Neutral Citation Number: [2021] EWCA Civ 1370

Case No: A3/2020/1392

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM**
**The Upper Tribunal (Tax and Chancery) Chamber**
**(The Honourable Mr Justice Zacaroli and Judge Thomas Scott)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/09/2021

**Before :**

**LORD JUSTICE HENDERSON**
**LADY JUSTICE ELISABETH LAING**
and
**SIR NICHOLAS PATTEN**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **The Commissioners for Her Majesty's Revenue and Customs** | **Appellant** |
| **- and -** | |
| **Professional Game Match Officials Limited** | **Respondent** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr Akash Nawbatt QC and Mr Sebastian Purnell** (instructed by **HMRC Solicitors Office and Legal Service**) for the **Appellant**
**Mr Jonathan Peacock QC and Miss Georgia Hicks** (instructed by **McCormicks Solicitors**) for the **Respondent**

Hearing dates : 20-22 July 2021

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

**Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00 a.m. on Friday, 17 September 2021.**

## Lady Justice Elisabeth Laing DBE :

*Introduction*

1. This is an appeal by Her Majesty's Revenue and Customs ('HMRC') against a decision of the Upper Tribunal (Tax and Chancery Chamber) ('the UT'). The UT upheld a decision of the First-tier Tribunal (Tax and Chancery) Chamber ('the FTT'). The FTT had allowed the appeal of Professional Game Match Officials Limited ('PGMOL') from determinations and decisions of HMRC. The practical issue is whether PGMOL should deduct income tax and employer's National Insurance Contributions from the payments it makes to referees whom it supplies to officiate at football matches.
2. The liability to make such deductions depends on whether the relationship between PGMOL and the referees was governed by a contract of employment, or by a contract for services. In this case, the FTT and the UT considered both whether or not there was an overarching contract of employment which covered the whole football season ('an overarching contract'), and if not, whether each occasion on which a referee officiated at a match was governed by a specific contract of employment ('an individual contract').
3. As Lord Clarke JSC said in *Autoclenz Limited v Belcher* [2011] UKSC 41; [2011] ICR 1157, paragraph 18, '… the classic description of a contract of employment (or contract of service as it used to be called) is found in the judgment of Mackenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] QB 479 at 515' ('*RMC*'). That description has three elements.

*'(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.'*

4. The FTT held, rejecting PGMOL's arguments to the contrary, both that there was an overarching contract between PGMOL and the referees, and that there were match-specific, or 'individual' contracts. PGMOL did not appeal to the UT against those conclusions. The FTT also held that there was not, either in the overarching contract, or in the individual contracts, sufficient mutuality of obligation to satisfy the first of the three limbs of the *RMC* test. The FTT did not make a specific finding about whether the second limb was satisfied in the overarching contract, but did hold that it was not satisfied in relation to the individual contracts. HMRC appealed to the UT against those conclusions. On that appeal, the UT upheld the FTT's decisions about mutuality of obligation in relation to both contracts, but held that the FTT had erred in law in reaching its conclusion that there was no sufficient framework of control in the individual contracts. It did not substitute its own decision, or remit this issue to the FTT, because of its conclusion about mutuality of obligation.
5. The overall questions on this appeal are whether the FTT or the UT erred in law. In more detail, there are two broad questions and several subsidiary questions.
    i. Did the FTT err in law in its conclusions
        1. about mutuality of obligation
            a. in the overarching contract and/or
            b. in the individual contracts and
        2. about control in the individual contracts?
    ii. Did the UT err in law in its conclusions that the FTT

1. did not err in law on the questions of mutuality of obligation but
2. did err in law on the question of control in the individual contracts?

PGMOL have served a Respondent's Notice seeking, in effect, to restore the reasoning of the FTT on the last sub-issue.

6. On this appeal, Mr Nawbatt QC and Mr Purnell represented the Appellant. Mr Peacock QC and Miss Hicks represented PGMOL. I thank counsel for their written and oral submissions.
7. When I refer in this judgment to paragraph numbers, I am referring to paragraph numbers in the determinations of the UT and FTT, as the case may be. If it is necessary to distinguish between the two determinations in any context, I will refer to the relevant paragraph numbers as 'UT paragraph [number]' and 'FTT paragraph [number]' respectively.
8. A decision on the main legal issues depends on an understanding of the principles involved in many decisions of the Employment Appeal Tribunal ('the EAT') and of the Court of Appeal in the employment field, and in some cases in the field of income tax and National Insurance Contributions. The Court heard, over three days, intricate submissions. There were three separate files of authorities. I mean no discourtesy to counsel's industry by not referring to all of the submissions or to all the authorities. The parties' legal submissions on this appeal largely repeated the submissions which they made below, with the addition of submissions attacking, or as the case might be, defending the reasoning of the UT. Some of the debates about the precise nuances of the authorities are of forensic interest only. The authorities are examples of the courts' application of broad underlying principles to particular facts. It is not in my view profitable to examine those authorities minutely searching for the exact answer to the questions raised by the issues in this case, on what are, on any view, very unusual facts.
9. For that reason, it is convenient to start with a summary of the facts as found by the FTT. I will then consider the legal context, before turning to the legal reasoning of the FTT and of the UT.

*The facts found by the FTT*

10. The hearing before the FTT took seven days. The FTT read 11 witness statements and heard evidence from five witnesses (paragraph 19). The FTT gave a broad summary of the evidence in paragraphs 20-28. The witnesses included two referees from the relevant group of referees. The FTT also read witness statements from three referees who officiated at lower levels. The FTT also considered many documents, including HMRC's interviews with some referees (paragraph 27) and the documents described in paragraph 28. The FTT also had the benefit of legal submissions from leading counsel on both sides.
11. PGMOL is a company limited by guarantee. It was set up in 2001. Its three members are the Football Association Limited ('the FA'), the Football Association Premier League Limited ('the Premier League') and the Football League Limited ('the EFL'). Its members fund PGMOL. The FTT gave a detailed account of that relationship in paragraphs 92-101. PGMOL is not a profit-making body. PGMOL's role is to provide referees and other officials for significant matches, in particular in the Premier League, the FA Cup and the EFL (which comprises 72 clubs in the Championship and Leagues 1 and 2), and to ensure that there is a pool of actual and future elite referees. The FA is the governing body and regulator of English football. It classifies 30,000 referees in ten groups ranging from the International to Level 9 (trainees). PGMOL

appoints referees at Level 1 to officiate at matches and helps with the training and fitness of Level 2 referees.

12. PGMOL employs some full-time referees under written contracts of employment ('Select Group Referees'). At the relevant time they mostly refereed games in the Premier League. Select Group Referees are in the FA's Level 1. Level 1 also includes the part-time referees who are the subject of this appeal. These referees usually combine refereeing with full-time jobs in other fields. There were 60 such referees in 2014-15. PGMOL pays them match fees and expenses (the funding of these sums is explained in paragraphs 96-97). Referees do not submit an invoice, but are paid automatically once they have submitted a match report and entered their expenses on MOAS (paragraph 99). MOAS is a software programme used by the FA, to which PGMOL and the referees have access (paragraph 32).
13. The FTT referred to these referees as the 'National Group Referees'. I will use the acronym 'NGRs'. At the relevant time the NGRs mostly officiated at matches in Leagues 1 and 2, but also in the Championship and the FA Cup. They also acted as fourth officials in Premier League games. Very occasionally, an NGR who was being considered for promotion to the Select Group would referee a match in the Premier League (paragraph 11). The FTT explained, in paragraph 12, why the NGRs played a 'significant' role.
14. The FTT's comprehensive findings of fact are in paragraphs 35-108. I will only refer to those which are relevant to the issues on this appeal. The FTT described the FA's role in paragraphs 29-36. The FA is, in effect, football's regulator. A referee must be registered with the FA. Once registered, a referee is bound by all the FA's rules, which are in a 'lengthy handbook'. The FA can discipline referees for breaking the rules. For referees at Level 1, 'the FA's disciplinary role effectively sits alongside PGMOL's own role' (paragraph 30).
15. All referees start at the lowest level and work their way up. Referees must pass regular fitness tests. If they fail they are 're-classified' (this is a euphemism for 'demoted': see the first sentence of paragraph 74). Their performance is assessed, and the higher the level, the more rigorous is the scrutiny. There are merit tables at Level 4 and above. To get promoted, referees have to officiate at a minimum number of games.
16. The FA makes match appointments of referees at Levels 4-2 on MOAS. Referees and PGMOL also have access to MOAS. MOAS enables referees and officials to 'close' dates for which they will not be available, and PGMOL to notify, and referees and officials to accept (or reject), match appointments. MOAS is used to communicate match reports and assessment scores. MOAS also enables referees to indicate geographical preferences or restrictions. A referee may, but does not have to, give a reason for closing off a date.
17. The FTT considered the Laws of the Game, the FA Rules, the Referee Regulations, the EFL rules and the Premier League handbook in paragraphs 37-41. Law 5 of the Laws of the Game makes clear that the referee has full authority to enforce the Laws of the Game and that his decision is final.
18. Paragraphs 42-58 are headed 'PGMOL and Level 1 referees'. Before 2001 the FA appointed and managed referees at the higher levels. PGMOL's aims include ensuring that referees are independent of competitions and that there is a pool of referees for appointment to senior games who are of a high quality and well trained. It was agreed that PGMOL 'controls the National List (Level 1)' because it promotes referees to it, demotes people from it, and appoints referees to matches (paragraph 42). It has a low public profile (paragraph 45). As well as promoting referees to and in Level 1,

PGMOL also trains referees at Level 2A in order to ensure that there is a pool of suitable referees who can be promoted to Level 1, and to ensure consistency at all levels. PGMOL appoints assessors who watch and report to PGMOL on the performance of Level 1 referees. This assessment results in a 'competency score' for each referee for each match, which is based on performance against several different criteria, including 'Key Match Decisions' ('KMDs'). KMDs are reviewed by independent panels. Clubs also give reports on referees to PGMOL (paragraph 47).

