Analysis

Professional Game Match Officials: clarity on mutuality of obligation

Speed read

Determining employment status for tax purposes requires the evaluation of, and then the stepping back from numerous 'status indicators' to paint an overall picture. The concept of 'mutuality of obligation' is a cornerstone of the evaluation yet, for a point said to be so important, it is perhaps surprising that opposing views of its meaning have subsisted for so long. The recent PGMOL case remedies that dichotomy by documenting the evolution of the concept and objectively weighing the authorities to provide three guiding principles on the meaning and application of mutuality today.

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This article considers the case of *HMRC v Professional Game Match Officials Ltd* [2020] UKUT 0147 (TCC), which examines whether certain referees engaged by Professional Games Match Officials Ltd (PGMOL) were employed or self-employed.

To assist readers unfamiliar with the background, PGMOL engages football referees in two distinctly different ways. First, there is the Select Group, which officiates at Premier League and some international matches. These officials have made refereeing their career and are engaged as employees by PGMOL. Then there is the National Group, which officiates mainly in leagues 1 and 2 of the Football League; they also officiate in the Championship, the FA Cup, and occasionally in the Premier League as fourth official. Refereeing for the National Group is a serious hobby, done when the referees want to, in their spare time, and fitted around other full-time employment and family life. PGMOL's need for obligations and control in the case of the Select Group referees is that group's raison d'etre. The same extent of obligations and control is not required or imposed in the case of National Group referees.

HMRC raised reg 80 determinations in respect of PAYE (under the Income Tax (Pay as You Earn) Regulations, SI 2003/2682) and issued s 8 notices in respect of class 1 NICs (under the Social Security (Transfer of Functions) Act 1999 s 8) in relation to the National Group referees covering 2014/15 and 2015/16. The First-tier Tribunal (FTT) (Judge Sarah Falk and Member Janet Wilkins) allowed PGMOL's appeal against those determinations, concluding that National Group referees were not employees during the periods in question, on account of insufficient mutuality of obligation (MoO) and control. HMRC appealed on three grounds relating to the question of mutuality in the individual contracts, the overarching contract, and the question of control in the individual contracts.

The basics of employment status and roots of mutuality of obligation

The essential conditions required for employment were summarised by McKenna J in the seminal case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (*RMC*), which will be familiar to most readers:

> 'A contract of service (employment) exists if 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.'

The first condition from *RMC* is sometimes referred to as MoO in its entirety. However, the question of 'personal service' (the servant provides *their own* work and skill) has become a test in its own right, usually judged by its nemesis 'substitution', the leading case on which is now *Pimlico Plumbers v Smith* [2017] ICR 657. The third test is usually dispatched by considering numerous indicators of being in business on one's own account (see *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173). Then, subject also to establishing the true terms of the contractual relationship (*Autoclenz Ltd and Belcher & Ors* [2011] UKSC 41), the overall conclusion is finally reached by painting a picture from the accumulation of detail, standing back from that picture and viewing it from a distance (*Hall v Lorimer* (1993) 66 TC 349). So, what about MoO, on which this case turned?

The feeling isn't mutual

The two opposing views on the content of mutual obligations are summarised at para 50:

> 'HMRC contend that the first limb of the *RMC* test is satisfied wherever the individual provides the services through his personal work or skills and the employer pays him for any work actually done. PGMOL, on the other hand, contend both that the putative employer must be under an obligation to provide either work or payment in lieu of work and that the putative employee must be under an obligation to accept work and to carry it out personally.'

After a detailed consideration of the authorities, the Upper Tribunal (UT) (Mr Justice Zacaroli and Judge Thomas Scott) provided the following three guiding principles on mutuality (paras 68–70):

> 'First, so far as the obligations on the employee are concerned, the minimum requirement is an obligation to perform at least some work and an obligation to do so personally. It is consistent with such an obligation that the employee can in some circumstances refuse to work, without breaching the contract. It is inconsistent with that obligation, however, if the employee can, without breaching the contract, decide never to turn up for work: see, in particular, *Cotswold Developments*

Construction Ltd v Williams [2006] IRLR 181 and *Weight Watchers (UK) Ltd v Revenue and Customs Commissioners* [2012] STC 265.'

'Second, the minimum requirement on an employer is an obligation to provide work or, in the alternative, a retainer or some form of consideration (which need not necessarily be pecuniary) in the absence of work. We think it is insufficient to constitute an employment contract if the only obligation on the employer is to pay for work if and when it is actually done. We consider this to be the better reading of the judgments of the Court of Appeal in *Clark v Oxfordshire Health Authority* [1998] IRLR 125 (including the passages cited in it from *Nethermere (St Neots) Ltd v Gardiner* [1984] IRLR 240 (CA)) and the judgment of Langstaff J in *Cotswold Developments*; see also *Usetech v Young* [2004] STC 1671 and *Weight Watchers*.

'Third, in both cases (and as reiterated in a number of the authorities, for example *Clark* [at para 22] and *Weight Watchers* [at para 31]), the obligations must subsist throughout the whole period of the contract.'

After a detailed consideration of the authorities, the Upper Tribunal has provided three guiding principles on mutuality

Relationship between PGMOL and the National Group Referees

Referees are invited by PGMOL to join the list comprising the National Group annually before the start of each season, providing various pre-season documents, including the code of practice, a copy of which must be signed by the referee and returned to PGMOL.

