

# Employment status: Revenue v Customs Commissioners v Professional Game Match Officials Ltd [2020] 5 WLUK 118

---

By [Craig Ludlow](#)

*3PB Barristers*

## Factual Background

1. Professional Game Match Officials Limited (**‘PGMOL’**) is a company whose 3 members are The Football Association Ltd (**‘the FA’**), The Football Association Premier League Ltd (**‘the Premier League’**) and the Football League Ltd (**‘the Football League’**), now referred to as the English Football League (**‘the EFL’**).
2. PGMOL is funded by its members on an annual basis and is intended to be run on a “not for profit” basis, with 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 FA Cup, and the EFL, which comprises 72 clubs and the Championship League and Leagues 1 and 2.
3. 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.
4. 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. 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.
5. 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. Some of these individuals are also qualified to referee internationally.

6. 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 2014-2015 season there were 60 referees in this category - the “National Group” referees. The appeal relates to payments to these individuals, mainly in respect of match fees and expenses.
7. 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. 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.
8. 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.
9. HMRC determined that the arrangements subsisting between PGMOL and the National Referees meant that PGMOL was the employer of the National Referees and issued assessments for PAYE (£172,849.18) and NICs (£123,990.30) accordingly. PGMOL appealed that decision to the to the First Tier Tax Tribunal (‘FTT’).

### **The issue on appeal and the agreed law**

10. The principal issue in the appeal to the FTT was whether the referees were in employment relationships with PGMOL. In seeking to establish that they were not, PGMOL’s case was not simply that the referees were self-employed, but also that there was in fact no contract between it and the referees at all.
11. It was common ground that the essential test for contracts of employment remains that stated by MacKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance**<sup>1</sup> (‘the **RMC** test’):

---

<sup>1</sup> [1968] 2 QB 497 at p.515C-D.

*“A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.*

12. The first element is the “mutuality of obligation” requirement and the second element is the “control” requirement.

### **The FTT’s decision.**

13. Having rejected PGMOL’s contention that there were no contracts at all with National Group referees, the FTT reached the following conclusions in relation to the Overarching Contract between them:

- (1) Its terms were to be found largely in the pre-season documents. The Code of Practice and covering email amounted to a written offer to include the referees on the National Group list for the relevant season, which the referee accepted by signing and returning the Code of Practice. The written terms could then be found in various places in the Code of Practice, the Fitness Protocol, the Declaration of Interests form, the merit payment document, the Match Day Procedures and (for 2015-16) the Code of Conduct.
- (2) Although much of the documentation was written in terms of expectation rather than legal obligation, there were some provisions which amounted to express legally enforceable rights and obligations. These included, from PGMOL’s perspective, its agreement to include the referees on the list; to provide a system of continual assessment and feedback; to provide a training programme and a coaching system, and to provide match kit, health insurance and access to sports scientists. For their part, the referees agreed to act impartially; to declare conflicting interests; not to enter into sponsorship or promotion arrangements, and not to undertake media work except as permitted. The Match Day Procedures document also contained a number of obligations, as to arrival time at grounds, turning off mobile phones, and behaving appropriately.
- (3) What was lacking from the Overarching Contract, however, was any legal obligation on PGMOL to provide work or on the referee to accept work offered.

- (4) HMRC had submitted, on the basis of the Supreme Court decision in Autoclenz v Belcher<sup>2</sup> and numerous other authorities that where the Code of Practice referred to “expectations” upon the referees these were in substance and reality to be regarded as legal obligations. The FTT rejected that contention.
- (5) The FTT considered whether the existence of the merit payment arrangement implied some level of obligation on PGMOL to offer match appointments, but considered that was not the case.
- (6) Finally, the FTT rejected HMRC’s reliance on St Ives Plymouth Limited v Haggerty<sup>3</sup> and Addison Lee v Gascoigne<sup>4</sup> (indicating that 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), both on the basis that each case must turn on its own facts and on the absence in those cases of an express term negating an obligation to provide or accept work.
14. As to the mutuality of obligation requirement in the Individual Contracts between PGMOL and the National Group referees, the FTT reached the following conclusions:
- (1) The existence and terms of the Overarching Contract were factors to which regard must be had in determining the obligations under the Individual Contracts.
- (2) Each individual match appointment gave rise to a contract, constituted by the offer of the appointment made by PGMOL and its acceptance by the referee using the MOAS system. Under the contract, the referee would agree to officiate and PGMOL would agree to pay fees and expenses at the specified rates.
- (3) There was, however, no sanction, if the referee, having accepted an appointment, was unable to get to the match. Nothing in the documentation or the parties’ conduct was 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 did not have the right to substitute another to do their task: if he could not attend, the contract simply fell away without sanction, and without payment.

---

<sup>2</sup> [2011] UKSC 41.

