary resulted in a loss which concerned a redfish voyage. In that instance the owners recovered the loss from subsequent redfish voyages. Mr Carden asserted that when the Norma Mary made this loss the overpayment on the cash advances made to Mr Barney was carried forward and set off his settling for the subsequent trip.

15 33. The record of settling sheets dealing with the redfish voyages referred to in paragraph 32 above did not support Mr Carden's assertion. According to the settling sheets, the loss of £177.38 was not carried forward to the subsequent settling. The record was exhibited at E7 to E9 and set out below:

Trip Number	Sailing Dates	Settling (£)	Advance Payments (£)	Net Payment Due (£)
3 part 1	17.10.07- 26.10.07	295.04	400.00	-177.38
3 part 2	26.10.07 – 01.11.07	390.81	200.00	190.81
3 part 3	01.11.07 – 08.11.07	537.52	233.50	304.08

34. The Tribunal finds the following in respect of the questions of losses and Mr Barney's remuneration:

20 (1) Mr Barney was not required to contribute to the costs of the vessel and fishing trips which were borne by the owners.

(2) If the costs for a particular trip exceeded the value of the gross sales of fish the vessel owners would carry the losses forward to the next trip. There was only one occasion when the Norma Mary made a loss. Mr Barney did not have any financial liability in respect of the losses incurred.

25 (3) Mr Barney's remuneration was calculated as a fixed percentage of the value of the gross sales of fish from the designated voyage. The owners specified the fixed percentage which depended on the rank of the crew members and was non-negotiable.

(4) On balance the Tribunal prefers the evidence of Mr Carden in respect of the value used for gross sales to calculate Mr Barney's remuneration. Mr Carden stated that it was the value of the sales minus freight costs. The Tribunal, however, accepts that Mr Barney was not aware of this arrangement. The settling sheets given to Mr Barney simply gave a figure for gross sales, and did not mention the amount of freight costs. Also the freight costs were not significant in relation to the overall gross sales. The indicative figures given by Mr Carden were that the freight costs constituted about two to three per cent of the gross sales.³

(5) The sole financial risk carried by Mr Barney in respect of his engagement on the Norma Mary was that the size of his remuneration depended upon the value of gross sales. The Tribunal considers that the risk was such that it would not mean that Mr Barney would receive no remuneration from his engagement on the Norma Mary. The evidence showed that the owners always achieved a gross sales figure for each trip undertaken by Norma Mary.

(6) The risk of Mr Barney receiving minimal remuneration was mitigated by the facility of a weekly cash advance of £200 afforded to him by the vessel owners. The Tribunal decided that Mr Barney's description of the cash advance as a guaranteed weekly payment was supported by the settling evidence for the redfish fishing trip which was the only occasion when the settling did not exceed the list of the deductions. The Tribunal considers Mr Carden's assertion that the owners would have taken steps to recover the overpayment from Mr Barney was an after-thought when he realised that no adjustments had been made in the subsequent settling sheets to recover the overpayment to Mr Barney for the first redfish trip.

35. Mr Barney accepted that he received no holiday pay from the Norma Mary vessel owners. Mr Barney took his leave when the Norma Mary was docked. Mr Barney believed that he was entitled to sick pay from the owners who held an insurance policy to cover such risks. Mr Barney gave an example of when his legs were crushed on the Norma Mary and was off work for ten to twelve weeks during which he was paid £100 per week by the owners. Mr Barney also recalled an occasion when he fractured his hand onboard and unable to work but he still received his full share of the settling for that trip. Finally Mr Barney asserted that the owners funded his attendance at the local further education college to gain the necessary certificates which were required to be held by all seamen by the Sea Fishing Authority.

36. Mr Carden conceded that the vessel owners took out insurance cover for members of crew to cover risks of death, total and temporary disablement. Mr Carden indicated that the owners paid a premium of £30,000 per annum for each crew to Ecclesiastical Life Ltd for cover under The Fisherman's Protection Plan. The terms of the Plan exhibited in the bundle used the words, *employer* and *employment* at paragraphs 4(c) and 16. Mr Carden stated that originally when a crew member suffered an injury the owners received a payment from the insurance company which was then passed onto the crew member. Now the insurance company paid the crew

³ See paragraph 31 of S3 in the bundle.

member direct. Mr Carden explained that the owners took out the insurance policy because the crew members would have nothing if they were injured on board. He considered that the taking out of insurance by the owners was not a problem for them, and cast them in good light.

