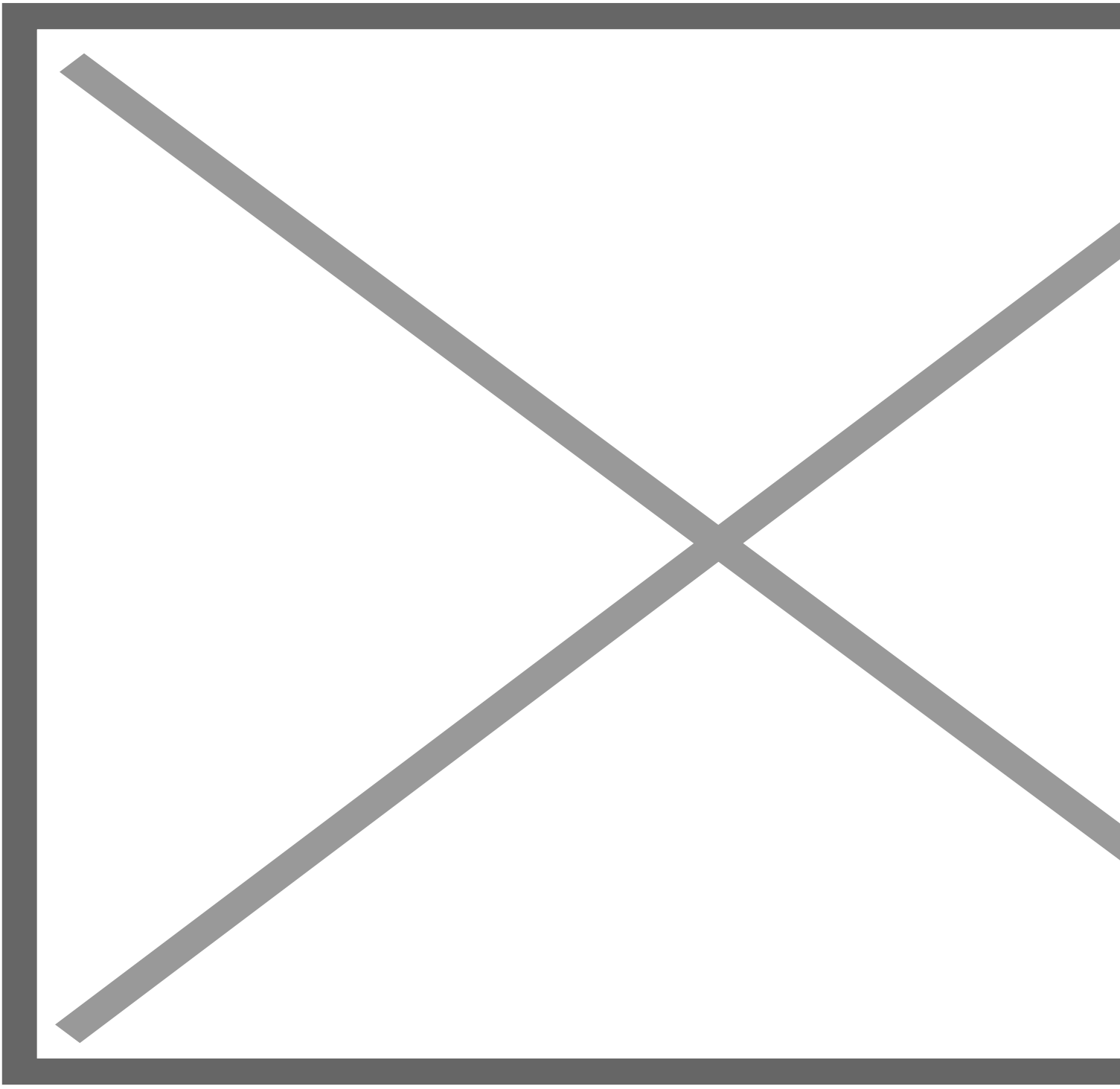
# Men in black

Employment Tax



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*Keith Gordon* looks at a case which considers the employment status of professional football referees

## Key Points

### What is the issue?

The question of employment status is currently a hot topic and there is no shortage of cases going through the Tribunal which consider it.

### What does it mean to me?

Where there is a live dispute with HMRC, it must be remembered that HMRC often view facts from the perspective that the relationship is one of employment.

### What can I take away?

Advisers should ensure that they are familiar with the case law and be prepared to argue their corner because HMRC are not always right.

The question of employment status is currently a hot topic and there is no shortage of cases going through the Tribunal which consider it. And when one adds the current deluge of IR35 cases which deal with the same issues (albeit by reference to a deemed relationship) it is clear that advisers need to have the legal position clear in their mind.

Being a matter that is based on the common law, each case will bring along its own particular facts. Accordingly, study of a wide range of cases should give advisers the confidence to deal with the nuances of any particular cases that they are dealing with.

This article considers the recent case of *Professional Game Match Officials Limited v HMRC* [2018] UKFTT 528 (TC).

## Facts of the case

The Appellant ('PGMOL') is effectively owned and controlled by the three main English footballing bodies, being the FA, the Premier League and the Football League. It provides the match officials for the competitive games played by the 92 clubs in the top four flights of professional football. A number of referees are employed by PGMOL on a full-time basis – these are the ones who generally officiate at Premier League and some international matches. The case, however, concerns the status of referees who provide their services in their spare time, typically alongside other full-time employment. Generally, they would officiate at matches in Leagues 1 and 2 (effectively the third and fourth divisions of English football), some Championship matches (the effective second division) and also the FA Cup, although payments for this latter category did not feature in the decision under appeal). They also occasionally provide their services as 'the fourth official' in some Premier League matches.

