

The employment implications and tax status of English football referees: *Commissioners for HM Revenue and Customs v Professional Game Match Officials Ltd* [2021] EWCA Civ 1370

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Abstract

In September 2021, the Court of Appeal in England and Wales delivered its judgment in the case of *Commissioners for HM Revenue and Customs v Professional Game Match Officials* [2021] EWCA Civ 1370 (hereafter PGMOL). The case concerned the employment status of referees who officiate in the men's professional game. The First-Tier Tribunal of the Tax and Chancery Chamber (FTT) had allowed PGMOL's appeal against the Revenue's determination that a certain class of part-time referees were the employees of PGMOL under s. 4(1) of the Income Tax (Earnings and Pensions) Act 2003, and that income tax and employer's national insurance contributions should be deducted from the payments that PGMOL made to them in 2013–2016. On the Revenue's appeal, the Upper Tribunal (UT) upheld the FTT's decision on 6 May 2020. The Revenue further appealed.

Keywords

Taxation, employment, mutuality of obligation, control, football, referees

Case: *Commissioners for HM Revenue and Customs v Professional Game Match Officials Ltd* [2021] EWCA Civ 1370. This case was appealed to the UK Supreme Court and was heard on 26 and 27 June 2023.

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Introduction

In September 2021, the Court of Appeal of England and Wales delivered its judgment in the case of *Commissioners for HM Revenue v Customs Professional Game Match Officials* [2021] EWCA Civ 1370 (hereafter *PGMOL*).¹ The case concerned the employment status of football referees who officiate in the men's professional game. The First-Tier Tribunal of the Tax and Chancery Chamber (FTT) had allowed PGMOL's appeal against the Revenue's determination² that a certain class of part-time referees were the employees of PGMOL under s. 4(1) of the Income Tax (Earnings and Pensions) Act 2003, and that income tax and employer's national insurance contributions should be deducted from the payments that PGMOL made to them in 2013–2016. On the Revenue's appeal, the Upper Tribunal (UT) upheld the FTT's decision on 6 May 2020. The Revenue further appealed. This article considers that decision.

The background

Briefly, the case concerns the employment and tax status of referees who officiate primarily at matches involving the 52 clubs in levels three and four in the professional men's game of England and Wales (EFL 1 and EFL 2). There are approximately sixty referees who are directly affected. The relevant Codes of Practice stated that a referee in this category was not an employee of PGMOL and would be treated as self-employed.³ They were part-time, their work was 'a hobby, albeit a very serious one' and, as the general manager of PGMOL told the Court, what they earn 'does not pay the bills.'⁴ They were paid match-fees and expenses, but unlike the referees who officiate at the two highest levels of the professional pyramid (the FA Premier League and the English Football League Championship) they were not paid a salary.

During a match the referee 'has full authority to enforce the Laws of the Game...his decision is final'⁵ (they are all men), and the Revenue contended that notwithstanding the referees' part-time status and the absence of a salary, the degree of control that PGMOL exercised over its match officials meant they were employees and PGMOL should have deducted income tax and national insurance from the payments it makes to referees. Given the small sums paid to those officials (in contrast to Premier League referees, who are employees and can earn over £100,000 a year through base salary and match fees), there is a legitimate concern within PGMOL that many of the referees lower down the scale will stop doing so if those sums are deducted.

The obligations imposed on the referees and the levels of control exercised by PGMOL are extensive. Indeed, they are so extensive that the Revenue has a valid point so far as the issue of control is concerned. For example, while referees are bound by the rules of the English Football Association, the national governing body, they are also bound by the rules of PGMOL – which is responsible for their recruitment, training, and career progression.⁶ Reports on performance from independent assessors and participating clubs form the basis of PGMOL's continual assessment and contribute to a merit table which is then used to determine performance-related

1. *Commissioners for HM Revenue and Customs v Professional Game Match Officials Ltd* [2021] EWCA Civ 1370.

2. Under the Income Tax (Pay as You Earn) Regulations 2003, SI 2003/2682.

3. *Commissioners* (n 1), para 27.

4. *Ibid*, para 20.

5. *Ibid*, para 17.

