Appeal number: TC/2017/01162

PAYE and NIC – regulation 80 determinations and section 8 decisions – whether Level 1 National Group football referees have contracts with PGMOL – yes – whether they are employees of PGMOL – no – whether payments made on behalf of and at expense of PGMOL within s 687 ITEPA – yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

PROFESSIONAL GAME MATCH OFFICIALS LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE SARAH FALK
JANET WILKINS

Sitting in public at the Rolls Building, Fetter Lane, London EC4A 1NL on 18 to 20, 26, 27, 30 and 31 July 2018

Jolyon Maugham QC and Georgia Hicks, instructed by Deloitte LLP, for the Appellant

Akash Nawbatt QC and Sebastian Purnell, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal relates to determinations issued under regulation 80 of the Income Tax (Pay as You Earn) Regulations 2003 ("regulation 80 determinations") in respect of income tax deductible under the Pay As You Earn ("PAYE") system, and decisions issued under section 8 of the Social Security (Transfer of Functions) Act 1999 ("section 8 decisions") in respect of Class 1 National Insurance Contributions ("NICs"), in relation to the tax years 2014-15 and 2015-16. The determinations and decisions were issued on the basis that the appellant, Professional Game Match Officials Limited ("PGMOL"), was the employer of certain football referees during three football seasons falling partly or wholly in those tax years, namely the 2013-14, 2014-15 and 2015-16 seasons. The amounts directly at stake in the appeal are income tax of £172,849.18 and NICs of £123,990.30 in respect of the tax year 2014-15, and income tax of £162,661.84 and NICs of £124,372.75 in respect of the tax year 2015-16, a total of £583,874.07 excluding interest.

2. The principal issue in the appeal is whether the referees were in employment relationships with PGMOL. In seeking to establish that they were not, PGMOL's case is not simply that the referees were self-employed, but also that there was in fact no contract between it and the referees at all. In addition, it has raised an issue as to whether, even if an employment relationship is established with PGMOL, the determinations and decisions were incorrectly issued because (in essence) it did not make the relevant payments.

Preliminary issues

3. There were two preliminary issues. The first related to the fact that the Tribunal had classified the appeal as complex in May 2017. Mr Maugham explained that PGMOL had intended to opt out of the costs regime under rule 10(1)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"). However, it had failed to do so within the permitted 28 day period. PGMOL wanted the time limit to be extended to allow a late application. HMRC opposed this, and in the light of that Mr Maugham did not pursue the point.

4. The second issue related to two additional witnesses whom PGMOL wished to call, and in respect of whom witness statements had been served on HMRC on 28 June 2018, relatively shortly before the hearing and well after the deadline set by the case management directions. One of these witnesses, Peter Elsworth, was relatively uncontroversial because his role was to provide witness evidence in place of another witness, Neale Barry, who had been taken ill and was unable to attend. HMRC did not object to the late service of Mr Elsworth's evidence, and we admitted it.

5. The second additional witness was Ms Pamela Martin. HMRC objected to the admission of Ms Martin's evidence on the basis that PGMOL wished to adduce it to support what HMRC viewed as new grounds of appeal, relating to whether PGMOL was the contracting party and whether it was not liable on the basis that it did not

make the relevant payments, and that the proper approach would have been for PGMOL to make an application to amend its grounds of appeal.

6. After hearing submissions from both parties we agreed to admit the evidence. Following further submissions during the course of the hearing by Mr Nawbatt for HMRC, it was also agreed that Ms Martin would produce a supplementary witness statement covering certain matters omitted from the original, sufficiently in advance of giving evidence for it to be considered by Mr Nawbatt.

7. We agree that the arguments about whether PGMOL was the contracting party, and whether it was not liable because it did not make the relevant payments, were raised for the first time in Mr Maugham's skeleton argument. However, they had now been raised and, given the factual matrix that the Tribunal would in any event have to consider, they were not in reality points that could simply be ignored by the Tribunal in determining whether the determinations and decisions were correctly made. In the circumstances the best course available was to ensure that the Tribunal had the appropriate evidence before it.

Factual background

8. PGMOL is a company limited by guarantee whose three members are The Football Association Limited (the "FA"), The Football Association Premier League Limited ("the Premier League") and The Football League Limited ("the Football League"), now referred to as the English Football League ("the EFL"). PGMOL is funded by its members on an annual basis and is intended to be run on a "not for profit basis", with any annual surplus being retained as a reserve to cover unexpected costs or deficits in other years. PGMOL's role relates to the provision of referees and other match officials for matches in the most significant national football competitions, in particular the Premier League (the top 20 clubs), the FA Cup, and the EFL, which comprises 72 clubs in the Championship League and Leagues 1 and 2.

9. The FA is the governing body for English football, including all referees in England. The FA classifies referees by reference to a number of different levels, ranging from International, then Level 1 (the National List) to Level 9 (trainee referees). There are over 30,000 referees in total, the vast majority at the lower levels. PGMOL's role relates primarily to referees at Level 1 and their appointments to matches, although it has some role in relation to training and fitness for referees at the next level down, Level 2[1]. The FA has the role of making match appointments for referees at Levels 2 to 4 (broadly corresponding to semi-professional football), and below that referees are appointed to matches by the County FAs and Leagues.

10. PGMOL employs a number of referees under full-time written employment contracts. These are referred to as the "Select Group" referees, who at the relevant time primarily refereed Premier League matches[2]. Some of these individuals are also

[1] Level 2 is sub-divided into Levels 2A and 2B.

[2] During the period under appeal there was a single Select Group of 17 referees. Since that time the Select Group has been divided into Select Group 1 and Select Group 2, totalling 35 employed

qualified to referee internationally. The referees to which this appeal relates are, like the Select Group, Level 1 referees in FA terms, but undertake refereeing in their spare time, typically alongside other full-time employment. During the 2014-15 season there were 60 referees in this category. Although there is some variation in terminology we will refer to this group as the "National Group" referees. The appeal relates to payments to these individuals, mainly in respect of match fees and expenses.

11. At the relevant time National Group referees primarily refereed matches in Leagues 1 and 2, but also in the Championship League and FA Cup. They also acted as "Fourth Official" in some matches, including in the Premier League[3]. Occasionally National Group referees might also referee matches in the Premier League, but this was exceptional and related to a few referees being considered for the Select Group.

12. Whilst secondary to the Premier League, the Championship League is still a very significant competition in terms of viewing figures, both in terms of attendance at matches and on TV. Promotion from the Championship League to the Premier League (or indeed relegation) also has material financial implications for clubs. The role of a referee at this level is clearly a significant one.

Legal background: summary

13. Section 4(1)(a) of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") provides that "employment" includes "any employment under a contract of service". Section 2(1)(a) of the Social Security Contributions and Benefits Act 1992 ("SSCBA") defines an "employed earner" as a person who is "gainfully employed in Great Britain…under a contract of service…with earnings". Section 122(1) of SSCBA defines "employment" as including "any trade, business, profession, office or vocation and 'employed' has a corresponding meaning". Neither Act provides any further definition of these terms, so recourse must be had to the case law meaning of "employment" and "contract of service".

14. The classic summary of the conditions required for a contract of service was provided by MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515:

> "(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."

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referees, with Select Group 2 referees primarily refereeing Championship matches. This has resulted in a smaller National Group (the group which is the subject of this appeal), who now primarily referee games in Leagues 1 and 2.

[3] At professional level, a game has four match officials, namely the referee, two assistant referees who act as linesmen, and a Fourth Official. National Group referees would act as referee or Fourth Official, but not generally as assistant referees.

15. The first condition is generally referred to as mutuality of obligation: some level of obligation to perform work personally and pay remuneration is an "irreducible minimum" of a contract of service: *Carmichael v National Power* [1999] 1 WLR 2042 at 2047. However, it 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. This is discussed further below.

16. The second condition, control, is an important indicator but not a straightforward one, particularly when applied to certain professions. A "sufficient framework of control" must exist in the sense of "ultimate authority" (*Montgomery v Johnson Underwood* [2001] EWCA Civ 318, [2001] ICR 819 at [19]), rather than there necessarily being day-to-day control in practice.

17. The third condition is a negative one. If the first two are satisfied there will be a contract of employment unless other elements of the contract are inconsistent with that prima facie conclusion (*Weight Watchers (UK) Limited and others v HMRC* [2012] STC 265 at [41] and [42]).

18. Other approaches have been considered by the courts in determining whether an employment relationship exists. These include in particular a test of whether the individual can be regarded as in "business on his own account", taking account not only of control but also of such factors as whether the individual supplies his own equipment, what degree of financial risk he takes (the ability to make a profit from the way he undertakes the task, and the risk of loss) and whether he already has an established business (*Market Investigations Limited v Minister of Social Security* [1969] 2 QB 173 at 184 to 185). However, there is no simple check list. Not all details are of equal weight in any given situation. An overall picture must be painted from an accumulation of detail, and then must be viewed by standing back from the detail: see *Hall v Lorimer* [1994] 1 WLR 209 at 216 where comments of Mummery J to this effect (at [1992] 1 WLR 939, 944) were cited with approval by Nolan LJ in the Court of Appeal. Mummery J also referred to additional potential factors to consider, being the understanding or intentions of the parties, whether the individual has set up a business-like organisation, the degree of continuity with the engager, how many engagements are performed and whether for different people, and whether the individual is accessory to the engager's organisation or "part and parcel" of it. However, the test of whether someone is in business on their own account may also be of little assistance where the individual carries on a profession or vocation: *Hall v Lorimer* (CA) at 218, where Nolan LJ suggested that in such a case the extent to which he is dependent or independent of a particular paymaster for the exploitation of his talents may well be significant.

The evidence

19. Witness statements were produced by 10 witnesses for PGMOL and one, Frances Ritson, for HMRC. We heard oral evidence from five witnesses, Michael Riley, Peter Elsworth, Pamela Martin, Stuart Attwell and Chris Sarginson. The other witnesses for PGMOL were Neale Barry, John Brooks, Sam Purkiss, Harry Phillips and William

Finnie. As already mentioned Mr Barry was too unwell to give oral evidence, and the other witnesses were not required to be cross-examined.

20. Mr Riley has been the Managing Director (previously called the General Manager) of PGMOL since 2010. He previously had 30 years of experience of refereeing, including in the Select Group and at an international level. He clearly has an in-depth knowledge of the company's affairs and, as a relatively small organisation, has had a significant involvement in operational as well as more strategic matters. Whilst he was clearly mindful of the issues in the case and this on occasion resulted in some hesitation or qualification of his answers, we found Mr Riley's evidence to be clear and his responses to questions helpful. We had no concerns as to the veracity of his evidence and accept it as regards matters of fact.

21. Mr Barry has been the head of refereeing at the FA since 2005. Like Mr Riley he had spent about 30 years refereeing, including at Premier League matches, before moving into a management role. During the period in dispute he was also a member of what was referred to as the Operational Management Team of PGMOL, alongside Mr Riley and two other individuals employed by PGMOL. Mr Barry's witness statement related primarily to the FA, the different levels of referees, how referees progress through the levels, appointments of referees to matches, training and development of referees at different levels by the FA, and other general matters affecting referees such as fitness testing, kit, the "Laws of the Game", and FA rules and directives. Mr Elsworth produced a relatively short witness statement which exhibited a copy of Mr Barry's witness statement, marking it up to show some additions and corrections and otherwise adopting that statement. Mr Elsworth is the Senior Referee Manager for the FA and reports directly to Mr Barry. He does not have a direct role with PGMOL or Level 1 referees. However, we accept that, given his role and the fact that he has been employed by the FA for 13 years, he was in a position to speak to most of the matters covered by Mr Barry's statement. We accept Mr Elsworth's evidence, and the marked-up statement from Mr Barry, as to matters of fact.

22. Ms Martin is the Business Director of PGMOL, responsible among other things for administration and finance at PGMOL. She is a qualified chartered accountant. Ms Martin joined the company in September 2016, after the period covered by the appeal. As already indicated Ms Martin produced two witness statements, the second of which was produced during the course of the hearing. As well as expanding on certain areas the second statement corrected errors in the first statement.

23. Ms Martin accepted in oral evidence that she now appreciated that her initial evidence was insufficiently detailed, and that in producing both statements she had had to rely to a significant extent on conversations with individuals in her team at PGMOL, together with staff in the finance functions at the Premier League and the EFL. This was in part because she was not employed by PGMOL at the time, but also because the details covered were complex and convoluted, and lacked clear documentation. She had also relied on conversations with Mr Riley and with Javed Khan. During the period in dispute Mr Khan was the Finance Director of the Premier League and was described as the CFO in PGMOL's accounts, although he was not on

the PGMOL Board. He has since retired from the Premier League and his successor as Finance Director holds a similar role at PGMOL, although Mr Khan continues to be involved as an adviser to the PGMOL Board. Prior to Ms Martin's role being created (about 12 months before Ms Martin joined, replacing the initial holder of that role) its functions were in practice covered by a combination of Mr Riley and Mr Khan, although Ms Martin is more involved in the detail than Mr Khan had been.

