Industrial Law Journal, 2025.
https://doi.org/10.1093/indlaw/dwaf002

RECENT CASE

Employment Status: The Death Throes of the Tests of Mutuality of Obligation and Control

Acceptance Date January 6, 2025; Advanced Access publication on January 31, 2025.

ABSTRACT

The UK Supreme Court in HMRC v Professional Game Match Officials Ltd answered two contentious issues about the identification of contracts of employment for the purpose of tax law. The first rejected the claim that 'mutuality of obligation' is a necessary feature of contracts of employment unless it is interpreted to mean the same as 'consideration', an essential requirement for all legally binding contracts. The second interpreted the meaning of the necessary requirement of control exercised by the employer to require no more than authority granted by a contractual framework backed up with the possibility of imposing sanctions for poor performance. Although the case concerned a question of tax law, the Supreme Court intermingled case law from employment law as well, so that the case is the leading authority on mutuality of obligation and control for employment law as well.

1. INTRODUCTION

The legal distinction between employees (contracts of service) and independent contractors (contracts for services) is used in many branches of the law. In addition to employment law, many of the leading cases concern the application of tax law. In that context, the distinction matters primarily because the PAYE system for collection of taxes applies only to employees, and a different National Insurance regime applies to those who are not employees. To add further complexity, tax and National Insurance law uses only this binary classification, as found in the case law, and not the worker concept found in employment law. However, many of the tax cases on employment status do involve the application of legislation, often referred to as the Intermediaries legislation or IR35, which sometimes treats a person whose services are provided through a personal service company as an

employee for the purposes of PAYE and National Insurance.[1] The IR35 legislation, somewhat unwisely, incorporates the common law case law on the definition of employment. HMRC tends to press for as many workers as possible to be classified for tax purposes as employees or to be treated as employees under the IR35 legislation, and there has been a good deal of litigation on this issue in the IR35 context recently.

In drawing the distinction between employees and independent contractors, there has been much cross-fertilisation between branches of the law: leading cases are drawn from both employment and tax. For instance, one of the most frequently cited cases in employment law, a case often regarded as the starting point for legal analysis, is the tax case of *Ready Mixed Concrete (South East) Ltd v Ministers of Pensions and National Insurance* ('RMC').[2] Cross-fertilisation can, however, lead to confusion and error when the context of a decision in one branch of the law is not properly understood by courts and tribunals addressing issues arising in a different branch of the law. The decision of the Supreme Court in *HMRC v Professional Game Match Officials Ltd* ('HMRC v PGMOL')[3] was required to sort out a misunderstanding in the tax tribunals of two lines of authority in employment law cases. The confusion was encouraged by some of those arguing IR35 cases with a good deal of revenue at stake, although HMRC v PGMOL is not itself an IR35 case. The influence of the IR35 cases is relevant, however, because they involve taxpayers operating through limited companies which might have appeared to have an impact on the nature of the tests. The precedents under discussion concerned the idea of 'mutuality of obligation' and the concept of 'control' that is generally regarded as a necessary feature of contracts of employment.

2. THE HISTORY OF THE CASE

In professional football, referees for matches are provided by PGMOL, a not-for-profit intermediary established jointly by the Football Association,

[1] The case of *HMRC v Atholl House Productions Limited* [2022] EWCA Civ 501 is an example of a case arising from this legislation and is cited frequently in PGMOL, not least because it was a decision led by Sir David Richards, who also gave the judgment in PGMOL, having by this time been elevated to the Supreme Court.

[2] [1968] 2 QB 497.

[3] *Commissioners for His Majesty's Revenue and Customs v Professional Game Match Officials Ltd* [2024] UKSC 29,

the Premier League and the English Football league. Referees have to be registered with the Football Association and comply with their rules. PGMOL trains the referees and allocates them to specific matches. While some referees are full-time employees of PGMOL, a larger group agrees to referee matches in their spare time. The arrangements for part-time referees specify that neither is PGMOL obliged to offer them work nor are referees required to accept a match when offered. In practice, these part-time referees are offered a match on a Monday for the following weekend. Referees normally accept a match or give a reason such an injury for turning the opportunity down. Although either side could cancel an engagement at short notice without sanction, normally the work is performed and PGMOL pays the match fee. PMGOL controlled the performance of the job in the sense that referees needed to be registered, comply with the rules of the game, and to complete their reports, for otherwise they would not be paid or offered work. On the other hand, PGMOL could not control the performance of the referee during the match; for instance, it could not instruct the referee to award a penalty kick! The question in the case was whether the part-time referees were employees of PGMOL or independent contractors.

