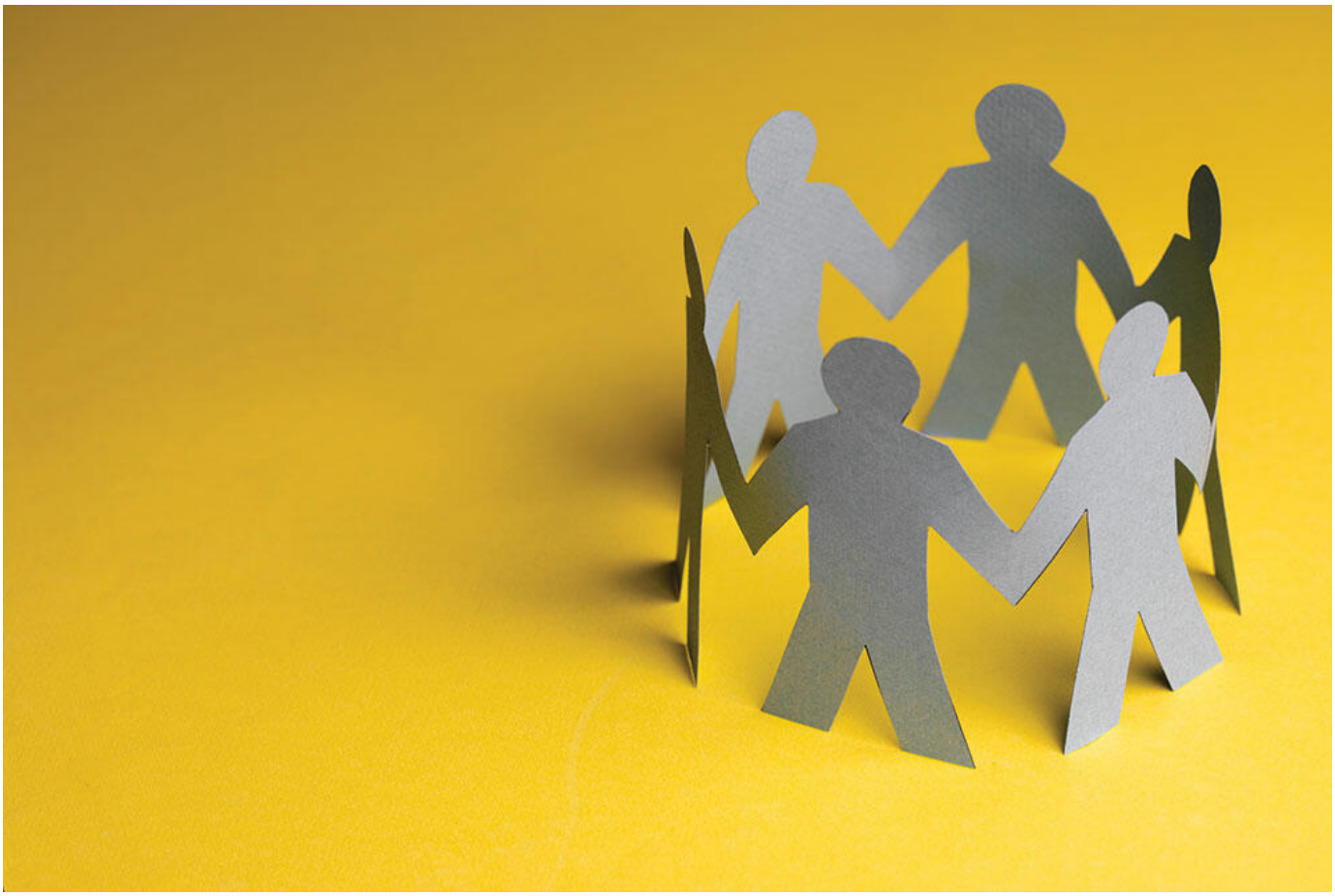
Our Mutual Friend

Employment Tax | Personal tax



03 November 2021

Keith Gordon considers the Court of Appeal's decision in a case looking at the employment status of football referees

Key Points

What is the issue?

Professional Game Match Officials Ltd (PGMOL) supplies football referees for the higher levels of the English game. HMRC had ruled that the referees were employees of PGMOL; however, the First-tier Tribunal concluded that the relationship lacked a

mutuality of obligation. Although the Upper Tribunal upheld the decision on mutuality of obligation, the Court of Appeal found this decision could not be upheld.

What does it mean for me?

The case of Ready Mixed Concrete set out what has become the almost universally accepted three-limb test for employment, requiring three conditions to be satisfied if a relationship is to constitute one of employment.

What can I take away?

The employment status of workers who are engaged from time to time must be considered by reference to the conditions in place when the services are actually performed. Unless either of the first two limbs show that a worker is not an employee, a worker's status cannot be determined without considering the overall picture.

In the November 2018 issue of Tax Adviser, my article 'Men in Black' considered the First-tier Tribunal's decision in the case of Professional Game Match Officials Ltd v HMRC [2018] UKFTT 528 (TC).