24. Overall, we accept that Ms Martin was attempting to provide accurate evidence and ultimately did her best to assist the Tribunal. Whilst there is something in Mr Nawbatt's submission that Mr Khan would have been better placed to provide evidence, and that evidence from others such as PGMOL's head of HR might have been helpful, we do not see anything sinister in the choice of Ms Martin, given her current role and Mr Khan's retirement. We also accept that Mr Khan was unlikely to have the level of detailed knowledge required to address details of the invoicing and payment arrangements.

25. Mr Attwell and Mr Sarginson were both National Group referees during the relevant period, although Mr Attwell had been in the Select Group between 2008 and 2012 (at which point he was reclassified to the National Group), and he re-joined the Select Group as from the 2016-17 season. They were both helpful witnesses in relation to the factual background from the referees' perspective, and we accept their evidence as to matters of fact.

26. For the periods in dispute Mr Brooks, Mr Purkiss, Mr Phillips and Mr Finney were all referees at Level 2A or below. Their witness statements were not challenged, and we accept them as to matters of fact, insofar as they are relevant.

27. Ms Ritson is an HMRC officer who was involved in the enquiry. The primary role of Ms Ritson's witness statement was to exhibit notes of interviews undertaken with a number of referees during 2015.

28. A significant amount of documentary evidence was produced. This included documents relating to PGMOL's dealings with National Group and Select Group referees, documents relating to its legal structure and financial position, rules and regulations of the FA, the Premier League and the EFL, and correspondence between the parties. It is regrettable that a fair amount of relevant evidence was only produced by PGMOL shortly before, and in some cases during, the hearing.

Findings of fact

The FA's role

29. The FA's responsibilities include ensuring that match officials uphold standards and apply the Laws of the Game. It is effectively their regulator. Referees may not officiate in any affiliated match or competition unless they are registered with the FA, which must be done annually through a County FA. By registering, a referee agrees to become bound by the FA's rules and regulations, including the FA's Regulations for the Registration and Control of Referees (the "Referee Regulations") which are

discussed further at paragraph 39 below. All the FA's rules and regulations are set out in a lengthy handbook, published before the start of each season. Breaches of FA rules, including failure to apply the Laws of the Game, can lead to disciplinary action by the FA.

30. The FA operates in part through a Council. Under the FA's constitution the Council has power to manage a number of areas including the registration, control and development of refereeing. This is done through a committee of the Council, the Referees Committee, of which Mr Riley is a co-opted member. This committee has a broad responsibility for matters relating to referees, including match appointments and disciplinary matters[4]. Within the FA it is therefore the main body responsible for referees. For referees at Level 1 the FA's disciplinary role effectively sits alongside PGMOL's own role (discussed further below), but it is only the FA that is entitled to cancel or suspend FA registration.

31. The FA (with County FAs) has responsibility for the recruitment, training and development of referees from the grassroots level up to Level 2. Any referee must start at the lowest level and work up: there is no fast track. Registration is dependent on showing proficiency in the Laws of the Game[5] and, from Level 4 upwards, a mandatory annual pre-season fitness test which increases in difficulty at higher levels. Failure to pass the test (or a re-test) will lead to reclassification. Increased amounts of assessment of the referee's performance are required at higher levels, both from observers at matches (referred to as assessors at National Group level) and from clubs. Promotion between levels also requires a minimum number of games to be refereed. At Level 4 and above merit or ranking tables operate within the levels, which affect how matches are allocated as well as being relevant for promotion purposes.

32. As already mentioned, the FA appoints referees to matches at Levels 4 to 2. It uses software called the Match Official Administration System ("MOAS"), to which referees have access. MOAS is also used by PGMOL, which has the benefit of a non-exclusive licence over it. Its functions include calendar management, under which referees and other match officials can "close" dates they expect to be unavailable, notification of match appointments and acceptance (or rejection) of those by match officials, and dissemination of performance analysis such as match reports and assessment scores. MOAS allows referees to include a temporary location or otherwise indicate that they have a geographical preference or restriction that affects the location of matches that they can take on at a particular time. When closing off dates there is a drop-down menu to enter the times that the referee is unavailable and the reasons (such as work, illness, holiday etc.), although there is also a "no reason given" option.

[4] This reflects FIFA regulations, which require member associations like the FA to establish a Referees Committee, and require it to have exclusive control over refereeing organisation, regulation and development. Effectively the FA outsources part of this function to PGMOL.

[5] Below Level 3 this is dealt with by attendance at a basic referee course and through referee development sessions, but on promotion to Level 3 there is a mandatory test which must be passed.

33. Training is offered by the FA. Between Levels 4 and 2 this covers not only practical on-field matters, but also such matters as psychological support, diet and fitness training and dealing with players, clubs and observers off-field. Training is not compulsory and not paid for, although non-attendance could result in a conversation to ascertain the reasons. (This would probably also happen if match dates were regularly closed off with no reason given.) A coaching and mentoring system is also in place.

34. Referees below Level 1 are paid (modest) match fees and expenses by the home club after each match, and not through the FA. The FA prescribes what match officials may wear, but it does not provide kit.

35. As already mentioned, through registration with the FA referees are required to comply with its rules and regulations. This includes, for example, the correct application of the Laws of the Game, together with duties to act impartially, with integrity and in the best interests of the game, to declare conflicts of interest, to follow certain match day procedures relating to timing and other requirements, and to report incidents of misconduct to the FA.

36. Each competition is also able to set its own rules and directives, provided they do not contradict the Laws of the Game or FA rules. Both the Premier League and the EFL do set their own rules, and referees officiating in matches in those competitions therefore need to be familiar with them, so far as relevant to their role, as well as with the Laws of the Game and FA rules.

The Laws of the Game, FA rules, Referee Regulations, the EFL rules and the Premier League handbook

37. The Laws of the Game are controlled by the International Football Association Board ("IFAB"), which itself consists of FIFA, the FA and its Scottish, Welsh and Northern Ireland equivalents. Law 5 deals specifically with the referee's role. It makes it clear that the referee has full authority to enforce the Laws of the Game, and that decisions made by the referee are final.

38. A key part of the FA's constitution is the FA rules. Among other things these provide for the affiliation of clubs and County FAs and the sanctioning of competitions, and impose rules in relation to match participants, including match officials. The rules empower the FA to take action for misconduct, including breaches of the Laws of the Game, the FA rules, other FA requirements and competition rules. The rules also include requirements about standards of behaviour, integrity and prohibitions on betting on matches. There are powers of enquiry and disciplinary powers. Sanctions include suspension, fines and expulsion. Rule 26 deals with fees for match officials, and provides that they are to be set by the competitions within FA limits.

39. The FA's Referee Regulations make detailed provision for the registration, recruitment, training, examination, classification, promotion and conduct of referees. There are provisions for examinations and annual fitness tests, marking of referees by

clubs and regular appraisals by competitions, as well as annual reviews of the competitions' list of officials. The FA can require attendance at training. A specific obligation of impartiality is imposed, together with obligations to declare conflicts of interest and to decline to act. There are requirements about uniforms and obligations on referees to report details of misconduct, sendings off and cautions to the FA. The Referee Regulations also require referees to be bound by an appended Code of Conduct. This code in turn provides that PGMOL "is responsible" for officials operating in the Premier League and the EFL.

40. As previously noted, the competitions also have their own rules, and these are sent to referees before the start of each season. We saw the versions of the EFL and Premier League rules for the 2014-15 season. The EFL's Standing Orders relating to match officials provide among other things that PGMOL will determine match fees and allowances but that fees will be paid "monthly directly by The League". Various requirements are specified, including that officials are generally required to be present two hours before kick-off, conflicting engagements must not be accepted and reports must made to the League on certain matters such as misconduct.

41. Section N of the Premier League rules deals with match officials, providing that PGMOL is responsible for compiling the list and for match appointments, which match officials must acknowledge to PGMOL. Rule N.4 provides that acknowledgment of an appointment:

> "…shall constitute an agreement with the League by such Match Official to be bound by and to comply with:
>
> N.4.1 the Laws of the Game;
>
> N.4.2 the Football Association Rules;
>
> N.4.3 these Rules."

PGMOL and Level 1 referees

42. PGMOL was established in 2001 to oversee the management and administration of refereeing in the professional game, in particular the Premier League, the Football League and the FA Cup. Before that the FA was responsible for appointing and managing referees in the professional game as well as at lower levels, although following the formation of the Premier League there were some interim arrangements under which it and the Football League (now the EFL) had their own referee lists and organised appointments. The aims behind the formation of PGMOL included ensuring, in line with UEFA principles, that referees are appointed independently of competitions, and that a holistic approach is adopted for the professional game with a view to ensuring that a high quality and well trained pool of referees is available. It was not disputed that PGMOL controls the National List (Level 1), being responsible for promotions to it, reclassifications to Level 2, and the appointment of National List referees to matches. PGMOL also determines the number of officials required on the Select Group and National Group lists.

43. PGMOL's Memorandum of Association[6] provides that its objects are to "provide the services of match officials" to FA recognised competitions and to organise courses, conferences, training and other programmes for match officials. Its statutory accounts for the year to 31 July 2015 describe its principal activity as the "provision of referees and refereeing services" to the FA, the Premier League and the EFL.

44. PGMOL's Board comprises an independent chairman, a representative of each member (the FA, the EFL and the Premier League) and Mr Riley. Only the member representatives have votes. Reporting to Mr Riley are the Select Group Director and National Group Director (at the start of the relevant period referred to as the Select Group Manager and National List Manager), who as the names suggest are responsible for the Select Group and National Group referees respectively. They are both employees of PGMOL, and at the relevant times were Keren Barratt for the Select Group and David Allison for the National Group. It was these individuals who, with Mr Riley and Mr Barry, comprised the Operational Management Team ("OMT"). Coaching staff (see further below) also reported to Mr Barratt and Mr Allison.

45. PGMOL does not have a significant public profile. Its "logo" simply comprises the logos of each of its three members, and when Mr Riley engages with the media he is usually described as "head of refereeing" since there is little public understanding of PGMOL's role. Referees' match kit has the relevant competition logo together with any sponsorship logo, with no reference to PGMOL.

46. Whilst PGMOL's key responsibilities in respect of referees relate to promotion to Level 1 and referees in Level 1, it is involved in training and development at Level 2A, known as the "Panel Select" group, with the aim of ensuring that there is a suitable pool of referees available for promotion to Level 1, and that there is continuity of training and quality across the levels. PGMOL also makes certain performance payments and provides kit to Level 2A referees. In addition, it has a limited level of involvement in training and fitness testing at Level 2B (the "Panel Group").

47. PGMOL also deals with assistant referees at Level 1, for whom there is a separate Select Group and National Group, and appoints observers (called assessors for the National Group and evaluators for the Select Group) who attend each match to report on the performance of Level 1 officials. The assessors provide verbal feedback to the match officials shortly after the match, then review a DVD of the match (now done online via "MOAStv") and complete a detailed post-match report on the officials' performance. The assessment procedure results in each referee being awarded a competency score after each game, based on a number of criteria including his application of the Laws of the Game and his "Key Match Decisions" ("KMDs"). KMDs are also reviewed by independent panels, and in addition clubs provide their own reports on referees, strictly to the competitions but in practice through PGMOL.

[6] Strictly now part of its Articles, s 28 Companies Act 2006.

48. Promotion to the National Group depends on a number of criteria. Eligible referees seeking promotion to the group from Level 2A are invited to attend a selection day, and their performance there is assessed together with their on-field performance. The selection day includes fitness and psychological assessments, interviews (including with the OMT) and a DVD match situation test. Although promotion to Level 1 is strictly the responsibility of the FA, in practice PGMOL has worked with it to refine the selection criteria, and PGMOL manages the process. As discussed below, appointment to the National Group is made on an annual basis, before the start of each football season. It is dependent on passing a pre-season fitness test, based on FIFA requirements, although there are opportunities to take the test again if it is failed initially.

49. Once in the National Group, performance is assessed continually using match reports from assessors and clubs (all recorded on MOAS), and a merit table is compiled. Relative performance is relevant to selection for appointment to matches as well as to the performance payment arrangements discussed below, and to the potential for joining the Select Group or being reclassified back to Level 2. Concerns about fitness could also lead a mid-season fitness test.

