Analysis

The Court of Appeal's ruling in *PGMOL*: seven lessons on mutuality of obligation

Speed read

On 17 September 2021, the Court of Appeal handed down its much-awaited decision in the case of *HMRC* v *Professional Game Match Officials Ltd*. Having lost before the FTT and UT, HMRC succeeded in persuading the Court of Appeal that the FTT erred in law in its approach to the question of mutuality of obligation in the referees' match by match contracts. But the question remains: what constitutes sufficient mutuality of obligation for the purposes of the *Ready Mixed Concrete* test? Rather than tackling that question head-on, the court remitted the case to the FTT to determine this, as well as a separate point about control. But, as things stand, HMRC would not be correct to argue that there is sufficient mutuality of obligation just because there has been payment for work done; the content and extent of the mutual obligations will still be relevant in the overall evaluation of the contract.

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PGMOL, the body that provides football referees to the Premier League and Championship, has come up against HMRC in a third round to determine the employment status of its National Group referees. HMRC assessed PGMOL on the basis that the referees, who largely have full-time jobs and referee as a hobby (albeit an obsessive one) in their spare time, are employees. PGMOL, which accepts that the referees are workers, has argued that the referees are self-employed. For present purposes, it is relevant that the match officials were found to enter into a season-long overarching contract with PGMOL as well as individual contracts each time they accepted an engagement to officiate a match. The First-tier Tribunal (*Professional Game Match Officials Ltd v HMRC* [2018] UKFTT 528 (TC)) found that there was no mutuality of obligation in the overarching contract and insufficient mutuality of obligation within the individual contracts to establish an employment relationship. This was upheld by the Upper Tribunal ([2020] UKUT 147 (TCC)).

What started as a case about the employment status of some referees has raised some probing questions about the mutuality of obligation limb of the *Ready Mixed Concrete* test. To recap, the test set out by MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 ('*RMC*') (at 515C) is that 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 of his master. More specifically, the engager must be obliged to offer some work (although paying a retainer in lieu would suffice) and the individual must be obliged to accept some work (see *Nethermere (St Neots) Ltd v Taverna and Gardiner* [1984] ICR 612 at paras 18–20).

So far, so simple. However, as working relations have developed, the test has been adapted to fit various situations across both the tax and employment fields. One key development has been the means of analysing relationships as being governed by overarching contracts, which might stretch over the entire course of a football season (as here) but which, being mere framework agreements, are supplemented by individual contracts each and every time the individual is engaged (here, the individual engagement was found to start when the match official accepted the match assignment and ended on submission of the match report). In the tax sphere, it is sufficient for HMRC's purposes if either the overarching contract or individual contract is one of service, as long as that is the contract pursuant to which the sums in issue were paid.

Another complication of this arrangement is that whilst there may well be written terms governing the overarching contract (as here), there will rarely be written terms governing the individual contracts. Therefore, in analysing that contract to ascertain whether there is an *obligation* on the employer to provide work and an *obligation* on the individual to accept, the tribunal may not be assisted by written terms. Is it enough, then, that the individual did, as a matter of fact, perform services and the engager did, as a matter of fact, pay them? The FTT and UT found that it was not. On appeal, HMRC argued before the Court of Appeal (*Professional Game Match Officials Ltd v HMRC* [2021] EWCA Civ 1370) that all that was required to fulfil the first limb of the *RMC* test was that the individual performed services personally and that he was paid for those services. Further, HMRC argued that it was irrelevant that either side could walk away without sanction as all the material contracts before the tribunal (pursuant to which match fees were paid) were fulfilled. PGMOL, on the other hand, argued that the fact of performance tells you nothing about the obligations, only what happened in retrospect. To understand the nature of the obligations in the individual contract, the fact that either side could choose not to fulfil the contract without sanction was highly material: it suggested that there was insufficient obligation on either party to begin with.

What did the Court of Appeal decide on this key issue?

The court agreed with HMRC that the FTT had erred in law in its analysis of the individual contracts and therefore allowed the appeal. Specifically, the fact that both sides could withdraw before performance of the contract did not negate the existence of a contract or of mutuality of obligation under a contract ([2021]

EWCA Civ 1370 at paras 122 and 125); indeed, the court saw such a factor as 'immaterial' as the contract and its mutual obligations continue unless and until terminated (at para 122). However, neither did the court accept HMRC's view of mutuality of obligation: it remitted the case to the FTT to determine whether, notwithstanding the fact that there had been payment for work personally performed, there was 'sufficient' mutuality of obligation within each individual contract to found a contract of employment (at para 133). The bad news is that the court offered no guidance to the FTT as to what 'sufficient' mutuality of obligation means. But take comfort: the good news is that it is not enough for HMRC to argue that the first *RMC* limb has been met simply because there has been payment for work done. All the circumstances will be relevant in seeking to classify the contract, and this includes the absence of mutual obligations in the overarching contract and any gaps between engagements (see para 121 and *Windle v Secretary of State for Justice* [2016] EWCA (Civ) 459).

What else did the Court of Appeal decide?

There were two other main issues on appeal: mutuality of obligation in the overarching contract, and control.