5 37. Mr Carden disputed that the owners paid for Mr Barney's attendance at the local further education college to gain the necessary certificates. As far as he was concerned the courses were organised by the Sea-Fish Industry Authority and local colleges funded by Government which he knew from his position as the local treasurer for the Sea-Fish Industry Authority.

10 38. The Tribunal considers that Mr Barney and Mr Carden were in agreement about the nature of the payments which Mr Barney received, whilst off work for injuries suffered on board the Norma Mary. Both accepted that the payments originated from an insurance policy taken out by the owners. The Tribunal finds that the owners took out the insurance cover because they acknowledged that they bore some responsibility
15 for the welfare of the crew members engaged by them on their vessels.

39. The Tribunal accepts Mr Carden's evidence that the courses attended by Mr Barney were organised by the Sea-Fish Industry Authority, a non-departmental public body set up by an Act of Parliament, and that the courses were not funded directly either by the owners of the Norma Mary or by Mr Barney.

20 40. The final area of the factual context concerned the parties' intentions in respect of the nature of the engagement between them. The Tribunal finds the following that

(1) There was no written agreement between the parties stating that Mr Barney was employed or self employed in respect of his engagements with the owners of Norma Mary during the relevant period.

25 (2) Mr Carden believed that he was not in a position to engage anyone in an employed capacity and not authorised to tell anyone that they were an employee. In his view the engagement of any person for work on the Norma Mary would have always been on the basis of self-employment. Mr Carden considered that everyone working in the fishing industry knew that share fishermen were self
30 employed.

(3) Mr Carden asserted that Mrs Norma Smart would have told Mr Barney that he was self employed and that he did the same but not on every trip made by Mr Barney. The Tribunal was not convinced by Mr Carden's assertions of what Mr Barney was told by Mrs Smart. Mr Carden's statement regarding Mrs Smart was
35 an assumption. Mr Carden acknowledged that he had no involvement with Mr Barney prior to 2006, and that he changed the payroll arrangements put in place by Mrs Smart which described Mr Barney as an employee on the payslip. Equally the Tribunal considers that on balance Mr Carden did not inform Mr Barney that he was self employed because of his belief that Mr Barney must have known that
40 share fishermen were self employed, in which case there would have been no need to tell him.

(4) Mr Barney paid enhanced Class 2 National Insurance as a self employed person under a special scheme for share fishermen for the period 11 April 1993 until 5 July 2008.

5 (5) Mr Barney used the self employed pages for his self assessment tax returns for the disputed years. No income from employment was declared in those returns.

(6) Mr Barney did not make a claim for redundancy or unfair dismissal when his engagements with the owners of Norma Mary ceased.

10 (7) Mr Barney had tax stopped from his settlings by the Icelandic and German authorities. Mr Barney has not made a claim for double taxation relief and that the tax paid to the German authorities was deducted in a period outside the tax years under dispute.

15 (8) Mr Barney first raised with HMRC about the possibility of being employed on 7 August 2009 which was after HMRC opened their enquiry into his tax returns on 16 January 2009. Despite raising the question on his status, he subsequently submitted on 30 January 2010 a self assessment tax return on the basis of self employment.

20 (9) Mr Barney considered he was naïve and unaware of the different tax regimes between self employment and employment until informed by his accountant. Mr Barney believed that as a British Citizen he should be paying tax. Mr Barney had registered as self employed when he started on the wooden fishing boats, and thereafter submitted self employed tax returns. Mr Barney had simply carried on the same arrangements when he joined the Norma Mary.

Consideration

25 41. In this Appeal there was no written contract between the parties dealing with the terms of Mr Barney's engagement on the Norma Mary. Equally the Tribunal has found there was no evidence of the words used by the parties to create their contract. Thus the disputed issue of whether Mr Barney's contract was one of employment (contract of service) or of self employment (contract for services) is principally one of
30 fact, which is examined in two stages.

