[2024] UKSC 29
On appeal from: [2021] EWCA Civ 1370

JUDGMENT

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

before

Lord Hodge, Deputy President
Lord Leggatt
Lord Stephens
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
16 September 2024

Heard on 26 and 27 June 2023

Appellant
Jonathan Peacock KC
Georgia Hicks
Harry Sheehan
(Instructed by McCormicks Solicitors)

Respondent
Akash Nawbatt KC
Sebastian Purnell
(Instructed by HMRC Solicitor's Office (Bush House))

LORD RICHARDS (with whom Lord Hodge, Lord Leggatt, Lord Stephens and Lady Rose agree):

Introduction

1. The underlying issue in this litigation is whether part-time football referees were employees of the appellant company. The issues raised by this appeal concern two critical elements in determining whether a contract of employment exists. First, the mutual obligations involved in the provision of services personally by the putative employee and the obligation of the putative employer to pay remuneration for those services. Second, the requirement for a sufficient degree of control by the putative employer over the provision by the putative employee of his or her services. These elements, and the issues before the Court, can be understood only in the broader context of the correct approach to deciding whether an employment relationship exists.

2. The issues in this case arise in the context of taxation and National Insurance payments. The relevant legislation adopts employment under a contract of employment or under a contract of service as the criterion for determining the treatment of income for the purposes of income tax and National Insurance contributions. The legislation contains no definition of a contract of employment or a contract of service but leaves them to be determined in accordance with common law principles. It is not a case where a particular meaning is to be given by reference to the context and purpose of the legislation.

3. As will appear, this is by no means unique. Important rights, remedies and obligations arising under legislation and at common law in many fields are also dependent on the common law concept of a contract of employment.

The applicable legislation

4. The Income Tax (Earnings and Pensions) Act 2003 imposes charges to income tax on "employment income" and makes provision for its collection through the Pay As You Earn scheme (PAYE). So far as relevant, section 4(1) provides that "employment" includes "any employment under a contract of service".

5. The Social Security Contributions and Benefits Act 1992 provides for the payment of National Insurance contributions. Different regimes are provided for "employed earners" and "self-employed earners". So far as relevant, an "employed earner" is defined by section 2(1)(a) as "a person who is gainfully employed… under a contract of service". For the purposes of the Act, section 122(1) defines a "contract of service" as "any contract of service or apprenticeship whether written or oral and whether express or implied".

6. There is no distinction between a contract of employment and a contract of service, either at common law or for the purposes of these statutory provisions.

The facts: a brief summary

7. At this stage, I will give a brief summary of the facts, leaving the more detailed facts to the sections below dealing with the issues on the appeal.

8. The appellant, Professional Game Match Officials Limited ("PGMOL"), is a company limited by guarantee which provides referees and other match officials for the most significant football competitions, including the Premier League, the FA Cup and the English Football League, the latter comprising a total of 72 clubs in the Championship League and in Leagues 1 and 2. The members of PGMOL are the Football Association Limited ("the FA"), the Football Association Premier League Limited and the English Football League Limited. It is funded by its members and is intended to be run on a not-for-profit basis.

9. The FA is the governing body of English football, including match officials. It is effectively their regulator. Referees must be registered with the FA if they are to officiate at any match in any affiliated competition and they must comply with the FA's rules and regulations.

10. The FA classifies match officials according to nine levels, the highest of which is Level 1 (the National List). PGMOL's role relates to the training and provision of referees primarily at Level 1, which comprises two sub-sets. The first is a group of full-time referees, who principally officiate at Premier League matches and who are employed under written contracts of employment (known as "the Select Group"). The second is a larger group (known as "the National Group") comprising those who referee in their spare time and who usually have other full-time employment or occupations. They primarily officiate at matches in the Championship League and the FA Cup and may also act as Fourth Official in some matches, including in the Premier League.

11. This appeal concerns the employment status of the referees in the National Group, and hence the treatment of the match fees paid to them for income tax and National Insurance purposes in the tax years 2014-15 and 2015-16. The facts set out below relate to those tax years.

12. The system whereby referees in the National Group were engaged to officiate at matches was briefly as follows. Match appointments were offered to National Group referees using software called the Match Official Administration System ("MOAS"). An appointment for a weekend game was usually offered on the preceding Monday. It was

open to a referee to refuse an appointment, but PGMOL would typically want to know the reason. Having accepted an appointment, a referee could still back out of it before arriving at the ground on match day. Referees would usually back out only because of illness or injury or because of a late change in work commitments. PGMOL could likewise make changes after a match appointment had been accepted, if it considered it appropriate to do so. The First-tier Tribunal ("the FTT") found that, when a referee accepted a match appointment offered by PGMOL, a contract was formed under which the referee agreed to officiate at the match in question and to 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 sanction, and no match fee would be payable.

13. Referees were appointed to the National Group on an annual basis, before the start of each season. They were required to pass a fitness test and attend an introductory seminar.

14. PGMOL operated its own disciplinary procedures. Breach of match day procedures might result in PGMOL taking disciplinary action against a referee. In the case of a serious complaint, the FA and PGMOL would discuss which of them was better placed to investigate the allegation. Whilst PGMOL could suspend or remove a referee from its list, only the FA could cancel the referee's registration as a Level 1 referee.

15. The FTT found that the pre-season documents provided to referees and the communications about match fees and expenses constituted an express, season-long overarching contract between the referees and PGMOL, which included terms that there was no obligation on PGMOL to offer matches and no obligation on referees to accept matches. It is now common ground that this did not amount to a contract of employment.

16. The overall issue in the case is whether the contracts formed each time that an offer of a match appointment was accepted by a referee were contracts of employment, although as stated above this appeal is confined to the issues of mutuality of obligation and control.

The decisions below

17. Before the FTT, HMRC argued that the overarching contract and the individual contracts were contracts of employment, while PGMOL argued that there were no contractual relationships between PGMOL and the National Group referees and, in any event, no contracts of employment between them.