6. *Ibid*, paras 12–20.

bonuses. Those assessments also inform the decisions that PGMOL makes on promotion and demotion. Their fitness levels are continually monitored, and these can also be a basis for demotion. Through PGMOL, referees are provided with the services of a sports scientist and receive one-to-one support from coaches who 'will discuss areas for improvements and targets. A coach may give advice before and after a match, and at half-time, and might make a written report... Most referees will ring their coach after a game to discuss it.'⁷ Medical insurance, cardiac screening and psychological support are provided, as are match and training kits, suits, branded ties and coats which have to be worn during travel to games, and the communications equipment which allows officials to communicate with each other during a game. The referees supply their own footwear, watches, red and yellow cards and whistles for use on match days. Computers, gym subscriptions, nutritional supplements, subscription TV packages and sports massages are all personally paid for too.⁸ If tax and national insurance are deducted, the cost of those could easily outstrip the matchday payments.

Further control is exercised via the Match Official Administration System (MOAS), an online facility where referees state what dates they are not available, set geographical limits on where they could officiate and to accept or reject the appointments offered. This is also used to inform referees of their next assignment. Partly in order to restrict the possibility of illegal approaches from potential match-fixers, referees are usually informed on Monday of their commitment for the forthcoming weekend.

The FTT noted that:

Once appointments are allocated, referees can accept them on MOAS. They can reject an appointment if they are no longer available although PGMOL will want to understand why. Changes can be made after an appointment is accepted (a referee may suddenly get ill, or have an unexpected work commitment). If a referee does not attend, he is not paid a match fee. PGMOL can cancel an appointment too, if for example, a referee has 'unhelpful media attention' or there was a risk that his integrity might be seen as compromised. PGMOL, not the referee, chooses a substitute.⁹

In establishing the nature of the relationship, both the FTT and, on appeal, the UT had considered whether there was an overarching contract between PGMOL and the individual referees that lasted for the whole of the domestic football season (roughly, early August to late April), and, thereafter, whether the contracts for individual matches were contracts of employment. Having considered the classic description of a contract of employment in English law as laid down by Mackenna J., in *Ready Mixed Concrete*¹⁰ (*RMC*), the FTT had held that there was both an overarching season-long contract and a series of individual contracts. But it also held that in neither contract was there sufficient mutuality of obligation to satisfy the first limb of the *RMC* test for establishing somebody's status as an employee, namely, that 'in consideration of a wage or other remuneration (the servant) will provide his own work and skill in the performance of some service for the master.'¹¹ It did not make a finding on whether the second limb of *RMC* ('he agrees...that...he will be subject to the other's control') was satisfied in the overarching contract, but it did hold

7. *Ibid*, para 23.

8. *Ibid* para 24.

9. *Ibid* para 21.

10. *Ready Mixed Concrete v Minster of Pensions* [1968] QB 479.

11. *Ibid*, [515].

that in any event there was not a sufficient degree of control in the individual contracts for those to be contracts of employment. The UT upheld the FTT's decisions in respect of mutuality of obligation, and as a matter of law the absence of mutuality of obligation means that the contract cannot be a contract of employment. However, it held that the FTT had erred in law on the issue of control within those individual contracts. This raised the possibility that while the overarching contract might not be a contract of employment, the individual contracts for individual matches could be.

On the Revenue's further appeal, the Court of Appeal thus considered whether the FTT had erred in law in its conclusions about i) mutuality of obligation in the overarching and/or individual contracts and ii) control in the overarching contracts. It also considered whether the UT had erred in law in its conclusions that i) the TFF had not erred in law on the issue of mutuality but ii) had erred in law on the question of control in the individual contracts.

The Court of Appeal's analysis of the tribunal decisions

In the Court of Appeal, Lady Justice Laing noted that where an employee works seasonally or intermittently, in order to show continuity of employment 'he may need to establish...that his relationship with his employer was governed by an overarching contract during the periods when he is not actually working.'¹² Having reviewed the Supreme Court authorities on overarching contracts,¹³ she further noted¹⁴ that in the Court of Appeal's decision in *Prater*¹⁵ Mummery LJ had concluded that 'simply working hard on a regular basis under a series of short engagements one after the other was not enough...There had to be a continuing obligation to guarantee and provide *more* work and an obligation on the workers to do *that* work.' She also noted that the appeal concerned i) whether a contractual provision which allowed one side or the other to terminate it before performance negated the mutuality of obligation; and ii) what degree of 'control' was necessary for there to be a contract of employment. On the first point, she held that 'such a provision does not negate mutuality of obligation. Unless and until the option to bring the contract to an end is exercised, the contract subsists with its mutual obligations.'¹⁶ On the second, she stated 'I agree with the UT that the FTT directed itself correctly...there must be a "sufficient framework of control" ... in the sense of "ultimate authority" rather than there necessarily being day-to-day control in practice.'¹⁷