19. The FTT described, in paragraph 48, how referees are promoted to the National Group. This is, strictly speaking, a responsibility of the FA, but it is in practice managed by PGMOL. Once a referee is an NGR, his performance is 'assessed continually' using the reports from assessors and clubs, which are recorded on MOAS. A merit table is compiled. This is used for appointing officials to matches and for awarding performance bonuses, as well as for promoting and demoting referees (paragraph 49).
20. Mr Riley is a former referee who has been managing director of PGMOL (or its equivalent) since 2010. He described the role of a referee below the Select Group as a hobby 'albeit a very serious one at National Group level'. It is fitted round other paid work and does not pay the bills. By contrast, PGMOL 'own' the Select Group referees. They are expected to do whatever PGMOL asks. NGRs, by contrast, are not obliged to follow a particular training programme or to go to training meetings, and are not obliged to accept match appointments. 'In practice, however, [NGRs] are at that level because they love the role and are highly committed to it, so in the vast majority of cases they will do their best to referee as much as possible, and to remain sufficiently fit to do so at National Group level. Particular problems, such as work commitments, will be discussed with PGMOL staff' (paragraph 50).
21. Match appointments are offered to NGRs on MOAS, usually on the Monday of the relevant week. PGMOL's Operational Management Team ('OMT') allocates appointments. The OMT will take into account the referee's suitability, availability and any conflict of interest. It will try to take into account geographical preferences (paragraph 51). Once appointments are allocated, referees can accept them on MOAS. They can reject an appointment if they are no longer available, although PGMOL will want to understand why. Changes can be made after an appointment is accepted (a referee may suddenly get ill, or have an unexpected work commitment). If a referee does not attend, he is not paid a match fee. PGMOL can cancel an appointment, too, if for example, a referee has had 'unhelpful media attention' or there was a risk that his integrity might be seen as compromised. PGMOL, not the referee, chooses a substitute (paragraph 52).
22. NGRs are offered training sessions, for which they are paid a 'token' £100, plus expenses. PGMOL sends out a physical training programme each week during the season and a four-week pre-season programme. Referees used to think these were compulsory, but they are not. Some referees keep fit in other ways. The FTT's impression was that most referees followed these programmes 'pretty closely, not only for the obvious reason that they need to stay at a high level of fitness to be able to perform at National Group level, but also because they are generally highly motivated individuals with a strong desire to develop and perform to the best of their abilities'. PGMOL's sports scientists devise the programmes, and regularly receive and analyse training data about the referees. Sometimes they provide a 'more tailored' programme. PGMOL 'would expect' a National Group referee to 'have at least some level of engagement with his allocated sports scientist, otherwise he would be contacted, at least if match reports indicated there was an issue' (paragraph 53).

23. PGMOL also employs coaches for referees. Initially PGMOL could not afford to allocate a coach to each referee, but one is now. Those in their first or second year as NGRs get the most help. Coaches go to some matches, and give one-to-one support in person. They will discuss areas for improvement and targets. A coach may give advice before and after a match, and at half-time, and might make a written report. Referees in 'development groups' get significant support and coaching. Most referees will ring their coach after a game to discuss it. The support 'might well extend beyond on-pitch performance'. There is usually a review at the end of the season (paragraph 54).
24. PGMOL gives NGRs other support, such as private medical insurance (and it will generally pay any excess), heart screening and psychological support. There is an annual pre-season training conference. Select Group referees also go to it. There are mixed discussion groups (paragraph 55). PGMOL supplies match and training kit, and suits which 'should be worn' to and from matches, branded ties, and coats. Assistant referees and fourth officials wear the same uniforms, so that 'they appear as a professional team'. PGMOL lends match officials communications gear so that they can communicate with each other during a game. The referees supply their own boots, trainers, watches, cards and whistles. In practice they also need their own computers. Many pay for gym subscriptions, heart monitors, Sky TV subscriptions, nutritional supplements and sports massages (paragraph 56). NGRs are paid match fees, travel expenses and a training attendance allowance. If they do well during the season, they may also get a share of the 'performance or merit payment pot'. The amount in the pot is fixed before the start of the season. A referee's share depends on his position in the merit table. That amount will be cut if he completes fewer than a specified number of games in a season (paragraph 57). Many referees stay in the National Group for many years. The FTT referred to two who had stayed for 16 and 17 years respectively. Others stayed for between seven and 11 years. Some are promoted to the Select Group and 'a few' are demoted, including when they are not fit enough. Some retire. Mr Riley accepted that the NGRs 'could be seen as "part and parcel" of the PGMOL organisation, or as part of the PGMOL "family"'. The FTT noted their position on the PGMOL structure chart for the 2013-14 season (paragraph 58).
25. The FTT considered, in paragraphs 59-86, a range of relevant documents: the pre-season documents, the Code of Practice, the PGMOL Guidelines, the Match Day Procedures, the Declaration of Interests form, the Fitness test and fitness training protocol, the Promotion and reclassification criteria, the Code of Conduct, the Goal Decision System protocol, the match assessor guidelines, the covering email, the merit payment distribution, and the National List Development Groups Protocol.
26. When a NGR is first appointed, he gets a letter before the start of the season inviting him 'to serve on the National List' for the season, subject to two conditions, and wishing him 'a successful career as a National List referee' (paragraph 59). NGRs are then sent, by email, a number of documents, some of which they must sign. Those varied from season to season but not significantly. The FTT summarised the 2015-16 documents (paragraph 60).
27. The Code of Practice said that if a referee accepted the invitation to join the list, he would not be 'an employee of PGMOL and will be treated as being self-employed'. Officials who have accepted an appointment to the list are 'expected to adhere to the Code of Practice'. The referee has to sign and return that document. By signing he confirms that he has accepted the invitation to join the PGMOL list 'on the terms outlined above and in the Fitness Protocol' (paragraph 61). The Code of Practice is a short document organised under headings. It says that appointments are made by

PGMOL and there is '…no guarantee that [officials] on the List will be offered any appointments to matches and [officials] are not obliged to accept any appointments to matches offered to them' (paragraph 62). A number of points are then listed under the heading 'Expectations'. Officials are 'expected to be readily and regularly available for appointments'. There are also expectations about attaining and keeping fitness levels as determined by PGMOL, fitness and other testing in accordance with the Fitness Protocol, obeying FA and competition rules, and carrying out 'all instructions procedures and directives relating to [officials]' issued by PGMOL. Sanctions for breaking FA regulations were for the FA. Officials 'shall at all times act impartially'. They must not act if there is a conflict of interest and must declare any conflict to PGMOL. Officials may be invited to help promote the products or services of sponsors but may not take part in competing promotions. Referees can speak to the media immediately after a game to clarify points about the Laws. Other media work may only be done with PGMOL's approval. The document refers briefly to assessment, training and coaching. Referees 'will be required to attend meetings with coaches' (paragraph 65).