The First Tier Tribunal (FTT) held that there were both overarching (or umbrella) contracts for the season and individual contracts for each match. It held, however, that neither were contracts of employment. As regards the individual contracts for each match, the FTT held that they were not contracts of employment because the mutual obligations were insufficient to found a contract of employment since either party could cancel without sanction, and also because PGMOL had insufficient control over the referees in the individual match contracts.

On appeal, the Upper Tribunal dismissed the appeal by HMRC on the grounds that there was no mutuality of obligation to support the overarching contract and that there was insufficient mutuality of obligation in the individual match contracts to constitute them as contracts of employment.[4]

The Court of Appeal[5]allowed HMRC's appeal as regards mutuality of obligation in the individual match contracts, but dismissed their appeal as regards the overarching contracts. It rejected the further argument that there was insufficient control over the performance of work to qualify as a contract of employment. The case was remitted to the FTT to consider

[4][2020] UKUT 147 (TCC), noted in Collins and Freedman, 'Section 7 and Schedule 1: workers' services provided through intermediaries' (2022) (4) *British Tax Review* 394.
[5][2021] EWCA Civ 1370, [2022] 1 All ER 971.

whether there was 'sufficient mutuality of obligation and control in the individual contracts to be contracts of employment'.

Before the Supreme Court the only issue was an appeal by PGMOL against the decision of the Court of Appeal as regards the issues of mutuality of obligation and control under the individual match contracts. HMRC abandoned the argument for an overarching contract of employment. The Supreme Court was therefore asked to provide guidance and a decision on the narrow question of whether in the circumstances of the case in relation to individual match contracts there was both 'mutuality of obligation' and 'control'. Before considering how the Supreme Court addressed those issues, we need to remind ourselves of how the common law courts have sought to draw the distinction between contracts of employment and contracts for services.

3. THE QUEST FOR NECESSARY AND SUFFICIENT CONDITIONS

In answering the question of whether a contract is one of employment or for services, judges have always hoped for the existence of a test in which there are necessary and sufficient conditions for the existence of a contract of employment. This hope is forlorn. The correct legal analysis involves a multi-factor approach in which every proposed criterion is merely a factor that adds weight to one conclusion or the other. Nevertheless, judges always grasp at straws in the hope they can find necessary or sufficient conditions for the existence of a contract of employment. That is why the apparent certainty of MacKenna J in RMC is so often cited because he stated that there are three necessary conditions.

> 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.

Despite its appearance of providing the necessary and sufficient conditions for a contract of employment, careful examination reveals that this appearance of certainty is illusory.

The first condition (i) states that there must be consideration for the contract, which is of course required for any contract, whether of employment

or for services. It also contains the requirement of personal performance of work, though that is also consistent with a contract for services. MacKenna J added that the requirement of personal service was inconsistent with the ability to hire others to perform the contract, thereby supporting the 'no substitution' rule, but then the judge conceded that a limited or occasional power of delegation is consistent with a contract of employment. The Supreme Court in Deliveroo lent its support to the idea that the ability to substitute another negatived a contract of employment or worker status,[6] without recognising the qualification correctly acknowledged by Mackenna J. The concession is correct because it is commonplace in workplaces that one employee will ask another to help out in the completion of a task without that altering their employment status.

The second condition, (ii) control, is not in fact a rigid test because it is framed as a matter of degree: 'in a sufficient degree to make that other master'. Mackenna J mentioned (at 515 F) several factors that might be considered (the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it should be done), but ultimately he agreed with the High Court of Australia in *Zuijs v Wirth Brothers Pty Ltd* that: 'What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters'.[7]

The third condition, (iii), requires no more than for a court to consider the whole of the provisions of the contract for guidance as to whether on balance it fits into a standard model of a contract of employment. Although it is stated as a third condition, it is unspecific because there is no explanation of what terms would be inconsistent with employment status. In practice, as in *HMRC v PGMOL* itself, this third stage is regarded as requiring a multifactorial approach in which a court is required to consider all the circumstances of the case, not merely the terms of the contract.

