HMRC v. Professional Game Match Officials Limited [2020] UKUT 0147 (TCC)

A red card for HMRC in football referees case.

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This is a case about football referees and their independent status, which Michael Thexton wrote about when Professional Game Match Officials Ltd (PGMOL) won the first round against HMRC. The decision has again gone in favour of the match referees at the Upper Tribunal, now making the decision binding precedent.

As the facts have been covered in the previous article on AccountingWeb, Self-employed referees secure big tribunal victory (https://www.accountingweb.co.uk/tax/hmrc-policy/self-employed-referees-secure-big-tribunal-victory), I will concentrate of the technical arguments mainly concerning that of mutuality of obligations or (MOO).

The question in the appeal is whether certain referees engaged to officiate at football matches were employees of PGMOL or were self-employed under a contract for services. The appeal again relates only to the 'National Group' who undertake duties in their spare time.

Mutuality of Obligations
In the Upper Tribunal (UT), the tribunal dealt with Grounds 1 and 3, both relating to mutuality of obligation, Ground 1 relating to the Individual Contracts and Ground 3 relating to the Overarching Contract. Ground 2 related to the element of control in the Individual Contracts.

Mr Nawbatt, for HMRC, submitted that mutuality of obligation is relevant only to the questions of whether there is a contract at all. If there is a contract, whether it contains an obligation to provide services personally and obligations which are in some way "work related", and not to the question whether such contract is one of employment or a contract for services. This, incidentally, fits with the interpretation of mutuality that HMRC use in their CEST tool.

Is there a contract in existence at all?
HMRC's argument stems principally from Elias J's judgement in *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471. Elias J said that the significance of mutuality was solely that it "determines whether there is a contract in existence at all" but, this case concerned an agency worker.

The relevance in *Stephenson* was whether there was a contract in existence at all between the agency worker and the client, bearing in mind that there is an agency intervening in the relationship. It seems that the statement made by Elias J was very much fact specific to that case, so HMRC applying the argument to the facts of the referees' case hasn't quite worked.

Employee and employer obligations
The UT went through the case law on MOO in fine detail and then derived the follow propositions as to the required content of the mutual obligations:

1. So far as the obligations on the *employee* are concerned, the minimum requirement is an obligation to perform at least some work and an obligation to do so personally. In line with the principles of subsitution, it would be inconsistent with that obligation if the employee could decide never to turn up for work.

2. The minimum requirment on an *employer* is an obligation to provide work or, in the alternative, a retainer or some form of consideration (which need not necessarily be pecuniary) in the absence of work. The tribunal thought it would be insufficient to constitute an employment contract if the only obligation on the employer was to pay for work if and when it is actually done.

3. In both cases, the obligations must subsist throughout the whole period of the contract.

Ground 3 – Overarching Contract

Next the tribunal dealt with the requirement of MOO in relation to the Overarching Contract. In reliance on the principles above, the FTT were deemd by the UT to be correct in their conclusion that there would be insufficient MOO to charachterise the Overarching Contract as a contract of employment. This would be in the absence of an obligation on PGMOL to provide at least some work.

HMRC, however, contended that the FTT was wrong in their conclusion that there was in fact no obligation on PGMOL to offer work and no obligation on the referee to accept it. Mr Nawbatt submitted that references in the Code of Practice to referees being "expected" to adhere to it and being "expected" to do various specific things, including "be readily and regularly available for appointment to matches" are to be construed as legal obligations.

"Expected" or "obliged"?

The UT were not persuaded that the use of the term "expected" is to be read as "obliged". "The fact that the drafter of the Code of Practice has used both "obligation" (stating expressly that the referees are "not obliged to accept any appointments to matches offered to them") and "expectation" (stating what referees are nevertheless expected to do) demonstrates an understanding of the difference in meaning between the two phrases, and an intention that each is respectively to be read according to that different meaning."

Mr Nawbatt also submitted that the "realistic and worldly wise" approach mandated by the Supreme Court in *Autoclenz v Belcher* [2011] UKSC 41, should have determined that mutual obligations existed.