28. The PGMOL guidelines was a long document produced by Mr Riley. It is said to contain 'directives', although PGMOL refers to it as 'guidelines'. The FTT summarised the guidelines in paragraph 66. They accepted Mr Riley's evidence that the aim of this document is to summarise the relevant key requirements of the FA, the rules of the competitions, and guidelines which are of particular importance to PGMOL officials, together with best practice points from PGMOL's refereeing experts.
29. The Match Day Procedures document is self-explanatory. It applies to both the Select Group and to the NGRs. It is a detailed and prescriptive document. The FTT accepted from Mr Riley that the purpose of this document was to protect referees from concerns about their independence, and that other topics were being 'highlighted or transmitted to referees by PGMOL'. The FTT observed that the procedures also protect PGMOL and the competitions, cross-referring to the covering email described in paragraph 82 (paragraph 67).
30. The declaration of interests form must be filled in, signed, and returned to PGMOL. It reflects FA regulations. The FTT described its contents in paragraphs 68-70.
31. The FTT summarised the fitness and training protocol in paragraphs 71-73. 'This document must be signed and returned, in terms that the referee "understand[s] the PGMOL protocol outlined above and agrees to abide by it"' (paragraph 73).
32. NGRs who do not pass an annual test by 31 August will be demoted (unless they have a good excuse). No official is allowed to officiate if he has not passed the test. The OMT 'reserves the right' to insist on re-tests. The relevant criteria are listed. If the official does not pass a re-test by 31 March, the official will be demoted (unless he has a good excuse) (paragraph 71). The form recommends the weekly or fortnightly submission of data to PGMOL's sports scientists. If a referee is injured he 'must' tell his sports scientist immediately and keep the sports scientist informed of his progress. Such a referee may be required to be tested again before he can return to officiating. An official who does not satisfy his sports scientist that he is fit 'will not be allowed to officiate'. The FTT observed 'In contrast to this training advice for the National Group, training requirements for the Select Group, and the provision of training data, are mandatory' (paragraph 72).
33. The function of the promotion and re-classification criteria is also self-explanatory. The criteria are mostly based on performance. They take into account match reports, assessments and fitness. The FTT observed that 'fitness' was "denoted

by…compliance with the fitness protocol, match performance, and adherence to the training programme". The criteria for promotion contain a similar reference to fitness (paragraph 74).

34. The FTT considered the Code of Conduct between paragraphs 75 and 78. NGRs (and PGMOL directors and staff) were required to sign a declaration that they had read and would comply with the Code of Conduct, and FA regulations, and FA rules on bribery and betting, not tolerate any form of manipulation of matches, and report any issues. The Code of Conduct stated that compliance with it was 'a condition of…employment or engagement as a self-employed contractor'. Bribery or corruption could lead to removal from the relevant PGMOL list. The Code of Conduct refers to the need to comply with various requirements (paragraph 77). The evidence of Mr Riley, which the FTT accepted, was that the Code of Conduct both put the FA's relevant requirements in a 'digestible form' but also allowed PGMOL to act quickly, rather than having to wait for the FA to act (paragraph 78).
35. It was clear to the FTT that match assessors had 'an important role' in giving feedback to referees. The 'clear tone' was of 'advice and assistance in personal development, rather than instruction' (paragraph 81).
36. The covering email for 2015-16 said that the Code of Conduct was 'the basis for your relationship with PGMOL'. In 2014-15, it said that the Code of Conduct 'sets out PGMOL's requirements of you'. The Declaration of Interests form is said to be the way in which a referee 'is obliged to notify us' of any conflicts. The Match Day Procedures 'protect you and PGMOL'. The email emphasises that it is important to 'adhere' to them. In 2015-16, in a new procedure, the referee was required to confirm that he had read, understood, and would "comply" with its requirements (paragraph 82). The covering email for 2013-14 was very short. The referee was asked to sign and return the code of practice and the declaration of interests form.
37. In paragraph 84, the FTT summarised the document which sets out the arrangements for merit payments and which is also sent to NGRs at the start of the season. It described the total pot available, and how payments 'will' be calculated. The level of payments created incentives to officiate at more matches, and to achieve a good ranking in the merit table. Mr Riley's evidence was that, at the end of the season, the payments would be made as indicated, unless the referee group had had a 'catastrophic season' (paragraph 84).
38. The total hours worked by the NGRs varied, according to how many matches were offered and accepted. The FTT's 'general impression' was that referees who were performing acceptably would be offered a game in most weeks of the season. Some might also get a mid-week game. The overall commitment might be 12 hours a week. The average based on PGMOL's 2014-15 budget was about four matches every five weeks, as a referee or as a fourth official. The real figure, taking into account FA Cup games, could well be higher (paragraphs 87-89).
39. PGMOL has its own disciplinary procedures. The FTT saw examples of suspensions of a team of officials for a breach of match day procedures, after a PGMOL investigation, and a resignation from the National List by another referee after an investigation. PGMOL and the FA would discuss which organisation was better placed to investigate a serious allegation. The FA has greater powers. PGMOL could suspend a referee but only the FA could remove a referee from a List (paragraph 90).
40. In paragraphs 102-106, the FTT summarised HMRC's interviews with seven referees and with Mr Barry (who was too ill to give evidence at the FTT hearing). Mr Barry was a former referee, head of Refereeing at the FA, and a member of PGMOL's OMT. The FTT considered that the notes were 'informative'. His evidence was that

NGRs had a choice about whether to accept a game or to go to training. There are no oral agreements with referees. Everything is written down. PGMOL is the sole engager. It engages referees annually (because there is an annual review). The referee has total control on the field, subject to the FA's Referee Regulations. Off the field, PGMOL rules apply. Referees represent PGMOL as well as the FA when they officiate. A better performance by a referee can increase his annual income.

41. In paragraph 104, the FTT made important findings about the general picture which emerged from the witness statements and oral evidence. The NGRs were

*'committed, driven individuals who are passionate about football, refereeing and about their performance as referees, and who have a continual desire to improve'.*

They were not doing it for the money.

*'They are professional in their approach and place obligations on themselves: two referees referred to refereeing as an addiction. They are ambitious perfectionists. They have worked very hard over a number of years to be promoted through the different levels of refereeing. They recognise that not making themselves available for matches and training may compromise their ability to perform at the highest level and lose them the opportunity to be offered the best matches, and they do not want that to happen. They want to referee at the level they have worked hard to attain. That is the key reason why they make themselves available as much as possible and do a lot of training. Refereeing is however a hobby and must take second place to primary work commitments. Most but not all thought there was no contract (or at least employment contract) and most thought that the specific training programme was not obligatory. There were references to PGMOL having expectations of referees being available and doing training, and to an expectation on the part of referees of being able to officiate on most dates they had not closed off.'*

42. The FTT added that the referees closed off dates when they wanted to, and that PGMOL would arrange cover, even late in the day, if the referee could not officiate at a match at short notice (eg because of work commitments, illness or injury). There was no sanction for pulling out, but the referee would not be paid the match fee. The referees had their own pre-match routines. Those recognised that the referee was in charge on match day. Referees were paid a set fee, regardless of the time it would take them to travel to the ground (including overnight stays). They were paid nothing extra for preparation or for writing the match report which triggered the payment of the fee (ibid and paragraphs 105-6).
43. From the 2017-18 season onwards, PGMOL agreed that the NGRs were 'workers' for employment purposes, which gave the referees some employment rights. The Code of Practice was replaced by 'Terms of Engagement' (paragraph 107).

*The legal context*

44. As the FTT recorded in paragraph 13, the determinations in question were issued under regulation 80 of the Income Tax (Pay as You Earn) Regulations 2003 in respect of income tax deductible under the Pay as You Earn ('PAYE') system. The decisions in question were issued under section 8 of the Social Security (Transfer of Functions, etc.) Act 1999.
45. Section 4(1)(a) of the Income Tax (Earnings and Pensions) Act 2003 ('the 2003 Act') provides that 'employment' includes 'any employment under a contract of service'. Section 2(1)(a) of the Social Security Contributions and Benefits Act 1992 ('the 1992 Act') defines 'employed earner' as a person who 'is gainfully employed in Great Britain …under a contract of service …with earnings'. Section 122(1) of the 1992 Act defines 'employment' as including 'any trade, business, profession, office or vocation'. '"Employed" has a corresponding meaning' (FTT paragraph 13).

46. The decisions and determinations related to the tax years 2014-15 and 2015-16. The premise of those determinations and decisions was that PGMOL was the employer of certain football referees during three football seasons which partly coincided with those tax years (2013-14, 2014-15 and 2015-16) (FTT paragraph 1).
47. Whether or not a contract is a contract of employment is significant for the putative employer's liability to deduct tax and National Insurance Contributions from any payments it makes to the putative employee. It can also be significant in a different statutory context, because a contract of employment is the foundation for many, but not all, statutory employment rights, such as the rights to a minimum period of notice, to a redundancy payment, and to claim unfair dismissal. There is no requirement, for the purposes of tax or National Insurance Contributions, that the contract at issue should have lasted for any length of time. However, in the field of statutory employment rights, this question can be very significant, as, in order to claim many, but not all, statutory rights, an employee must show that he has the necessary period of continuous employment. The current statutory provision about continuity of employment is section 211 of the Employment Rights Act 1996 ('the ERA'). There have been similar provisions in employment legislation since the 1960s, at least (see section 1(1) of and Schedule 1 to the Contracts of Employment Act 1963 and sections 1(1) and 8(1) of the Redundancy Payments Act 1965).
48. Where an employee works seasonally, or intermittently, he may need to establish, in order to show that he has the necessary continuity of employment, that his relationship with his employer was governed by an overarching contract during the periods when he is not actually working. It is necessary to recognise, when considering the reasoning in any decision of the EAT (or of the Court of Appeal on appeal from the EAT), that in some cases, the employee had to establish that there was an overarching contract between him and his putative employer which bridged any gap between periods of work, and that in other cases, he did not, and that the criteria which apply to overarching contracts do not necessarily apply to contracts for a specific piece of work or engagement. It is further necessary to recognise that the legal reasoning in these decisions may not apply across the board, and to recognise which parts of the reasoning were essential to the actual decision in the case, and which parts were obiter. A further complicating factor is that some of the decisions analyse tri-partite relationships between employment agencies, their clients, and applicants/claimants, and that there is no tri-partite relationship in this case.
49. I can illustrate the main points by referring to three decisions of the Court of Appeal and to one decision of the House of Lords.
50. The first is *McMeechan v Secretary of State for Employment* [1997] ICR 549. The appellant ('A') was a litigant in person. He worked for an employment agency under a series of temporary contracts. The agency was required, as a matter of law, to give him a written statement of the terms on which he was engaged, which stated whether he was employed under a contract of service or not (p 551F-G). The terms of his contract said, among other things, that he was not an employee, but would provide his services as a self-employed person. He was not obliged to accept any engagement, but if he did, he was obliged to comply with listed obligations. The agency could instruct him to end an assignment with a client at any time and could dismiss him summarily for misconduct. The agency was not obliged to provide, and A was not obliged to serve, any particular number of hours during any day or week; but the contract would end if A did not accept an offer of work, or failed to attend work for any reason for any period. The terms are set out in full at p 552H-555C.