18. The FTT (Judge Sarah Falk, now Falk LJ, and Janet Wilkins) [2018] UKFTT 528 (TC) held that there were both overarching and individual contracts, but it rejected

HMRC's case that either were contracts of employment, and hence rejected HMRC's case that the match fees were subject to the PAYE scheme and that the referees were "employed earners" for National Insurance purposes. As regards the individual match contracts, it held that they were not contracts of employment, on the grounds that, first, the mutual obligations were insufficient to found a contract of employment, because of the right of both parties to cancel the appointment at any time before the referee's arrival at the ground, and, second, PGMOL had insufficient control over the referees under the individual match contracts. It made no finding as to control under the overarching contracts.

19. The Upper Tribunal ("the UT") (Zacaroli J and Judge Thomas Scott) [2020] UKUT 147 (TCC) dismissed HMRC's appeal, holding that the FTT's decision contained no error of law in concluding that there was no mutuality of obligation in the overarching contract and insufficient mutuality of obligation in the individual contracts to constitute them contracts of employment. While the UT held that the FTT erred in its application of the law on the issue of control under the individual contracts, it did not decide the issue itself or remit it to the FTT, given that its conclusion on mutuality of obligation was sufficient to decide that the match fees were not subject to the PAYE scheme and that the referees were not "employed earners".

20. HMRC appealed to the Court of Appeal as regards the UT's decision that there was no mutuality of obligation under either the overarching or the individual contracts. By a respondent's notice, PGMOL sought to uphold the UT's dismissal of HMRC's appeal on the additional ground there was insufficient control under the individual contracts for them to be categorised as contracts of employment.

21. The Court of Appeal (Henderson LJ, Elisabeth Laing LJ and Sir Nicholas Patten) [2021] EWCA Civ 1370, [2022] 1 All ER 971 allowed HMRC's appeal as regards mutuality of obligation under the individual contracts, but dismissed their appeal as regards the overarching contracts. It rejected PGMOL's case on the question of control. The Court of Appeal remitted the case to the FTT to consider on the basis of its original findings of fact whether there was "sufficient mutuality of obligation and control in the individual contracts for those contracts to be contracts of employment". The result therefore was that the Court of Appeal held that the overarching contracts were not to be treated as contracts of employment and that whether the individual contracts were to be so treated turned on the findings to be made on remission to the FTT.

22. PGMOL appeals to this Court against the decision of the Court of Appeal as it relates to the issues of mutuality of obligation and control under the individual contracts. HMRC does not challenge the decision that the overarching contracts are not contracts of employment.

Contracts of employment: the general legal approach

23. Unlike some other relational arrangements including agency, the basis in law of employment is necessarily contractual. Rooted in the common law, it depends on the existence of a contract between employer and employee. For many years, some commentators have thought that it would be better based on the relationship itself (see, for example, BA Hepple: *Restructuring Employment Rights* (1986) 15 ILJ 69) but it has "obdurately persisted" in being based on the individual contract of employment (see Paul Davies and Mark Freedland: *Changing Perspectives Upon the Employment Relationship in British Labour Law*, Chap 6 in *The Future of Labour Law* (2004), ed. Catherine Barnard and others, at p 130).

24. The common law has for many centuries recognised contracts of employment, or contracts of service as they used to be called, as a separate and particular type of contract with its own incidents. Historically, the law, particularly statute law, was more concerned with the rights of employers than with the rights of employees but the growth in statutory protections for employees, to temper the bargaining and management powers of employers, has seen a greater focus on the rights of employees. Changing patterns of work have exposed the limitations of the definition of employment as a basis for providing such protection, so resulting in there being numerous statutes which extend rights beyond employees to wider classes, such as "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work" (section 83(2)(a) Equality Act 2010). Likewise, at common law, the basis of vicarious liability of one person for torts committed by another is no longer tied to the extent it once was to an employment relationship, but whether or not there exists a contract of employment remains an important consideration: see *Various Claimants v Barclays Bank plc* [2020] UKSC 13, [2020] AC 973 and the earlier decisions of this Court there cited.

25. Nonetheless, the contract of employment remains the basis on which many statutory protections are based. Examples include claims for unfair dismissal (sections 94 and 230(1) of the Employment Rights Act 1996), rights to redundancy payments (sections 135 and 230(1) ibid), certain rights in relation to trade union membership and activities (sections 152-153, 168-170 and 295 of the Trade Union and Labour Relations (Consolidation) Act 1992), and rights on the transfer of businesses (The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)).

26. As noted above, it is the common law concept of employment that is applicable to the tax and National Insurance legislation relevant to this appeal.

27. The correct approach to determining whether a particular contract is one of employment has been the subject of numerous decisions, many of which were reviewed by the Court of Appeal in *Revenue and Customs Comrs v Atholl House Productions Ltd*

[2022] EWCA Civ 501, [2022] ICR 1059 ("*Atholl House*"). Counsel for both parties in the present appeal made clear that there was no challenge to the approach and analysis in *Atholl House*, which in material respects rejected submissions made in that case on behalf of HMRC. It should be noted that the present appeal raises no issue as to the application of the decisions of the Supreme Court in *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157 ("*Autoclenz"*) and *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657 ("*Uber*") to a contract of employment, so that part of the judgment in *Atholl House* dealing with those decisions is not in point on this appeal.

28. The starting point in deciding whether there is a contract of employment has often been taken to be the judgment of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 ("*RMC*"): see, for example, *Autoclenz*, where at para 18 Lord Clarke called it "the classic description of a contract of employment".

29. Before referring further to *RMC*, there are for present purposes two significant points to note, which are explored in more detail in *Atholl House*.

