PGMOL v HMRC: the long-awaited decision on employment status

Employment Tax



25 September 2024

We consider the long awaited decision of the Supreme Court in the football referees' case of *Professional Game Match Officials Limited.*

Key Points

What is the issue?

The case of *PGMOL v HMRC* concerns the employment status of football referees who are engaged on a match-by-match basis. HMRC considered that the referees' relationship with PGMOL, for the duration of any engagement, is that of employee, and so PAYE is due on the fees paid to attend the matches. PGMOL considered that the referees provide services on a self-employed basis.

What does it mean for me?

It has now become firmly established that a worker's employment status should be determined by reference to a three-stage test first put forward in the case of *Ready Mixed Concrete (RMC)*.

What can I take away?

Although stages 1 and 2 of *RMC* are still relevant, the focus in future cases will now be generally on the third stage andthe status of the contract is to be determined in the light of the wider factual matrix.

Exactly three years ago, in the November 2021 issue of *Tax Adviser*, I wrote about the Court of Appeal's decision in the case of *HMRC v Professional Game Match Officials Limited* (*PGMOL*) [2021] EWCA Civ 1370, a case concerning the employment status of football referees who are engaged on a match-by-match basis, principally in the Championship (the second tier of the professional game in England). That article, 'Our Mutual Friend', followed my previous article 'Men in Black', exactly three years before that in November 2018, which concerned the Upper Tribunal's decision in the case.

It has now become firmly established that a worker's employment status (i.e. whether an individual is an employee of the person engaging that individual's services or whether that individual is providing services on a self-employed basis) should now be determined by reference to a three-stage test as first put forward by Mr Justice MacKenna in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (often abbreviated now as '*RMC'*).

The *RMC* approach was recently confirmed by the Court of Appeal in the case of *HMRC v Atholl House Productions Ltd* [2022] EWCA Civ 501, not only so far as 'pure' employment status cases are concerned but also in IR35 cases, where the *RMC* approach must be applied to a hypothetical contract.

Those three stages, as set out in *RMC* and as explained in *Atholl House*, can be summarised as follows:

- To be an employment contract, there must be both personal service and a mutuality of obligations.

- To be an employment contract, the engager must have sufficient control over the worker.
- Unless one or more of the previous two tests has definitively led to the conclusion that there is not an employment contract, the status of the contract is to be determined by considering the contract in the light of the wider factual matrix.

In my 2021 article, I noted how the Court of Appeal's decision in *PGMOL* (although in favour of HMRC) nevertheless rejected a number of arguments being advanced by HMRC in relation to the third of those tests.

In *Atholl House*, the Court of Appeal (differently constituted) confirmed that HMRC's arguments in relation to the third stage were to be rejected.

In the present case before the Supreme Court, both PGMOL and HMRC made it clear that they were not suggesting that the Court of Appeal was wrong to reject the submissions previously advanced by HMRC in those earlier hearings. However, *Atholl House* did not need to (and did not) give any guidance about the first two tests (mutuality and control). And it was those two tests that lay at the heart of the *PGMOL* case, hence the keenness of many for the Supreme Court's decision, reported at [2024] UKSC 29 (particularly as the hearing took place back in July 2023).

The facts of the case

PGMOL is a company which is owned by the main football authorities in England. Matches in the top tier of English football are refereed by employees of PGMOL. However, the next tier of matches are refereed by a pool of keen 'amateurs' who provide their services on a part-time basis, usually alongside a full-time employment that they hold elsewhere.

Typically, the referees will sign up on a Monday to a match taking place the following weekend. However, until the match actually kicks off, the referee can withdraw from the commitment and, equally, PGMOL can remove the match from the referee's roster. If the referee does not referee a particular match, the referee will not get paid. Similarly, there is no obligation on any referee to sign up for matches on any particular weekend, but there is an expectation that they would do

without any good reason not to.

HMRC considered that each of these referees' relationship with PGMOL, for the duration of any engagement, is that of employee, and so PAYE is due on the fees paid to attend the matches, whereas PGMOL considered that each of these referees provides services on a self-employed basis.

The Supreme Court's decision

The case came before Lord Richards, Lord Hodge, Lord Leggatt, Lord Stephens and Lady Rose. The only judgment was written by Lord Richards, with whom the other judges agreed. It is worth noting that Lord Richards (then Sir David Richards) wrote the lead judgment of the Court of Appeal in *Atholl House*.

The judgment made reference to the evolution of the test of employment status – from the Victorian age when control was the sole determinant of employment status to the more nuanced approach in *RMC*. *RMC* necessarily retained control as a condition of there being an employment relationship but the third stage of Mr Justice MacKenna's test made it clear that, provided that there was sufficient control to bring the contract to one that could be one of employment, it was then necessary to consider the other terms of the contract. In the decades that have followed, the courts and tribunals have applied the third stage by looking at the wider picture, including factors outside the contract itself. The correctness of that approach was confirmed in *Atholl House* (contrary to the arguments of HMRC).

Another aspect of the approach that HMRC advanced unsuccessfully in *Atholl House* was whether the nature of the mutuality of obligations and/or control, i.e. the issues that lay at the heart of the first two stages of the *RMC* analysis, could then be taken into account at the third stage when looking at the wider picture. HMRC argued that they were precluded from being taken into account at the third stage but the Court of Appeal had held that the extent and nature of these matters were indeed relevant factors to betaken into account when painting the overall picture.

