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Football referees are employees, not self-employed (UK)

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Summary

The Court of Appeal (CA) has allowed an appeal by HM Revenue & Customs (HMRC) against a decision that there was insufficient mutuality of obligation and control for football referees to be treated as employees for tax purposes.

Legal background

For the purposes of tax legislation in the UK, there are two employment statuses: employee and self-employed. The third, intermediate status of 'worker' which applies for the purposes of many UK employment rights does not exist in tax law. The tests for determining who is an 'employee' are nonetheless essentially the same in both the tax and employment context.

When determining employment status, courts and tribunals take a multi-factorial approach and consider how the relationship works in practice, rather than being bound by what the contract says. Under the main test, which dates from the 1960s (*Ready Mixed Concrete – v – Minister of Pensions* [1968] 2 WLR 775), someone is an employee if: there is mutuality of obligation; they have an obligation of personal service; the putative employer exercises sufficient control over them; and other factors point to employment status. Two of these factors – mutuality of obligation and control – were the focus of this case.

Facts

The referees in this case were engaged by Professional Game Match Officials Ltd (PGMOL) to officiate at matches in certain of the English football leagues and the Football Association Cup. The individuals worked mostly part-time, combining refereeing with full-time jobs in other fields. They were offered matches through a software program and could accept or reject them.

PGMOL brought a claim in the First-tier Tribunal (FTT) against a determination by HMRC that the referees were employees, which meant PGMOL would have been required to deduct income tax and employer's National Insurance contributions from payments it made to them.

The FTT said that the referees had both an 'overarching' contract with PGMOL, which existed between matches, and individual, specific contracts which existed when the referees accepted a match. Having considered these separately, the FTT concluded that there was insufficient mutuality of obligation and control for either of the contracts to be contracts of employment.

The Upper Tribunal (UT) subsequently agreed with the FTT on the absence of mutuality of obligation but disagreed with its findings on control. Given there was insufficient mutuality of obligation for there to be an employment contract, however, the UT did not overturn the FTT's overall decision that referees were not employees. HMRC then appealed to the CA.

Court of Appeal's judgment

The CA sent the case back to the FTT for a final decision on the referees' status but ruled that both the FTT and the UT had been wrong in their approaches to mutuality of obligation and control.

The CA accepted that persons engaged to do work personally on an ad hoc, casual basis could have an overarching contract and/or a contract that exists for each individual assignment (in this case, a football match). The question of whether there was a contract of employment was distinct to each contract. This meant there could be an employment contract at the individual assignment level, even if the overarching contractual arrangement was not one of employment.

Mutuality of obligation

The CA considered there was no overarching contract of employment that would apply to periods when the

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referees were not officiating because there was insufficient mutuality of obligation. This was essentially because PGMOL was not required to offer any work and the referees were not required to accept any work offered.

In contrast, in relation to the individual, per-assignment contracts, the CA said that even though either party could cancel the contract, or the referee could refuse to work at any time before performance was due, this did not negate the existence of mutuality of obligation. It did not matter that a referee could pull out before an accepted game. There had nonetheless been a contract, involving mutual obligations, which had then been terminated.

Control

The work being performed by the referees was highly specialised. The CA compared the nature of the role to ones which, while the work is being performed, are highly autonomous and where the purported employer has very limited ability to influence the duties or 'step in'. As such, the referees were akin to surgeons, chefs, footballers and live broadcasters.

Outside of the matches that were officiated, there were various levels of control in place. These included: a requirement to sign up and adhere to a code of conduct; match-day procedures; requirements around fitness; repeated assessments; performance rating; merit bonuses based on rankings in a table; the ability of PGMOL to promote or demote; use of coaches; and submission of data to sports scientists. The CA (siding with the UT on this point but for different reasons) decided that the FTT had wrongly concluded that certain aspects of the relationship, including coaching and the assessment system, were not relevant to the question of control. The FTT had given decisive weight to PGMOL's inability to step in during the match that the referee was officiating, a factor which the CA regarded as an irrelevant consideration.

The CA also ruled that, for there to be control, there is no requirement for an employer's directions to 'be enforceable in the sense that there is an effective sanction for their breach'. Rather, the CA said that "control may be exerted by positive, as well as by negative, means".