30. First, there has been a tendency in some judgments, and still more in the submissions made in some cases, to focus unduly on the issues of mutuality of obligation and control and to treat all other terms of the contract and the surrounding circumstances of the parties' relationship as of less significance, or even as being relevant only if they negative the existence of an employment relationship. However, not only did MacKenna J himself make clear that mutuality of obligation and control were necessary, but not necessarily sufficient, conditions of a contract of employment, but there are decisions of high authority which emphasise the need to address "the cumulative effect of the totality of the provisions [of the contract] and all the circumstances of the relationship created by it" and to view "in the round, the relationship between the parties recorded in the agreement in the setting of the surrounding circumstances": *White v Troutbeck SA* [2013] EWCA Civ 1171, [2013] IRLR 949, per Sir John Mummery at paras 38 and 41, and see also *O'Kelly v Trusthouse Forte plc* [1984] QB 90, *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 (PC), *Hall v Lorimer* [1992] 1 WLR 939 (Mummery J) and [1994] 1 WLR 209 (CA).

31. This broader perspective can work both ways. While an impermissibly narrow focus on mutuality of obligation and control might lead to a finding of employment, notwithstanding the importance of the surrounding circumstances in assessing the effect of the contract pointing the other way, the decision in *White v Troutbeck* illustrates the opposite: the claimant caretakers were employees, notwithstanding that they had day-to-day control over their own work.

32. Second, while as a pre-condition to a finding of employment there must be, under the contract, a sufficient degree of control by the putative employer over the putative employee, the extent of that control in any particular case remains a relevant factor in the overall determination of whether there exists an employment relationship. It is not the case that once the pre-conditions of mutuality of obligation and control are satisfied, they drop out of the picture as relevant factors in the overall assessment of whether a contract of employment exists: see *Atholl House* at para 76.

33. These are relevant factors for the correct approach in the present case. If mutuality of obligation and control are regarded as largely determinative, with only a minor role for other considerations, courts may be led to apply an unduly restrictive interpretation of control in order to prevent relationships which overall are not suggestive of employment from being characterised as such. Conversely, by according a real significance to the "totality of the provisions … and all the circumstances of the relationship created by" the contract, a realistic approach can be taken to the issue of control. In other words, the bar to the existence of control need not be set at an unduly high level.

34. Flexibility in approach to deciding whether a sufficient level of control exists is critically important, given the ways in which employment practices have evolved and continue to evolve. The days when the vast majority of the workforce attended at a particular factory, shop or office between set hours to work in highly prescriptive roles have long gone, all the more so following the Covid pandemic of 2020/21.

35. The need for this flexibility was recognised by MacKenna J in his judgment in *RMC* to which I now turn. Indeed, his decision marked a significant break with the approach which had generally prevailed that control was the decisive test, once mutuality of obligation had been established.

36. The issue in *RMC* was whether an owner-driver of a commercial vehicle was an "employed person" (then defined, in largely similar terms to the current legislation, as a person "gainfully occupied in employment… being employment under a contract of service") for the purpose of National Insurance contributions. MacKenna J found on the facts of the case that he was not an employed person.

37. At p 515, MacKenna J set out the elements of a contract of employment:

> "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."

38. As regards the first condition (mutuality of obligation), MacKenna J emphasised the need for an employee to provide his or her own personal service, in consideration for payment:

> "There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Torts (1967) …"

39. The second condition, control, is expressed in the most flexible (if now outdated) terms: control "in a sufficient degree to make that other master". It requires the court to test control by reference to the conditions then prevailing as regards work and employment. While MacKenna J went on to instance matters that must be *considered* in this context ("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"), he quoted with approval what was said in the judgment of Dixon CJ and three other justices of the High Court of Australia in *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 (*Zuijs*) at p 571:

> "What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters."

Mutuality of obligation

40. It is an essential element of a contract of employment that the employee provides his or her personal service for payment by the employer. This requirement has been variously described, for example as "the wage-work bargain": see *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, para 48 (EAT, Langstaff J). This perhaps more clearly pinpoints its focus than the usual but bland term "mutuality of obligation", which could be applied to all bilateral contracts of any description. However, in this case, as in many others, it has been adopted as the label for the first pre-requisite of any contract of employment and, with some reluctance, I shall also use it.

41. This requirement of payment for personal service cannot, however, itself establish that the contract in question is a contract of employment. It is likewise an essential element of contracts for services whereby independent contractors agree to provide their personal services for payment, and of the broader statutory categories of "worker" under, for example, regulation 2(1) of the Working Time Regulations 1998 (SI 1998/1833) and of "employment" under the Equality Act 2010 (section 83(2)(a)). Beyond simply establishing the existence of a contract, it has been said to locate the contract in "the employment field": see *James v Greenwich London Borough Council* [2007] ICR 577, paras 16-17 per Elias J.

42. Although this element will usually be obvious, cases arise where that is not so. For example, in *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735, [2013] IRLR 99, a contract existed between the defendant and dancers working at its clubs, but they were not contracts of employment because the dancers were paid by customers, not by the defendant. It is commonly an issue in tripartite cases, involving individuals who are contracted by employment agencies to provide work for clients of the agency: see, for example, *McMeechan v Secretary of State for Employment* [1997] ICR 549 (CA) ("*McMeechan*").

43. PGMOL submits that mutuality of obligation involves more than payment in return for personal work but requires also an obligation on the part of the engager to provide work or pay in lieu of work and an obligation on the part of the person engaged to provide personal service. PGMOL accepts that, in the case of individual engagements such as an agreement to officiate at a particular match, these mutual obligations may subsist for a brief period of time before the personal work is due to be provided. For example, it would suffice in the case of a referee engaged to officiate at a match on a Saturday that the referee accepted the offer of the match on the preceding Monday, following which there would be mutual obligations on the part of the referee to officiate at the match and on the part of PGMOL to pay the referee for doing so. In the case of all contracts, including those of short duration, it is submitted that it is the task of the court to ascertain the terms of the contract, including the nature and extent of the mutual obligations. The essence of this submission is that the mutual obligations must exist for at least some time before the employee provides the personal service for which he or she is to be paid.