51. The agency became insolvent. A applied to the Secretary of State, under section 122 of the Employment Protection (Consolidation) Act 1978, for payment of the money owed to him by the agency in respect of his last assignment. The Secretary of State refused that application on the grounds that A was not an employee. The industrial tribunal ('the IT') dismissed his appeal. The EAT allowed A's further appeal, holding that the effect of the terms of his engagement was that he was an employee. It is significant that A did not have to establish any period of continuous employment in order to claim his pay for the last assignment.
52. Waite LJ, giving a judgment with which McCowan and Potter LJJ agreed, recorded (p 551E) that A's case had been that he was an employee of the agency because of his general relationship with the agency. The Court had allowed him to advance a new case on appeal, which was that 'he was entitled to be treated as an employee of the agency in respect of the single stint served with the particular client in respect of whom the moneys claimed had been earned'. The amount at stake was £105.07.
53. At p 555E, Waite LJ referred to the test whether the putative employee was 'in business in his own account'. He also referred to the leading text book, and to 'the criterion of mutual obligation. The principle which it enshrines is that, if there be an absence on the one side of any obligation to do such work as may voluntarily be provided, then that provides a powerful pointer against the contract (assuming that in such circumstances any contract has arisen at all) being one of service'. He added that temporary or casual workers posed particular problems for an IT, as there would often be two relationships which the IT would have to analyse: a 'general engagement… under which sporadic tasks are performed by one party at the behest of the other, and the specific engagement …which begins and ends with the performance of any one task. Each engagement is capable, according to its context, of giving rise to a contract of employment'. Waite LJ referred to two earlier decisions of this Court in support of that proposition: *Nethermere (St Neots) Limited v Gardiner* [1984] ICR 612 and *O'Kelly v Trusthouse Forte Plc* [1983] ICR 728.
54. He considered the 'general engagement' first, observing that this was the type of arrangement most often found in the authorities, no doubt because 'the temporary worker's single stints will seldom have been of sufficient length to found an independent claim in their own right for redundancy or unfair dismissal' (p 556B-C). He gave examples of cases in which ITs had, and had not, been willing to 'infer a generalised contract of service from a sustained course of dealing'. He added, at p 557C-D, that there was less authority about single engagements. One reason for this was that fewer rights attached to such engagements. It was an issue in *O'Kelly*. The majority of this Court had decided that the IT in that case had sufficiently considered that issue. Waite LJ referred to a different decision of the EAT in which the EAT had held that it had not been open to an IT, as a matter of law, to hold that a single engagement had been a contract of employment (557F-558G). For the reasons he gave at p 564 E-G, he held that that decision should not be followed.
55. Waite LJ summarised the procedural history and the arguments in this Court. He recorded a concession by the Secretary of State that this issue was not concluded by authority, which, in his view, was 'properly made'. Whether a particular engagement involved a contract of service could not be decided 'by rule of thumb' but by weighing all the 'various indicia as interpreted according to the particular context'. It had become clear to the Court that what A really wanted was to be treated as an employee in respect of, and paid for, his last stint. The Secretary of State did not object to this new argument, but made three submissions in response.

i. If the general engagement was not a contract of employment, there could be no contract of employment in respect of the single stint.
ii. Even if (i) was not a general rule, it was a proposition which applied in the present case, when the contractual terms applied both to the general engagement and to the single stint.
iii. If a single stint could, in theory, give rise to a contract of employment, the absence of mutual obligations to provide, and to do, work, was fatal to its existence in that case.

56. Waite LJ rejected submission (i). Where the claim related to pay for a single stint, it was logical to 'relate the claim to employment status to the particular job of work in respect of which the payment is sought'. He quoted the text book again: 'the better view is not whether the casual worker is obliged to turn up for, or do, the work, but rather, *if* he turns up, and does the work, whether he does so under a contract of service or for services'. There was nothing incongruous in holding that (in an employment agency case) A was an employee in respect of each stint actually worked, even if he was not an employee under the general terms of engagement. Waite LJ referred to *O'Kelly*. Its importance was not that the IT had 'fortuitously' reached the same conclusion about the general and the individual engagements, but that the IT had considered each separately, and had been held to have been right to do so. It was 'an irresistible inference' (at least, from the judgment of Lord Donaldson MR) that the IT was under a positive duty to do so. The force of that point was not lost if, as in the current case, the general terms were intended to apply both to the general engagement and to each stint. The difficulties of interpretation which might arise were disadvantages which did not 'supply any valid reason for denying the temporary worker or the contractor the right to have the issue of contractual status judged separately in the two contexts'.
57. The single stint covered four days' work in January 1992. The question was whether that assignment amounted to a contract of service 'in its own right'. Waite LJ then interpreted the general conditions as they applied to that single assignment, looking at several clauses and assessing their overall effect. The conditions which excluded mutuality of obligation were 'irrelevant in this context. That is not to say that in the different context of the general engagement they would be without effect…In the circumstances of a specific engagement, however, there is nothing on which they can operate. When it comes to …the terms of an individual, self-contained engagement, the fact that the parties are not obliged in future to offer, or to accept, another engagement with the same, or a different, client must be neither here nor there'. There were pointers in both directions in the terms, but the overall impression, despite the label which the parties had given to the relationship, was that for the specific engagement, the terms gave rise to a contract of service between A and the contractor.
58. The decision of this Court in *Clark v Oxfordshire Health Authority* [1998] IRLR 125 is also relevant to the issues in this case. It concerned a 'bank nurse' ('A') She was offered work when there was a temporary vacancy. In fact, with a few short gaps, she worked fairly continuously between January 1991 and January 1994. The IT held that she was not an employee because she was not obliged to accept, and the authority was not obliged to offer her, any work. On her appeal, the EAT held that her relationship with the authority was governed by a global contract of employment. This Court overturned that decision on appeal, because there was no mutuality of obligation during the periods when A was not working on a specific assignment. It remitted the case to the IT for it to consider whether, at the time of A's dismissal, there was a

specific engagement which amounted to a contract of employment, and could found a claim for unfair dismissal.

59. Sir Christopher Slade (with whom Schiemann and Beldam LJJ agreed) held (paragraph 41) that the Court was bound by earlier authority (which he referred to in paragraphs 22-26) to hold that '*some* mutuality of obligation is required to found a global contract of employment'. Those obligations 'need not in every case consist of obligations to provide and perform work… an obligation by the one party to accept and do work if offered, and an obligation by the other party to pay a retainer during such periods as work was not offered would …be likely to suffice'. The EAT was wrong to hold that there was a global contract of employment. The parties had, however, agreed that the IT had not considered whether 'at the relevant time there existed a specific engagement which amounted to a contract of service and could provide the basis for a claim for unfair dismissal' (paragraph 43). Mr Elias QC (as he then was), representing the authority, conceded that remission to the IT would be 'inevitable', so that the IT could consider that distinct question.
60. The Respondents ('Rs') in *Carmichael v National Power Plc* [1999] 1 WLR 2042 worked as tour guides at Blyth power stations in Northumberland. They applied to an IT for a written statement of the particulars of their employment. They were not entitled to that statement unless they were employees. Their primary case was that an exchange of letters in 1989 with the Central Electricity Generating Board ('the CEGB') amounted to a contract of employment. They did not argue that 'when they actually worked as guides they did so under successive ad hoc contracts of employment' (p 2044H per Lord Irvine of Lairg LC, with whom the other members of the Appellate Committee agreed).
61. The CEGB invited applications 'for the posts of station guides'. Successful applicants would be given full training. The invitation said that 'Employment will be on a casual as required basis' and stated the rate of pay. The offer letters repeated that the employment would be 'casual as required'. Enclosed with those letters was a typed reply, which again repeated that the employment was on that basis. Rs were trained, and worked as guides when asked to and when they were available.
62. The IT held that 'the case founders on the rock of absence of mutuality' and held that there was no contract at all between Rs and the CEGB, because when they were not working, there was no contractual relationship between them and the CEGB. The IT held that the documents 'did no more than to provide a framework for a series of successive ad hoc contracts of service or for services which the parties might subsequently make.' That analysis of the documents was adopted by Lord Irvine at p 2046D-E. The IT held that 'The parties incurred no obligations to provide or accept work but at best assumed moral obligations of loyalty in a context where both recognised that the best interests of each lay in being accommodating to the other' (p 2045G-H).
63. Lord Irvine said that if the case had turned only on the construction of the documents (but it did not) those imposed no duty to provide, or to do, any work; and that would mean that 'There would therefore be an absence of the irreducible minimum of mutual obligation necessary to create a contract of service (*Nethermere (St Neots) Limited v Gardiner*…and *Clark v Oxfordshire*…)'. It was evident that the documents were not a complete statement of the terms of the arrangement, but were one important source of material from which the IT was entitled to infer the parties' true intentions (p 2047C-D and G-H and 2050 D-E).
64. Lord Hoffmann (with whom the other members of the Appellate Committee also agreed) held that the construction of a written contract is only a question of law when