50. Mr Riley, and a number of the referee witnesses, described the role of a referee below the Select Group as a hobby, albeit a very serious one at National Group level. Refereeing is fitted in around other paid work, and it does not pay the bills. In contrast, members of the Select Group are full-time employees of PGMOL. Mr Riley described what he considered to be a fundamental difference between Select Group and other referees in that PGMOL "owns" Select Group referees, expecting them to do everything it asks, including following training programmes, attending all meetings, ensuring that pre-match preparation is suitable, being available for appointments and even cancelling holidays. In contrast National Group referees are, for example, not obliged to follow a particular training programme or attend training meetings, and they have no obligation to accept match appointments. In practice, however, National Group referees are at that level because they love the role and are highly committed to it, so in the vast majority of cases they will do their best to referee as much as possible, and to remain sufficiently fit to do so at National Group level. Particular problems, such as work commitments, will usually be discussed with PGMOL staff.

51. Match appointments are offered to National Group referees via MOAS, usually on the Monday of the relevant week. The allocation is dealt with by PGMOL's OMT (see paragraph 44 above). Apart from suitability for the particular match, the OMT will take account of referees' availability, any conflict of interest (so that, for example, a referee is not appointed to a match played by a team he supports or in his home town), and they will try to take account of any geographical preferences entered on MOAS.

52. Once appointments are allocated, referees must go on to the MOAS system to accept the appointment. It would be open to them to reject an appointment if for some reason they were no longer available, although PGMOL would typically want to understand why that had happened. In addition, changes can be made even after an

appointment has been accepted. Illness or injury may that mean a referee has to step down, or work commitments may change at the last minute. We were also given an example of a referee (Mr Sarginson) failing to get to a match due to traffic problems. Referees who do not attend for whatever reason do not get paid their match fee (although Mr Sarginson did have his expenses paid on that occasion). Mr Riley also confirmed in his witness statement that PGMOL may also cancel an appointment of one referee and replace him with another. We understood that this might happen, for example, if the referee had received unhelpful media attention or there was a risk of a perception that integrity was compromised. In each case substitution of an alternative referee would be a matter for PGMOL, not the referee.

53. Training sessions are offered to National Group referees each season, and a token £100 attendance allowance is paid together with travel expenses. A physical training programme is sent out each week during the season. There is also a four week pre-season physical training programme. It is not compulsory to follow these training programmes (although for a period there was a misconception among some National Group referees that it was compulsory) and a few do not, keeping sufficiently fit in other ways. However, our impression was that most do follow the programmes pretty closely, not only for the obvious reason that they need to stay at a high level of fitness to be able to perform at National Group level, but also because they are generally highly motivated individuals with a strong desire to develop and perform to the best of their abilities. PGMOL employs sports scientists who develop the training programmes and have direct contact with the individual referees, typically receiving and analysing training data on a regular basis. Depending on the degree of engagement and the data provided by the referee, a more tailored training regime may be provided. PGMOL would expect a National Group referee to have at least some level of engagement with his allocated sports scientist, otherwise he would be contacted, at least if match reports also indicated that there was an issue. The sports scientists also work with the Select Group, although the arrangements are more rigorous and participation is compulsory.

54. PGMOL employs coaches for referees. At the start of the period in dispute there were insufficient resources to allocate a coach to each referee, although this has now changed. Levels of engagement vary but referees in their first or second year at National Group level receive more intensive assistance, with coaches attending a number of matches and providing one-to-one support in person. Areas for improvement and targets will be discussed and reassessed over time. Whilst at a match a coach may offer advice both before and afterwards, and also at half time, and a written report may be produced. Referees in the "Development Groups" (see paragraph 85 below) would also receive significant support, and coaching from staff who also coach Select Group referees. Most referees will also call their coach after a game to discuss what went well and what might have gone better. The support provided might well extend beyond on-pitch performance. An end of season review would typically be conducted.

55. PGMOL also offers some other types of support to National Group referees. It offers private medical insurance, although many have that through their work, and in practice generally reimburses the excess on claims. It offers a heart screening

programme and psychological support. An annual pre-season training conference is arranged, and for those who cannot make it there is either a mop-up session or a personal meeting is arranged to ensure that they pick up key matters before they can start officiating. The conference is attended by Select Group as well as National Group referees and referees from Level 2. Match fee rates are announced at the conference, uniform is collected and certificates are awarded to retiring referees. Mr Riley provides a review of the previous season and a forward-looking message. Relevant changes in the Laws of the Game are covered and copies of the latest version supplied. Part of the conference involves smaller mixed discussion groups (led by and including referees from both Groups) to cover chosen topics.

56. PGMOL provides match and training kit for National Group referees, together with suits (which should be worn to and from matches), ties with the PGMOL logo and overcoats. Assistant referees and Fourth Officials receive similar kit, the idea being to ensure that they appear as a professional team. Match kit is provided in four different colours to take account of different club colours, with the referee choosing which set to use on the day. PGMOL loans the use of communication equipment to allow match officials to communicate. However, National Group referees must supply their own boots and trainers, watches, cards and whistles. In practice they also require their own computer, and many pay for gym subscriptions and for heart monitors that are used to provide data to PGMOL's sports scientists, as well as for other items such as Sky TV subscriptions, nutritional supplements and sports massages.

57. National Group referees are paid match fees, travel expenses and the training attendance allowance referred to above. Depending on performance during the season they may also qualify for a share of a performance or merit payment pot, the size of which is fixed before the season commences. The amount payable depends on the position of the referee on the merit table, and is discounted if fewer than a specified number of matches are completed.

58. Many referees remain on the National List for a number of years: we saw two examples of 16 or 17 years, and others of between 7 and 11 years. Some are promoted to the Select Group and a few are reclassified, including where they do not meet fitness requirements. Others retire from refereeing. Mr Riley accepted that National Group referees could be seen as "part and parcel" of the PGMOL organisation, or as part of the PGMOL "family". They were also shown with Select Group referees and other match officials and assessors on a PGMOL organisation structure diagram that we saw for the 2013-14 season.

The pre-season documents

59. As previously mentioned, referees are appointed to the National Group on an annual basis, before each season starts. For newly promoted referees this takes the form of a letter inviting the referee to "serve on the National List" for the relevant season, subject to the fitness test and to attendance at an introductory seminar, and wishing him a "successful career as a National List Referee".

60. Referees (including Select Group referees) that PGMOL proposes to appoint to the National List for the forthcoming season are then sent, by email on behalf of Mr Riley, a number of documents, some of which require signature. The content varied to some extent between the three seasons with which we are concerned. The description that follows is based on the materials for the 2015-16 season, but except where indicated the differences between seasons are not material.

(a) Code of Practice

61. This document refers to the invitation made to join the list, and states that if the invitation is accepted then "you are not an employee of PGMOL and will be treated as being self-employed". It goes on to say that match officials "who have accepted an appointment to the List will be expected to adhere to the Code of Practice outlined below". The document requires signature and return by the referee, who by signing confirms:

> "I am pleased to accept the invitation to join the Professional Game Match Officials List for Season 2015/16 on the terms outlined above and in the Fitness Protocol."

62. The content of the document is relatively brief, and deals with topics under a number of subheadings. Under "Appointments" it is stated that appointments will be made by PGMOL, and that there is:

> "…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."

63. A number of points are listed under "Expectations", all introduced by the words "Match Officials shall be expected to…". The points covered are: being readily and regularly available for appointment to matches, reaching and maintaining a satisfactory level of fitness as determined by PGMOL, undergoing fitness testing and any other assessment in accordance with the Fitness Protocol, observing and obeying the FA and competition rules and regulations, and carrying out "all instructions, procedures and directives relating to Match Officials" issued by PGMOL. It states that sanctions related to breach of FA regulations relating to referees will be carried out only under those procedures.

64. Under "Conflicts of Interest", the documents state that a "Match Official shall at all times act impartially", and that he must decline to act where there is a materially conflicting interest and declare it to PGMOL, whose decision will be final. Under the heading covering fees and other matters, it is stated that:

> "The Football Association, Premier League and Football League will set the fees and expenses for matches in their individual Competitions. Match Officials will be advised on the amount and claiming procedures separately."

This section also provides that Match Officials may be invited to assist in promoting products or services of sponsors or official partners of competitions (and may receive additional payments for that), but may not enter into arrangements under which

PGMOL, the FA, the Premier League or the EFL may be associated with any product or service, in particular if it is in competition with sponsors or official partners of any of them. Referees are permitted to speak to the media immediately after a game to clarify fact or points of Law, but otherwise media work may only be undertaken with the approval of PGMOL. If media work is undertaken with approval referees may receive additional payment for it. (We did not see any evidence of additional earnings from sponsorship or media work in practice.)

65. The document also has a heading briefly describing the match assessment and feedback system, referring to "continuous monitoring" of performance with "individual appraisals being made when appropriate". The training programme and coaching system is also referred to briefly and it is stated that referees "will be required to attend meetings arranged by coaches at specific times throughout the season". There is also reference to the provision of match kit and health insurance.

(b) PGMOL Guidelines

66. This is a relatively lengthy document produced by Mr Riley, described as containing "directives" issued by PGMOL for the relevant season. Within PGMOL the document is referred to as the "PGMOL Guidelines". There is a table of contents listing the topics covered. The focus is on the conduct of matches, for example safety and security matters (specific FA guidance being reproduced), dealing with injuries, disciplinary procedures, reporting certain incidents and on-pitch misconduct to the FA, dealing with abuse, and so on. There are a number of references to particular Laws of the Game. Appendices are included setting out FA reporting procedures in respect of certain incidents, and specific FA guidelines for assistant referees. We accept Mr Riley's evidence that the purpose of this document is largely to bring together, in a relatively digestible manner, key FA and (to some extent) competition requirements and guidelines that are of particular relevance to PGMOL match officials. It also includes some points of best practice from PGMOL's refereeing experts.

(c) Match Day Procedures

67. As the title suggests, this document sets out certain procedures to follow on match days. The same document deals with the Select Group and National Group, the procedures varying to some extent between the two. For National Group matches officials must arrive in accordance with the competition instructions, must enter the changing room at least 75 minutes before kick-off and at that point must switch off their mobile phones, not switching them on again until they leave the ground[7]. Further restrictions apply as to who else can enter the officials' changing room at various stages before, during and after the match. Match officials are reminded to be vigilant at all times of any possible threats to their integrity, and must report any concerns to the Select Group Manager or National Group Manager, or the General Manager (Mr Riley). There is an instruction to behave appropriately at all times and do nothing

[7] This is regarded as an important matter given the risk of inappropriate influence, bribery and so on, including the perception of it. TVs must also not be used.

which could give rise to concerns about their independence. We accept Mr Riley's evidence that these procedures are designed to protect officials from perceived or real threats to their integrity, and that generally such matters as timings are prescribed by the competitions and are simply being highlighted or transmitted to referees by PGMOL. However, the procedures also provide protection to PGMOL, as is clear from the covering emails referred to in paragraph 82 below, and to the competitions.

(d) Declaration of Interests form

68. This document was required to be completed, signed and returned to PGMOL, (although from the 2014-15 season referees previously on the list only needed to update PGMOL of any changes). It reflects the requirement in FA regulations to declare any potential conflict of interest.

69. The introductory text in the form restates that where a match official believes that there is a material conflict of interest, he must decline to act and must declare it to PGMOL, whose decision will be final and binding. It states that where a match official actively supports a given team then this must be declared. It also makes clear that match officials may not bet on a match or competition in which they may be involved, and that in case of doubt they should refer to the FA.

70. The remainder of the form contains boxes for completion declaring direct interests and also indirect interests affecting the immediate family. The form also has a gift register, with match officials being required to declare gifts with a value in excess of £20.

(e) Fitness test and fitness training protocol

71. Different protocols apply for the Select Group and National Group. For the latter, the first part of this form deals with the annual fitness test, stating that officials who do not successfully complete it by 31 August will be reclassified unless the OMT accept that there are extenuating circumstances (such as injury or work commitments), in which case a revised date will be provided. Various alternative dates for the test are provided in June and July (before the start of the season), with an additional test date at the end of August. The form makes clear that no official will be allowed to officiate on the National List until they have passed the test. It also states that the OMT "reserves the right to re-test any official on one or more occasions during the season", listing a number of criteria for this including performance in the initial test, body fat measurements, comments on fitness in match assessment reports, injury or an assessment by sports scientists of training records. Any re-test must be completed by 31 March, the sanction again being that the referee will be reclassified unless extenuating circumstances are accepted. Details of the test are provided.

72. The last part of the form deals with training monitoring, injury/illness and training expectations. It is recommended that training (heart rate) data is submitted to PGMOL's sports scientists weekly or fortnightly. Referees who become injured "must" inform their sports scientist immediately and keep them regularly updated, and may be required to undertake further testing before returning to officiating. The form

states that officials who do not satisfy the sports scientist that they are fit "will not be allowed to officiate". On the subject of training programmes, the document states that the programmes will be available each Friday, that referees are "advised" to follow them closely, and that they should speak to their sports scientist if they are having difficulty. The sports scientists will monitor the training and failure to "satisfy the Sports Scientists' training requirements may result in the loss of match appointments or a recall for a fitness test." In contrast to this training advice for the National Group, training requirements for the Select Group, and the provision of training data, are mandatory.