44. In support of this submission, reference was made to a number of authorities in which judges have spoken in terms of the need for *obligations* to provide work or payment in lieu and to provide personal service. It was said that the clearest enunciation of this was in the judgment of Dillon LJ in *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 ("*Nethermere*") at pp 632 and 634:

> "It is said nonetheless that there is one sine qua non which can firmly be identified as an essential of the existence of a contract of service and that is that there must be mutual obligations on

> the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service. So it is submitted in the present case that there is no evidence of any mutual obligations." (p 632)

> "For my part I would accept that an arrangement under which there was never any obligation on the outworkers to do work or on the company to provide work could not be a contract of service." (p 634)

45. As is the case of every passage extracted from a judgment, it is important to read it in the context of the facts and issues of the case. The issue in *Nethermere* was whether two individuals, who were part-time homeworkers who sewed garments manufactured by the appellant company, were employees of the company, and so had standing to bring proceedings for unfair dismissal. The company's case was that they were self-employed. It is critical to note that it was not argued that a separate contract arose each time that the applicants accepted a batch of garments to sew. Such contracts would not have satisfied the requirement for the period of continuous employment required in order to bring a claim for unfair dismissal. Instead, it was argued that that there was an overriding or umbrella contract under which individual batches of garments were accepted by the applicants: see p 626 per Stephenson LJ.

46. The need to establish an overriding or umbrella contract arises when it is necessary to show continuing employment in the periods between individual assignments. This can be done only by demonstrating the continuing existence of mutual obligations to perform work, when required, and to pay for such work. As the EAT (Elias J and lay members) said in *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471, para 12:

> "Cases frequently have had to decide whether there is an over-arching contract or what is sometimes called an 'umbrella contract' which remains in existence even when the individual concerned is not working. It is in that context in particular that courts have emphasised the need to demonstrate some mutuality of obligation between the parties…"

47. The existence of an overriding or umbrella contract was the issue in *Nethermere*, as it was also in *Carmichael v National Power plc* [1999] 1 WLR 2042 (HL). That case concerned part-time tour guides of power stations, who sought an order for the supply of the terms of their employment pursuant to the Employment Protection (Consolidation)

Act 1978. National Power defended on the grounds that they were not employees. As Lord Irvine of Lairg LC noted at p 2044, the case was not advanced on the basis that when the applicants worked as guides, they did so under successive ad hoc contracts of employment. As in *Nethermere*, the case was put exclusively on the basis that they were employed under overriding or umbrella contracts. In those circumstances, in order to be contracts of employment, there needed to be mutual obligations in place, during the entire period said to be covered by the overriding contract, to offer and to accept work and for payment to be made for work done. That is the background to the statement of Lord Irvine at p 2047 on which PGMOL relied:

> "If this appeal turned exclusively—and in my judgment it does not—on the true meaning and effect of the documentation of March 1989, then I would hold as a matter of construction that no obligation on the C.E.G.B. to provide casual work, nor on Mrs. Leese and Mrs. Carmichael to undertake it, was imposed. There would therefore be an absence of that irreducible minimum of mutual obligation necessary to create a contract of service …"

48. *Clark v Oxfordshire Health Authority* [1998] IRLR 125, another authority on which PGMOL relied, falls into the same category. The applicant, claiming for unfair dismissal, worked for the respondent's "nurse bank", with no fixed or regular hours, but she was offered work as and when a temporary vacancy occurred at one of the hospitals in the respondent's area. The industrial tribunal held that the applicant worked on a casual basis and that there was no obligation on the health authority to offer her work or on her to accept it when it was offered. She was not an employee as the necessary mutuality of obligation was absent. The Employment Appeal Tribunal reversed the decision, holding that there was "a global contract of employment" between the applicant and the respondent. Following *Nethermere*, the Court of Appeal reversed the EAT's decision and held that, without some mutuality of obligation, there could be no global contract of employment. Sir Christopher Slade, with whom Beldam and Schiemann LJJ agreed, made the point clear at para 41, where he said: "I would, for my part, accept that the mutual obligations required to found a global contract of employment need not necessarily and in every case consist of obligations to provide and perform work… . In my judgment, however, as I have already indicated, the authorities require us to hold that *some* mutuality of obligation is required to found a global contract of employment."

49. None of these authorities establishes that, where there is a single engagement (such as officiating at a particular match), there must be mutual obligations in existence before the engagement commences, for example before the referee arrives at the ground on the day of the match. On the contrary, there are authorities that establish the contrary. In *Clark v Oxfordshire Health Authority*, immediately following the passage quoted above, Sir Christopher Slade said, "I can find no such mutuality subsisting during the periods when the applicant was not occupied in a 'single engagement'".

50. The point is made in clear and direct terms in a number of authorities that a contract of employment may exist covering only the period while the employee carries out work for which he or she is paid.

51. In *McMeechan*, the applicant worked for an employment agency on a series of temporary contracts under conditions of service that he was under no obligation to accept any assignment but that, if he did so, he would comply with instructions and with duties of fidelity and confidentiality. The agency became insolvent, and the applicant claimed payment of the sum due in respect of his last assignment, which had lasted four days, from the Secretary of State under legislative provisions then in force. The claim was resisted on the grounds that the applicant had not been an employee, which was a pre-condition to payment under the legislation. The Court of Appeal dismissed the Secretary of State's appeal against the EAT's decision that the applicant had been an employee.