The taxpayer, often abbreviated as 'PGMOL', supplies football referees for the higher levels of the English game. HMRC had ruled that the referees were employees of PGMOL. Its determination was reached by applying the High Court decision of Mr Justice MacKenna in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, which set out what has become the almost universally accepted three-limb test for employment (notwithstanding the language that has become somewhat antiquated in the meantime).

That test requires each of the following three conditions to be satisfied if a relationship is to constitute one of employment:

1. 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.
2. 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.

3. The other provisions of the contract are consistent with its being a contract of service.

The first limb has since been explained as a requirement for the worker to provide his (or her) personal service. However, many cases have also taken it as authority for the proposition that a contract of employment must also involve a mutuality of obligations – for the putative employee to be obliged to accept work if offered and for the putative employer to offer work or perhaps to pay a retainer when no work is offered.

On PGMOL's appeal against HMRC's determination, the First-tier Tribunal concluded inter alia that the relationship lacked the necessary mutuality of obligations; and, furthermore, that PGMOL had insufficient control over the referees so as to make it their 'master'. As the Ready Mixed test requires all three conditions to be satisfied if the arrangement is to constitute an employment, the First-tier Tribunal allowed PGMOL's appeal.

HMRC appealed against the decision to the Upper Tribunal. Although the First-tier Tribunal was found to have applied the 'control' test incorrectly, the Upper Tribunal upheld the First-tier Tribunal's decision on mutuality of obligation. HMRC appealed again to the Court of Appeal; the decision is reported as [2021] EWCA Civ 1370.

The facts of the case

There is a category of referees who are employed full time by PGMOL and who officiate at the top games (Premier League and international ties). The referees at the heart of this case, however, represent the next category down in the pecking order, working mainly at Championship matches and at games in Leagues 1 and 2 (effectively the second to fourth tiers of the English game), as well as at some cup matches. Their refereeing activities are carried out in their spare time, typically alongside other full-time employment. It is, in effect, a hobby activity, albeit a hobby that is seriously pursued.

Games for the following week are usually allocated to and accepted by the referees on a Monday morning. However, until a particular match has actually started, a referee could cancel the arrangement (in theory at the last minute); similarly, PGMOL could withdraw a referee from the match at any time before kick-off.

The Court of Appeal's decision

The case came before Lord Justice Henderson, Lady Justice Elisabeth Laing and Sir Nicholas Patten.

The court identified the two different types of contract that arise in many scenarios where work is carried out on an ad hoc basis. There is the contract for the particular engagement, but often, in addition, an ‘umbrella’ or overarching agreement governing all engagements subsequently entered into.

The court made clear (citing earlier case law) that one cannot determine a worker’s status when carrying out a particular engagement solely by looking at the overarching contract. Furthermore, a standalone engagement can give rise to a single contract of employment (albeit one of limited duration).

The First-tier Tribunal had considered that the parties’ ability to cancel a booking right up to the time of kick-off meant that there was no mutuality of obligations. However, the court held that the First-tier Tribunal had conflated two matters – the overarching agreement (entered into at the beginning of each football season) and the separate agreements governing each individual match.

The court also considered the question of control. One part of the First-tier

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Tribunal’s reasoning had been the fact that PGMOL cannot exercise control by intervening in the course of a match. The court considered that this meant that the First-tier Tribunal had failed to address the correct question, as to whether there was a sufficient framework of control. The court also considered that the First-tier Tribunal had wrongly disregarded certain factors (the coaching and internal assessment procedures) that can influence the referees’ performance. In this regard, the court agreed with the Upper Tribunal’s decision (which held that there was sufficient control over the referees). As the court held, control can manifest itself by positive as well as negative influence.

For completeness, the court made a couple of qualifications to the Upper Tribunal’s approach to the control test. The first was a quibble concerning the method of enforcing control: the Upper Tribunal had wrongly assumed that control must be exercised in the form of sanctions. The second concerned the role of an appellate

tribunal (such as the Upper Tribunal) to a decision of the First-tier Tribunal. The court emphasised that, when looking at a multi-factorial test, the amount of weight given by the First-tier Tribunal to a particular consideration is not something that should usually be revisited on an appeal. The Upper Tribunal had suggested that the First-tier Tribunal had given 'insufficient' weight to certain matters when considering control. The court said that such an 'error' would not have justified overturning the First-tier Tribunal's decision. However, as the court continued, a better description of the First-tier Tribunal's error of law was that it had taken into account matters that should not have been considered in the first place.

The most important point, however, is that the Court of Appeal agreed with HMRC in that the Upper Tribunal's overall decision could not be upheld (because the Upper Tribunal had wrongly agreed with the First-tier Tribunal on mutuality of obligation) and therefore HMRC's appeal was allowed. The case will now return to the First-tier Tribunal for consideration of the mutuality of obligation point.

Commentary

As I noted in my previous article, I was somewhat surprised by the First-tier Tribunal's decision on mutuality of obligation. As I had continued, the decision showed the importance of drilling down to the essence of the relevant contractual relationship. However, as the Court of Appeal has now determined, the First-tier Tribunal, when considering those facts, had applied the wrong legal approach to mutuality of obligation.