42. The first stage is to identify all the relevant incidents of the relationship between Mr Barney and the owners of the Norma Mary which the Tribunal has carried out in the preceding section. The second stage is the evaluation of the facts found and form a
35 conclusion on all the facts taken together as to whether the contract is one of employment or self employment.

43. The Tribunal is assisted with its evaluation by an analysis of the authorities on whether a particular relationship is a contract of service or not.

40 44. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 the issue was whether a worker was within the class of employed persons under the National Insurance Act 1965. MacKenna J said ([1968] 2 QB 497 at 515):

5 'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'

45. MacKenna J added ([1968] 2 QB 497 at 515):

10 'Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done.'

46. In MacKenna J's view, control was a necessary, but not sufficient, condition of a contract of service. A contract might thus be for services, rather than of service, even
15 if control existed.

47. In *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, the Court of Appeal identified the elements of control and mutuality of obligation as part of the "irreducible minimum" for the existence of a contract of employment.

48. In *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173
20 Cooke J said that the fundamental test was whether a person performed services as a person in business on his own account. Although control was relevant it was not the sole determining factor; when one was dealing with a professional man, or a man of some particular skill and experience, there could be no question of the employer telling him how to do the work.

25 49. In *Hall (Inspector of Taxes) v Lorimer* [1994] STC 23, [1994] 1 WLR 209 the taxpayer was a vision mixer who undertook work for a number of different television production companies and whose engagements consisted of short term contracts lasting one to two days. In four years he worked over 800 days. The Court of Appeal held that there was no single path to a correct decision whether a person was an
30 employee or self employed:

35 "In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list 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 matter of the overall effect of the detail, which is not necessarily the same as
40 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 important from one situation to another".

50. The Court of Appeal then went onto identify a non-exhaustive list of relevant factors taken from decided cases about whether a person was employed or self employed:.

5 “The decided cases give clear guidance in identifying the detailed
elements or aspects of a person's work which should be examined for
this purpose. There is no complete exhaustive list of relevant elements.
The list includes the express or implied rights and duties of the parties;
the degree of control exercised over the person doing the work;
10 whether the person doing the work provides his own equipment and
the nature of the equipment involved in the work, whether the person
doing the work hires any staff to help him; the degree of financial risk
that he takes, for example, as a result of delays in the performance of
the services agreed; the degree of responsibility for investment and
management; how far the person providing the services has an
15 opportunity to profit from sound management in the performance of
his task. It may be relevant to consider the understanding or intentions
of the parties, whether the person performing the services has set up a
business-like organisation of his own; the degree of continuity in the
relationship between the person performing the services and the person
20 for whom he performs them; how many engagements he performs and
whether they are performed mainly for one person or for a number of
different people. It may also be relevant to ask whether the person
performing the services is accessory to the business of the person to
whom the services are provided or is "part and parcel" of the latter's
25 organisation”.

51. Mr Carden regarded Mr Barney as a share fisherman which is a form of engagement recognised by statute and raises specific issues about the nature of the relationship between the fisherman and the vessel owners. In respect of the latter the decision of the Court of Appeal in *Todd & Anors v Adams & Anor* [2002] EWCA
30 CIV 509 is particularly instructive. At paragraph 122 the Court of Appeal identified the statutory references to share fishermen:

 “Mr Nolan for the defendants points to the definition in a series of statutory instruments of "share fishermen" as meaning (with irrelevant minor variations):

35 "any person who . . . is ordinarily employed in the fishing industry
otherwise than under a contract of service, as a master or member of
the crew of any fishing boat [within the meaning of section 373 of
the Merchant Shipping Act 1894 being a fishing boat] manned by
more than one person, and . . . remunerated in respect of that
40 employment in whole or in part by a share of the profits or gross
earnings of the fishing boat; . . ."