52. The applicant was permitted to raise in the Court of Appeal an argument that he was an employee of the agency in respect of the single assignment in respect of which he made his claim for payment. Having considered in detail the terms applicable to the assignment, the Court of Appeal accepted this argument and held that the applicant had been employed for the final assignment alone. For present purposes, the important feature is that it mattered not that the applicant had been under no obligation to accept the assignment and was under no obligation to accept future assignments. At pp 555-556, Waite LJ (with whom McCowan and Potter LJJ agreed) contrasted, in relation to temporary or casual workers, general engagements and specific engagements and said:

> "There is the general engagement, on the one hand, under which sporadic tasks are performed by the one party at the behest of the other and the specific engagement on the other hand which begins and ends with the performance of any one task. Each engagement is capable, according to its context, of giving rise to a contract of employment."

Waite LJ noted that this had been acknowledged by the majority of the Court of Appeal in *O'Kelly v Trusthouse Forte plc* [1984] QB 90.

53. The position as regards single engagements and overriding contracts was summarised in *Atholl House* at para 74:

> "It is now established that, while a single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment, an overarching or umbrella contract lacks the mutuality of obligation required to be a

> contract of employment if the putative employer is under no obligation to offer work …"

54. The single engagement was addressed by Lord Leggatt in *Uber* at para 91:

> "Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working: see eg *McMeechan v Secretary of State for Employment* [1997] ICR 549; *Cornwall County Council v Prater* [2006] ICR 731. As Elias J (President) said in *James v Redcats (Brands) Ltd* [2007] ICR 1006, para 84:
>
> > 'Many casual or seasonal workers, such as waiters or fruit pickers or casual building labourers, will periodically work for the same employer but often neither party has any obligations to the other in the gaps or intervals between engagements. There is no reason in logic or justice why the lack of worker status in the gaps should have any bearing on the status when working. There may be no overarching or umbrella contract, and therefore no employment status in the gaps, but that does not preclude such a status during the period of work.'
>
> I agree, subject only to the qualification that, where an individual only works intermittently or on a casual basis for another person, that may, depending on the facts, tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with worker status: see *Windle v Secretary of State for Justice* [2016] ICR 721, para 23."

55. In the light of these authorities, it is clearly established that there may be sufficient mutuality of obligation to satisfy one of the essential requisites of a contract of employment, even if the obligations subsist only during the period while the putative employee is working for the putative employer. The example of casual workers given by Elias J in the passage from his judgment in *James v Redcats (Brands) Ltd* [2007] ICR 1006, para 84 is enough to show that this is a commonplace occurrence. Indeed, the FTT in the present case said, and this was not challenged by PGMOL, that "[I]t is possible for

a contract of employment to exist only when work is being performed, such that a casual worker may have a series of contracts of employment" (para 15). With regards to the referees in the present case, there would be sufficient mutuality of obligation in the period from their arrival at the ground on Saturday to the submission of their match report on the following Monday. It would not be necessary to show that they were under contractual obligations before their arrival at the ground.

56. Nonetheless, it is the case that a referee and PGMOL were under mutual contractual obligations from the time early in the week that the referee accepted the offer of a match on the Saturday of that week. PGMOL did not challenge the FTT's finding that "individual match appointments each gave rise to a contract, constituted by the offer of the appointment made by PGMOL, and its acceptance by the referee, through the MOAS system" (para 159). Despite the creation of a contract in this way, PGMOL submitted that no mutual obligations existed because both the referee and PGMOL were free to cancel the engagement, without penalty, at any time before the referee arrived at the ground. But, it does not follow from the right of either party to cancel the engagement without penalty that, while the contract remained in being, the parties were not under mutual obligations to each other. On the contrary, those mutual obligations existed from the time of acceptance of the match, unless the engagement was terminated.

57. In my judgment, it is clear that the individual engagements of referees to officiate at matches satisfied the test of mutuality of obligation, which is a necessary but not sufficient condition to the existence of a contract of employment, and that the Court of Appeal was correct so to hold.

58. In developing his submissions on behalf of PGMOL, Mr Peacock KC said that it was not their case that the right to terminate an engagement without penalty necessarily negated mutuality of obligation. While not determinative, it was a relevant factor to be weighed when addressing the nature of the obligations owed. PGMOL's primary case was that it was relevant at the initial stage of deciding whether there existed the mutuality of obligation necessary for a contract of employment but, if that was not right, it was a relevant factor at the third stage of assessing overall whether the contract was one of employment. Mr Peacock said that it did not greatly matter to PGMOL's case whether it came at the first or the third stage.

59. In my judgment, the right to terminate is irrelevant at the first stage of determining whether there exists the mutuality of obligation required for a contract of employment. Where there exist the necessary mutual obligations under the contract, as was the case with each engagement to officiate at a match, and the contract remains in place, it satisfies the condition of mutuality. Mr Peacock's submission that it did not greatly matter whether this point came in at the first or third stage overlooks that, if it did come in at the first stage and was held to be decisive on the facts of the particular case, the contract in question could not be one of employment. By contrast, if it is a relevant factor at the third

stage, it is just one of many factors that may be relevant to determining the nature of the contract.

60. I do, however, accept that the nature and extent of the mutual obligations are relevant to determining whether the contract is one of employment. In *Windle v Secretary of State for Justice* [2016] EWCA Civ 459, [2016] ICR 721, a case concerning the extended meaning of "employment" in the Equality Act 2010, the Court of Appeal rejected a submission that the absence of mutuality of obligation between engagements added nothing to the enquiry as to whether the claimant was an employee in the extended sense of being engaged under "a contract to do work personally". Underhill LJ, with whom Jackson and Lindblom LJJ agreed, said at paras 23 and 24 in a passage with which I agree:

> "23. …. I accept of course that the ultimate question must be the nature of the relationship during the period that the work is being done. But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course it will not always do so, nor did the employment tribunal so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it *in limine* runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances.
>
> 24. … The factors relevant in assessing whether a claimant is employed under a contract of service are not essentially different from those relevant in assessing whether he or she is an employee in the extended sense, though (if I may borrow the language of my own judgment in *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667, para 17(5)), in considering the latter question the boundary is pushed further in the putative employee's favour – or, to put it another way, the pass mark is lower."