The court's decision then gave rise to an interesting procedural question that might have repercussions in other cases. Having decided that the two preceding tribunal decisions were both based on erroneous views of the law, how should the case now proceed? A similar issue has arisen in recent IR35 cases involving appeals by HMRC to the Upper Tribunal (Kickabout, Atholl House). In both of those cases, HMRC first had to persuade the Upper Tribunal that the respective First-tier Tribunal's decision had been tainted by an error of law; and, having done so, then asked the Upper Tribunal to make the relevant employment status determination by reference to the correct view of the law and applying that to the facts as previously found by the First-tier Tribunal. The alternative approach that the Upper Tribunal could have taken was to remit the case to the First-tier Tribunal so that it could remake the decision, albeit with a direction as to the correct legal approach it should follow.

There is indeed case law that explains which of those two approaches should be followed in different scenarios, although often more prosaic considerations prevail. For example, a person seeking to uphold the First-tier Tribunal's view will typically want the case to be remitted to the judge who had found in that party's favour once before, and vice versa. Conversely, a party concerned about the costs of the litigation process would often be keener to avoid yet a further hearing, even if the original tribunal is thought to be sympathetic to that party's case.

In both Kickabout and Atholl House, the Upper Tribunal indeed concluded that there had been errors of law in the First-tier Tribunal's decision and HMRC successfully persuaded the Upper Tribunal to proceed to redecide the matter itself, albeit with differing outcomes. In Kickabout, the matter was redecided in HMRC's favour, but in Atholl House, the Upper Tribunal concluded that the First-tier

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Tribunal had in fact reached the right decision (even if for incorrect reasons).

In PGMOL, however, the court's provisional view was that the remaking of the decision should in fact be undertaken by the First-tier Tribunal. Whether that happens – and, if it does, the extent to which there is a further hearing – will depend in many ways on the views of the parties themselves, as well as the tribunal. Indeed, it should be noted that the First-tier Tribunal in its original decision did observe that the wider facts of the case had 'elements that may be suggestive of an employment relationship'. Without wishing to prejudge the case, its defeat in the Court of Appeal might persuade PGMOL to blow the final whistle on this case without any further expense being incurred.

This might suggest that HMRC would be delighted by the court's decision. Nevertheless, there are aspects of the decision that will make very uncomfortable reading for them. One line of attack that HMRC is deploying (it was the main thrust of its oral arguments in the Kickabout case) concerns the application of the third limb of the Ready Mixed test. Over the past quarter century, it has become almost universal practice for parties to refer to the Court of Appeal's decision in the case of Hall v Lorimer, which requires a tribunal to consider the wider picture when determining a person's employment status. In short, if the first two limbs of the Ready Mixed test do not rule out an employment relationship, the tribunal must look

at the whole picture to form a view. Indeed, that is precisely what the First-tier Tribunal did in the present case.

Nevertheless, HMRC has started to argue that the Hall v Lorimer approach is in fact entirely inconsistent with the Ready Mixed test and should no longer be followed. In Kickabout, the Upper Tribunal did not need to respond to that (what I consider to be a rather novel) approach by HMRC. Thus, the fact that the argument is even being considered by HMRC is still not widely known.

However, it is worth recognising that in its latest decision in the PGMOL case, the Court of Appeal made a number of comments that will deal a major body blow to HMRC's argument. In particular, the court referred to earlier authority that deprecates any attempt to determine employment status mechanistically; instead, the exercise involves 'weighing all the various indicia as interpreted according to the particular context'.

Elsewhere, the court made it clear that one has to 'look at all the circumstances in the round before deciding whether or not there is a contract of employment'.

HMRC's argument to the contrary always struck me as ambitious (or, if I were being less circumspect, desperate). It would not surprise me it was quietly dropped by the time of the Kickabout appeal (due to be heard in February).

What to do next

Two important principles emerge from the PGMOL decision which must be carefully borne in mind in any discussions with HMRC.

First, in the context of workers who are engaged from time to time, their employment status (particularly for tax purposes) must be considered by reference to the conditions in place when the services are actually performed.

Secondly, unless either of the first two limbs of Ready Mixed Concrete definitively shows that a worker is not an employee, a worker's status cannot be determined without taking a step back and viewing the overall picture.

HMRC's CEST program that is meant to determine workers' status famously omits any reference to mutuality of obligation. HMRC's stance in that regard is in part justified by the first of these two principles. However, the programming of HMRC's CEST suggests that they consider that any viewing of the overall picture (principle 2)

should similarly disregard the fact that a worker is engaged only intermittently. Court of Appeal authority (particularly, the case of Stringfellow Restaurants Ltd v Quashie [2013] IRLR 99) shows that such an approach is wrong. That might explain why HMRC has been keen to downplay the relevance of Hall v Lorimer. It might therefore be necessary to await the next instalment from the Court of Appeal in the Kickabout case.