all the terms of the contract are embodied in the document. If they are not, and the parties' intentions have to be gathered partly from a document or documents and partly from oral exchanges and conduct, a decision about what the terms of the contract are is a question of fact (p 2049B-C). He added, at p 2051C-D, that if the IT's finding about lack of mutuality could not be disturbed (on an appeal on a point of law), it followed that Rs' engagement in 1989 could not have been a contract of employment; although 'it may well be that when performing the work, they were being employed'. That would not have been enough for Rs, however, as 'They could succeed only if the 1989 engagement created an employment relationship which subsisted when they were not working'.

65. In *Prater v Cornwall County Council* [2006] EWCA (Civ) 102; [2006] 3 All ER 1013, a teacher was engaged under successive and overlapping contracts to teach different children who could not be taught in school. She did not argue that there was an overarching contract between her and the Council, but that each contract to teach a pupil was a separate contract of employment. She relied, instead, on the temporary cessation of work provisions in section 212 of the ERA to bridge the gaps during her ten-year relationship with the Council.
66. Mummery LJ, with whose judgment Longmore LJ and Lewison J (as he then was) agreed, recorded the Council's argument on the appeal in paragraph 30: 'The mutuality created by Mrs Prater being contractually obliged to work during each successive engagement was not …the same mutuality necessary to constitute the "irreducible minimum" required for a contract of service to exist. Simply working hard on a regular basis under a series of short engagements one after another was not enough to make Mrs Prater an employee of the council. There had to be a continuing obligation to guarantee and provide *more* work and an obligation on the workers to do *that* work' (original emphasis). Mummery LJ encapsulated that argument, in paragraph 32, as an argument that the authorities showed that 'mutuality of obligation within each separate contract is insufficient to create a contract of service if, after the end of the contract, there is no continuing or further obligation on the council to offer more work, or on Mrs Prater to accept more work'.
67. He rejected that argument in paragraphs 33 and 38, and explained in paragraphs 34-37 why the authorities did not support it. In paragraph 40 he summarised the position in five propositions. They included that, under each contract, Mrs Prater was engaged and was paid to teach pupils; it made no difference that the Council was not obliged to offer her more work at the end of each engagement, or she to accept it; the 'important point' was that 'once the contract was entered into and while it continued, she was under an obligation to teach the pupil and the council was under an obligation to pay her…That was all that was legally necessary to support the finding that each individual teaching engagement was a contract of service.'
68. A distinct legal issue in this appeal is whether a provision in a contract which enables one side or another to terminate it before performance negates the mutuality of obligation which is one of the necessary elements of a contract of employment. Mr Nawbatt referred us to several authorities which show that such a provision does not negate mutuality of obligation. Unless and until the option to bring the contract to an end is exercised, the contract subsists, with its mutual obligations. See, for example, paragraph 26 of *Byrne Bros (Formwork) Limited v Baird* [2002] ICR 667 (EAT: Mr Recorder Underhill QC – as he then was – and lay members); paragraphs 13 and 30 of *Stephenson v Delphi Diesel Systems Limited* [2003] ICR 471 (EAT: Elias J – as he then was – and lay members).

69. A further legal issue is what degree of control is necessary. At this stage, all I need to say is that I agree with the UT that the FTT directed itself correctly in paragraph 16 on the criterion of control. The FTT referred to a statement in paragraph 19 of *Montgomery v Underwood* [2001] EWCA (Civ) 318; [2001] ICR 819 that there must be a "sufficient framework of control" …in the sense of "ultimate authority" rather than there necessarily being day-to-day control in practice'. That approach is illustrated by the decision of the High Court of Australia ('the HCA') in *Zuijs v Wirth Brothers Proprietary Limited* (1955) 93 CLR 561, to which the UT referred. The worker in that case (A) was an acrobat in an itinerant circus. He was injured in the course of a performance and claimed compensation from the Workers' Compensation Commission ('the Commission'). His putative employer was not able, for obvious reasons, to 'step in' when he was doing his work. His employer could neither control nor interfere in his work. A's claim for compensation was dismissed by the Commission and by the Supreme Court of New South Wales ('the SC'). The HCA, in a passage quoted by the UT, said, '…a false criterion is involved in the view that if, because the work to be done involves the exercise of a special skill or individual judgment or action, the other party could not in fact control or interfere in its performance, that shows that it is not a contract of service' (p 570). The HCA continued, '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 and collateral matters' (p 571). The HCA gave examples of those matters on p 572. Between pp 573-4, it cited a passage from *Stagecraft v Minister of National Insurance* (1950) SC 288, a Scottish decision about comedians, including this sentence: 'The employer of such a servant can direct the objective to which the servant's skill is to be addressed, but he is powerless to control the manner in which the servant's skill is exercised'. The HCA held that the SC had erred in law in holding that there was no contract of employment and remitted the claim to the Commission with a direction that it be re-heard.

*The FTT's legal reasoning*

70. The FTT introduced the legal issues in paragraphs 13-18. It referred to the relevant statutory provisions. The FTT said (ibid) that the definitions in those provisions depended on the approach which the courts had taken to the meaning of those terms in decided cases. The FTT quoted (paragraph 14) the 'classic summary of the conditions required for a contract of service' given by MacKenna J in *RMC* (see paragraph 3, above).
71. The FTT explained that the first condition is generally referred to as 'mutuality of obligation'. Some degree of that is the 'irreducible minimum' for the existence of a contract of service. It is possible for a contract of employment to exist only when work is being done. A casual worker may therefore have a series of contracts of employment (FTT paragraph 15). The FTT said it would return to that subject. Control was an 'important indicator' but not straightforward to apply to some professions. There must be a 'sufficient framework of control', in the sense of 'ultimate authority' rather than, necessarily, day-to-day control in practice (paragraph 16). The third condition was a negative one. If the first two conditions are met, there will be a contract of employment unless other elements of the contract are inconsistent with that view (paragraph 17).
72. In paragraph 18, the FTT noted that other tests have been used by the courts, such as whether a person can be seen as being 'in business on his own account'.