The Court of Appeal analysed the FTT's turgid legal reasoning at very considerable length¹⁸ before considering its 'overall conclusion was that there was "insufficient mutuality of obligation and control in the individual engagements to amount to employment" (notwithstanding) elements that may be suggestive of an employment relationship.' Those elements included the levels of integration with PGMOL's business, the hours worked, the fact that they were not in business on their own account and the fact that PGMOL was their only or primary paymaster in their refereeing activities.¹⁹

12. *Commissioners for HM Revenue and Customs* (n 1), para 48.

13. *McMeechan v Secretary of State for employment* [1997] ICR 549; *Clark v Oxfordshire Health Authority* [1998] IRLR 125; *Carmichael v National Power plc* [1999] 1 WLR 2042.

14. *Commissioners for HM Revenue and Customs* (n 1), para 66.

15. *Prater v Cornwall County Council* [2006] EWCA Civ 102, para 30 emphasis in original.

16. *Commissioners for HM Revenue and Customs* (n 1), para 68.

17. *Ibid*, para 69 per *Montgomery v Underwood* [2001] EWCA Civ 318 para 19.

18. *Commissioners for HM Revenue and Customs* (n 1), paras 70–92.

19. *Ibid*, para 91.

It then analysed the UT's equally turgid reasoning at similar length.²⁰ It noted that on the question of mutuality, the UT 'had rejected HMRC's argument that the mutuality requirement was irrelevant to the categorisation of the contract as one for employment or for services, beyond merely requiring that the services be performed personally'. On the contrary, 'it is an essential requirement in categorising a contract as one of employment'.²¹ On the content of the obligations, the UT had concluded that 'the minimum obligation on an employee is to perform at least some work and to do it personally.' While in some situations an employee could refuse to work without breaching the contract, 'it (would be) inconsistent with that obligation...if an employee can, without breaching the contract, decide never to turn up for work.' Relatedly, the obligation on the employer was 'to provide work, or in the alternative... some sort of consideration...in the absence of work.'²²

Second, on the overarching contracts, the court noted that the UT had also decided the FTT had been 'clearly correct to conclude, as a matter of law, that in the absence of an obligation on PGMOL to provide at least some work... or in the absence of an obligation on the referee to undertake at least some work, there would be insufficient mutuality of obligation to characterise the overarching contract as a contract of employment,' and that the 'expectations' on the parties were not the same as 'obligations.'²³

Third, on the matter of the individual contracts the UT had already decided that mutuality of obligation was 'a critical element in delineating a contract of service from a contract for services.' The UT did 'not accept that a contract which provides merely that a worker will be paid for such work as he or she performs contains the mutuality of obligation to render it a contract of service: the worker is not under an obligation to do any work and the counterparty is not under an obligation (to provide either work or valuable consideration in lieu of it).'²⁴ PGMOL's obligation to pay referees for work done was enough to create a contract, but it was not one of employment,²⁵ and the referee's right to withdraw before performance 'was a further factor that negated mutuality of obligation.'²⁶

Fourth, although its findings on mutuality in the overarching and individual contracts rendered the issue of control irrelevant, the UT had considered the matter because it had been extensively argued by the parties. It held that the FTT's relying on PGMOL's inability to 'step in' if a referee was doing badly while officiating a game, and the fact that it could only impose sanctions after a match has ended, were irrelevant to the issue of control. The FTT had also erred in saying that because PGMOL's only remedy was to end the contract if an issue emerged (such as illness or integrity concerns) between the referee's appointment and the match being played, there was no control 'during an engagement'. 'On the contrary, in such a case PGMOL would be stepping in *during* the period of the contract.' The FTT had been wrong to say that PGMOL was unable to impose any sanction during the period of the contract,²⁷ but the UT's findings on mutuality meant it was not necessary for it to reach a decision on the sufficiency of control.

20. *Ibid*, paras 93–117.

21. *Ibid*, para 100 per para 19 of the UT ruling.

22. *Ibid*, para 104 per paras 68–70 of the UT ruling.

23. *Ibid*, para 105.

24. *Ibid*, para 106 per para 100 of the UT ruling.

25. *Ibid*, para 108.

26. *Ibid*, para 109.

27. *Ibid*, para 116 per para 140 of the UT ruling.