73. This document must be signed and returned, in terms that the referee "understand[s] the PGMOL protocol outlined above and agree[s] to abide by it".

(f) Promotion and reclassification criteria

74. This document sets out the way in which individuals will be selected for promotion or re-classification (demotion) between the various lists that PGMOL maintains, including promotion to the Select Group from the National Group and reclassification from the National List to Level 2A. The criteria for these promotions and reclassifications are largely performance based, taking account of match reports and performance in the assessor and club merit tables, but also include fitness and (for promotion to the Select Group) the ability to demonstrate the off-pitch social, political and diplomatic skills required for an international referee. In relation to fitness there is a reference to "fitness denoted by…compliance with the fitness protocol,… match performance and adherence to the training programme…". A section dealing with promotion to the National List refers to the selection interview process and states that promotion will depend on a combination of performance as a referee and performance at interview. There is a similar reference to the fitness protocol and training programme.

(g) Code of Conduct

75. For the 2015-16 season, a new PGMOL Code of Conduct was produced. This is expressed to apply to PGMOL directors and staff, and to all match participants (including match officials, coaches and assessors). Individuals were required to sign a declaration confirming that they had read and would comply with the Code and with the requirements of FA rules and regulations, and also that they would comply with FA rules on bribery and betting, not tolerate any form of manipulation or unlawful influencing of match results, and would report any issues.

76. The content of the Code states that compliance with it is a "condition of… employment or engagement as a self-employed contractor", and that bribery or corruption could result in dismissal of employees for gross misconduct or, for self-employed match participants, removal from the relevant PGMOL list.

77. The Code includes sections covering risk areas, as well as specific sections on bribery, hospitality and gifts, inside information and reporting of concerns. FA guidance on match fixing is appended, together with the FA rules on bribery and

betting. There is a specific reference to the need to comply with PGMOL's declaration of interests requirements, and a direction to comply with the Code and also to "attend and actively participate in PGMOL education and awareness programmes". Hospitality or gifts in excess of £50 in value must be recorded on the gift register without delay, and anything in excess of £100 requires prior approval by the General Manager. These limits are fixed by PGMOL and the Code expressly states that the PGMOL Board, OMT and line managers are responsible for the implementation and monitoring of the integrity policy.

78. Mr Riley explained in evidence, and we accept, that the Code of Conduct was designed to put the FA's integrity related obligations into a digestible form for match officials, but also that it allowed PGMOL to take action quickly rather than waiting for an FA process. However, the ultimate sanction of de-registration was one for the FA.

(h) Goal Decision System protocol

79. This document is a protocol relating to the electronic system provided by Hawk-Eye, and details the procedures to follow in terms of pre-match testing, what to do if there is a problem with the system at any stage, and certain unusual situations where match officials considered that the system has produced an incorrect result.

(i) Match assessor guidelines

80. Referees are also provided with a copy of the match assessor guidelines. We did not see these for 2015-16, but the earlier versions we did see set out detailed instructions and marking guides set by PGMOL for match assessors in relation to the National Group. (The arrangements are different for the Select Group when refereeing in the Premier League, but the match assessor procedure does apply to them for Football League and FA Cup matches.) There is a system to allow a referee to challenge KMD scores, which are relevant to the merit tables.

81. There are a number of comments in the guidelines about how the assessor should interact with the match officials. We also saw some sample assessors' reports. It is clear that assessors do have an important role in providing feedback to referees, both in the immediate debrief following the match and in the subsequent detailed written report that they produce, as well as in providing an appraisal and marks that are relevant to the merit tables. The clear tone of the interactions with referees is one of advice and assistance in personal development, rather than instruction.

(j) The covering email

82. The 2015-16 covering email refers to the Code of Practice as setting out "the basis of your relationship with PGMOL". The 2014-15 equivalent states that the Code "sets out PGMOL's requirements of you". The Declaration of Interests form is stated to set out the basis on which referees are "obliged to notify us" of any conflicts of interest and gifts received. The Match Day Procedures are stated to exist to "protect you and the PGMOL", and the importance of adhering to them is stressed. For 2015-16 there

is reference to the new Code of Conduct and the need to complete a form on the PGMOL portal confirming that the referee has read, understood "and will comply" with its requirements.

83. In contrast to the 2015-16 and 2014-15 pre-season emails, the cover email for the 2013-14 season was very brief and simply referred to the need to sign and return the Code of Practice and Declaration of Interests forms.

(k) Merit payment distribution

84. Although not included in the same covering email, a further document is provided to National Group referees by PGMOL by the start of the season, informing them of details of the merit payments available. This states the total "pot" available for the season and how payments "will" be calculated. Those at the bottom of the merit table, and those who complete fewer than 10 matches, do not qualify. Payments to those who complete fewer than 20 matches are discounted (by 40% up to 14 matches and 15% up to 19). The distribution is otherwise based on a set number of "shares" which are split in the manner specified in the document, with the first ranked referee receiving the most shares. A further email is sent on behalf of Mr Riley after the end of the season referring to PGMOL's Board having confirmed the size of the pot. The maximum payment for 2014-15 was around £3,500 and the lowest was under £700. Mr Riley's evidence was that merit payments would be made as indicated unless the referee group had had a "catastrophic" season, which he thought might happen if the EFL was dissatisfied with the overall level of service.

(l) National List Development Groups Protocol

85. This protocol is a separate document issued to National Group referees regarded as having the potential for Select Group status. There are two groups, with Development Group 1 aiming for the Select Group within two to three seasons and Development Group 2 within three to five. Composition of these groups is reviewed annually, and referees accepting a place in either group are expected to comply with the development protocol.

86. As might be expected, the protocol sets out a stronger level of commitment than for other National Group referees, including fitness requirements, regular engagement with the sports scientist and weekly submission of training data, attendance at some Select Group training sessions and at Development Group seminars, and full engagement with the coaching process. The document must be signed and returned. However, despite the additional commitment there is still a recognition that attendance at training sessions is not obligatory: we saw a sample email to Mr Attwell, as a member of Development Group 1, which made it clear that it was recognised that work came first.

Hours worked

87. The total hours worked by National Group referees obviously varies with the number of matches offered and accepted. We heard and saw a variety of evidence on

this but our general impression is that, for National Group referees performing at an acceptable level, they would be offered match appointments in most weeks in the (42 week long) season. Some may referee at a mid-week evening match as well as at the weekend. In oral evidence Mr Riley suggested that a National Group referee could expect a referee or Fourth Official appointment in three out of every four weeks. A table he had produced with the discussion paper relating to worker status referred to in paragraph 108 below suggested an average of 28 matches per season (20 as referee and 8 as Fourth Official) and an overall commitment of 12 hours (match and non-match) per season week. Mr Nawbatt submitted that the figures in that table were an underestimate for the period in dispute. The table was produced in respect of a later period, when the Select Group had been expanded. Mr Nawbatt also pointed out that Mr Attwell refereed 43 matches (including four in the Premier League) in 2015-16 and acted as Fourth Official on around 15 further occasions. However, Mr Attwell is clearly exceptionally committed and was working hard to be promoted to the Select Group.

88. In its 2014-15 budget PGMOL budgeted for National Group referees to referee around 1600 matches, and to act as Fourth Official in 300 Premier League matches and in 120 Football League matches. Based on 60 National Group referees this would indicate an average of around 27 matches a season as referee and 7 as Fourth Official. FA Cup matches are not reflected either in the budget or (it seems) Mr Riley's table. A consultation meeting in January 2015 refers to an average of 30 matches in the previous season, with some refereeing almost 40. The merit tables for the three seasons relevant to the appeal suggest an average of around 30 matches as referee.

89. On these figures we agree that the estimate of the average number of matches refereed in the table was something of an underestimate as far as the periods in dispute are concerned. Over a 42 week season, the average based on the 2014-15 budget looks closer to four matches in every five weeks, as referee or Fourth Official. The real figure, taking account of FA Cup matches, may well be a bit higher than that.

Disciplinary arrangements

90. PGMOL operates its own disciplinary procedures, and did so before the Code of Conduct was introduced. We saw examples of suspensions of a team of officials for breach of match day procedures, following an investigation and meetings with PGMOL management, and a resignation from the National List by another National Group referee following an investigation by and meetings with PGMOL representatives, including a meeting with Mr Riley. In that case a settlement deed was entered into between PGMOL and the individual (not involving any payment by PGMOL, other than a small contribution to legal fees). Mr Riley explained that where there was a serious allegation of wrongdoing there would be a discussion with the FA about who was better placed to investigate it, the FA having greater investigative powers. In addition, whilst PGMOL could suspend an official or remove him from its lists, removal would lead to the individual being in limbo since without action from the FA he would still be registered as a Level 1 referee.

Consultation arrangements

91. PGMOL operates a forum for elected representative of each group of officials to meet regularly with Mr Riley to discuss a variety of issues. Notes we saw included discussion about anomalies under which some National List referees had not received Fourth Official appointments, with a reference to addressing the unfairness of that, discussion about the marking scheme and merit table, discussion of training related issues and discussion about the appropriate size of the National Group.

PGMOL's financial arrangements

92. As previously mentioned, PGMOL is funded on annual basis by its three members. This funding makes up the vast majority of PGMOL's revenue, although it also derives a relatively small proportion of its income from sponsorship. There is no formal funding agreement with the members. In practice the funding split between the three has remained relatively stable, with the FA contributing less than the Premier League and the EFL. The Premier League and FA each make two instalment payments per season representing their agreed funding contributions. The EFL's contribution is also paid in two instalments, but in its case payment of the second amount is in practice netted against the charge to PGMOL referred to below, and a balancing payment is made by PGMOL or the EFL as appropriate. PGMOL issues invoices to each of its members in respect of their contributions (including the gross amount of the EFL's second instalment), with the description "Contribution to PGMOL running costs". VAT is charged on these amounts.

93. PGMOL's budgeting process is undertaken in a three year cycle, corresponding to the period covered by TV rights deals agreed by the Premier League and the EFL. The three year cycle is reflected in a strategic plan for the whole period, including draft budgets for all three seasons. We saw the plan for the 2013-14 to 2015-16 period. This referred to objectives of creating a more effective supply chain for producing elite officials and continuing to review match official costs, to the need for PGMOL to provide 10 new Select Group and 63 National Group referees over 10 years to allow for retirements, and a plan to put more emphasis on performance related pay, with a new bonus scheme for National Group referees (this is the merit payment arrangement).

94. The budget for the first year is discussed and agreed by the PGMOL Board before the start of the season, and the final budgets for years two and three (including proposed or required changes from the figures anticipated at the start of the three year cycle) are agreed annually thereafter. Bearing in mind that only the members' representatives have votes on the Board, this effectively involves the budgets being agreed by the individual member organisations through the mechanism of the PGMOL Board. The annual budgets include a Match Fees Schedule which specifies the fee and expense rates for Select Group and National Group referees, assistant referees, Fourth Officials and assessors for each season for Premier League, FA Cup and Football League matches respectively. These fee rates clearly feed directly into the budgeted costs.

95. As well as incurring expenditure on overheads, training and staff costs for non-match official staff (such as coaches, sports scientists and office personnel) PGMOL incurs expenditure in relation to match officials, both in the Select Group and National Group. In relation to the Select Group the position is relatively straightforward: PGMOL as employer pays their salary, match fees and expenses from its own bank account, albeit with the assistance of Premier League staff since PGMOL does not have its own payment processing capacity.

96. As far as the National Group is concerned, and (it appears) with the exception of fees and expenses for FA Cup matches, all costs are reflected in PGMOL's budget and accounts. However, the EFL pays the majority of the sums the referees receive from its own bank account and recharges the amount paid, with VAT, to PGMOL at the end of each season. This includes most EFL related match fees and expenses, training allowances and expenses, and any performance payment. The typical description on the invoice produced for the recharge is along the lines "PGMO running costs 2014/15", although we saw one invoice for 2013-14 which referred to "Costs incurred on behalf of PGMO". It is this recharge that is netted against the second instalment of the EFL's funding contribution.

97. There was a different approach where National Group referees officiated in Premier League matches. In those cases match fees and expenses were paid by PGMOL in seasons up to and including 2014-15. Thereafter these payments have been made by the EFL and included in the recharge, as for Football League matches. The same applied to Football League matches where a National Group referee was acting as Fourth Official in a match otherwise refereed by a Select Group refereeing team, and to any Premier League related training fees and expenses (for example, where Development Group referees attended Select Group training events). In addition, where National Group referees officiated in FA Cup matches during the period in dispute, payments were made directly by the FA by cheque and not recharged to PGMOL[8]. This changed after the period in dispute, with the EFL making the payments in respect of FA Cup matches from 2017-18 onwards, including them in its recharge to PGMOL, and PGMOL in turn recharging the FA. In response to a question from the Tribunal, it was confirmed during the hearing that the regulation 80 determinations and section 8 decisions do not reflect payments for FA Cup matches.