Control

61. There can be no doubt that a sufficient element of control by the employer over the employee is essential to the existence of a contract of employment, but it is a test that can prove difficult to apply. In most situations, of course, there is no difficulty. The degree of control over the work to be undertaken by the employee, where and when it is to be undertaken and, in many cases, the way the work is to be done leaves no room for doubt that the level of control is consistent with employment. But, in a minority of cases, where the nature of the services provided by the putative employee leaves little room for intervention by the putative employer, the question of control may be difficult to answer.

62. This was recognised by MacKenna J in *RMC*. In his summary of the three conditions for the existence of an employment contract, he expressed the requirement of control in these terms: "[The employee] 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 [the employer]*" (emphasis added) (p 515D). The emphasised words, which are echoed in later authorities, allow for a wide range of circumstances and leave the question of control to be answered by an assessment of the facts of each case. In *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, [2001] ICR 819 ("*Montgomery*") at para 19, Buckley J (with whom Brooke and Longmore LJJ agreed) referred to "some sufficient framework" of control. The relevant passage is quoted below.

63. MacKenna J expanded on the question of control at p 515F:

> "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. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.
>
> > 'What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters.'— *Zuijs v Wirth Brothers Proprietary, Ltd* (1955) 93 CLR 561, 571."

64. In that passage MacKenna J listed factors which would generally characterise a contract of employment at the time of his judgment in 1967, and to a great extent they remain applicable today. Developments in the patterns of work have, however, increased the cases in which some or all of those factors will be absent but where nonetheless it is

appropriate to find the necessary degree of control. The existence of such cases was recognised by MacKenna J, as his repetition that the right must exist "in a sufficient degree" to create the relationship of employer and employee, as well as the quotation from the decision of the High Court of Australia in *Zuijs*, shows. *Zuijs* has been an influential authority in this country and the statement that what matters is "lawful authority to command so far as there is scope for it…if only in incidental or collateral matters" has been frequently quoted, for good reason.

65. This question was discussed in *Montgomery* in which Buckley J said at para 19 that, as to control, MacKenna J:

> "had well in mind that the early legal concept of control as including control over how the work should be done was relevant but not essential. Society has provided many examples, from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent. In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment."

66. The phrase used by Buckley J, a "sufficient framework of control", has also been adopted in subsequent authorities, including the FTT and the UT in the present case. Neither party on this appeal sought to advance a more precise test of control, and I doubt if it is possible to do so.

67. The reference in the passage from *Montgomery* contains reference to those in occupations where, by the nature of the work, a putative employer can have little or no control over the execution of the work. Buckley J gave the examples of masters of vessels, surgeons, research scientists and technology experts. *Zuijs* concerned an acrobat working for an itinerant circus and it was in that context that the majority made the statement quoted by MacKenna J in *RMC*. The principal judgment was given by Dixon CJ and three other members of the Court. It is worth quoting the entirety of the relevant part of that judgment (at p 571):

> "The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail

> may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters. Even if Mr Phillip Wirth could not interfere in the actual technique of the acrobatics and in the character of the act, no reason appears why the appellant should not be subject to his directions in all other respects."

68. This passage makes clear that, on the one hand, the requirement for control extends only so far as there is scope for it and, on the other hand, that there must be some control, if only in incidental or collateral matters.

69. As will be seen, the FTT in the present case laid stress on the inability, as a matter of law as well as practice, of PGMOL intervening in the performance by referees of their duties while officiating during matches. This is to misunderstand the degree of control which is necessary as a pre-condition to a finding of employment. As the authorities show, it is not necessary that an employer should have a contractual right to intervene in every aspect of the performance by an employee of his or her duties. In the case of football referees, the FA rules put them in a position of institutional independence while officiating at a match. This is as true of the Select Group as it is of the National Group, but it is common ground, and obviously correct, that members of the Select Group are employees of PGMOL.

70. Equally, there are many occupations in which the employer would not have the practical ability, nor probably the legal right, to intervene during the performance of at least some duties so as to direct the manner in which they were performed. It is hard to see that hospital managers would be entitled to intervene in the performance of an operation which was being carried out in a competent manner or that the managers of an opera house could intervene in the conductor's performance to direct him or her to increase or reduce the tempo. That is not to say that there would not be circumstances in which intervention would be both permissible and practical, such as where the duties were being performed in a way which was by relevant standards unacceptable. That would be equally true in the case of an independent contractor. Dixon CJ was right to say in *Zuijs* at pp 571-572: "There are countless examples of highly specialised functions in modern life that must as a matter of practical necessity and sometimes even as a matter of law be performed on the responsibility of persons who possess particular knowledge and skill and who are accordingly qualified."

71. In approaching this question, it is sometimes said that what matters is not whether in practice the employer could intervene, but whether as a matter of theoretical rights the employer would be contractually entitled to do so. When applied to the performance of highly skilled tasks, this, in my view, involves detaching contractual rights from any practical reality. It is almost invariably the case that an employer's right of intervention

is implied not express, and it is difficult to see a basis for implying a right that either cannot or will not ever be exercised. In this context, reference is frequently made to *White v Troutbeck SA* [2013] IRLR 286 at paras 40-42 (EAT) (affirmed on appeal: [2013] EWCA Civ 1171, [2013] IRLR 949 (CA)). The EAT said at para 40 that "the key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The key question is not whether in practice the worker has day-to-day control of his own work". On the facts of that case, there was no difficulty in applying a test based on a legal right of general control over the claimants' work. They were employed as caretakers and managers of a farm. The owner of the farm lived abroad and only occasionally visited the farm. In practice, there was little or no control over the couple's work at the farm, but it was clear that the owner enjoyed a contractual right to exercise a high degree of control and there was nothing in the nature of their work which presented any difficulty in doing so. But, it is wrong to deduce from this decision that control must involve so wide a right of intervention.

