Press Summary

16 September 2024

Commissioners for His Majesty's Revenue and Customs (Respondent) v Professional Game Match Officials Ltd (Appellant)

[2024] UKSC 29

On appeal from [2021] EWCA Civ 1370

Justices: Lord Hodge (Deputy President), Lord Leggatt, Lord Stephens, Lady Rose, Lord Richards

Background to the Appeal

This appeal considers the employment status of part-time football referees in order to determine the way match fees paid to them should be treated for income tax and National Insurance purposes.

The appellant company ("**PGMOL**") provides referees and other match officials for the most significant football competitions. The Football Association Limited ("**the FA**") classifies match officials according to nine levels, the highest of which is Level 1. PGMOL is responsible for training and provision of referees primarily at Level 1. There are two sub-sets of Level 1, one of which is a group known as the "**National Group**" comprising those who referee in their spare time and who usually have other full-time employment or occupations. These referees primarily officiate at matches in the Championship League and the FA Cup.

This appeal concerned the employment status of referees in the National Group in the tax years 2014-2015 and 2015-2016. During the relevant period, referees were appointed to the National Group on an annual basis. They were required to pass a fitness test and attend an introductory seminar. PGMOL also operated its own disciplinary procedures and breach of match day procedures might result in PGMOL taking disciplinary action against a referee.

The system for engaging referees in the National Group operated as follows. Match appointments were offered to referees via a software system. An appointment for a weekend game was usually offered on the preceding Monday. A referee could refuse an appointment but PGMOL would typically want to know the reason for the refusal. Once a referee had accepted an appointment, he or she could back out of it before arriving at the ground on match day, but would generally only do so as a result of injury, illness or work commitments. PGMOL could likewise make changes after a match appointment had been accepted. When a referee accepted

a match appointment offered by PGMOL, a contract was formed under which the referee agreed to officiate and submit a match report and PGMOL agreed to pay the appropriate fee. If the referee did not attend the match, the contract would fall away, without any sanction being imposed, and no match fee would be payable.

The underlying question in this appeal is whether these individual contracts were contracts of employment. Before the tribunals below and the Court of Appeal, the key issues were whether two key elements for the establishment of an employment contract were present: (i) the mutual obligations of the employee (to provide personal service) and the employer (to pay for those services) and (ii) a sufficient degree of control by the employer over the employee.

The First-tier Tribunal (the "**FTT**") found in favour of PGMOL, holding that the contracts were not contracts of employment because: (i) there was insufficient mutuality of obligations between PGMOL and the referees; and (ii) PGMOL had insufficient control over the referees under the contracts. Although the Upper Tribunal held that the FTT had misapplied the law on control, it dismissed the respondent's ("**HMRC**") appeal, on the basis that there was insufficient mutuality of obligation. The Court of Appeal allowed HMRC's appeal as regards mutuality of obligation and remitted the case to the FTT to re-consider the issues of mutuality of obligations and control, on the basis of its original findings of fact.

PGMOL appeals to the Supreme Court on the issues of mutuality of obligation and control under the individual contracts.

Judgment

The Supreme Court unanimously dismisses PGMOL's appeal, holding that the minimum requirements of mutuality of obligation and control necessary for a contract of employment between the National Group referees and PGMOL were satisfied in relation to the individual contracts. In light of its conclusion that these minimum requirements were met, the Supreme Court remits the case to the FTT for it to decide whether, in the light of all relevant circumstances, the individual contracts were contracts of employment. Lord Richards gives the judgment, with which the other Justices agree.

Reasons for the Judgment

The employment relationship is contractual in nature and is rooted in the common law **[23]**. Although employment relationships are now governed by both common law and statute, it is the common law concept of employment that is applicable to the tax and National Insurance legislation relevant in this appeal **[26]**.

An appropriate starting point for determining whether or not there is a contract of employment is the decision of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 **[28]**. This provides that both mutuality of obligations and a sufficient degree of control are elements necessary for the existence of a contract of employment **[37]**.

Mutuality of obligations requires that the employee provides his or her personal service in return for payment by the employer **[40]**. For the purposes of considering whether the necessary mutuality of obligations exists, a distinction must be drawn between overriding or umbrella contracts (which govern continuous employment) and individual contracts of the kind arising in this case (which govern single engagements) **[44]-[45]**. In the case of umbrella contracts, it may be necessary to demonstrate the continuing existence of obligations to perform work and pay for such work **[46]**. By contrast, in the case of individual contracts, it is not necessary that mutual obligations between the parties exist before the engagement commences **[49]**. Rather, sufficient mutuality of obligations may exist even if the parties' obligations are only in

existence during the period when the employee is working for the employer **[55]**. For the purposes of this appeal, this means that it would not be necessary to show that the referees were under contractual obligations before their arrival at the ground. Rather, the parties' obligations in the period from the referees' arrival at the ground on Saturday to the submission of their match report on the following Monday would satisfy the requirement for sufficient mutuality of obligations **[55]**. In any case, however, a referee and PGMOL were under mutual contractual obligations from an earlier point, namely the time early in the week that the referee accepted the offer of a match on the Saturday of that week **[56]**. It did not matter that either party had a right to cancel the engagement without penalty; whilst the contract remained in place, the parties were under mutual obligations to each other **[56]**. Therefore, the individual engagements of referees to officiate at matches satisfied the test of mutuality of obligation **[57]**.

The question of whether the employer has a sufficient degree of control over the provision by the employee of his or her services will require an assessment of the facts on each case **[62]**. It is not necessary that the employer should have a contractual right to intervene in every aspect of the performance by an employee of his or her duties for there to be a sufficient degree of control **[69]**. It is also not required that the employer has the practical ability or legal right to intervene during the performance of the employee's duties **[70]-[71]**. What needs to be shown is a sufficient framework of control as regards each contract taken separately **[73]**. Ultimately, demonstrating that sufficient control consistent with an employment relationship exists may take many forms and is not confined to the right to give direct instructions to the individuals concerned **[76]**. Applying these principles to this case, the Court of Appeal was correct to say that the combination of contractual obligations imposed on referees as to their conduct generally during an engagement from the time the match was accepted to the time when the match report was submitted, and as to their conduct during the match, was capable of giving PGMOL a sufficient framework of control to meet the control test for employment purposes **[88]**.

There remains the overall question whether, in the light of all relevant circumstances and applying the guidance given by the Court of Appeal in *HMRC v Atholl House Productions Ltd* [2022] EWCA Civ 501, [2022] ICR 1059 and by the Supreme Court in the present case, the National Group referees were engaged for individual matches under contracts of employment. The case is remitted to the FTT to determine that issue.

References in square brackets are to paragraphs in the judgment.