Instances are: The Social Security (Employed Earners Employment for
Industrial Injuries Purposes) Regulations 1975 SI No467, Sch 2 Pt 1
para.1(5); The Social Security (Mariners' Benefits) Regulations 1975 SI
45 No529 reg 1(2); The Social Security (Contributions) Regulations 1979 SI
No591, reg 86; The Social Security Benefit (Computation of Earnings)
Regulations 1996 SI No2745 reg 13(1)(c); The Jobseeker's Allowance
Regulations 1996 SI No207 reg 156. Other regulations refer to a self-

5 employed earner whose employment is that of a share fishermen as defined in
The Social Security (Mariners' Benefits) Regulations 1975 SI No529: see The
Income Support (General) Regulations 1987 SI No1967 reg 38; The Council
Tax Benefit (General) Regulations 1992 SI No1814 reg 22; The Housing
Renewal Grants Regulations 1996 SI 2890 reg 27; and The Family Credit
(General) Regulations 1987 SI No1973 reg 22”.

10 52. Mance LJ at paragraph 124 pulled the threads together regarding the statutory
definitions of share fishermen, and concluded that the question of whether a share
fisherman is employed or self employed is a matter of judgment having regard to all
the circumstances:

15 “These statutory definitions suggest that the concept of a self-
employed share fisherman is well-known to the fishing industry and
the legislature, and also demonstrate that a description of someone as
"employed" by no means indicates whether he is employed by a master
or self-employed. However, Parliament has also shown itself conscious
that a fisherman remunerated only by a share of the profits or gross
earnings of a vessel may be employed under a contract of service:
otherwise the provisions of s 144(2) of the 1978 Act, cited above, now
s 199(2) of the Employment Rights Act 1996 would not have been
20 necessary. So ultimately it must be a matter of judgment in the light of
all the relevant circumstances and factors into which category any
fisherman falls”.

25 53. The Tribunal now turns to the evaluation of the facts. The Tribunal found that Mr
Barney had been worked as a deckhand and factory hand on the Norma Mary for a
continuous period of eight years. During that period Mr Barney had not missed a
voyage of the Norma Mary and not worked on any other boat. Also the Tribunal
decided that Mr Barney had the expectation and guarantee of work on the Norma
Mary provided he satisfactorily performed his duties on board. In those eight years Mr
Barney’s periods of inactivity coincided with the times when the Norma Mary was in
30 dock and not fishing. The Tribunal finds that the above factors supported a
characterisation of the engagement of Mr Barney on the Norma Mary during the
periods in question as one of employment.

35 54. HMRC accepted that the owners of Norma Mary supplied the vessel, the
associated machinery, the nets and virtually all the equipment necessary for Mr
Barney to perform his duties. In addition the Tribunal found that Mr Barney was
subject to a high degree of control in the discharge of his duties. He was told what to
do and would effectively be dismissed if he refused to carry out the instructions of the
officers. The fact that Mr Barney who was an experienced and competent deckhand
requiring minimal supervision did not upset the Tribunal’s finding on the high degree
40 of control.

45 55. Under normal circumstances the combination of high control and the provision of
the infrastructure by the owners enabling Mr Barney to perform his duties would
strongly suggest an employment relationship. The Court of Appeal, however, decided
in *Todd & Anors* that these factors carried less weight in determining the correct
characterisation of the status of fishermen because they were an inevitable and given

part of the nature of a fishing enterprise. As Neuberger J, as he then was, observed at paragraphs 71 and 72:

5 “In the present case, many of the features of the arrangement between
the respondent owners and those on board the Vessel, and indeed as
between those on board amongst themselves, were inevitable because
of the fact that the respondents were the owners of the Vessel, or
because of the very nature of the venture upon which the Vessel was
engaged, namely fishing at sea. Thus, the fact that the Vessel was
owned by the respondents alone meant it was inevitable that they
would be responsible for keeping the Vessel, machinery, and its fishing
equipment in good condition; it was inevitable that they would have
some say as to where the Vessel went, in the sense, for instance, of
being able to veto dangerous waters. Equally, it was inevitable that
there should be a Skipper, and that he should have some control and
authority over the other members of the crew and that, presumably, he
would be the natural channel of communication between members of
the crew and the owners. Further, the nature of the venture was such
that those on board would have to have a substantial degree of control
over where to fish and for how long to fish.