73. The FTT quoted *RMC*. It noted, correctly, by reference to *Carmichael*, that 'some level of obligation to perform work personally and pay remuneration is an "irreducible minimum" of a contract of service', and that a contract of employment could exist only when work is being done, 'such that a casual worker may have a series of contracts of employment' (paragraph 15). Control was an important indicator, but not straightforward, 'especially when applied to certain professions'. The FTT then cited the passage from *Montgomery v Underwood* to which I have already referred (paragraph 16).
74. The FTT summarised the parties' submissions in paragraphs 109-123. It recorded that PGMOL's 'principal submission' was that there was no contract between PGMOL and the NGRs. PGMOL submitted, among other things, that control stemmed from the Laws of the Game. If there was a contract it was not necessary to imply a term that PGMOL were obliged to offer matches, or the NGRs were obliged to accept matches. PGMOL was not obliged to offer work or to pay if it did not provide work. There was no 'wage-work' bargain. 'Even if there was mutuality during each individual assignment, taking account of its absence between assignments, the mutuality was insufficient for a contract of service (*Windle v Secretary of State for Justice* [2006] EWCA (Civ) 459; [2016] ICR 721). The control was regulatory control not 'control resting with PGMOL'. There was 'no possibility of control during individual engagements'.
75. HMRC submitted that the terms of the relevant contracts were partly to be found in the documents which the FTT had considered, but were also to be inferred from 'the wider factual matrix'. The test was not necessity (*Carmichael v National Power* [1999] ICR 1226). The written terms might not reflect the parties' true intentions (*Autoclenz v Belcher*). The practical reality of the arrangements is important. The engagements to officiate at matches were contracts of employment. Their context was an overarching contract. 'It was not necessary to decide the nature of the overarching contract, although in HMRC's view it was a contract of employment.'
76. In paragraphs 124-134, the FTT explained its conclusions that the seasonal arrangement and the individual engagements were both contractual. There was 'a wealth of evidence to support this conclusion and very little evidence to support PGMOL's contention…' (paragraph 124). PGMOL was 'created to *provide the services* of match officials to the competitions…In order to provide those services, PGMOL had to engage referees' (original emphasis) (paragraph 125). The FTT did not accept Mr Maugham QC's submission that PGMOL was acting as a 'glorified bank account' which was a 'brave attempt' to explain evidence, which emerged during the hearing, that payments were made directly by PGMOL to NGRs (Mr Maugham represented PGMOL at the FTT hearing). The evidence showed that PGMOL fixed the fees and engaged the referees (paragraphs 128 and 129). In paragraph 129, the FTT referred to 'PGMOL's requirements' of referees and its disciplinary procedures. In paragraph 132, the FTT held that '…the pre-season documents, together with the communication of financial terms orally and/or in writing amounted to express contractual relationships between PGMOL and the referees'. The FTT distinguished both *Cheng Yuen v Royal Hong Kong Golf Club* [1998] ICR 131 (PC) (a case about a golf caddie who was, in reality, paid and engaged by individual golfers rather than by the golf club) and *Quashie v Stringfellow Restaurants Limited* [2012] IRLR 536 (a case about a lap dancer who paid a club a fee to dance there, and was paid by the customers of the club).
77. In paragraphs 135-150, the FTT considered the approach it should take to deciding what the terms of any contract were. The FTT found that there was an annual

overarching contract. The terms were 'largely' in the pre-season documents. The FTT rejected PGMOL's submission that because the documents were not written in contractual language, they could not have any contractual effect. The FTT decided that it was not looking for implied terms, and that the effect of *Carmichael*, on which HMRC relied, was that the FTT could consider the parties' conduct, which could be the source of contractual terms, and to read the documents in the light of the parties' conduct. On the authority of *Carmichael*, that was a fact-finding exercise (paragraph 141).

78. Many of the documents referred to 'expectations' but there were some legally binding obligations on both sides, which the FTT listed in paragraphs 142 and 143. The Code of Conduct largely reflected obligations owed to the FA, and the Match Day Procedures reflected competition requirements, but 'they do amount to specific commitments to PGMOL' (paragraph 143). The documents also amounted to 'commitments by PGMOL that if referees attend training or officiate at matches…they will be paid fees and expenses at the rates specified' (paragraph 144). The FTT rejected HMRC's submission that 'the reality of the arrangements was that there was some legal obligation to provide work or accept work offered…The terms of the Code of Practice are clear that there was no such obligation.' That was not overridden by the parties' conduct. Ordinarily a body which has to provide the services of highly qualified people 'from a limited pool of available talent' would 'wish to ensure that it can call on staff who have a legal commitment to work. However, this is not an ordinary situation. PGMOL is dealing with highly motivated individuals who are keen to referee at the highest level, and who generally wish to make themselves available as much as possible. There is no need for legal obligation. The referees simply place obligations on themselves (see the discussion in paragraph 104 above)'. PGMOL had control over the size of the pool, and had 'doubtless tailored that to ensure that in practice it has a sufficient number of referees available…' (paragraph 145).
79. The FTT considered, in paragraphs 146-151, and rejected, several arguments which HMRC relied on to show that the overarching contract was a contract of employment, based on the system for merit payments, and on the contention that an expectation of being offered work, can, over a period, if in practice work is offered, somehow crystallise into an obligation on the employer to offer it. The FTT distinguished *St Ives Plymouth Limited v Haggerty* UKEAT/107/08, 22 May 2008, unreported (EAT) and *Addison Lee v Gascoigne* [2018] ICR 1826 (EAT) because the contractual terms in this case expressly negated obligations to offer work, or to accept such an offer. The practice (regular offers and acceptances) in this case was explained by the fact that the referees were driven and ambitious, and by the limited size of the qualified pool. The overarching contracts for each season were not contracts of service because there was no mutuality of obligation (paragraph 151).
80. The FTT then considered whether the individual engagements were contracts of service. In paragraph 152 it asked itself, first, whether, and if so, how, the existence of the seasonal overarching contracts might affect that issue. *Windle v Secretary of State for Justice* showed that 'the nature of arrangements between periods of work, and in particular the presence or absence of mutuality of obligation can shed light on the character of the relationship when the work is being done'. The question in that case was whether freelance interpreters were workers. The Court of Appeal held that the ET was 'right' to take into account the absence, between assignments, of an overarching contract imposing an obligation to offer or to accept work. The ultimate question 'must be the nature of the relationship during the period when the work is

being done'. The absence of mutuality between assignments might shed light on the nature of the specific contract. If a person is only supplying work on an 'assignment-by-assignment basis' that might 'tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status, even in the extended sense….Its relevance will depend on the particular facts…it is necessary to consider all the circumstances' (paragraph 23 of *Windle* per Underhill LJ). The FTT considered some other authorities and concluded (paragraph 158) that 'Ultimately the test of whether an employment relationship exists is multi-factorial'. The overarching contracts were 'part of the relevant factual matrix'.

81. In paragraph 159, the FTT held that individual match appointments 'each gave rise to a contract constituted by the offer of the appointment made by PGMOL, and its acceptance by the referee, through the MOAS system. Under the contract the referee would agree to officiate…and PGMOL would agree to pay fees and expenses at the specified rate, subject to the submission of a post-match report'. The context for the individual engagement was the overarching contract. The FTT said that there was 'no sanction' if a referee did not turn up for a match. Nothing suggested that not attending a match was a breach of contract. Usually, in practice, there would be a good reason for non-attendance. The referee 'clearly' had no right to substitute someone else for himself. If he did not turn up, he would be replaced, and the 'particular contract would fall away (without sanction) and no match fee would be paid'. It was also understood that if PGMOL needed to, it could cancel a particular appointment and replace the referee with another person. 'In our view this would, again, not involve a breach of contract'. Subject 'to these points' the FTT considered that 'during the actual engagement there would be some level of mutuality, namely for the referee to officiate as contemplated (unless he informed PGMOL that he could not) and for PGMOL to make payment for the work actually done'.
82. The FTT understood that the question for it was whether there was mutuality during each individual contract (paragraph 161). It was relevant that the individual contract started when the match was offered and accepted and that even after acceptance, both sides could withdraw. The FTT distinguished *Weightwatchers (UK) Limited v HMRC* [2012] STC 265 (a decision of Briggs J (as he then was), sitting in the UT) on the grounds that, in that case, the right of the meeting leader to withdraw before holding a meeting was fettered (a leader could only not hold a meeting for good reason, had to try to find a suitable replacement, and had to give as much notice as possible). The leader's obligation only came to an end when a replacement was found or the meeting was cancelled.
83. The FTT also distinguished *Cornwall County Council v Prater*. The teacher in that case was engaged under a series of individual contracts to teach individual children who could not go to school. Each contract was held to be a contract of employment. The difference was that once the contract was entered into and while it continued, 'the teacher was under an obligation to teach the pupil and the council was under an obligation to pay her for teaching the pupil'. The FTT observed 'In this case, there is no comparable obligation, outside the actual performance of duties at a match' (paragraph 162).
84. In paragraphs 163-9 the FTT considered control. In order for the individual engagements to be contracts of employment 'there must be not only mutuality but also a "sufficient framework of control"…this means some contractual right of control, in the sense of the employer having the right to step in, even if that right is not exercised in practice and even if the individual is engaged to exercise his or her own judgment about how to do the work…(paragraph 163). Mr Maugham submitted

that any control was regulatory, not PGMOL's, and that 'during engagements, referees, like clergy, were beyond control'. HMRC relied on the assessment and coaching system, and the controls imposed by the documents.