4. MUTUALITY OF OBLIGATION

In *HMRC v PGMOL* the Supreme Court had the opportunity to eliminate the confusing concept of 'mutuality of obligation' from the whole discussion

[6] *Independent Workers Union of Great Britain v Central Arbitration Committee & Anor* {2023] UKSC 43, [2024] ICR 189

[7] (1955) 93 CLR 561 at p 571.

of the distinction between contracts of employment and contracts for services. The Irish Supreme Court had done precisely that only a few months before.[8]It recognised that the requirement of mutuality in both UK cases and Irish cases is exactly the same as the common law requirement that a contract should be supported by consideration. Condition (i) in RMC uses the language of consideration, but in recent years this requirement has also been described 'mutuality of obligation'. The requirement of mutuality was then elevated to being a necessary condition for contracts of employment rather than simply being a requirement for all contracts as a result of a loose phrase in *Carmichael National Power PLC*.[9] At the end of an argument to demonstrate that there was no binding umbrella contract of any type, it was said that what was missing was 'that irreducible minimum of mutual obligation necessary to create a contract of service'.[10]If only the last two words 'of service' in that quotation had been omitted, we would have been spared a great deal of confusion and litigation. In *HMRC v PGMOL,* Lord Richards, giving judgment for a unanimous Supreme Court, expresses some reluctance to use the term mutuality of obligation,[11] but unfortunately continued to use it. It would appear that writers of textbooks on the law of contract will have to say that every enforceable contract must be supported by consideration, except contracts of employment, which require mutuality of obligation, though mutuality means exactly the same as consideration. But perhaps the Supreme Court has done enough to assist the death of the concept of mutuality.

At the very least, Lord Richards may have succeeded in eliminating the confusion that has surrounded the concept of mutuality of obligation in the tax tribunals. He correctly points out that the phrase was introduced in employment law cases in order to help to determine whether casual work consisting of intermittent performance of work was performance under long-term overarching contract or umbrella contract. The existence of a long-term contract that existed in between jobs being performed was often necessary for employees to be qualified to claim employment law rights because of requirements of lengthy periods of continuity of employment before employment law rights would accrue. The phrase mutuality

[8] *The Revenue Commissioners v Karsham (Midlands) Ltd t/a Domino's Pizza* [2023] IESC 24; noted Michael Docherty, 'Domino Dancing: Mutuality of Obligation and Determining Employment Status in Ireland' (2024) 53 *Industrial Law Journal* 524.
[9] [1999] ICR 1226.
[10] Ibid., 1230.
[11] Para [40].

of obligation was often used to express the idea that for a long term or umbrella contract to exist, it was necessary for both parties to enter into binding promises to provide work in return for remuneration in an on-going relation. In casual work, however, it is often the case that the employer does not promise any work and the employee does not promise to perform work when it is offered. That was the contractual arrangement in PGMOL with the part-time referees, which made it hard for the HMRC to argue that there was any long-term contract. Even if there is a long-term overarching or umbrella contract, there is a good chance that it will not fit the model of a contract of employment but be regarded as some other kind of framework agreement.

Unfortunately, the tax tribunals appear to have taken the phrase mutuality of obligation out of context and treated it as an independent and necessary condition for the existence of a contract of employment. In particular, the Upper Tribunal seemed to think that mutuality of obligation requires that a contract should be long-term if it is to qualify as a contract of employment. For that reason, it ruled out the possibility of contracts of employment for the duration of a football match. That reasoning transplanted the search in employment law for an umbrella contract, which needs to be long-term to provide continuity of employment, into the wholly different question of whether a short-term contract for the performance of work personally in return for remuneration was a contract of employment. Although both parties to employment relations often hope and expect that it will endure for a period of time, lengthy duration is not a necessary condition for the existence of a contract of employment. It is possible, if uncommon, for a contract of employment to exist for only 90 minutes. In *HMRC v PGMOL*, the Supreme Court concluded that the contract was formed on Monday, when a match was offered to a referee, and was concluded the following Monday when the referee lodged the necessary report and was paid a match fee. The contract was of short duration, but nevertheless was a contract of employment.

PGMOL raised one further argument for suggesting that there was no mutuality of obligation. It pointed out that under the terms of the contract, either party could terminate the contract without sanction prior to the match. It was suggested that either that term negatived mutuality of obligation or that it was a relevant consideration at the third stage of considering whether the agreement fitted the model of a contract of employment. Lord Richards correctly rejected any suggestion that the termination clause had any bearing on the question of consideration or mutuality of

obligation. The fact that a contract contains a term that enables either party to terminate it on giving short notice does not prevent a legally enforceable contract from arising. Lord Richards did not rule out the possibility that a termination clause might be relevant to the multi-factorial assessment at the third stage of the enquiry, but it would only be one among many factors to be considered. This clearly does not have the strength that those pushing the mutuality argument in the tax context had hoped for, but they can be expected to reintroduce many of their arguments at the third stage of the inquiry as PGMOL has been remitted back to the First Tier Tribunal for this to proceed.