20 That is not to say that those factors are therefore of no relevance when
deciding whether or not the deceased were "employed under a contract
of service", because, inevitable or not, they were features of the
relationship which existed between the parties. However, it seems to
me legitimate, indeed appropriate, to bear in mind which features of
the relationship, which are in principle relevant to the question of
determining its characterisation, are virtually inevitable in light of the
nature of the enterprise concerned, and which features are not so
inherent. Of course, the very fact that some features are inevitable
because, for instance, the respondents owned the Vessel, can rightly be
said to serve to emphasise why the fact that they owned the Vessel
assists the argument that the crew were engaged under contracts of
service”.

35 56. According to Mance LJ, the traditional analysis of the distinction between
contracts of service and for services as highlighted in the authorities of *Ready Mixed
Concrete, Market Investigations and Hall* did not address in sufficient detail the
critical issue of joint venture which was at the heart of the nature of the relationship
between fishermen and owners. If it was a joint venture the relationship was one of
self employment.

40 57. The defining characteristics of a joint venture were the sharing of profits, and
liability for losses. In the case of Mr Barney, the Tribunal found that the size of his
remuneration depended upon the value of gross sales after deduction of freight
charges with those charges constituting a relatively insignificant proportion of the
gross sales. The use of gross sales rather than profits meant that the risk of Mr Barney
receiving no income from his work onboard the Norma Mary was remote. The reality
45 of that risk was further dissipated by the Tribunal’s finding that the weekly cash
advance of £200 afforded to Mr Barney was in effect a guaranteed weekly payment.

58. On the question of liability for losses the Tribunal found that Mr Barney had no responsibility for the costs of the voyages of the Norma Mary. Also the Tribunal was satisfied that Mr Barney had no exposure to any losses incurred by the owners of Norma Mary. HMRC suggested that Mr Barney would suffer a loss if the level of his settling for a particular trip was below the value of the weekly cash advance. The Tribunal considers that HMRC's construction strained the ordinary meaning of loss. In any event the Tribunal held on the evidence that the owners did not recover from Mr Barney overpayments in the cash advances.

59. The Tribunal concludes that Mr Barney was not subject to significant financial risk from his work for the owners of the Norma Mary. Mr Barney's relationship with the owners did not have the hue of a joint venture. This view was reinforced by the facts that Mr Barney had no say in the key operational decisions concerning the Norma May, and was not in a position to negotiate the terms of his remuneration. The owners determined when and where the Norma Mary fished and fixed Mr Barney's percentage of gross sales which decided the level of his earnings. As identified by the Court of Appeal in *Todd & Anors* share fishermen engaged in a joint venture would usually have a substantial degree of control over the actual fishing operations⁴, and the ability to negotiate the size of their remuneration⁵.

60. The Tribunal identified a series of features of Mr Barney's relationship with the owners which in the Tribunal's view were more at home in a contract of service. Mr Barney would not offer a substitute if he was unable to attend work. The owners organised and paid for Mr Barney's journeys to and from the Norma Mary. The owners supplied at no cost Mr Barney's food whilst on board. The owners took out insurance which provided Mr Barney with cover if he was injured at work.

61. The principal incident of Mr Barney's work arrangements on the Norma Mary that supported a contract for services was the parties' intentions. Mr Carden was adamant that Mr Barney was engaged on a self employed basis which was in line with the fishing industry's understanding of the status of share fisherman. Given those circumstances the owners did not deduct UK tax at source from Mr Barney's earnings or supply him with P45's P60's or P11d's. The owners, however, deducted Icelandic and German tax from Mr Barney's settlings but this was after the tax years under Appeal.

62. Although the Tribunal was not convinced that Mr Carden informed Mr Barney that he was self employed, Mr Barney submitted self-assessment tax returns on the basis of his self employment as a share fisherman. Further Mr Barney did not question his self employment status with HMRC until after an enquiry was opened into his tax returns, and despite raising the question Mr Barney made another return declaring that he was self employed.

63. The facts found on Mr Barney's treatment of his tax affairs during the disputed period damaged his credibility, and left him open to the allegation that his assertion of

⁴ See paragraph 71

⁵ See paragraph 139

employment status was an afterthought to escape liability from a substantial assessment. Mr Barney explained that he had worked hard all his life and believed he had an obligation to pay tax. Mr Barney stated that he completed the self assessment returns because they were sent to him. Mr Barney considered he was naïve and only realised that he was an employee after receiving advice from his accountant. Mr Barney was minded to raise the question of his status when the owners deducted German and Icelandic tax from his earnings but in the end took no action. Mr Barney asserted that his under-declaration in the returns was due to Mr Carden's failure to send a complete set of settling sheets for the years in question.