Although the costs of paying the referees (fees and travel expenses) are ultimately borne by the member organisations, it was accepted that PGMOL pays the referees in respect of the matches at which they officiate.

The HMRC decisions under appeal were to the effect that, applying the common law principles of an employment contract, the referees were employees of PGMOL and, therefore, the payments should have been

subject to deductions in respect of PAYE and National Insurance.

PGMOL first argued that the referees were not under any contract with them (and therefore there could be no employment contract between them). In the alternative, they argued that, if there was a contract, it still fell short of any employment relationship.

As the firmly-established case law makes clear, there are three critical qualities that must be present in a contractual relationship if it is to be one of employment (historically, but vividly, described as a master-servant relationship):

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.'

Although the genesis of this test is 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, it has been endorsed at the highest levels, most recently by the Supreme Court in the case of *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29.

The first of the three qualities in fact deals with two separate issues, commonly known as 'mutuality of obligations' and 'personal service'. Not only must the worker be obliged to provide his or her own services (and not be able to delegate the task to another), but there must also be on the other side a duty to provide the work.

## The Tribunal's decision

The Tribunal was presided over by Judge Sarah Falk who has since been elevated to the High Court bench and now sits as Mrs Justice Falk. Judge Falk was sitting with member, Janet Wilkins.
The Tribunal had little difficulty in rejecting PGMOL's first argument, concluding that there was a wealth of evidence pointing to the existence of a contractual relationship between PGMOL and the referees.

In reaching this conclusion, the Tribunal found that there were two levels to the contractual arrangements – an overarching framework and the agreements for individual matches. The Tribunal therefore had to consider the tests for employment in relation to both levels.

So far as the overarching agreements were concerned, they were entered into at the beginning of each football season and set out the terms on which referees would be engaged during the coming year. As these agreements, by themselves, conferred no guarantee or promise of any work, they did not constitute an employment relationship. The Tribunal therefore looked at the relationship on an individual assignment basis – in this case, each particular match for which the referees were engaged.

The Tribunal concluded that, within any such assignment, the referee had no right to appoint a substitute. Accordingly, personal service was an element of the arrangement. Mutuality of obligation was very likely to be found as well, given that it would have required only an agreement under which the referees would be obliged to officiate at a specified match. However, the Tribunal noted that, even after acceptance, the referees had an unfettered right to cancel (and require PGMOL to appoint a replacement). Equally, PGMOL had a similar right to cancel each arrangement. Accordingly, even at that stage in the process, there was no obligation on either side to continue with the engagement. Accordingly, the Tribunal held that the first of Mackenna J's criteria was not satisfied.

So far as control is concerned, the Tribunal noted that some referees had been interviewed by HMRC and that these referees (apparently) claimed that they had no control over where they were sent. However, the Tribunal considered that this did not reflect the legal position as the referees could state a geographical preference and they could also refuse any engagement offered.

Moreover, the Tribunal considered that PGMOL did not exercise sufficient control over the referees. Much of what PGMOL provided was guidance rather than control; where control existed it was more to ensure compliance with the rules of the game rather than PGMOL's own requests. Most importantly, during the course of any match, the referees are in charge. As the Tribunal noted, PGMOL can hardly come in at half time and substitute a referee for another of its choosing.

So far as the third part of the Ready Mixed Concrete test, the Tribunal considered that other factors were more supportive of there being an employment relationship. However, the lack of mutuality of obligations and control was fatal to HMRC's case. PGMOL's appeal was therefore allowed.

## Commentary

One might consider that the most surprising aspect of the decision is that attendance at a particular match was not subject to a mutuality of obligations. However, it shows the importance of drilling down to the essence of the relevant contractual relationship. If, as the Tribunal held, neither party was obliged to follow through with an assignment, then the conclusion that there was no mutuality of obligations was bound to follow.

Many readers will know that (to 'assist' the new IR35 rules as they apply to workers engaged through intermediaries to public sector bodies), HMRC have published an online status indictor (called CEST). However, this indicator has been programmed to presume that any particular relationship is governed by a mutuality of obligations. It would seem likely, therefore, that HMRC took a similar approach when considering their attitude towards PGMOL. Given the high-profile nature of the PGMOL case, the fact that they fell down partly on the lack of mutual obligations must be somewhat of an own goal.

The decision is less surprising in respect of the question of control although it perhaps does illustrate HMRC's current perception regarding working relationships. It is not clear to what extent HMRC tried to rely on 'evidence' gleaned from their interviews with some of the referees. It is certainly my experience that such interviews are often conducted with HMRC predisposed to a particular view and, therefore, it is not uncommon for HMRC's questions and their reporting of the answers to reflect their preferred view of the facts. In this case, the Tribunal seems to have been able to dispense with this evidence quite summarily – no doubt, it was reminded that the evidence was, at most, hearsay and would have been much stronger if the interviewees had been called by HMRC as witnesses and they had been made available for cross-examination.

What to do next

Where there is a live dispute with HMRC, it must be remembered that HMRC often view facts from the perspective that the relationship is one of employment. Advisers should ensure that they are familiar with the case law and be prepared to argue their corner because HMRC are not always right. Indeed, their success rate in recent status cases is not that impressive.

As this case shows, HMRC are not averse to interviewing workers and interpreting the workers' answers in a way that supports HMRC's view of the facts. In any case where employment status is a potential issue, it would be important to gather evidence which can be deployed before a Tribunal if necessary. Indeed, by the time that a case reaches a Tribunal, I would say on average four years after the relevant events, much useful evidence will have disappeared if it is not carefully preserved 'in real time'.