The Court of Appeal rejected HMRC's appeal against the findings of the FTT and UT as regards mutuality of obligation in the overarching contract. HMRC argued that an exclusion clause (providing that there was no guarantee of matches and no obligation to accept matches) did not reflect the reality as PGMOL had to provide referees to the top flight matches such that either the exclusion clause did not reflect the true agreement or the contract should be interpreted in a realistic and worldly-wise way such that 'expectations' of matches should be read as obligations to provide and referee them. This was rejected by the FTT, which found that PGMOL was dealing with highly motivated individuals, keen to referee at the highest level, and who wished to make themselves available for work as much as possible. In the circumstances, there was no need for a legal obligation to offer or accept work: the referees simply placed those obligations on themselves. And the express term in the overarching contract negating any obligation on PGMOL to offer and on NGRs to accept work reflected the true agreement. This was upheld by the UT and Court of Appeal, which held that this was a finding of fact open to the FTT to make.

The argument on control is also important. The FTT found that PGMOL did not have a sufficient degree of control in the individual engagements to satisfy the test (see paras 165-169 of that decision). HMRC appealed to the UT, arguing that the FTT erred in law in focusing impermissibly on (a) PGMOL's inability to step in during the 90 minutes of a match and (b) the absence of a mechanism enabling PGMOL to exercise any right of control during an engagement. The UT allowed that appeal, finding that:

- a practical limitation on the ability to interfere in the real-time performance of a task by a specialist, whether that be as a surgeon, a footballer or a live broadcaster, does not of itself mean that there is not sufficient control to create an employment relationship (at para 135 of that decision); and
- what mattered was the right to give directions or impose sanctions, even if these were enforced after the contract had ended (at para 138).

But the UT did not determine the matter, instead again remitting to the FTT to reconsider the question of control.

The Court of Appeal (considering PGMOL's challenge) confirmed the UT's decision to remit, holding that the FTT seemed to treat PGMOL's inability to step in during an engagement as a decisive consideration when it should have asked whether the relationship between the parties (including the terms of the overarching contract) constituted a sufficient framework of control (see para 126).

Why does this case matter?

This case matters for two main reasons. First, it is relevant not just for the National Group referees and the referees below them in the refereeing pyramid, but potentially for referees and match officials in other sports and, more pertinently, anyone who engages or works under a series of individual contracts and is only paid for the services they perform.

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Second, it may yet provide some much needed clarity on the mutuality of obligation test. The *RMC* test has been rightly praised for its flexibility and applicability. But the ever-evolving landscape of employment means that the test has been applied and adapted across different contractual relationships, fact patterns, and disciplines (tax and employment). In that process, the term 'mutuality of obligation' has been used to mean different things in different contexts, with the result that the authorities do not speak with one voice about what is required under this limb. Whilst worker status has been a hot topic with two cases (*Pimlico Plumbers Ltd v Smith* [2018] UKSC 29 and *Uber BV v Aslam* [2021] UKSC 5) reaching the Supreme Court in recent years, employment status has not been considered at that level for some time. As a result, there is a lack of guidance as to the requirements of the test and how tribunals are to apply it in practice. The Court of Appeal declined the invitation to provide guidance in this area, but it remains to be seen whether the case is to be considered by the Supreme Court.

What can we take from this in the meantime?

Here are our seven pointers for tax practitioners advising clients on the mutuality of obligation requirement of employment status.

1. **Consider the type of contract governing the services**. Is the relationship in question governed by an overarching contract, individual contracts each time the work is performed, or both? If the sums in question were paid pursuant to the individual contract, this will be the material one for HMRC's purposes, but the terms of the overarching contract will be relevant (whether they be terms relevant to mutuality of obligation or control).
2. **Establish the terms of the overarching contract.** These may well be written. If they are not written,

perhaps the relationship is not governed by a contract but something altogether looser.

3. **Establish exclusion clauses.** If there is an exclusion clause in the overarching contract (stipulating that there is no obligation to offer work and no obligation to accept work), establish that this reflected the true agreement between the parties. Witness evidence will be relevant, as well as examples of people who were engaged under the contract but performed no services.
4. **Establish the parameters of the individual contract.** When was the gig offered? When was it accepted? The offer might be the circulation of the shift rota, the acceptance might not be until the worker shows for the shift, or it might be when s/he emails to confirm receipt. When is the contract completed? This might be with submission of time sheets.

The terms of the overarching contract and gaps between assignments are all relevant in considering mutuality of obligation and seeking to classify the contract

5. **Establish the terms of the individual contract.** The overarching contract might stipulate some terms for the individual contract. For example, some contracts provide that there is no obligation to accept an assignment but, once accepted, the individual must complete the assignment. In circumstances where there is no written contract, taxpayers might lead evidence from either party as to what they understood the terms to be. This might reveal something about the nature of the obligations entered into. For example, if someone expects to be paid a full shift once it has been accepted, even if there is insufficient work, this is a stronger indication of employment than someone who is only paid for work actually done.
6. **Do these represent the true agreement between the parties?** Following *Uber BV v Aslam* [2021] UKSC 5, it is more important than ever that taxpayers lead evidence to support any contractual terms they do rely on, or adduce evidence to demonstrate that a given term did not reflect the true agreement. If there is a substitution clause, it will have to be shown to be genuine. Evidence that it has been used will be essential. If there is an exclusion clause, HMRC may well seek to argue that it is unrealistic and did not represent the reality of the relationship. Explain why this is not the case.
7. **Present the complete picture.** The terms of the overarching contract and gaps between assignments are all relevant in considering mutuality of obligation and seeking to classify the contract. ■

Note: the authors were instructed to act for the taxpayer in this case.

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- Cases: *HMRC v Professional Game Match Officials Ltd* (21.9.21)
- IR35: why (and when) mutuality of obligation matters (D Francis, 9.7.20)
- *Professional Game Match Officials*: clarity on mutuality of obligation (S Groom, 12.5.20)
- Paint me a picture: employment or self-employment? (S Pevsner, 14.2.20)
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