64. The Tribunal considers that Mr Barney's explanation had a ring of truth, with tallied with his life experience. The Tribunal's view of Mr Barney was that he was a hard working individual who had managed to hold down regular employment for 43 years in a tough and precarious industry. He had been at sea from the age of 15 doing a range of manual jobs. The Tribunal considers that his life experience was such that he would not readily appreciate the technicalities and tax consequences associated with contracts of service and for services, except that he had to pay tax. In respect of the latter he resorted to the method that he had used throughout his working life of completing self assessment returns as a share fisherman. In short the Tribunal believes his assertion of naivety and that he only realised the correct position regarding his employment status after advice from his accountant. The Tribunal, however, was circumspect about his reasons for the under-declaration of earnings in his returns. Mr Barney should have known his level of earnings during the years in question and it was unfair to blame Mr Carden for his own shortcomings.

65. The decision of Lord Denning in *Massey v Crown Life Insurance Co* [1978] IRLR 31 provides the starting point on the significance of the parties' intentions in discerning whether the contract is one of service or for services. At page 33 he said:

“The law as I see it is this: If the true relationship of the parties is that of master and servant under a contract of services, the parties cannot alter the truth of that relationship by putting a different label upon itOn the other hand, if their relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity, by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true relationship between them”.

66. Manse LJ in *Todd & Anor* placed weight on the declared intentions of the parties, at paragraph 141 he said:

Fourthly, what was clearly common ground between the parties was their shared understanding (accepted by the Inland Revenue) that the crew members were self-employed..... The judge mentioned Mr Nolan's reliance on this factor in passing in his concluding analysis. But it seems to me a factor deserving some emphasis, particularly in a case which the judge regarded as borderline. Both in *Ready Mixed Concrete* [1968] 2 QB 497, [1968] 1 All ER 433 and in *Massey* [1978] 2 All ER 576, [1978] 1 WLR 676, the courts were prepared to attach weight to the parties' own expressed attitude in a contractual statement

regarding their respective status, and the parties' attitude also seems to me relevant, even in the case of post-contractual conduct, to throw light on the true nature of an unwritten relationship”.

5 67. Neuberger J, however, in the same decision explained that the parties’ treatment of their tax affairs whilst significant was not decisive in determining the nature of the contract. At paragraph 81, he said:

10 “Those Statutory Instruments treat share fishermen (defined in terms which plainly included the crew members in the present case) as people employed "other than under a contract of service". In the context of determining whether a share fisherman is "employed under a contract of service", which will depend on the facts of the particular case, the fact that he is treated as self-employed for taxation purposes plainly cannot be decisive. However, it is a point of some significance, particularly in a case such as this, where it appears to have been
15 accepted that there was nothing unusual in the share fishing arrangements”.

20 68. The Tribunal concludes that in this Appeal the parties’ intentions, and in particular the tax treatment of their respective positions, were an important feature in the factual matrix. The clarity of those intentions was, however, tempered by the absence of documentary and oral evidence of a shared understanding of the nature of their relationship at the onset of Mr Barney’s engagement. The Tribunal understands that the owners now require crew members to sign a document confirming that they are responsible for their tax affairs at the beginning of a fishing trip.

25 69. The Tribunal considers that the evidence on parties’ intentions indicated a shared assumption that their relationship was one of share fishing with the normal rules applying without testing that proposition against the individual circumstances. In this respect, the owners’ deduction of foreign tax from Mr Barney’s earnings was relevant, even though the deduction occurred after the tax years under Appeal. It appears to the Tribunal that the owners simply applied their understanding of the tax rules in the
30 various jurisdictions without considering the implications of those decisions for each jurisdiction.

Conclusion

35 70. The Court of Appeal in *Hall* emphasised the decision should not be a mechanical exercise of running through items on a check list. The object of the exercise is to paint a picture from the accumulation of detail and stand back from that picture to make an informed qualitative decision.