The key consideration was whether there was a 'sufficient framework of control'. Even when looking at individual assignment contracts, account could be taken of the terms of any overarching contract as part of the framework of that relationship. The factors listed above indicated to the CA that there was a sufficient framework of control for an employment relationship to exist in this case.

Commentary

This is the latest in a long line of cases in the UK which show that, when making employment status determinations, the direction of travel of the courts and tribunals is to limit the significance of mutuality of obligation in the overall test.

The approach taken by the CA creates potential difficulties for anyone engaging individuals on a casual or ad hoc basis, who might previously have taken the view that they could legitimately be classified as self-employed on account of the overall nature of the engagement. The CA's judgment means that such individuals could now be deemed employees (and therefore should be taxed as such) in relation to each individual assignment, regardless of how ad hoc or sporadic the underlying arrangements are.

This is the case irrespective of the fact that the individual (or putative employer) can cancel the assignment or decide not to go ahead with it at any time up to performance. The CA considered that the fact a company is not required to offer work and an individual is not required to accept it was not sufficient. This low bar may mean that casual arrangements are more easily fitted into the 'employment' box in the future, making questions of control and personal service all the more important. It may only be possible to conclude confidently that an individual is not an employee if they have an unfettered right of substitution/delegation, or they are not subject to any checks or guidelines at all in the way they carry out their work.

The findings on control in this case are significant for those engaging highly skilled individuals to provide services in scenarios where they are being hired precisely for their skills – for example, IT or technology consultants. When engaging such individuals, their personal service is often required (another hallmark of an employment relationship). The CA's judgment makes clear that purported employers cannot rely on their inability to 'interfere' while those individuals are working, or dictate 'how' the work is done, if the broader framework of the relationship involves sufficient control. This will mean greater scrutiny and reliance on other factors such as the level of integration and how much control the engager otherwise has over the individual. For example, an individual's days and hours of work, any behavioural regulations or codes of practice, purported performance management and disciplinary procedures and the level of financial risk and independence could potentially be cited to show that they are genuinely self-employed.

Comments from other jurisdiction

Germany (Frank Schmaus, Luther Rechtsanwaltsgesellschaft mbH): Although the criteria for distinguishing self-employment from employment are under German jurisdiction very much comparable to those applied under the laws of the United Kingdom, German courts would be likely to consider the referees to be self-

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employed. This would not only apply for the overarching contract but also for each individual assignment (=football match).
The overarching contract would not be deemed to be a contract of employment as the putative employer cannot unilaterally engage the referee to officiate football matches. In fact, mutual consensus would be needed for such an engagement. Whenever mutual consensus is stipulated in an overarching / framework contract and factually applied as well, there is under German law, insofar, no room for employment (Federal Labor Court [Bundesarbeitsgericht – BAG] February 15, 2012, 10 AZR 111/11; Hessian State Labor Court [Landesarbeitsgericht Hessen - LAG Hessen] March 15, 2018, 9 Sa 1399/16).
Contrary to UK case law, German courts would be likely to hold each referee's individual, per-assignment contract to be carried out under the status of self-employment as this determination has been already confirmed by the Federal Fiscal Court [BFH] and the Lower Saxony State Labor Court [LAG Niedersachsen] in terms of referees officiating football matches in Germany's professional football leagues whose contractual conditions are essentially comparable to the one's UK referees are subject to (LAG Niedersachsen, February 12, 2020, 2 Sa 172/19; BFH, December 20, 2017, I R 98/15).
Both courts primarily base their decision on the fact that the referees are due to their independency in the specific game situation completely exempted from any instructions addressed by the football association. This high level of autonomy would be suitable to outweigh all other criteria arguing in favour of employment, such as reporting obligations after the match, dress code, fitness requirements etc.
German case law did not deal yet with the newly introduced Video Assistant Referee (VAR) in German professional football. As VAR intervenes if there was in his opinion an evident wrong referee decision in order to give the employee the opportunity to correct his wrongful decision, it is imaginable that case law might change with respect to the employment status of referee's individual, per-assignments. Nonetheless, the likelihood of such a change in case law is rather low as the referee is not bound to VAR's opposing opinion, he is only obliged to review the game scene on the screen, leaving the referee's ultimate decision authority eventually unaffected.

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