The Court of Appeal's ruling

Having devoted over 100 paragraphs to the Tribunals' rulings, the Court's ultimate disposal was mercifully shorter.

On mutuality of obligation, it noted that *McMeechan* and the other authorities 'do not support any suggestion that the criterion of mutuality of obligation is the sole, qualifying test for the existence of a contract of employment, so that if there is some mutuality, but it is not the right sort of mutuality, there can be no contract of employment.' It was necessary to 'look at all the circumstances in the round' before deciding whether a contract of employment existed.²⁸ There was no appeal against the FTT's conclusion that there was both an overarching contract and a series of individual contracts, it had been entitled to decide that the overarching contract was not one of employment because 'it did not require PGMOL to offer work, or the (referees) to do it,' and that was not a conclusion the UT or the Court of Appeal could interfere with as a point of law.²⁹ The UT had also been right to hold that the terms of the overarching contract were relevant to determining employment status under the individual contracts,³⁰ but 'in my judgment the FTT erred in law in deciding that the ability of either side to pull out before a game negated the necessary mutuality of obligation... if there is a contract, the fact that its terms permit either side to terminate the contract before it is performed, without breaching it, is immaterial. The contract subsists (with its mutual obligations) unless and until it is terminated by one side or the other.'³¹ Justice Laing went on to say that perhaps the parties' 'elaborate' submissions had then led the UT to 'overcomplicate that analysis'. Specifically, its reasoning:

Confuses 'a contract in the employment field' (which could be a contract of employment or a contract for services) with a contract of employment. It also wrongly elides the mutuality of obligation which is necessary to show that an overarching contract is a contract of employment with the mutuality which is necessary to show that a single engagement is a contract of employment.³²

The UT had erred in law by, first, concluding that the individual contracts could not be contracts of employment if they merely provided for a referee to be paid for the work he did and, second, by concluding that the mutuality of obligation which is necessary to found an overarching contract also applied to the individual engagements.³³ It also erred in upholding the FTT's conclusion that having a provision which allowed either side to withdraw before performance negated mutuality of obligation. For fixtures on a Saturday, 'a bilateral contract came into existence on the Monday when the referee accepted the offer on MOAS, and ended with the submission of the match report.'³⁴

On the question of control, the Court of Appeal decided the FTT had 'asked itself the wrong question' by considering whether PGMOL had even a theoretical right to step in when the referee was officiating. The FTT had already recognised that the referees' work was not amenable to that level of practical control; the issue was whether the relationship between them amounted to 'a sufficient framework of control.'³⁵ Contrary to what the FTT decided, the coaching and assessment systems

28. *Ibid*, para 118.

29. *Ibid*, para 120.

30. *Ibid*, para 121.

31. *Ibid*, para 122.

32. *Ibid*, para 123.

33. *Ibid*, para 124.

34. *Ibid*, para 125.

35. *Ibid*, para 126.

could be relevant to the question of control. Those systems gave PGMOL ‘a significant lever with which to influence’ the referees’ performance, while coaching – which involved discussing areas of improvement, setting performance targets and giving written reviews – could ‘influence a referee’s approach to decision in later games.’³⁶ Both could provide a ‘sufficient framework.’

The UT had thus wrongly decided that the FTT had been entitled to reach the decision it did on coaching and assessment. But it had also said the FTT had erred in law by saying that PGMOL’s inability to ‘step in’ or impose sanctions until after the match were relevant to an absence of control; that it was not open to the FTT to decide PGMOL was unable to impose any sanction during the period of an individual contract; and that the FTT had erred by not giving any, or any sufficient, weight to the elements of control conferred by the overarching contract.³⁷ The Court of Appeal agreed with the UT on those points, subject to two important qualifications.

First, the relevant cases ‘do not require that an employer’s directions be enforceable in the sense that there is an effective sanction for their breach.’ A contractual obligation ‘is by its very nature enforceable, if necessary by legal action.’³⁸ Employers did not have to be able to exert an immediate and tangible response in the event of their directions not being followed. Second, deciding how much weight to give to a relevant matter was a question for the first-instance decision maker and not open to review. In contrast, giving decisive weight to an irrelevant consideration – PGMOL’s inability to ‘step in’ and its supposed inability to apply sanctions during the currency of the contract – was reviewable. In that regard Justice Laing thought there were ‘many features’ of the relationship between the parties that could give a sufficient framework of control, especially when the overarching contract was taken into account. These included PGMOL’s power to promote and demote, the merit payments, the fitness and training protocols, and the terms and expectations under various Codes of Practice and FA Regulations.³⁹