40 71. The picture in this Appeal was complicated by the overlaying of share fishing which gives the picture an added dimension and blurs those features normally associated with a contract of service. The case that HMRC has conducted this Appeal on the basis that Mr Barney was a share fisherman, however, should not preclude the Tribunal from examining whether the use of the description, *share fisherman* by the parties is a label of convenience rather than an accurate statement of the relationship between the parties.

72. The facts of this Appeal were different from those considered by the Court of Appeal in *Todd & Anors*. In the latter there were two distinct parties, the owners and the skipper and the crew, with each party making a specific and separate contribution to the success or otherwise of the fishing expedition but coming together at the end to share in the triumphs and tribulations of their joint venture.

73. The picture of this Appeal was in marked contrast to that painted in *Todd & Anors*. The owners not only provided the vessel and all the necessary equipment but the Skipper and the officers who were company men. The owners through their Skippers determined where and when the vessel fished, laid down the precise roles played by the various fishermen on board, and decided their terms of engagement. The owners bore the costs of the voyages and any associated losses. Within that overall context Mr Barney did what he was told to do and at the end of each voyage took home what he was given by the owners. Mr Barney in taking up his position of deckhand with the owners of the *Norma Mary* was not exposed to financial risk. The owners paid and arranged for his transport to and from the vessel. The owners took out insurance to provide him with cover in the event of injury at work. The owners looked after his needs whilst on board and when he was injured and off work. The owners made regular cash advances which ensured that the needs of his loved ones back home were met. His earnings were calculated with reference to gross sales which meant that he received some reward for his endeavours. The fluctuations in his earnings were mitigated by the regular cash advances which on the evidence were not recovered if they exceeded the settling for a particular trip. Mr Barney was guaranteed a job on the next trip provided he performed his duties to the satisfaction of the skipper. Mr Barney worked on the *Norma Mary* for a period of eight years, and during that time he did not go out on another vessel under different ownership.

74. The picture portrayed in the above paragraph is one of a contract of service (employment). The vividness of that picture was not dulled by the facts to the contrary regarding the parties' intentions, no provision for notice, and that the owners did not provide the full range of benefits normally associated with employment, such as paid leave.

75. Mr Hall for HMRC raised two matters which require examination by the Tribunal. The first was his contention at paragraph 49 of his final submissions when he suggested that Mr Barney had no expectation of remuneration from his work on the *Norma Mary*. Thus the requirement of mutuality of obligation, an essential ingredient of the irreducible minimum for a contract of service, was not met. The Tribunal found otherwise. The Tribunal decided that Mr Barney would receive remuneration for his efforts and that the risk of him receiving minimal or no remuneration was remote because of its relationship with gross sales rather than profit and the provision of a guaranteed cash advance.

76. Mr Hall in his final submissions alleged that Mr Barney had not established a nexus between himself and Samherji, and, therefore, there could be no contract of service between them. The Tribunal did not understand Mr Hall's submission, if he was correct there presumably would be no contract for services either. In the Tribunal's view there was clear evidence of an agreement between Mr Barney and the

owners of the Norma Mary in which Mr Barney provided work in return for remuneration. The Tribunal has decided that the agreement took the form of a contract of service. The owner of the Norma Mary was Onward in which Samherji had a controlling interest from 2006.

5 **Decision**

77. The Tribunal decides that Mr Barney was employed under a contract of service with the owner of the Norma Mary during the tax years of 2006/07 and 2007/08. The Tribunal allows the Appeal in respect of this specific issue of employment status. The Tribunal is not in a position to determine the other matters that flow from this
10 decision, which requires discussion between the parties. The Tribunal gives leave to the parties in absence of agreement to request the Tribunal to decide the outstanding issues.

78. The Tribunal wishes to acknowledge the able assistance given to it by the parties' representatives. Ms Barney who stood in at the last moment and proved to be a
15 competent advocate for her uncle. Mr Hall was equally as competent in presenting the case for HMRC.

79. 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
20 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.

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MICHAEL TILDESLEY OBE
TRIBUNAL JUDGE
RELEASE DATE: 22 December 2011