72. While I entirely agree with the well-established proposition that control must be based on the terms of the contract in question, it does not follow that an employer must have a contractual right to intervene in every aspect of the performance by the employee of his or her duties.

73. It is of central importance in the present appeal that we are considering separate contracts for each match. What needs to be shown is a sufficient framework of control as regards each contract taken separately. In this respect, this case differs from many of those involving people who exercise a high degree of skill and independent judgment while carrying out their work. The present case is therefore not analogous on its facts to *Zuijs* which involved a "weekly hiring for an indefinite period to do a defined task on the premises of the other party as an integral portion of a spectacle under his general management and control" (p 569).

74. Lord Leggatt addressed issues of control in his judgment in *Uber*, with which the other members of this Court agreed. Although the appeal concerned the question whether Uber drivers were "workers" for the purposes of various statutory provisions, Lord Leggatt dealt with control as it applied to employees as well as to workers. The term "worker" is defined by section 230(3) of the Employment Rights Act 1996 to include not only an individual who works under a contract of employment but also an individual under any other contract "whereby the individual undertakes to do or perform personally any work or services for another party to the contract" unless the other party is a client or customer of any profession or business carried on by the individual.

75. Although in the case of Uber drivers, there is a tri-partite relationship involving passengers as well as drivers and Uber, Lord Leggatt said at para 92 that the focus was on the relationship between the drivers and Uber to determine the question of control. At paras 93 to 100, Lord Leggatt identified a number of findings of the employment tribunal

which justified its conclusion that the drivers worked for and under contracts with Uber. At para 97, he referred to a "second form of control" exercised by Uber by monitoring the driver's rate of acceptance of trip requests. If it fell below a set level, and warnings were ignored, the driver was logged off the Uber app for ten minutes. Lord Leggatt stated that this plainly placed drivers in a position of subordination to Uber. At para 99, Lord Leggatt referred to a "further potent method of control", being the use of a system whereby passengers rate drivers. A failure to maintain a specified average rating resulted in warnings and ultimately in termination of the driver's contract with Uber, described by Lord Leggatt as "a classic form of subordination that is characteristic of employment relationships". These and the other findings taken together showed that the service provided by drivers was "very tightly defined and controlled by Uber" (para 101).

76. The significance of this part of the judgment in *Uber* to the present appeal lies not in finding parallels between those findings and features of the present case, but in demonstrating that sufficient control consistent with an employment relationship may take many forms and is not confined to the right to give direct instructions to the individuals concerned.

77. It is HMRC's case that the terms on which the National Group referees are engaged for each match contain a sufficient framework of control exercisable by PGMOL to satisfy the element of control necessary for a contract of employment, even though PGMOL cannot control their work by actually intervening during a match. Put in broad terms, their case is that referees were subject to contractual obligations as to their conduct and performance during each individual engagement which were sufficient to constitute control, particularly when coupled with PGMOL's powers, in effect, to penalise referees for breaches by denying them opportunities to officiate at future matches and by reducing, on account of their performance during the season, their right to share in the "performance or merit payment pot", the size of which is fixed before the start of the season.

78. The FTT found that a suite of documents described as the pre-season documents, which included a fitness protocol, a match day procedures document and a code of conduct, "imposed some obligations on referees which gave PGMOL elements of control" and that "[s]ome of those obligations applied to match day activity (most obviously the Match Day Procedures) and were therefore relevant to individual match appointments" (para 165). The FTT further held that although referees were subject to FA rules while at a match, "they also owed direct commitments to PGMOL by virtue of the terms of the pre-season documents" (para 165). The referees were subject to an assessment system, based on reports of their performance at matches. The FTT said that it was not persuaded that the assessment system provided further elements of control, although they accepted that "the assessment system was and is clearly very important and feeds into the merit tables, selection for future match appointments and ultimately to the merit payment distribution, promotion and reclassification". They considered the assessment system, and the coaching system under which coaches were assigned to referees to support and assist them to develop to the best of their ability, were "advisory

rather than controlling in nature" (para 166). Nor did the FTT accept that the referees had no control over where they were sent for matches, as they were always free to accept or decline an offer of a match.

79. The FTT laid stress on the independence of referees while they were officiating at a match, saying, at para 168: "In reality it is hard to see how PGMOL could retain even a theoretical right to step in while a referee is performing an engagement at a match, however badly [anyone] from PGMOL who might be watching thinks that the referee is doing. At most they could offer advice at the time and take action after the engagement has ended…. [T]here was no suggestion that PGMOL could (for example) remove the referee at half time and replace him with another, or do anything more than offer coaching advice."

80. The FTT's overall conclusion, at para 16, was that PGMOL did not have "a sufficient degree of control during (and in respect of) the individual engagements to satisfy the test of an employment relationship". They gave their reasons as follows, at para 169:

> "It did have a level of control outside match appointments as a consequence of the overarching contract. Although some of the obligations imposed by that contract applied to matches, there was no mechanism enabling PGMOL to exercise the correlative rights during an engagement. In reality, the only sanction PGMOL could impose for failure to adhere to these commitments was not to offer further match appointments, and to suspend or remove the referee from the National Group list. If an issue emerged between a match appointment being made and the date of the match, then the most PGMOL could do in respect of that appointment was to cancel it. But that is not an exercise of control during an engagement: it is a termination of that particular contract altogether."