98. Mr Riley's witness statement (which was produced several months before details of the payment arrangements started to be provided) was clearly written on the basis that PGMOL both "paid", and indeed "engaged", the National Group referees. The budgets also include National Group related referee costs under an "employment costs" heading.

99. Payment of match fees and expenses is not dependent on the production of an invoice by the referee. From 2015-16 onwards it has been an automated process that follows from the submission of a post-match report by the referee and the entry of details of expenses on MOAS. Training attendance fees and expenses are paid in the same way. Prior to this, match expense claims for EFL matches were submitted

[8] Match expenses were and are borne by the home clubs and re-claimed by them from the FA.

directly to the home club via an expenses claim form, paid by the club and then reclaimed by it from the EFL, with the EFL then including that amount along with match fees in its recharge to PGMOL.

100. PGMOL's statutory accounts include members' contributions and sponsorship income within turnover (including the gross amount invoiced to the EFL). Costs include National Group referee costs, including the amount recharged by the EFL, as well as Select Group and other staff costs and overheads. The note relating to staff numbers and costs excludes National Group referees, although in the corporation tax return "employment costs" covers National Group referees as well.

101. It was clear from the evidence that PGMOL relies on assistance from both the Premier League finance function and that of the EFL. Premier League finance staff operate PGMOL's bank account on its behalf, prepare PGMOL's monthly management report and process invoices. PGMOL is also assisted by the Premier League in other areas. For example, it uses the Premier League's offices and has access to its in-house IT support and legal teams. In addition, administration staff associated with match appointments for the National Group are based at the EFL's office and were employed by it until 2015-16. PGMOL was described a number of times as a "lean organisation".

HMRC's interviews and other referee evidence

102. Ms Ritson of HMRC interviewed seven referees and Mr Barry during 2015. The notes of interviews were extensive and informative.

103. The following points of particular interest appeared from HMRC's interview notes with Mr Barry, which had been amended by him and by Mr Khan:

(1) National Group referees have a choice as to whether to accept a game or attend training.

(2) There are no verbal agreements with referees: everything is documented.

(3) The PGMOL Board agrees the rates of match fees and expenses annually as part of its budgeting process. PGMOL make the payments (including expenses from 2015-16), using funds provided by its members. This takes away the suspicion of possible corruption witnessed in other countries, because PGMOL is independent.

(4) PGMOL is the sole engager, and engages referees on an annual basis (because there is an annual review). Mr Riley specifically agreed this comment about sole engagement in cross examination, commenting that it was on a per season basis and adding the qualification that National Group referees might referee in addition for County FAs, the Army or other service organisations.

(5) The referee has total control on the field, subject to the FA Referee Regulations. Off the field PGMOL rules apply, such as in relation to the

misuse of social media. But referees do represent PGMOL as well as the FA when they officiate.

(6) Better performances by a referee can improve his overall annual income.

104. The general picture from the notes of interviews with referees and the witness statements and oral evidence provided by referees was one of committed, driven individuals who are passionate about football, refereeing and about their performance as referees, and who have a continual desire to improve. Certainly at National Group and below, they are not refereeing for the money. They are professional in their approach and place obligations on themselves: two referees referred to refereeing as an addiction. They are ambitious perfectionists. They have worked very hard over a number of years to be promoted through the different levels of refereeing. They recognise that not making themselves available for matches and training may compromise their ability to perform at the highest level and lose them the opportunity to be offered the best matches, and they do not want that to happen. They want to referee at the level they have worked hard to attain. This is the key reason why they make themselves available as much as possible, and do a lot of training. Refereeing is however a hobby and must take second place to primary work commitments. Most but not all thought that there was no contract (or at least employment contract) and most thought that the specific training programme was not obligatory. There were references to PGMOL having expectations of referees being available and doing training, and to an expectation on the part of referees of being able to officiate on most dates they had not closed off. But the evidence shows that National Group referees could and did close off dates when they wanted to do so. It was also clear that cover would be arranged by PGMOL even late in the day if something arose that conflicted with an appointment (typically, but not only, work commitments, illness or injury), and there would be no sanction for pulling out. In such a case the referee would not receive the fee.

105. Referees have their own particular match day routine with, for example, individual approaches to preparation, whether to stay overnight the night before, pre-match interactions with other officials and the precise time of arrival at the ground. They also clearly recognise that it is the referee who is in charge on match day.

106. The point was made that National Group referees were paid a set fee for matches, whatever the travel or other time taken (including overnight stays). There was nothing extra for preparation or the post-match reports they had to write, the submission of which triggered payment of the fee.

Worker status

107. For the 2017-18 season onwards (so outside the period covered by this appeal) PGMOL agreed to worker status for National Group referees for employment law purposes, as a result of which they started to receive pension benefits and holiday and sick pay. The Code of Practice was replaced by a "Terms of Engagement" document. This initially caused some confusion, and in a follow up email Mr Riley explained

that the new document "effectively updates" the Code of Practice[9], that the document "clarifies your relationship with PGMOL as we have done in previous seasons" and that the substantive changes reflected the introduction of worker status. The email states that PGMOL "will meet its obligations" under pension legislation, and for holidays and holiday pay. It also refers to "your time commitment to PGMOL" in the context of the working time rules. Mr Riley agreed in cross examination that the substantive changes related to the additional benefits arising from worker status. In practice, the EFL makes payments for holiday and sick pay and recharges them with other amounts to PGMOL.

108. We saw a discussion document produced by Mr Riley relating to the potential introduction of worker status. This referred to the terms on which PGMOL "currently engages" with officials and the fact that "revised contracts" would be needed. It notes that some officials considered that they were PGMOL employees and discussed possible actions to strengthen PGMOL's position on status, including:

> "Reviewing the number of officials on each List to create greater diversity in appointments and enable officials to close dates with greater regularity."

Submissions

Submissions for PGMOL

109. Mr Maugham's principal submission was that there was no contractual relationship between PGMOL and the National Group referees, PGMOL instead simply managing the interactions between them and the competitions. There was no written or oral contract between PGMOL and the referees and the test for implying one was necessity (*The Aramis* [1989] 1 Lloyds Law Rep 213; *James v London Borough of Greenwich* [2008] EWCA Civ 35, [2008] ICR 545). The Code of Practice was not written in contractual language, the fitness requirements were preconditions to appearing or remaining on the National List (that is, a qualification for the work) and reflected FA rules, and the training programme was not mandatory. The Match Day Procedures also simply reflected FA and competition requirements. The controls on National Group referees were imposed by the Laws of the Game (which it was referees' job description to apply), the Referee Regulations and the competition rules, and not by PGMOL. PGMOL just communicated FA and competition requirements in a digestible form. The referees also wanted to referee at the highest level and so typically wished to adhere to PGMOL's requests on a voluntary basis. They were driven by their passion for refereeing and would not act any differently if a contract was in place. The only sanction available to PGMOL was not to invite referees to officiate in future matches.

110. PGMOL's role was to provide a service to the FA and the competitions of managing the supply and administration of referees, with the FA and competitions delegating refereeing-related functions to PGMOL to ensure that their requirements

[9] The email refers to Code of Conduct, but this was a typographical error.

for high quality referees were met. It was simply a joint venture between the three members and had no meaningful independent life or public presence. It was not significant that National Group referee costs were included in PGMOL's budget because in reality its costs were simply borne by the three funders in the agreed funding proportions: the mechanism for achieving that, through PGMOL as a glorified bank account, was not material. The role of the PGMOL Board in setting match fees was just as the delegate of the competitions, Rule 26 of the FA rules making it clear that it is the competitions' responsibility to set fees. It was clear from the EFL's Standing Orders that referees needed to look to it for payment, and the contracts that PGMOL accepted that referees had for individual Football League engagements were with the EFL. The EFL acted as principal and not as agent of PGMOL, and it was consistent with this that VAT was charged on its recharges of refereeing costs to PGMOL. For Premier League matches, rule N.4 (see paragraph 41 above) amounted to an express agreement between it and the referee in relation to each match appointment. Payment by PGMOL simply discharged the Premier League's obligation to pay, and the cost was recouped via the funding arrangement.

111. Mr Maugham submitted that the "no contract" analysis was supported by payments being made and agreed by entities other than PGMOL, relying on *Cheng Yuen v Royal Hong Kong Golf Club* [1998] ICR 131 and *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735; [2013] IRLR 99. PGMOL was like the golf club in *Cheng Yuen*, providing a framework or context for the relationship between referees and the competitions.

112. If, contrary to Mr Maugham's primary submission, there was a contractual relationship with PGMOL, then the test for implying terms into a contract is again one of necessity (*Liverpool City Council v Irwin* [1977] AC 239). Again, the Referee Regulations, competition rules and referees' perceived self-interest meant that there was no need for implied terms. There was no basis to imply any obligation on PGMOL to offer matches or on referees to accept appointments where a key document relied on by HMRC, the Code of Practice, explicitly precluded such obligations. Cases relied on by HMRC as supporting the existence of mutuality did not share this feature. Similarly, there was no need to imply an obligation to pay.

113. In any event any contracts between the referees and PGMOL were not contracts of employment. They lacked the essential features of mutuality of obligations and control, and other features also pointed away from employment. Employment required some obligation to provide work or make payment if work was not provided: *Usetech Ltd v Young* 76 [2004] STC 1671 at [64]. PGMOL was under neither obligation so the necessary "wage work bargain" was absent. Even if there was mutuality during each individual assignment, taking account of its absence between assignments the mutuality was insufficient for a contract of service: *Windle and another v Secretary of State for Justice* [2016] EWCA Civ 459, [2016] ICR 721. The control that existed was regulatory control rather than control resting with PGMOL. Control over whether referees stayed in the National Group was not control in the relevant sense, but simply a qualification to be offered work. Requirements such as fitness and the need to remain impartial and independent were also necessary characteristics of the role of referee and did not reflect control by PGMOL as

employer: compare *Matthews and another v HMRC* [2014] STC 297, where an entertainer on cruise liners was held not to be employed despite some controls over on-ship behaviour. There was also no possibility of control during individual engagements. Like the rector in *Sharpe v Bishop of Worcester* [2015] EWCA Civ 399, [2015] IRLR 663, referees performing their duties were beyond control. The Laws of the Game made it clear that it is the referees who have full authority.

114. Other features also pointed away from employment, such as being in charge of their own fitness, taking responsibility for pre-match preparation, the provision of some kit, and the opportunity to profit from sponsorship, media interactions and officiating in more matches. Refereeing for National Group referees was a passion or hobby and their commitment to it was not an incident of employment but instead of their enjoyment and desire to develop.

115. Mr Maugham also submitted that, even if PGMOL had an employment relationship with PGMOL, it was not liable for PAYE and NICs in respect of payments made by the EFL. Payments by the EFL were not made on PGMOL's behalf or at its expense within s 687 ITEPA. For NIC purposes the EFL, not PGMOL, was liable as a "UK agency".

Submissions for HMRC

116. Mr Nawbatt submitted that there were express annual contracts between PGMOL and the referees, with an expectation of renewal (subject to a review). Because there was no single document fully recording the terms, the Tribunal had to consider the written documents and the wider factual matrix, including the parties' subsequent conduct, to ascertain the terms: *Carmichael v National Power*. In this case some of the terms were contained in the Code of Practice, Match Day Procedures and Fitness Protocol but other terms needed to be inferred from the wider factual matrix, including the parties' conduct. *Carmichael* did not apply a test of necessity in determining the terms of an express contract which was not fully recorded in writing. In addition, written terms may not reflect the parties' true intentions: *Autoclenz Ltd v Belcher* [2011] UKSC 41, discussed in *Weight Watchers*. The practical reality of the arrangements is important. PGMOL was providing refereeing services and recruited and retained the referees to provide that service. There was no evidence to support PGMOL's contentions that this was not the case.

117. The latest case law illustration of an analogous "no contract" argument was *Uber BV and others v Aslam and others* [2017] IRLR 4 (ET), [2018] ICR 453 (EAT), where Uber also relied on *Cheng Yeung* and *Quashie*, and failed on the basis that in reality Uber ran a transportation business, rather than simply providing a technology platform with the contracts being between drivers and passengers. The principles applied by the Employment Tribunal were directly applicable here.

118. HMRC's case was that individual engagements to officiate at matches were contracts of employment, and that these existed in the context of an overarching or umbrella contract between PGMOL and the referee. It was not necessary to decide the nature of the overarching contract, although in HMRC's view it was a contract of

employment. As regards the individual engagements, these were express contracts between PGMOL and the referee. Even if that was not right then contracts must be implied on the basis that PGMOL was engaging the referees to officiate for a fee: *James v London Borough of Greenwich*.