85. The FTT agreed that the pre-season documents gave PGMOL 'some elements of control'. Some, most notably the Match Day Procedures, applied only on match days and 'were therefore relevant to individual match appointments'. Others, such as contact with sports scientists, did not. As well as owing regulatory obligations to the FA, and the competitions, the FTT had found that the NGRs owed direct commitments to PGMOL via the pre-season documents (paragraph 165). The FTT did not consider that the assessment and coaching systems 'themselves provide further elements of control in respect of individual match appointments'. The assessment system was 'clearly very important' and fed into the merit tables, selection for further matches, merit payments, promotion and demotion, but 'it is advisory rather than controlling in nature'. The coaching system was personal, and designed to support the referees. A coach might offer advice at half-time, but it was advice and not 'an indicator of control' (paragraph 166).
86. Some referees suggested in interviews that they had no control over where they were sent. The FTT did not consider that that was 'legally correct'. They could express geographical preferences on MOAS, and could refuse particular appointments once offered. They were legally free to do so. Where the referee went was a function of the nature of the engagement he accepted, rather than being the outcome of control 'in an employment sense' (paragraph 167).
87. The FTT was not persuaded by Mr Maugham's analogy with clergy. It was nevertheless relevant to 'consider the nature of the role'. The referee was in charge on match day, had full authority, and his decisions were final. Fourth officials 'answer to, and work with, the referee'. The FA alone deals with breaches of its Referee Regulations. It was hard to see how PGMOL could 'retain even a theoretical right to step in while a referee is performing an engagement at a match…however badly Mr Riley, or anyone else from PGMOL who might be watching, thinks that the referee is doing'. The most they could do was to offer advice at the time and to take action afterwards. The Laws of the Game make clear that the referee's decision is final. There was no suggestion that PGMOL could remove the referee at half-time (paragraph 168).
88. The FTT's conclusion on this issue (paragraph 169) was that PGMOL did not have 'a sufficient degree of control during (and in respect of) the individual engagements to satisfy the test of an employment relationship. It did have a level of control outside match appointments as a consequence of the overarching contract'. Some of the mechanisms imposed by that contract applied to matches, but 'there was no mechanism enabling PGMOL to exercise the correlative rights during an engagement'. The only real sanction which PGMOL could impose 'for failure to adhere to these commitments was not to offer further match appointments, and to suspend or remove the referee from the National Group list. If an issue emerged between appointment and match day, all PGMOL could do was to cancel the appointment. 'But that is not an exercise of control during the engagement: it is a termination of that particular contract altogether'.
89. The next section of the FTT's decision is headed 'The third condition and other approaches' (paragraphs 170-174). In paragraph 170, the FTT referred to the examples of contracts which are not contracts of employment given by MacKenna J in *RMC* (a building contract, and a contract of carriage). The FTT said 'The fact that there is some element of control does not mean that there is necessarily a contract of

service. Simplistically, the equivalent here would be to say that a referee is engaged to officiate at a particular match, rather than to work for PGMOL under its control'.

90. The test of whether a person is in business on his own account, the FTT observed in paragraph 171, is not very illuminating in the case of a professional such as a surgeon or an actor who does not supply his equipment and takes no financial risk. The FTT considered the evidence. Referees could not be considered to have set up their own 'business-like organisations'. The fees were fixed for the task, irrespective of how long it took. Referees could increase their earnings to a limited extent (paragraph 172). If this was relevant, PGMOL and most referees did not think the relationship was a contract of employment. The referees were seen as 'part and parcel' of the PGMOL organisation. The fact that the NGRs relied on one paymaster was a pointer towards employment (paragraph 173).
91. The FTT's overall conclusion was that there was 'insufficient mutuality of obligation and control in the individual engagements to amount to employment, even though the level of integration, the hours worked, the fact that the referees could not obviously be described as in business on their own account and the fact that PGMOL was their only or primary paymaster in their refereeing activities, are elements that may be suggestive of an employment relationship'.

*The grant of permission to appeal to the UT*

92. The FTT gave HMRC permission to appeal on 13 November 2018. HMRC challenged the FTT's conclusions, in relation to the individual contracts, on mutuality of obligation and on control, and on mutuality of obligations in relation to the overarching contracts.

*The decision of the UT*

93. The UT summarised the FTT's decision in paragraphs 17-32. It described its task on an appeal on a point of law in paragraphs 33-35.

*Mutuality of obligation*

94. Paragraphs 36-70 are headed 'Mutuality of obligation'. The UT started that section by saying, in paragraph 36, that HMRC's submissions raised two questions of law.
    i. Apart from the requirement that services must be provided personally, is the requirement of mutuality relevant only to the question whether there is a contract of any kind, and not to the question of whether the contract is contract of employment or a contract for services?
    ii. Is the content of the relevant obligations only that they be sufficiently work-related, and 'in particular' is it 'unnecessary that the employer commits to provide work, or payment in lieu of work, or that the individual commits to accept work'?
95. In paragraph 37, the UT cited *Clark v Oxfordshire Health Authority* and *Carmichael v National Power* for the propositions that mutual obligations must subsist over the entire period of a contract of employment and that 'if there was no obligation on the putative employer to provide casual work' or on the putative employee to do it, there would be ' "an absence of that irreducible minimum of mutual obligation necessary to create a contract of service" '. HMRC argued that 'mutuality of obligation is relevant only to the questions of whether there is a contract at all, and, if there is a contract, whether it contains an obligation to provide services personally and obligations which are in some way "work-related", and not to the question whether such a contract is one of employment or a contract for services'. The UT thought that that approach 'stems principally' from a decision of Elias J (as he then was, sitting in the EAT) in

*Stephenson v Delphi Diesel Systems Limited* [2003] ICR 471. In paragraph 13 of his judgment, Elias J said that when the person is actually working, a contract must exist because the person undertakes to work, and the employer, to pay for that work. The existence or otherwise of obligations to offer work, or to do it, if offered, was irrelevant to the question of whether there is a contract while the work is being done. In such a case, the only question was whether there was sufficient control.

96. The UT thought that the EAT (Langstaff J) had taken a different view in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181. In that case, a carpenter was engaged to work as and when work was available. He had worked continuously for 21 months. The ET decided he was a worker, but not an employee. The EAT remitted the question whether he was an employee to the ET. The focus in the EAT was on whether there was an overarching contract. Langstaff J said in paragraph 48 of his judgment that the issue was not just control. 'The contract must also necessarily relate to mutual obligations to work and to pay for (or provide) it: to what is known in labour economics as "the wage-work bargain"'. At paragraph 54, Langstaff J repeated that 'Regard must be had to the nature of the obligations mutually entered into to determine whether a contract formed by the exchange of promises is one of employment, or should be categorised differently'.
97. The UT referred to *James v Greenwich London Borough Council* [2007] ICR 577. Elias J, again sitting in the EAT, referred to *Cotswold Developments* and indicated that '…the nature of the duty must involve some obligation to work such as to locate the contract in the employment field. If there are no mutual obligations of any kind, there is simply no contract at all, as *Carmichael*…makes clear; if there are mutual obligations, and they relate in some way to the provision of, or payment for, work which must be personally provided by the worker, there will be a contract in the employment field, and if the nature and extent of control is sufficient, it will be a contract of employment' (paragraph 16). He added, in paragraph 17, 'In short, some mutual irreducible minimal obligation is necessary to create a contract; the nature of those mutual obligations must be such as to give rise to a contract in the employment field; and the issue of control determines whether that is a contract of employment or not.'
98. The UT thought it unlikely that Elias J's reference to 'the employment field' was to the field occupied both by contracts for services and contracts of employment, because he had cited *Cotswold Developments* 'without criticism' (paragraph 44). The UT thought that this point was 'put beyond doubt' by a statement of Mummery LJ at paragraph 45 of his judgment in the Court of Appeal ('The mutuality point is important in deciding whether a contract, which has been concluded between the parties, is a contract of employment or some other contract'). The UT also thought that this approach was supported by the decision in *Weight Watchers (UK) Limited*. The UT said, 'The dual purposes of the mutuality of obligation requirement was reiterated…[it] can serve one of two distinct purposes. First, it can determine whether there is a contract at all…Second, it can determine whether a contract is one of employment, referring to numerous cases where there is no doubt that the parties had a contractual relationship …but the question was whether the mutual obligations were sufficiently work-related…'.
99. In paragraphs 46 and 47 the UT said that Elias LJ, as he by then was, had returned to the question in *Quashie*. In paragraph 14, he qualified what he had said in *Stephenson* by saying that he should have added to the last sentence of paragraph 14 of *Stephenson* that even where 'the work-wage relationship is established and there is substantial control, there may be other features of the relationship which will entitle a

tribunal to conclude that there is no contract of employment in place, even during the individual engagement. *O'Kelly* and [*RMC*] provide examples'. HMRC submitted that the only change of position by Elias LJ was expressly to recognise that the third limb of *RMC* was relevant. The UT thought that the problem with that, '(aside from the clear statement to the contrary') in *James v Greenwich* in the Court of Appeal, was that Elias LJ had expressly recognised that mutuality of obligation could be used in two senses: the obligations necessary to show that there is a contract, and the obligations necessary to show that there are 'obligations of the kind necessary to establish a contract of employment'.