HMRC’s appeal was allowed, and the case was remitted to the FTT for it to consider, on the basis of its initial findings of fact and the Court of Appeal’s ruling, whether there is sufficient mutuality of obligation and degrees of control in the individual contracts for those to be contracts of employment. However, PGMOL was given leave to appeal, and its appeal was heard by the Supreme Court in late June 2023.⁴⁰

Conclusion

The relationship between the football industry and the tax authorities has never been great. In 2006, the Special Commissioners overturned the Revenue’s determination that image rights agreements in respect of Arsenal players Dennis Bergkamp and David Platt were not genuine commercial payments but instead were disguised remuneration.⁴¹ The relationship reached its nadir in 2012, when the failed prosecution of then Tottenham FC manager Harry Redknapp over alleged tax evasion attracted widespread opprobrium from the media and tax specialists alike.⁴² It continues to have issues with players’

36. *Ibid*, para 127.

37. *Ibid*, para 129.

38. *Ibid*, para 130.

39. *Ibid*, para 132.

40. Case ID 2021/0220 *PGMOL v Commissioners for His Majesty’s Revenue and Customs* 26/27 June 2023, <https://www.supremecourt.uk/cases/uksc-2021-0220.html>

41. *Sports Club v Inspector of Taxes* [2000] 6 WLUK 137.

42. S. Jones and D. Conn, ‘Harry Redknapp: Tax Evasion Case Should Never Have Come to Court’ *Guardian* (8 February 2012).

use of ‘image rights’ companies, which it accepts as legitimate but perceives as part of ‘a convoluted system of taxation...athletes, clubs and agents have been forced to navigate a system of tax which is at best confusing.’⁴³ In contrast, referees’ remuneration must have seemed a much softer target when the Revenue started digging and decided to challenge the FTT decision; but making a legal or political football out of football rarely ends well, and if the Revenue ultimately prevails, the implications for the sport could be more significant than it cares to acknowledge.

In light of the Court of Appeal judgment (and at the risk of rendering oneself a hostage to fortune), it would not be in the least surprising if the Supreme Court agreed that the individual match contracts are indeed contracts of employment. But the Revenue needs to be careful what it wishes for. Justice Laing noted that the issues arose from ‘what are, on any view, very unusual facts’⁴⁴ and her analysis of those facts is eye-opening, both for those intrigued by the tax and employment aspects of sport’s unusual workplace relationships,⁴⁵ and for those who ‘love to hate the ref’ but have little appreciation of the workplace reality of referees in particular and sports professionals more broadly.⁴⁶ At the grassroots level, the English FA routinely bans players and spectators for attacking and threatening volunteer officials.⁴⁷ At the professional level, the weekly ritual of abuse from pundits, players and managers, and threats of violence from fans who would get out of breath climbing the stairs, create an exhausting and potentially toxic workplace environment. The mental health implications for both groups are significant and under-appreciated. It may be true that money is not a motivating factor for part-time referees at the third and fourth tiers of the men’s professional game, but by no stretch of the imagination is it a ‘hobby.’ Money is still a factor and maybe it makes the unpleasant side of the job slightly more bearable. Perhaps two years from now, it will be interesting to see if a change in tax status – should that come to pass – has persuaded some professional referees that it is no longer worth their while. That really would give the armchair pundits something to moan about.


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43. S. Carrick, ‘COVID-19 and the Taxation of Professional Athletes’ Image Rights’ (2021) 21 *International Sports Law Journal* 15–26 (15).

44. *Commissioners for HM Revenue and Customs* (n 1), [para 8].

45. *Red, White and Green Ltd v HMRC* 2020 1 WLUK 476; *Paya Ltd v HMRC* 2019 9 WLUK 598; *Kickabout v HMRC* [2022] EWCA Civ 502; *Albatel v HMRC* 2019 UKFTT 195; *Athol House v HMRC* 2019 UKFTT 242; *Lineker v HMRC* 2021 UKFTT 101; *Lineker v HMRC* [2023] UKFTT 340.

46. In that context, see *Varnish v British Cycling* UKEAT/0022/20/LA.

47. S. Rendell and M. Short, ‘Referee Abuse: FA Issued 380 Bans for Grassroots Match Official Attacks Last Season’ *Guardian* (11 October 2022).