For HMRC this is an important win, as those arguing against employment status, particularly in the context of IR35, had been pressing the mutuality test very strongly and complaining that it was not properly described by HMRC in its employment status manual and that it should have been included in its 'check employment status for tax' tool (CEST)[12] but was not. HMRC stood firm in resisting including mutuality as a test in CEST and now considers itself to be vindicated. Those representing taxpayers seeking to avoid classification as employees are disappointed but can be expected to continue their fight by trying to reintroduce these issues in other guises at stage 3 of the inquiry.[13]

5. CONTROL

The second issue before the Supreme Court was whether the referees were sufficiently under the control of PGMOL to satisfy the second condition for the existence of a contract of employment set out in RMC. It will be recalled that the FTT had held that there was insufficient control because the PGMOL had no power to direct the referees in the performance of their duties during matches. Indeed, under the binding rules of the Football Association, referees are required to act completely independently, so that they cannot lawfully act under the control of anyone. The FTT held that the ability of PGMOL to sanction referees after performance of the match contract by dropping them from the rota or requiring them to undergo

[12] https://www.gov.uk/guidance/check-employment-status-for-tax

[13] Keith Gordon, 'PGMOL v HMRC:I think it's all over (almost)'. *Tax Adviser*, October 2024, 34.

additional training was an insufficient degree of control for an employment relation.

These arguments of the FTT in favour of the absence of sufficient control were rejected by the Upper Tribunal and the Court of Appeal. The Supreme Court agreed that the combination of various contractual obligations regarding the conduct of referees during an engagement provided a sufficient framework of control. The existence of effective sanctions after performance of an engagement also contributed significantly to the ability of PGMOL to control the conduct of referees.

The Supreme Court provided useful clarification on the concept of control. It recognised that the absence of control over the detailed performance of the contract is not decisive, especially in the case of highly skilled workers. What is required is a framework of control, which can be derived from the contractual terms. The ability to impose economic sanctions for poor performance of the contract after termination also supports the view that there is sufficiency of control to qualify the contract as one of employment.

We could explain this view of control as authority by saying that contracts of employment are relational contracts because they are incomplete by design: not every detail is specified in the contract and a power or legitimate authority is conferred on the employer to fill in the gaps and adjust the performance according to the needs of the business. Control or authority may be a necessary condition, but it is a matter of degree, and ultimately it concerns an interpretation of the contractual relation to determine whether it confers significant authority on the employer to specify and adjust obligations under the contract. Limited powers of control can be also consistent with the contractual relation being one of a contract for services, as where I hire a landscape gardener to design and create a garden for me according to my taste and specifications. So 'control' is not necessarily a distinguishing feature between employment and independent contracting. Where these contractual arrangements differ is rather the on-going authority of an employer to monitor and direct performance of work.

6. CONCLUSION

The Supreme Court therefore allowed HMRC's appeal against the decision of the FTT. It held that for the individual match engagements there was mutuality of obligation (or consideration). It further held that the degree of control exercised by PGMOL over the referees was sufficient to satisfy this

requirement of a contract of employment. However, the court decided to remit the case to the FTT to consider whether there were any other factors, apart from mutuality of obligation and control, that were relevant and might lead to the conclusion that those factors negatived the existence of a contract of employment. It seems very unlikely that such factors existed given the intense and detailed review of the tribunal's decision. Nevertheless, following the three-stage test of RMC, that enquiry had yet to be carried out in full. This shows the very unsatisfactory nature of this test as a means of deciding in what manner and at what level to impose tax and National Insurance Contributions. The time it will take to determine this case is completely unacceptable and creates uncertainty for business and those who are engaged by them. The rise in the level of National insurance Contributions for employers in relation to employees in the 2024 Autumn Budget further increases the pressure on this distinction.

Perhaps the most important lesson to be drawn from *HMRC v PGMOL* is that lawyers should exercise extreme caution when transplanting concepts, rules, and quotations from one branch of the law to another. The sorry tale of the concept of mutuality of obligation is a lesson in the pitfalls of quotations out of context. Loose phrases can be misused when applied to different contexts. The story of mutuality of obligation has been plagued by such ambiguity. When judges have said that mutuality of obligation is necessary for the existence of a contract of employment, they should have said that it was simply necessary for the existence of any contract at all. The employment judges who said that there must be mutuality of obligation were originally trying to answer the question of whether there was an umbrella contract that joined together short term contracts to provide continuity of employment. They were not asking the question whether the contract could be characterised as a contract of employment. Mutuality of obligation tells us nothing about the nature of the contract, but simply confirms that the agreement is legally enforceable because it is supported by consideration.

HUGH COLLINS*
*London School of Economics, London, United Kingdom,
email: h.collins@lse.ac.uk

JUDITH FREEDMAN**
**University of Oxford, Oxford, UK,
email: judith.freedman@law.ox.ac.uk

https://doi.org/10.1093/indlaw/dwaf002