Following extensive examination of the facts, the FTT had found there was:

- an all-season 'overarching contract' the terms of which were to be found largely in the pre-season documents; and
- a series of separate 'individual contracts' between PGMOL and each National Group referee, commencing when the referee accepts an offer of a match by PGMOL, and ending on submission by the referee of a match report. Referees had the right to express geographical preferences, to refuse any particular appointment once it was offered, and even to back out after accepting an offer, without sanction.

Much of the documentation was written in terms of expectation rather than legal obligation, but there were some provisions which amounted to express legally enforceable rights and obligations. These include, from PGMOL's perspective, its agreement to include the referees on the list; to provide a system of continual assessment and feedback; to provide a training programme and a coaching system, and to provide match kit, health insurance and access to sports scientists. The referees agreed to act impartially; to declare conflicting interests; not to enter into sponsorship or promotion arrangements, and not to undertake media work except as permitted. A 'match day procedures' document also contained a number of obligations regarding arrival time at grounds, turning off mobile phones, and behaving appropriately.

However, nothing in the documentation imposed any legal obligation on PGMOL to provide work or on the referee to accept work offered. In fact, it was expressly stated that there was 'no guarantee that match officials on the list will be offered any appointments to matches and match officials are not obliged to accept any appointments to matches offered to them.' In the event of non-attendance, the individual contracts simply fell away without sanction, without payment. Similarly, PGMOL was free, if it felt it needed to do so, to cancel a particular appointment and replace the referee without breach of contract.

Key findings

The UT rejected contentions by HMRC that the expectations in the code of practice should be construed as legal obligations. It was noted that both expressions were used and properly understood and intended to be applied with their respective meanings within the document, so that HMRC's argument then stands or falls on the application of the *Autoclenz* approach (para 79).

The UT found (at paras 90, 96) that the FTT had correctly applied *Autoclenz*, in taking a 'realistic and worldly wise' approach to find that the express absence of obligations was not overridden by the conduct of the parties, contrasting a number of other cases with similar contractual provisions including *Autoclenz*, *Pimlico Plumbers*, and the more recent case of *Addison Lee Ltd v Lange* [2019] ICR 637 .

Applying the authorities (summarised in paras 68–70 as noted above), the UT judged that the FTT was clearly correct to conclude that, as a matter of law, in the absence of an obligation on PGMOL to provide at least some work (or some form of consideration in lieu of work) or in the absence of an obligation on the referee to undertake at least some work, there would be insufficient MoO to characterise the overarching contract as a contract of employment.

In relation to the individual contracts, the FTT had found there was some level of MoO (para 97), 'namely for the referee to officiate as contemplated (unless he informed PGMOL that he could not) and for PGMOL to make payment for the work actually done'. However, this was deemed insufficient to render them employment contracts, particularly given that both sides could cancel before or after acceptance of a match offer without breach of contract.

The UT stated (at para 100), 'mutuality of obligation is not only relevant to determining whether there was a contract at all, but is a critical element in delineating a contract of service from a contract for services.…[and]…. we do not accept that a contract which provides merely that a worker will be paid for such work as he or she performs contains the necessary mutuality of obligation to render it a contract of service…'. Further, the UT found that the principles of MoO were of general application and not restricted merely to overarching contracts (para 101), and that in any event the individual contracts extended beyond the time when the referee was actually refereeing (para 102).

The UT also found that the FTT was correct to distinguish PGMOL from *Weight Watchers*, where the right of a team leader not to take a particular meeting was fettered by a requirement to find a replacement (para 108). The UT accepted that not working if unable to do so is no different to any other employee (para 112),

but the only fetter on a National Group referee's right to accept, decline and even withdraw from matches after acceptance, was simply to notify PGMOL. The UT also found no error of law in the FTT's finding that PGMOL's right to cancel an appointment was unfettered.

Conclusions

The UT dismissed HMRC's appeal concluding that there was no error of law in the FTT's conclusions that:

- there was an absence of sufficient MoO in relation both to the overarching contract and the individual contracts; and
- National Group were engaged under contracts for services and were not employees.

There is a sense that the fog is now lifting from previous confusion on mutuality. The judgment has provided a similar clarity on mutuality to that provided by *Pimlico Plumbers* on substitution

The UT also made some important observations on control, which will be relevant in other cases. In particular, the UT stated (at para 138) that: 'Provided that the right to give directions relates to the performance of the employee's obligations during the subsistence of the contract, it is not to be disregarded because there is no ability to step in and give directions during the performance of the obligations (where the nature of the obligations precludes it) or because the sanctions for breach of those obligations could only be imposed once the contract has ended.'

The UT concluded (at para 140) that it was not open to the FTT to conclude that PGMOL was unable to impose, during the period of an individual contract, *any* sanction for breach by a referee. However, this 'does not necessarily mean that PGMOL did exercise sufficient control over the referees in the context of each individual contract to render them employees' (para 141). Given the UT's conclusions on MoO, it was unnecessary to consider this point further or remit the case to the FTT to do so.

There is a sense that the fog is now lifting from previous confusion on mutuality. The judgment in this case has provided a similar clarity on mutuality (at paras 68–70) to that provided by *Pimlico Plumbers* on substitution. That said, the circumstances in this case were unusual. The National Group referees were 'passionate hobbyists', and do not require, contractually or in practice, the same level of obligation or control that is required of employees.

HMRC has one month to apply for permission to appeal. ■

Note: The author was part of a team that advised PGMOL in this case.

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