The *PGMOL* judgment continues on this theme and emphasises that the importance of the first two stages should be downplayed. Although they both remain necessary conditions to be satisfied if there is to be an employment relationship, the *PGMOL* judgment stresses that the intellectual effort should in future be directed at looking

at the wider picture. So far as mutuality of obligations and control are concerned, they can, as held in *Atholl House*, be considered at the third stage in their full factual context.

Furthermore, the judgment has attempted to sharpen the focus on the mutuality of obligations test to the question as to whether 'the employee provides his or her personal service for payment by the employer'. As a result, the judgment has made clear that the absence of any mutual obligations between assignments is not a relevant issue for the first *RMC* test.

Of course, as the Court of Appeal noted in *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735, the precariousness of a worker's situation if engaged on an engagement-by-engagement basis is a relevant factor when looking at the third stage. That approach was reiterated in the Supreme Court in the case of *Uber BV v Aslam* [2021] UKSC 5 and expressly endorsed in the present judgment (albeit in relation to the category of individuals who are treated as 'workers' (individuals who are not employees but who still have some protections under employment law).

On the facts of the case, the judgment noted that there was in fact sufficient mutuality of obligations as soon as the matches were allocated to the referees at the start of the week. These mutual obligations continued even though either party was then at liberty to terminate the contract before the relevant match started. In the Supreme Court's judgment, the right to terminate the contract before the match was merely a factor that should be considered at the third stage of the *RMC* analysis.

In the *RMC* judgment itself, the first test was not expressed in terms of mutuality of obligations in the wider sense and the Supreme Court has effectively returned to that approach (limiting that stage to a question of personal service), albeit with the clear indication that the third stage can take account of more factors than would be permitted on a literal reading of the *RMC* judgment (as previously emphasised by the Court of Appeal in *Atholl House*). As a result, although the judgment did not spell it out in express terms, it is clear that the allocation of a match to a referee a few minutes before kick-off would have been sufficient to allow the first stage of *RMC* to be passed.

In relation to control, the judgment stressed that 'a sufficient element of control by the employer over the employee is essential to the existence of a contract of employment' and it continued to acknowledge that the control test 'is a test that can

prove difficult to apply … in a minority of cases'. It was also noted that the world has changed considerably since 1968, although much of Mr Justice MacKenna's guidance and examples remain applicable in the present age. However, the Supreme Court's judgment recognised that the test is vague, referring to a later case which referred to a 'sufficient framework of control', and adding that it was doubtful that a more precise test could be formulated.

The judgment has sought to steer courts and tribunals from focusing on questions such as whether, in theory, a putative employer could intervene in the course of performance of a contract. As Lord Richards' judgment said, 'when applied to the performance of highly skilled tasks, this, in my view, involves detaching contractual rights from any practical reality'. Furthermore, the Supreme Court made clear that the control test need not be a 'right to intervene in every aspect of the performance by the [putative] employee of his or her duties', although it emphasised that the alleged control must still derive from the contract itself.

The judgment has made clear that 'sufficient control consistent with an employment relationship may take many forms and is not confined to the right to give direct instructions to the individuals concerned'. In the *PGMOL* case, the First-tier Tribunal had considered that the inability of *PGMOL* to intervene in the middle of a match and the related fact that its only power over referees was to refuse to engage them in future were not incidences of control for the purpose of this test. However, the Upper Tribunal disagreed and this was upheld by the Court of Appeal (albeit with some slight variation). This meant that the Supreme Court had to consider whether the Upper Tribunal's correction of the First-tier Tribunal's decision on control was justified.

The Supreme Court said that it was. Furthermore, the Court considered that 'the existence of effective sanctions which it was open to PGMOL to impose after the end of an engagement are of some significance because, on the facts of this case, the right to impose those sanctions played a significant part in enabling PGMOL to exercise control over the referees in the performance of their duties, on and off the pitch'. As a result, the Supreme Court concluded that the second stage of *RMC* was also satisfied.

In the light of their decisions on those two stages, the First-tier Tribunal and Upper Tribunal did not address the third stage of *RMC*. In the same way as the Court of Appeal would have done, the Supreme Court has now sent the case off to the First-

tier Tribunal to complete the task.

Commentary

At the beginning of the judgment was the helpful statement that, although the context of the case was as a tax case, the case was being determined by reference to the common law tests of employment. Furthermore, the judgment made it clear that the court was expecting the case to be relevant to those other areas of law which turn on the employment status of a worker.

The judgment appears to have completed the transition of the test of employment status which was started in *RMC* and continued with *Atholl House*. With *Atholl House*, the Court of Appeal ensured that the third stage of the *RMC* analysis can look at the overall picture and not merely individual terms of the contract in question.

What *PGMOL* has done is relegated the first two stages as low-level thresholds which will be crossed in all but the most obvious of cases. As a result, as the Supreme Court has made clear, little time and energy ought now to be expended on those first two issues. I do wonder, however, whether there will be some ongoing doubts as to how the ‘personal service’ test should be applied. Subject to that, it is hoped that the Supreme Court has blown the final whistle on stages one and two of *RMC*, although it is inevitable that there will be yet another case effectively seeking a replay (or VAR).

What to do next

Although stages one and two of *RMC* are still relevant, the focus in future cases will now be generally on the third stage of *RMC* and the question of the wider picture as explained in *Atholl House*.

Indeed, contrary to the title of this article, for PGMOL it might not be allover because they now have the chance to argue in the First-tier Tribunal that the overall picture is one of self-employment rather than employment. A win at that third stage of *RMC* overrides any defeat at stages 1 and 2. It’s a funny old game, isn’t it?

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