119. As regards mutuality of obligation, Mr Nawbatt relied on the Court of Appeal decision in *Pimlico Plumbers v Smith* [2017] EWCA Civ 51, [2017] ICR 657, where Underhill LJ referred at [145] to comments he had made in *Windle v Secretary of State* about the relevance of the arrangements between periods of work in shedding light on the nature of the relationship while the work was being done. He pointed out that in *Pimlico Plumbers* Underhill LJ added that not only legal obligations were relevant here: where work was regularly offered and accepted that might weigh in favour of a conclusion that the individual had "at least" worker status.

120. Mr Nawbatt submitted that the expectation of being offered work, resulting from the practice over a period of time, can constitute a legal obligation to provide some work or perform work provided, relying on *St Ives Plymouth Limited v Haggerty* UKEAT/0107/08/MAA, unreported, 22 May 2008 and *Addison Lee v Gascoigne* UKEAT/0289/17/LA, unreported, 11 May 2008 at [33] to [35]. In this case there was a sufficient mutuality of obligation between matches, but in any event the referees were in practice regularly offered, and regularly accepted, work throughout the season. The requirement in the Code of Practice to be readily and regularly available for appointment to matches was in practice more than an "expectation". They would be reclassified if they were not so available. It was not just a question of goodwill and mutual benefit. Referees expected to be appointed to matches most weeks of the season and in practice they were. The merit payment criteria had to involve a corresponding obligation to offer appointments, and the merit payments were an integral part of the earnings and depended on regular match appointments. There were also other subsisting obligations between matches, a significant degree of investment by PGMOL and a commercial imperative to provide referees. The continuing relationship was underpinned by, for example, consultation arrangements under which elected representatives of referees were regularly consulted on a number of matters. In any event mutuality existed once a match appointment was made and accepted, and the referee had no right of substitution.

121. Mr Nawbatt also submitted that there was a sufficient degree of control. The practical realities of the relevant industry had to be taken into account, and all that was needed was a sufficient framework of control. The level of control exercised during matches was the same as for the Select Group, who were accepted as being employed. There was continual monitoring and assessment via the assessor and coaching system, and assessments fed into remuneration. The assessment system was no different to regular employee appraisals. Once a referee had indicated his availability on a particular date he had no ability to choose which match to officiate in. That was entirely at the discretion of PGMOL. PGMOL also had the ultimate right to sanction referees by suspending them from officiating, and imposed controls on off-pitch activity via the Code of Practice and Protocols.

122. In addition, PGMOL provided much of the equipment and health insurance, and covered most expenses. Payment was not dependent on invoices being produced, and referees did not have the opportunity to profit from how they performed the task, or a risk of loss. They were not in business on their own account, and were integrated into PGMOL. The degree of continuity in the relationship was significant. The fact that the parties may not have intended to enter into contracts of employment was of little, if any, assistance: *Dragonfly Consultancy Ltd v HMRC* [2008] STC 3030 at [53] to [55].

123. The fact that referees were paid by a third party did not prevent there being an employment relationship, *Cable & Wireless plc v Muscat* [2006] EWCA Civ 220, [2006] ICR 975 at [34] and [35]. It was not necessary to rely on s 687 ITEPA, but it was satisfied and PGMOL was also liable for the NICs as employer.

Discussion

Contracts with PGMOL?

124. We have concluded that National Group referees did have contractual relationships with PGMOL during the periods in dispute. In our view there is a wealth of evidence to support this conclusion, and very little evidence to support PGMOL's contention that the referees instead entered match by match engagements with the competitions.

125. The creation of PGMOL was intended to ensure that referees were appointed independently of competitions, and that a pool of high quality referees was available. The former aim at least underlined the need for a separate legal entity. However, PGMOL's role went beyond simply making choices about match appointments, training referees and controlling the lists of Level 1 referees. It is clear from PGMOL's constitution and accounts, as well as from Mr Riley's evidence, that PGMOL was established to *provide the services* of match officials to the competitions, and specifically to the Premier League and the EFL. In order to provide those services PGMOL had to engage the referees.

126. PGMOL's budgeting and accounting is consistent with this. With the exception of FA Cup matches it bears the full costs in respect of National Group referees, either directly or through a recharge of amounts paid to them (at cost, with no mark up) by the EFL. We accept that VAT is charged on this recharge, but we do not consider that any weight can be placed on that. There is no indication that any proper consideration had been given to whether VAT was appropriate, and even if it had been the view taken could simply have been incorrect either as a matter of law or fact. The invoice that stated that costs were incurred "on behalf of" PGMOL was the most accurate in terms of the description (paragraph 96 above), but VAT was still charged under that invoice. We do not accept Mr Maugham's suggestion that PGMOL was operating as a glorified bank account, with the costs being borne by its funders. That was a brave attempt to explain the evidence that emerged during the hearing that some payments to referees were made direct by PGMOL, rather than by the EFL or the Premier League. However, it not only ignores PGMOL's existence as a separate entity, but

also the objects for which it was established. Other suggested explanations for the costs falling on PGMOL's budget, such as the competitions engaging referees, and supplying them to PGMOL only to be supplied them back by PGMOL, are unrealistic and also not supported by the evidence.

127. In our view the absence of payment processing capacity at PGMOL is by far the most likely explanation for the fact that the EFL makes most payments to National Group referees. It was clear from the evidence that PGMOL relies on both the Premier League and the EFL for invoice and payment processing support. Premier League staff have direct access to PGMOL's bank account, which explains why payments processed by the Premier League are made directly from that account. There was no suggestion that staff at the EFL have similar access, and against that background the system under which the EFL makes payments and then recharges amounts paid to PGMOL makes perfect sense. The very fact that it proved so difficult for Ms Martin to unearth the precise details of the payment arrangements, and the fact (for example) that payments in respect of Premier League matches switched to being made by the EFL rather than direct from PGMOL's bank account after 2014-15 with no suggestion that the change had any significance, illustrate that the details of the payment arrangements are not material. They are all PGMOL costs. Both Ms Martin and Mr Riley accepted that referees' costs were borne by PGMOL. The notes of meeting with Mr Barry, which were reviewed and corrected by Mr Khan as well as by Mr Barry, also stated that PGMOL made the payments. In substance we think that is correct, and the payment and recharge arrangements with the EFL are simply machinery.

128. We have also concluded that PGMOL sets the rates of match fees and expenses annually, as part of its budgeting process and by means of a PGMOL Board decision (see paragraph 94 above). This is also reflected in the notes of HMRC's meeting with Mr Barry, and is consistent with PGMOL engaging the referees. The process involves recommendations by the OMT to the PGMOL board, the voting members of which will discuss the matter within their own organisations before agreeing the budget. This can be reconciled with the requirement in rule 26 of the FA rules (that competitions must set the fees) because in practice the competitions agree the fee rates via the mechanism of a PGMOL Board decision. The fact that PGMOL sets the rates is entirely consistent with it being the engager, and would require some additional explanation if it were not.

129. There was also a significant amount of other documentary and witness evidence to support the fact that PGMOL engages the referees. It is PGMOL that communicates the fee and expense rates to referees, at the annual conference. It is PGMOL that produces and sends the pre-season documents discussed further below, requiring signature and return of some of them to it. The covering emails for 2014-15 and 2015-16 explicitly refer to PGMOL's requirements of referees or its relationship with them. It is PGMOL that communicates the performance payment criteria and confirms the amounts due. It is PGMOL that provides coaching and other support, including health insurance, and offers an attendance allowance for training sessions. It also provides kit. Disciplinary procedures are conducted by it. To the extent that anyone's views or impressions are relevant, then (leaving to one side Ms Martin's

recently produced evidence) none of the witness statements suggested that the engager was anyone other than PGMOL, and until very recently correspondence with HMRC was on the same basis. Mr Riley spoke of National Group referees as being part of a PGMOL family and he agreed with Mr Barry's comment about PGMOL being the engager (see paragraph 103(4) above). The strategic plan for the three relevant seasons refers to the need for PGMOL to provide new National Group referees (see paragraph 93 above). It was also PGMOL that successfully defended a claim by a National Group referee for unfair dismissal in *Martin v Professional Game Match Officials Ltd* (Employment Tribunal, Case 2802438/2009), and entered into a settlement deed in another case, with no suggestion that the referees concerned had no contractual relationship with it.

130. We agree with Mr Nawbatt that the way in which PGMOL dealt with the worker status issue is also of some relevance (see paragraphs 107 and 108 above). Mr Riley's follow up email referred to clarifying referees' relationship with PGMOL, and the discussion document referred to PGMOL engaging referees and to "revised contracts". The Terms of Engagement document is based on the Code of Practice. PGMOL was clearly accepting an obligation to pay holiday pay, yet in practice payments are made by the EFL, as with match fees. Other correspondence we saw in connection with worker status proceeded on a similar basis.

131. We are not persuaded by Mr Maugham's suggestion that contracts between referees and the competitions were evidenced by the EFL's Standing Orders and by the Premier League rules. The statement in the Standing Orders that fees and allowances will be paid "monthly direct by the League" (see paragraph 40 above) simply reflects the factual position that the actual payments are made by the EFL. Rule N.4 of the Premier League rules (paragraph 41 above) does amount to an undertaking to comply with the Laws of the Game, FA rules and Premier League rules, but our interpretation of that is that it is intended to be an undertaking about standards of behaviour in respect of the particular appointment, rather than an agreement to take on an engagement for a fee. The fact that it would also apply to the Select Group illustrates this. None of the witness evidence pointed to these provisions as being seen as having any particular relevance to the terms of engagement of referees.

132. Turning to the case law relied on by Mr Maugham, we do not think that this is a case where there were no written or oral contractual terms, such that the test to apply is whether it is necessary to imply a contract (under the principles described in *The Aramis*). As discussed further below we consider that the pre-season documents, together with the communication of financial terms orally and/or in writing, amounted to express contractual relationships between PGMOL and the referees.

133. The facts are also very far from those in *Cheng Yuen v Royal Hong Kong Golf Club* and *Quashie v Stringfellow Restaurants Ltd*. *Cheng Yuen* concerned a caddie who had been trained and provided uniform by a golf club. The club paid in cash for each round that the caddie worked, but debited the relevant member for the amount paid. The Privy Council held that the only reasonable view of the arrangements was that the caddie was contracting with the individual members, who bore the cost, could

instruct the caddie about what they wanted and how they wanted it done, and for whom the caddie's duties were actually performed. The caddie simply had a licence from the club to offer himself as a caddie on certain terms. As with PGMOL, the precise payment arrangements were machinery: in each case the cost was passed on to the actual engager. In contrast to the golf club member in *Cheng Yuen*, the competitions and clubs in this case do not instruct referees about what they want done and how (and indeed that would compromise the referees' independence). Referee services are provided to the competitions, but that is done under the arrangement the competitions have with PGMOL.

134. *Quashie* concerned a lap dancer who unsuccessfully claimed for unfair dismissal. The key point in that case was that Stringfellows was not obliged to make any payment to the dancer at all. She negotiated fees with customers and was herself charged by the club for being allowed to perform. In contrast and as discussed further below, in this case PGMOL is obliged to pay the referees.

The contractual terms: overarching contract and the approach to take to determine its terms

135. We also agree with HMRC that PGMOL and National Group referees entered into annual (per season) "overarching" contracts, in addition to match specific engagements. In our view the terms of the overarching contracts can be found largely in the pre-season documents. We do not agree with Mr Maugham that because, for example, the Code of Practice was not written in formal contractual language, none of its terms have contractual force.

136. Mr Nawbatt placed significant reliance on *Carmichael v National Power* in arguing that additional terms should be inferred from the wider factual matrix, disagreeing with Mr Maugham that the test that had to be applied was one of necessity (*Liverpool City Council v Irwin*). Mr Nawbatt also relied on *Autoclenz v Belcher*. The wider factual matrix included the reality of referees being regularly offered, and regularly accepting, matches, their time commitments and approaches to training.

137. *Carmichael v National Power* was a case where part time power station guides who worked on a casual basis claimed that they had employment contracts for employment law purposes. Their claims were not made on the basis that they had successive ad hoc contracts of employment, so the dispute related to the existence or otherwise of an obligation to provide or undertake work in between engagements. The House of Lords held that there was no such obligation. Lord Irvine approved the tribunal's approach of considering not only the documentation but the way in which it had been operated and the parties' understanding of it, from which the tribunal could infer the parties' true intentions, objectively ascertained ([1999] 1 WLR 2042 at 2045 and 2047). Lord Hoffmann explained that whilst the construction of documents is a question of law, that does not apply where the intention of the parties, objectively ascertained, must be gathered partly from documents but also from oral exchanges and conduct (including subsequent conduct). In that case the terms of the contract are a question of fact, as is the question of whether the parties intended the documents to

be an exclusive record (page 2049). (See also the summary of the approach taken in *Carmichael* in *Ministry of Defence HQ Defence Dental Service v Kettle* UKEAT/0308/06/LA, unreported, 31 January 2007 at [38] to [45].)