"Realistic and worldly wise"

In *Autoclenz*, the court pointed out that it is more common for a tribunal to investigate allegations that the written contract does not represent the actual terms agreed, and that the court must be "realistic and worldly wise" when it investigates the written terms. HMRC, therefore, argued that taking a "realistic and worldly wise" approach there was an obligation on PGMOL to provide some work and an obligation on the referees to perform it if asked and that that would constitute a contract of employment.

The Upper Tribunal disagreed. They considered that this case was to be contrasted with an 'ordinary' situation, "…where an entity whose function is to provide the services of a number of highly qualified individuals from a limited pool of talent on a regular basis for important commercial events would wish to impose a legal commitment on its staff to work." In contrast, in the present

case, the referees were highly motivated and wished to make themselves available as much as possible such that "there is no need for a legal obligation".

HMRC disagrees!
The court considered that HMRC's real complaint is that it "…disagrees with the conclusion the FTT reached." The UT said that even if they did agree with HMRC, that would be insufficient grounds to permit the tribunal to interfere with the FTT Decision. In their judgement, the express terms of the Overarching Contract negating any obligations to offer and take on work reflect the true agreement.

Ground 1 - Individual Contracts
The FTT found that in relation to the Individual Contracts each engagement constituted a separate contract in which there was some level of MOO. There was some obligation 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", but the FTT thought that this was insufficient to render them employment contracts.

The right of the referee having accepted an engagement to officiate at a single match and then to withdraw from the match because of injury or work commitments or for any other reason, without breaching the contract, was inconsistent with the obligations of an employee. As was the right of PGMOL to cancel an appointment once made. HMRC argued that so far as PGMOL were concerned, mutual obligations were satisfied by PGMOL's obligation to pay if the referee worked. This argument was again rejected by the UT which held that there was insufficient MOO to create a contract of employment.

Although the UT considered that the failure of Grounds 1 & 3 of of the appeal was sufficient to lead to a dismissal of the appeal, they went on to consider Ground 2, regarding control in the Individual Contracts, for completeness.

Ground 2 - Control
The FTT identified the test for establishing control as requiring a "sufficient framework of control" in the sense of "ultimate authority", rather than there necessarily being day-to-day control in practice. They expanded on this as follows: "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."

The FTT applied the test to the pre-season documents, including the fitness protocol, Match Day Procedures and the Code of Conduct. The pre-season documents imposed direct committments to PGMOL.

The FTT concluded, however, that "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".

The right to 'step in'
During the appeal, however, the FTT considered four related questions on control:

1. The right of PGMOL to 'step in'.
2. The inability of PGMOL to give any sanction for breach until after the Individual Contract had ended.
3. PGMOL's right of control under the Overarching Contract during the term of each Individual Contract; and

4. Could PGMOL impose any sanction for breach during an Individual Contract.

In the Upper Tribunal's judgment, what the authorities establish on these questions is that there is 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 chef, a footballer or a live broadcaster, but that does not of itself mean that there is not sufficient control to create an employment relationship. It is also important to note that most of the authorities contemplated a relationship of a longer term than a single engagement.

Error of law
When it came to control, the UT considered that the FTT had, in fact, erred. Although, this did not necessarily mean that PGMOL did exercise sufficient control over the referees in the context of each Individual Contract to render them employees.

Bearing that in mind, in order to reach a conclusion on the issue of control the UT considered that a full evaluation would need to be undertaken but, that given their conclusion on mutuality of obligations, it was unnecessary to undertake the task themselves or to remit it to the FTT.

No error of law
Ultimately, the Upper Tribunal concluded that there was no error of law in the FTT's conclusions that there was insufficient mutuality of obligation in relation both to the Overarching Contract and the Individual Contracts. It follows then that there was no error of law in its conclusion that the referees in the National Group were engaged under contracts for services and were not employees and the appeal was dismissed.

Conclusion
HMRC have already declared that they are going to appeal this case. This case is very thorough on the issue of mutuality though so, it is hard to see how HMRC would appeal it. It is more likely then to be appealed on the point of control but, then that is unlikley to outweigh the lack of mutuality.

It will be interesting to see what avenue HMRC are going to use taxpayer's money for to challenge this case but, that is what the law is for. Hopefully, it will bring some much needed clarity on the issue of mutuality and in turn, an amendment of the CEST tool.