81. Although the UT agreed with the FTT's conclusion on the absence of mutuality of obligation and therefore dismissed HMRC's appeal, it disagreed with the FTT's conclusion on control. It identified several respects in which the FTT had erred. First, it had wrongly relied on PGMOL's inability "to step in while a referee is performing an engagement at a match". The UT noted that there are many circumstances in which an employer cannot step in during the performance of an employee's obligations, particularly if special skills are involved, as the authorities referred to above demonstrate. Second, the UT held that the FTT was wrong to rely on the fact that PGMOL could only impose sanctions, such as not offering further matches or suspending or removing a referee from the National Group list, after the end of the individual engagement. These were, the UT held, effective sanctions for breach of a referee's obligations to PGMOL

committed while officiating at a match. Third, the FTT was wrong to conclude that, if an issue emerged between the referee's acceptance of the match and the day of the match, PGMOL's only remedy of terminating the engagement did not amount to control during the engagement. By terminating the engagement, PGMOL would be stepping in during the period of the contract.

82. The UT set out its reasons on the first and second of those issues at paras 137-138:

> "137. The critical question in this case (where the period of the contract ends with the submission of the referee's match report shortly after the final whistle) is whether the absence of an ability to step in to regulate the referee's performance of his core obligation (officiating at the match), or to impose any sanction, until after the contract has ended means that there is not sufficient control.
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> 138. The authorities do not provide direct assistance on this question, and we therefore address it as a matter of principle. We consider that, whether it is referred to as a right to step in or as a framework of control, the test requires that the putative employer has a contractual right to direct the manner in which the worker is to perform their obligations, and that those directions are enforceable, in the sense that there is an effective sanction for their breach. 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 existence of an effective sanction (irrespective of when its impact would be felt by the employee) is sufficient to ensure that the employer's directions constitute enforceable contractual obligations."

83. The Court of Appeal agreed with this assessment and conclusion, subject only, at para 130, to one qualification. It did not consider that "for the purposes of the control criterion, an employer's directions are only enforceable contractual obligations if there is an effective sanction for their breach", because control may be exerted by positive, as well as negative, means and because a contractual obligation is enforceable by legal action, if necessary.

84. The UT had considered that the FTT was entitled to decide that the assessment and coaching systems were irrelevant to control on the grounds that they consisted of, at most, advice. The Court of Appeal disagreed. The assessment system, which formed part of the overarching contract between PGMOL and the referees, had "wide ramifications", as the FTT had acknowledged. As Elisabeth Laing LJ said at para 127: "The point is that the assessment system gave PGMOL a significant lever with which to influence the performance by [National Group referees] of their individual engagements, and was, thus, plainly capable of being relevant to the question of control." She also considered that the coaching system was potentially relevant to the question of control.

85. PGMOL submitted to this Court that the UT and the Court of Appeal wrongly interfered with the decision of the FTT on the question of control. In particular, the UT was wrong to identify as the critical question in the case of a contract of short duration, "whether the absence of an ability to step in to regulate the referee's performance …(officiating at the match), or to impose any sanction, until after the contract has ended means that there is not sufficient control". It was submitted that the UT was wrongly focusing on the *ability* to step in, rather than whether it had the *right* to do so, while the FTT correctly identified the right to do so as the critical factor.

86. PGMOL also submitted that the FTT's conclusion that the assessment and coaching systems were advisory only and therefore irrelevant to control was a conclusion properly open to the FTT and therefore not a conclusion with which the Court of Appeal was entitled to interfere. Likewise, the FTT's conclusion that the right to terminate an engagement, and its overall conclusion that the contractual terms did not give PGMOL a sufficient degree of control consistent with employment, were conclusions properly open to the FTT.

87. I do not accept PGMOL's submissions. In my judgment, both the UT and the Court of Appeal were entitled to interfere with the FTT's conclusion on control, and the Court of Appeal was entitled to reach a different conclusion on the relevance of the assessment and coaching systems to those of the FTT and the UT. The UT correctly identified the errors of principle made by the FTT, which were sufficient to undermine its decision.

88. In my view, 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 that a match was accepted to the submission of the match report, and as to their conduct during a match, was capable of giving PGMOL a framework of control sufficient for the purposes of meeting the control test for employment purposes. Unlike the Court of Appeal, I consider that the existence of effective sanctions which it was open to PGMOL to impose after the end of an engagement are of some significance because, on the facts of this case, the right to impose those sanctions played a significant part in enabling PGMOL to exercise control over the referees in the performance of their duties, on and off the pitch. I am not downplaying the

significance of the fact that the referees' obligations were contractual and enforceable as such, but I think the UT was right in this case to attach some significance to those sanctions.

Conclusion

89. For the reasons given above, I would dismiss PGMOL's appeal on both issues, mutuality of obligation and control.

90. The question then arises as to the appropriate disposition of the case. The Court of Appeal ordered the case be remitted to the FTT to determine, on the basis of its original findings of fact, whether there were sufficient mutuality of obligation and control in the individual contracts for them to be contracts of employment.

91. In my view, the position as regards both mutuality of obligation and control is clear. On both issues, I consider that this Court is able, on the basis of the FTT's findings of fact and the extensive submissions made by both parties, to conclude for itself that the irreducible minimum of mutuality of obligation and control necessary for a contract of employment between the National Group referees and PGMOL is satisfied in this case in relation to the individual match contracts.

92. It does not, however, follow that, applying the established approach of taking account of all relevant terms of the contracts, in the light of all the surrounding circumstances which were known, or could reasonably be supposed to be known, to both parties (see *Atholl House* at paras 123-124), that the individual match contracts are to be characterised as contracts of employment. Having reached its conclusion that there was insufficient mutuality of obligation and control, the FTT did not express any view as to what the position would otherwise be, other than pointing to some features that "may be suggestive of an employment relationship" (para 174).

93. In those circumstances, the right course is to remit the case to the FTT for its decision, on the basis of its original findings of fact and applying the guidance as to the correct approach to the issue as given by the Court of Appeal in *Atholl House* (decided after the hearings below in the present case) and by the Court in this judgment, whether the individual match contracts were contracts of employment, given that the requirements of mutuality of obligations and control are met in this case. It is part of that guidance that the FTT should take into account the nature of the mutual obligations and the degree of control exercisable by PGMOL, as described in this judgment.