138. *Liverpool City Council v Irwin* was an earlier House of Lords case about the terms of a lease. The written conditions were clearly incomplete. Lord Wilberforce referred to various types of implications of terms into a contract, of which the relevant one was a situation where the parties have not fully stated the terms in writing, and the court is simply concerned to establish what the contract is ([1977] AC 239 at 253 to 254). He went on to describe the question of whether certain maintenance obligations on the landlord could be read in as involving a test of necessity (page 254F). A similar approach was taken in other judgments.

139. In our view there is no necessary conflict between these approaches. There was no suggestion in *Irwin* that the parties, and in particular the council, had conducted themselves in a way which would allow the relevant obligations to be inferred. So it was truly a question of implying terms. In contrast what HMRC seek to establish in this case is that the behaviour and practice of the parties effectively supplies some of the contractual terms, and that the written terms are to be read in the light of this. That approach is consistent with the approach taken in *Carmichael*, and the question is one of fact.

140. Turning to the facts of this case, we first consider the documents and then go on to consider whether the terms that can be derived from them are added to, or affected by, oral communications or conduct.

Overarching contract: written terms

141. The Code of Practice and covering email amount to a written offer to include the referee on the National Group list for the relevant season, which the referee accepts by signing and returning the Code of Practice. The written terms, in the sense of the legal rights and obligations of the parties, can be found in various places in the Code of Practice, the Fitness Protocol (to which specific cross reference is made), the Declaration of Interests form (which must also be signed and returned), the merit payment document and (for 2015-16) the Code of Conduct. We also consider that some additional terms are supplied by the Match Day Procedures, which we have found exist to provide protection to PGMOL as well as the referees and competitions.

142. Although much of the documentation is written in terms of expectation rather than legal obligation, there are some provisions that we consider amount to express legally enforceable rights and obligations. From PGMOL's perspective, it agrees to include the referee on the list, to provide a system of continual assessment and feedback (along the lines indicated by the match assessor guidelines), to provide a training programme and a coaching system, and to provide match kit, health insurance and access to sports scientists. From the referees' perspective, they agree to act impartially, to declare conflicting interests and decline to act, and to declare gifts over a certain limit. They also agree not to enter into sponsorship or promotion arrangements or undertake media work except as permitted. In the fitness protocol,

whilst passing the fitness test is a qualification to join or remain on the list rather than an obligation on referees, PGMOL clearly undertakes to provide the opportunity for referees to be tested and reserves the right to require a re-test. As regards training, the document is largely in terms of recommendation or expectation, but there is an obligation on referees to inform their sports scientist immediately about injury and keep them updated about that. The Code of Practice also contains an obligation to attend meetings with coaches. The merit payment document is also written in terms of legal entitlement, providing a relatively clear formula for the distribution of the available amount. It has a clear link to the merit table, and therefore to the match assessor guidelines.

143. The Match Day Procedures document contains a number of obligations, for example about arrival time at grounds, turning off phones, behaving appropriately and reporting possible threats to integrity. The Code of Conduct also places obligations on referees, who specifically agree to comply with it. Whilst this code largely reflects obligations that referees owe the FA in any event, and the Match Day Procedures largely reflect competition requirements, they do amount to specific commitments to PGMOL.

Overarching contract: other terms

144. Apart from the merit payment document, the pre-season documents do not cover financial aspects. However, it is clear that match fee and expense rates are communicated by PGMOL, primarily at the annual conference, and that the amount of the attendance allowance for training would also have been communicated by it. In our view these amount to commitments by PGMOL that, if referees attend training or officiate at matches during their time on the National Group list, they will be paid fees and expenses at the rates specified.

145. Mr Nawbatt sought to argue that the reality of the arrangements meant that there was some legal obligation to provide work or accept work offered. We disagree. The terms of the Code of Practice are clear that there was no such obligation, and we do not think that this is overridden by the parties' conduct, the practical realities or (in *Autoclenz* terms) the true intentions of the parties. We accept that ordinarily an entity the function of which is to provide the services of a number of highly qualified individuals, from a limited pool of available talent, on a regular basis for important commercial events (here professional football matches) would wish to ensure that it can call on staff who have a legal commitment to work. However, this is not an ordinary situation. PGMOL is dealing with highly motivated individuals who are keen to referee at the highest level, and who generally wish to make themselves available as much as possible. There is no need for a legal obligation. The referees simply place obligations on themselves: see the discussion in paragraph 104 above. PGMOL has control over the size of the National Group and has doubtless tailored that to ensure that in practice it has a sufficient number of referees available, and that referees are generally content with the number of matches they are offered and accept. It is not surprising from this perspective that the question of the appropriate size of the National Group is covered in consultation discussions.

146. We have considered whether the existence of the merit payment arrangement must imply some level of obligation on PGMOL to offer match appointments. We do not consider that this is the case. In practice referees know the size of the National Group and (in rough terms) must have a good idea of the number of matches for which appointments are likely to be needed. At the very most, an obligation might be implied that, to the extent match appointments are offered, PGMOL will not adopt an overtly unfair method of allocation as between different referees who have made themselves available. However, that is speculation and we do not make any finding that there is such an obligation. The point could equally be explained by the fact that, if PGMOL does not adopt a fair approach in practice, then the reality is that it will start losing referees, or at least risk losing their goodwill.

147. Mr Nawbatt relied on *St Ives Plymouth Limited v Haggerty* and *Addison Lee v Gascoigne* to support his submission that the expectation of being offered work, resulting from the practice over a period of time, can result in a legal obligation to provide some work or perform work provided. *St Ives* was an unfair dismissal case brought by a casual worker, where the EAT held that the Employment Tribunal was entitled to conclude that there was sufficient mutuality of obligations in the gaps between individual employments (which were accepted as contracts of service) to infer the existence of an overarching contract of employment. The Tribunal found that there was no arrangement to offer or accept any specified minimum amount of work, and the worker could decline offers. However, based on conduct over a long period there was an expectation that the worker would be available, and if she persistently declined offers she would be removed from the list of casuals. There was also an expectation that she would be offered a reasonable amount of work. The EAT noted that a course of dealing may be capable of giving rise to mutual legal obligations, and concluded by a majority that there was a sufficient factual substratum to support a finding that a legal obligation had arisen in that case, as a matter of fact, based in part at least on commercial imperatives including the importance of the work to the employers, the regularity of the work, the lengthy period of the arrangements and the fact that the employer felt under an obligation to distribute the work fairly (paragraphs [26] to [30]).

148. In *Addison Lee* the principles discussed in *St Ives* were applied in a "limb (b) worker" status situation, with the EAT concluding that the requisite mutuality of obligation was established by the Tribunal's findings about established practice and expectations (paragraph [35]).

149. We did not find either of the cases to be of great assistance. Each case turns on its facts. In neither of those cases was there any express provision negating an obligation to provide or accept work. In this case there is. Referees' willingness to take on work is amply explained by their passion and personal ambition. PGMOL's regular offers of work is equally explained by the number of matches available and the limited pool of referees on the list. In *Autoclenz* terms there was nothing unreal, and no failure to reflect the parties' true intentions or agreement, in the statements in the Code of Practice that there was no guarantee that appointments would be offered and no obligation to accept any appointments. Both parties understood and accepted that.

150. In *Stevedoring & Haulage Services Ltd v Fuller and others* [2001] EWCA Civ 651, [2001] IRLR 627, where the question (as in *St Ives*) was whether casual workers were employees when not working, the documents under which casual work was offered expressly negated any obligation to offer or accept work. The Court of Appeal quashed the decision that the individuals were employees, on the basis that the documents flatly contradicted the terms that the Tribunal had implied to the effect that a reasonable amount of work would be offered and taken on. At best there was a moral obligation of loyalty and mutual economic interests (paragraphs [10] and [11]). In *Hafal Ltd v Lane-Angell* UKEAT/0107/17/JOJ, 8 June 2018, the EAT observed the obvious point that an expectation to provide work is not the same as an obligation, and noted that whilst expectations may crystallise over time into legal obligations, *St Ives* was a case where there were no express terms negating such obligations. The facts of *Hafal* were closer to those in *Stevedoring* and *Carmichael v National Power* and the documents showed that there was no obligation between periods of work (see paragraphs [29] and [33]). Similarly, in this case there were express terms negating any obligations to offer and take on work, and in our view those terms reflected the true agreement.

151. It follows that, whilst there were overarching contracts between PGMOL and National Group referees in respect of each season, those contracts were not themselves contracts of service, because there was no mutuality of obligation outside individual engagements: see *Usetech v Young* at [57], applying *Stevedoring* and *Carmichael v National Power* as well as *Clark v Oxfordshire Health Authority* [1998] IRLR 125 (CA). However, the question remains as to whether the individual engagements were contracts of service. In answering this question it is necessary to consider whether the existence of the overarching contract affects the analysis.

The relevance of the overarching contract: Windle

152. It is clear from *Windle v Secretary of State* that the nature of arrangements between periods of work, and in particular the presence or absence of mutuality of obligation, can shed light on the character of the relationship while work is being done. That case concerned interpreters providing services for courts and tribunals. The Court of Appeal held that the Employment Tribunal were right to take account of the absence of an umbrella contract involving a commitment to offer or accept work as a relevant factor in determining that the individuals were not employees within the extended definition of that concept for equality legislation purposes. Underhill LJ said the following at [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 ET 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."

153. Underhill LJ went on to note at [24] that Elias LJ had made a similar point in *Quashie*, where the question was whether there was a contract of service rather than whether the extended equality legislation concept applied, and said that the point was the same, albeit that the "pass mark" was lower in the latter case.

154. Underhill LJ commented on the same issue in the Court of Appeal decision in *Pimlico Plumbers* (a "limb (b) worker" case, so again considering an extended definition of employment), where he said at [145]:

> "It is necessary to distinguish two separate circumstances in which the issue of whether a putative employee/worker is engaged on a casual basis might arise. The first is where the substantive claim directly depends on their enjoying employee/worker status in respect of their periods of work (e.g. because the claim concerns their pay or some discriminatory treatment in the workplace). In such a case the question whether the engagement is casual is indeed relevant, but only on the basis that it may shed light on the nature of the relationship while the work in question is being done (see *Quashie v Stringfellow Restaurants Ltd* [2002] EWCA Civ 1735, [2013] IRLR 99, at paras. 10-13, and *Windle* at paras. 22-25). But it is not only legal obligations that may shed light of that kind. If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had (at least) worker status, even if the contract clearly (and genuinely) provided that there was no legal obligation either way in between the periods of work. The second situation is where the claim directly depends on the claimant's status during periods of non-work, either because he or she has to establish continuity of employment or because the claim itself relates to their treatment during that period: in such a case mutuality of legal obligations is essential."

155. For tax purposes, of course, we are concerned with the first circumstance referred to: HMRC will succeed if the referees are employed under contracts of service while they actually perform tasks. As can be seen from the passage quoted, in *Pimlico Plumbers* Underhill LJ was suggesting that a practice of being regularly offered and accepting work might weigh in favour of "at least" worker status, even if there was no legal obligation. In making that suggestion he seemed to be going further than he did in *Windle*.

156. In the Supreme Court decision in *Pimlico Plumbers*, Lord Wilson said the following at [41]:

> "So the tribunal found, legitimately, that there was an umbrella contract between Mr Smith and Pimlico. It is therefore unnecessary to consider the relevance to limb (b) status of a finding that contractual

> obligations subsisted only during assignments. The leading authority in this respect is now *Windle v Secretary of State for Justice* [2016] ICR 721, in which Underhill LJ suggested at para 23 that a person's lack of contractual obligation between assignments might indicate a lack of subordination consistent with the other party being no more than his client or customer. The energetic submission of Ms Monaghan QC on behalf of Mr Smith that, on the contrary, it might indicate a greater degree of subordination to that other party must await appraisal on another occasion."

157. This does not refer to Underhill LJ's wider reference in the Court of Appeal decision in *Pimlico Plumbers* to the position in practice, so the current status of those comments – and their application to contracts of service questions – is not entirely clear. In this case of course referees are generally regularly offered and regularly accept work for the reasons already discussed, but we have found that there were no legal obligations to do so. There were however some other legal obligations to which each party was subject under the overarching contract.

158. Ultimately, however, the test of whether an employment relationship exists is a multi-factorial one: *White and another v Troutbeck SA* [2013] IRLR 286 (EAT) at [34][10]. In our view the existence and terms of the overarching contracts, and indeed the wider context of the parties' relationship in practice, must be factors to which we should have regard in determining the nature of the individual match engagements. Those contracts are part of the relevant factual matrix.