<sup>3</sup> UKEAT/0107/08.

<sup>4</sup> [2018] ICR 1826.

- (4) Similarly, PGMOL was free, if it felt it needed to do so, to cancel a particular appointment and replace the referee with another person, without breach of contract. There was no suggestion that there was any limit on PGMOL's rights in this respect.
- (5) Subject to those points, there would be some level of mutuality "during the actual engagement", 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".
- (6) The relevant mutuality of must subsist throughout the whole period of the contract and, in contrast with Weight Watchers (UK) Ltd v HMRC<sup>5</sup> and Cornwall County Council v Prater<sup>6</sup>, the referee was entitled to withdraw from the engagement before he arrived at the ground and PGMOL was entitled to cancel the appointment.
- (7) Accordingly, there was "insufficient mutuality of obligation" to give rise to a relationship of employment.

15. In summary, applying the RMC test, the FTT concluded that:

- (1) There was no mutuality of obligation outside individual engagements and on that basis the Overarching Contract was not a contract of employment;
- (2) There was insufficiency of mutuality of obligation and insufficiency of control in the Individual Contracts, such that they also were not contracts of employment.

16. Accordingly, the FTT concluded that the National Group referees were not employed under contracts of service during the periods under appeal, and therefore the appeal was allowed.

17. HMRC appealed against each of those conclusions to the Upper Tribunal.

### **Upper Tribunal's decision**

18. In dismissing HMRC's appeal, although it expressed its view that the FTT had erred in the weight which it gave to PGMOL's rights of control under the Overarching Contract, nonetheless the Upper Tribunal held 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 that there was no error of

---

<sup>5</sup> [2012] EWCA Civ 1155.

<sup>6</sup> [2006] EWCA Civ 102.

law in its conclusion that the referees in the National Group were engaged under contracts for services and were not employees<sup>7</sup>.

## Comment

19. Although this is a taxation case, the issue of 'employment status' frequently arises in both tax and employment tribunals and each jurisdiction regularly cite the other's cases.
20. The decisions by both the FTT and the Upper Tribunal are principally interesting because of their comprehensive citation and detailed analysis of the relevant case law dealing with the much litigated issue of employment status, but also because of their comments about the extent of contractual fetter on a referee's ability to withdraw from an engagement<sup>8</sup> and control<sup>9</sup> (which the Upper Tribunal did not actually need to consider as part of the appeal owing to its agreement with the FTT on mutuality of obligation, but did so anyway – the Upper Tribunal stating that the FTT had erred in some aspects of dealing with the control issue, but ultimately this not having any bearing on either tribunal's decision).
21. It also still remains to be definitively determined whether or not as a matter of law an unfettered right of substitution provides a 'silver bullet' to any assertion of worker / employee status.
22. With the effects of the recent reasoned order handed down by the ECJ in **B v Yodel Delivery Network Ltd**<sup>10</sup> yet to be seen, the judgment of Choudhury P awaited in the case of **Varnish v British Cycling Federation t/a British Cycling**<sup>11</sup> (heard remotely at the EAT on the 19<sup>th</sup> / 20<sup>th</sup> May 2020), and the Supreme Court being due to hear the appeal against the Court of Appeal's judgment in **Uber & Others v Aslam & Others**<sup>12</sup> on 21<sup>st</sup> July<sup>13</sup> (this writer being particularly interested to see what the Supreme Court make of Underhill LJ's compelling dissenting judgment<sup>14</sup>), 2020 promises to be an extremely interesting year for cases involving determinations of employment status.

---

<sup>7</sup> Paragraph 142 of the Judgment.

<sup>8</sup> Page 28, paragraph 109 of the Judgment.

<sup>9</sup> Page 33, paragraphs 129 to 141 of the Judgment.

<sup>10</sup> C-692/19; a helpful summary of which is contained in an article written by Sarah Clarke of 3PB in last month's newsletter:

<https://www.3pb.co.uk/content/uploads/Sarah-Clarke-on-Yodel-v2.pdf>

<sup>11</sup> <http://employmentappeals.decisions.tribunals.gov.uk/public/Upload/18May2020.pdf>

<sup>12</sup> [2018] EWCA Civ 2748; [https://www.lawtel.com/UK/FullText/AC5005312CA\(CivDiv\).pdf](https://www.lawtel.com/UK/FullText/AC5005312CA(CivDiv).pdf)

<sup>13</sup> <https://www.supremecourt.uk/cases/uksc-2019-0029.html>

<sup>14</sup> Page 44, paragraph 107 onwards.

2<sup>nd</sup> June 2020



**Craig Ludlow**

*Barrister*  
*3PB*

0330 332 2633

[craig.ludlow@3pb.co.uk](mailto:craig.ludlow@3pb.co.uk)

[3pb.co.uk](http://3pb.co.uk)