The individual engagements and mutuality

159. In our view 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. Under the contract the referee would agree to officiate, whether as referee or Fourth Official, and PGMOL would agree to pay fees and expenses at the specified rates, subject to submission of a post-match report. These contracts existed in the context of the overarching season-long contracts. There was however no sanction if, having accepted an appointment, the referee was unable to get to the match. We do not think that anything in the documentation or the parties' conduct is consistent with non-attendance amounting to a breach of contract. Invariably, given referees' personal commitment levels, there would in practice be a good reason for the failure to attend. The referee clearly had no right to substitute another person to do the task. It was understood that if he could not attend then his appointment could and would be replaced by the appointment of another official. The particular contract would simply fall away (without sanction) and no match fee would be paid. Similarly, as indicated in Mr Riley's witness statement, it was understood that if PGMOL felt that it needed to do so, it could cancel a particular appointment and replace the referee with another person. In our view this would, again, not involve a breach of contract. The reference in Mr Riley's statement was in the context of integrity, and stated that there were processes allowing appointments to be changed by PGMOL if "risk factors" came to light. However, there was no suggestion that

[10] The EAT's decision was approved by the Court of Appeal at [2013] EWCA Civ 1171.

there was a contractual limit on PGMOL's rights in this respect, and in our view any decision about changing an appointment would be one that it was free to make if it felt that it was appropriate to do so. Subject to these points, during the actual engagement there would be some level of mutuality, 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.

160. In *Weight Watchers* Briggs J considered whether meeting leaders were employed for tax purposes. In relation to mutuality of obligation, he identified the question as not simply whether there is a contract, but whether the mutual obligations are "sufficiently work-related" (paragraph [23]). He noted at paragraph [30] that contracts for discontinuous work might either comprise single overarching contracts, a series of discrete contracts, or a hybrid class consisting of an overarching contract in relation to some matters supplemented by discrete contracts for each period of work. In that third case it was sufficient if either the overarching contract or the discrete contracts are contracts of employment. Where the period of a discrete contract coincided with the period of work, there was no difficulty in demonstrating mutuality under that contract. However, in *Weight Watchers* each discrete contract was for a series of separate meetings, and in that case the relevant mutuality of obligation needed to subsist during the whole period of that contract (paragraph [31]).

161. This is a case within Briggs J's third category, so it is sufficient for there to be mutuality during each discrete contract for work done. However, although not on all fours with the facts of *Weight Watchers*, it is in our view relevant that the discrete contract started when an individual match appointment was offered and accepted, and that even after acceptance the referee had the ability to withdraw from the engagement before he arrived at the ground, and that PGMOL was also able to cancel the appointment. By contrast in *Weight Watchers*, where an employment relationship was found to exist, there was some obligation on the leader to not take meetings only for good reasons, to try to find a suitable replacement, and if that failed to give as much notice as possible, the leader's original obligation to work only ceasing when a replacement leader was found or the meeting was cancelled. The right not to take a meeting was therefore fettered (see paragraphs [89] and [92]).

162. A comparison can also be made with the facts of *Cornwall County Council v Prater* [2006] EWCA Civ 102, [2006] ICR 731, where a teacher engaged under a series of individual contracts to teach children unable to attend school was held to be employed, each engagement in respect of a particular child being a contract of service. The teacher was committed to teach the child in question for the duration of the engagement or for so long as was necessary. Mummery LJ said at [40]:

> "The important point is that, once a contract was entered into and while that contract continued, [the teacher] was under an obligation to teach the pupil and the council was under an obligation to pay her for teaching the pupil…"

In this case there is no comparable obligation, outside the actual performance of duties at a match.

Control

163. In order for individual engagements to be contracts of employment, there must not only be mutuality but also a "sufficient framework" of control in relation to that engagement (*Montgomery v Johnson Underwood* at [19]). This means some contractual right of control, in the sense of the employer having the right to step in, even if that right is not exercised in practice and even if the individual is engaged to exercise his or her own judgment about how to do the work: see *White and another v Troutbeck SA* (EAT) at [40] to [42].

164. Mr Maugham submitted that the control that existed was regulatory control rather than control resting with PGMOL, and that during engagements referees, like clergy, were beyond control. Mr Nawbatt submitted that there was a sufficient degree of control, including via the assessment and coaching system as well as controls imposed by the documents.

165. We agree that the pre-season documents, including the fitness protocol, the Match Day Procedures document and (for 2015-16) the Code of Conduct, imposed some obligations on referees which gave PGMOL elements of control. Some of those obligations applied to match day activity (most obviously the Match Day Procedures) and were therefore relevant to individual match appointments. Others, such as contact with the sports scientist, clearly did not apply in respect of individual match appointments. Although referees were and are undoubtedly subject to both FA and competition rules and regulations while at a match, we have found that they also owed direct commitments to PGMOL by virtue of the terms of the pre-season documents.

166. We are not persuaded that the assessment and coaching systems themselves provide further elements of control in respect of individual match appointments. While 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, it is advisory rather than controlling in nature. Similarly, the coaching system is very much a personal, one to one, arrangement designed to support referees and assist them to develop to the best of their ability. A coach present at a match might offer advice at half time as well as before or after, but that is simply advice and not an indicator of control.

167. Although some referees suggested in HMRC's interviews that they had no control over where they were sent for matches, we do not think that that is correct in a legal sense. They had the right not only to express geographical preferences on MOAS but also to refuse any particular appointment once it was offered, or even to back out later. They might well not have wanted to do that for their own reasons, but legally they were free to do so. This was not the sort of arrangement under which PGMOL could direct the referees about where to go or when to go there, or indeed what task to perform when they got there (whether as referee, Fourth Official or indeed anything else). In each case the referees needed to agree to take on a particular task at a specified location, date and time. Clearly referees had to travel to the location to carry out at the appointment, but that was determined by the nature of the task they had agreed to take on rather than by any form of control in an employment sense.

168. Whilst we would not go so far as to compare referees to clergy, it is relevant to consider the nature of the role. The referee is undoubtedly the person in charge on match day, he has full authority and his decisions are final. Fourth Officials answer to, and work with, the referee, whoever that referee is and whether he is employed by PGMOL or not. The Code of Practice also recognises that the FA alone will deal with breaches of its Referee Regulations. 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 Mr Riley, or anyone else 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. In our view this is the case despite the undoubted fact that the referee might be officiating in a critical match at which large sums are at stake (for example, where the match is relevant to a club's promotion or relegation between leagues). The Laws of the Game make clear that the referee's decision is final, and there 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.

169. Overall, we are not persuaded that PGMOL had a sufficient degree of control during (and in respect of) the individual engagements to satisfy the test of an employment relationship. 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.

The third condition and other approaches

170. The third condition referred to by MacKenna J in *Ready Mixed Concrete* is that, as well as there being mutuality of obligation and sufficient control, the other provisions of the contract are consistent with it being a contract of service. MacKenna J referred (at [1968] 2 QB 497, 516) to examples illustrating the distinction between contracts to build or carry goods, and contracts to work for a builder or to work for someone on terms that the individual provided his own transport (the latter examples being employment). The fact that there is some element of control does not mean that there is necessarily a contract of service. Simplistically, the equivalent here would be to say that a referee is engaged to officiate at a particular match, rather than to work for PGMOL under its control.

171. We have considered the various other tests of employment status referred to at paragraph 18 above. As Nolan LJ suggested in *Hall v Lorimer* ([1994] 1 WLR 209 at 218, the test of whether a person is in business on his own account is not necessarily very illuminating where a profession or vocation is concerned. This is not a case where it is straightforward to point, for example, to the fact that the individual

supplies his own equipment, because a referee needs relatively limited equipment. Like an actor, surgeon or other professional, there may also be limited financial risk, in the sense of risk of loss, and earnings may be driven largely by how much work is done and the quality of the work obtained.

172. With these caveats, we have considered the fact that National Group referees were supplied with some equipment by PGMOL but also supplied some of their own equipment at their own expense, that the profits they made could increase with the work done, not only because they would receive increased income but because their (relatively fixed) expenses would represent a smaller proportion of total revenue. However, referees could not really be said to have set up their own "business-like organisations" (as referred to by Mummery J in the High Court in *Hall v Lorimer*) and they had no ability to negotiate individual fee rates. There was a very low risk of loss. But the fees were fixed for the task, irrespective of the number of hours spent, so to some extent referees could manage the total time spent and increase their ability to take on further commitments by doing so. They also had full responsibility for managing their own fitness and for pre-match preparation. In addition, by officiating at more matches they would also obtain a greater return on overall time spent, bearing in mind that they were not paid for their own fitness training.

173. To the extent relevant, PGMOL and, for the most part, the referees did not consider that the relationship was one of employment. However, the referees did officiate wholly or substantially for a single engager, with a significant degree of continuity in most cases, and generally also performed a significant number of engagements for PGMOL involving a material commitment in terms of hours worked. It is also the case that the referees were relatively integrated into the PGMOL organisation, being seen as "part and parcel" of the PGMOL organisation. We are mindful of Nolan LJ's suggestion in *Hall v Lorimer* (at page 218) that, for an individual who carries on a profession or vocation, the extent to which he is dependent or independent of a particular paymaster for the exploitation of his talents may well be significant. In this case that factor would point towards employment status.

174. Standing back as we are required to do, our conclusion is that there was insufficient mutuality of obligation and control in the individual engagements to amount to employment, even though the level of integration, the hours worked, the fact that the referees could not obviously be described to be in business on their own account and the fact that PGMOL was their only or primary paymaster in their refereeing activities, are elements that may be suggestive of an employment relationship. Our conclusion is that individual appointments to matches were engagements to perform the task of officiating at the match in question for a fee, and not contracts of service.

Whether PGMOL was correctly assessed

175. Mr Maugham submitted that, even if PGMOL had an employment relationship with the referees, it was not liable for PAYE and NICs. Given our conclusion that

there was no employment relationship it is not strictly necessary to address this point, but we will make some comments in case the issue becomes relevant on any appeal.

176. For PAYE purposes, Mr Maugham submitted that regulation 21 of the Income Tax (Pay As You Earn) Regulations 2003 ("regulation 21") imposes obligations to deduct tax on the employer only when the employer makes the relevant payment. This is modified by s 687 ITEPA, which provides that where an "intermediary" makes a payment the employer is to be treated as making that payment for the purposes of the PAYE regulations. So far as relevant here, "intermediary" is defined as a person acting "on behalf of the employer and at the expense of the employer". Mr Maugham argued that the EFL was making payments to referees as principal, under its Standing Orders, and so was not an intermediary. Mr Nawbatt submitted that the EFL did fall within s 687, but that *R (oao Oriel Support Ltd) v HMRC* [2009] STC 1397 also showed that it was not necessary to go that far.

177. We do not propose to comment on the *Oriel* case, beyond noting that whilst the thrust of the reasoning – that PAYE in respect of payments received by employees in their capacity as such should be accounted for under the PAYE reference of the employer and not that of a third party – appears supportive of HMRC's position, the issue in that case was different, and in particular it was not disputed that the relevant employer was under a liability to account for PAYE. However, we do consider that the EFL was making payments "on behalf of and at the expense of" PGMOL, so that s 687 ITEPA would in any event apply. We have concluded that the payment process was simply payment processing machinery. The expense was borne by PGMOL through the recharge, and we also consider that the EFL made the payments on behalf of PGMOL, discharging its liability. The statement about payment in the EFL's Standing Orders is no more than a factual description of the payment arrangements.

178. The position in relation to FA Cup matches is less clear. For relevant periods payments were made by the FA and not recharged to PGMOL. It was confirmed in submissions at the end of the hearing that these amounts are not reflected in the regulation 80 determinations and section 8 decisions (although it was not disputed that the Tribunal has power to increase them if appropriate). However, Mr Maugham also accepted that the burden was on PGMOL to show that these payments were not at PGMOL's expense, and conceded that it had not produced evidence to do so.

179. For NIC purposes it is clear that the basic rule is that the employer is liable whether or not it makes the relevant payment, unless that is altered by a specific rule. PGMOL's case, as developed during the hearing, was that paragraph 2 of Schedule 3 of the Social Security (Categorisation of Earners) Regulations 1978 was such a rule and applied here. However, this analysis would require PGMOL to be treated as an "end client" and the EFL as a "UK agency", with the referee providing services to PGMOL "under or in consequence of" a contract between PGMOL and the EFL. This does not seem to us to be an apt description of the arrangements: referees provide their services to PGMOL under the contracts they have with PGMOL. The fact that PGMOL would not need these services but for its commitments to the EFL (and its commitments to its other members) is in our view not sufficient to alter the analysis.

Disposition

180. We have concluded that the National Group referees were not employed under contracts of service during the periods under appeal, and therefore the appeal is allowed.

181. 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 against it pursuant to Rule 39 of the Tribunal Rules. 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.

SARAH FALK
TRIBUNAL JUDGE
RELEASE DATE: 30 August 2018