100. The UT also referred to the judgment of Lewison J (as he then was) in *Prater v Cornwall County Council*. The UT described the nature of the case, and said that the claimant 'claimed that each engagement was an employment contract and that the periods between the engagements were abridged [sic] by…section 212(3) of [the ERA]'. Mummery LJ said that the 'important point' was that "once a contract was entered into and while that contract continued, [the tutor] was under an obligation to teach the pupil and the council was under an obligation to pay her for teaching the pupil made available to her by the council under that contract. That was all that was legally necessary to support the finding that each individual teaching engagement was a contract of service". Longmore LJ similarly identified sufficient mutuality of obligation in that the council "would pay" the claimant for the work which she in return agreed to do. Lewison J was inclined to think that the question of mutuality went to whether there was a contract at all. The UT's view was that since the point was not in issue and *Cotswold* was not cited, Lewison J's 'comment does not carry the weight it otherwise might' (paragraph 48). Its understanding of those authorities led the UT to reject HMRC's argument that the mutuality requirement was 'irrelevant to the categorisation of the contract as one of employment or for services, beyond merely requiring that the services be performed personally…It is an essential requirement in categorising a contract as one of employment' (paragraph 49).

101. The UT's next heading was 'The content of the obligations' (paragraphs 50-70). The UT described the parties' rival positions. HMRC submitted that the first limb of *RMC* is satisfied when a person provides services through his personal work or skills and the employer pays him for the work actually done. PGMOL's case was 'both that the putative employer must be under an obligation to provide either work or payment in lieu of work and that the putative employee must be under an obligation to accept work and carry it out personally' (paragraph 50). The UT then referred to several authorities which had stressed the importance of mutual obligations, and cited extensively from *Nethermere v Gardiner*. All members of the Court had agreed that there were obligations to do work and to provide work. The UT's view was supported, it considered, by *Clark*, in which the issue was 'whether a nurse who worked as "bank staff" did so under a global contract of employment.' The tribunal found that the authority was under no obligation to offer work and that she was under no obligation to accept it and that there was 'no sufficient mutuality of obligations'. The UT quoted paragraph 41 of the judgment of Sir Christopher Slade (in which he referred, twice, to what was necessary 'to found a global contract of employment').

102. In paragraph 62, the UT noted that PGMOL relied on paragraph 55 of *Cotswold*, in which Langstaff J said that a right to refuse work or to withhold it did not mean there was no mutuality of obligations in an overarching contract, but there had to be 'some obligation upon an individual to work and some obligation on the other party to provide or pay for it'. The UT thought that this passage was 'at least consistent with the proposition that the minimum obligation required of an employer is that it

provides work or payment in lieu'. The UT said that 'the high point' of PGMOL's case was *Usetech v Young* [2004] STC 1671, in which the issue was 'whether an overarching contract which the relevant legislation required to be assumed between the worker and the taxpayer company contained sufficient mutuality of obligation'. Park J said, at paragraph 64, that the taxpayer accepted that the mutuality requirement would be satisfied by a contract which provided a retainer for hours actually worked. 'It is only where there is both no obligation to provide work and no obligation to pay the worker for the time in which work is not provided that the want of mutuality precludes the existence of a continuing contract of employment'.

103. The UT did not accept that in *Prater* the Court of Appeal was 'suggesting that mutuality of obligation could be satisfied, so far as the employer was concerned, merely by an agreement to pay for work if and when it was done'. It was not in issue that the council was obliged to continue to provide work until the engagement ceased (paragraph 64).

104. In paragraphs 68-70, the UT concluded that the minimum obligation on an employee is to 'perform at least some work' and to do it personally. 'It is consistent with such an obligation that an employee can in some circumstances refuse to work, without breaching the contract. It is inconsistent with that obligation, however, if the employee can, without breaching the contract, decide never to turn up for work: see, in particular, *Cotswold Developments* and *Weight Watchers*.' The minimum requirement on the employer is 'to provide work, or, in the alternative, a retainer or some sort of consideration (which need not necessarily be pecuniary) in the absence of work'. An obligation to pay for work actually done is not enough. That was 'the better reading of the judgments of the Court of Appeal in *Clark* (including the passages cited in it from *Nethermere*) and the judgment of Langstaff J in *Cotswold Developments*; see also *Usetech* and *Weight Watchers*'. The obligations must last for the length of the contract.

*The overarching contracts*

105. Section F is headed 'Ground 3: the requirement of mutuality of obligation in relation to the Overarching Contract' (paragraphs 71-96). In the light of my conclusions on the next issues (whether the requirement was satisfied in relation to the individual contracts and control in the individual contracts) I do not need to set out the UT's reasons at any length. In short, it concluded that 'the FTT was clearly correct to conclude, as a matter of law, that in the absence of an obligation on PGMOL to provide at least some work (or some form of consideration in lieu of work), or in the absence of an obligation on the referee to undertake at least some work, there would be insufficient mutuality of obligation to characterise the Overarching Contract as a contract of employment' (paragraph 71). It also concluded that, properly construed, the references to 'expectations' in the documents did not connote obligations. That was so whether the documents were construed in isolation, or against the facts as found by the FTT. FTT paragraph 104 (which I have quoted in paragraph 41, above) showed that the FTT had applied *Autoclenz* correctly (paragraphs 89 and 90).

*The individual contracts*

106. Section G is headed 'Ground 1: the requirement of mutuality of obligation in relation to the Individual Contracts' (paragraphs 97-129). HMRC relied on paragraph 13 of *Stephenson*. In paragraph 100, the UT rejected that argument. It had already decided that 'mutuality of obligation was not only relevant to determining whether there is a contract at all, but is a critical element in delineating a contract of service from a contract for services. In that context…we do not accept that a contract which provides

merely that a worker will be paid for such work as he or she performs contains the necessary mutuality of obligation to render it a contract of service: the worker is not under an obligation to do any work and the counterparty is not under an obligation either to make any work available or to provide any form of valuable consideration in lieu of work being available' (paragraph 100).

107. The UT specifically rejected HMRC's submission that the cases on which the UT had relied in support of its conclusion about the requirements for an overarching contract did not apply to individual engagements: 'We do not accept …that the statements of principle as to what is necessary to establish mutuality of obligation sufficient to found an employment relationship in the cases we have referred to in Section E above are inapplicable to the Individual Contracts, merely because the cases themselves involved longer term or "overarching contracts". The principles are of general application' (paragraph 101). The UT further observed that Elias J's analysis (in paragraph 13 of *Stephenson*) was 'inapposite' because the period of each individual contract was longer than the period for which the referee was 'actually working': the individual contract lasted from the Monday morning when the referee accepted the appointment and ended when the referee submitted the match report (paragraph 102).
108. In paragraph 103, the UT rejected HMRC's submission that the FTT's conclusion that there was no mutuality of obligation was inconsistent with its decision that there were legally binding contracts; if both sides could withdraw, there was no contract. The UT considered that there was no doubt that PGMOL was obliged to pay the referee if he officiated: 'That is enough to create a contract, albeit a unilateral contract…' Such a contract did not have 'sufficient mutuality of obligation to constitute an employment contract' (ibid).
109. For the reasons given in paragraphs 104-114, the UT held that the referees' right to withdraw from the contract before performance was a further factor that negated mutuality of obligation, and that the FTT had been entitled to take it into account as such a factor. The UT was not satisfied that the FTT had erred in law in holding that PGMOL had an unfettered contractual right to cancel an appointment (paragraphs 115-116). That meant that even if the FTT was wrong to decide that the referees were not bound by the necessary obligations, it was entitled to conclude that PGMOL was not (paragraph 117). There was nothing to support the suggestion that the FTT had overlooked the terms of the overarching contract when considering the issue of mutuality of obligation in the individual contracts. The UT referred to paragraph 158 of the FTT decision (paragraph 118). In paragraph 119, the UT rejected a submission that PGMOL's acceptance, from 2017-18 onwards, that the NGRs were 'workers' involved an acceptance that they were employees. The definition in section 230(3) of the ERA does not require the putative employer to have any obligations. This development was, in any event, irrelevant to the position in earlier seasons (paragraph 119).
110. The UT's decision on mutuality in the overarching contracts and in the individual contracts made it unnecessary for it to consider control, as it recognised in paragraph 120. It did so, nonetheless, because that issue had been fully argued (paragraphs 121-141).

*Control in the individual contracts*

111. The FTT had identified the test in paragraph 16: ultimate authority, rather than day-to-day control, and expanded on that in paragraph 163, by reference to *White v Troutbeck* [2013] IRLR 949. The FTT applied that test in paragraphs 163-169. The

UT summarised those findings in 11 sub-paragraphs (paragraph 122). The UT summarised the parties' submissions in paragraphs 124-128.

112. The UT rejected the argument that the FTT erred in dismissing the assessment and coaching systems as irrelevant to the issue of control, as it was open to the FTT reasonably to conclude that those systems were advisory only (paragraph 129). The UT considered that HMRC's arguments raised four related questions (paragraph 130).
    i. Did the FTT correctly apply the test whether PGMOL had the right to 'step in' and give instructions to referees?
    ii. Was the FTT correct to rely on PGMOL's inability to impose any sanction for breach until after an individual contract had ended?
    iii. Did the FTT err in the weight it gave to PGMOL's right of control conferred by the overarching contract while the individual contract was in force?
    iv. Was the FTT's conclusion that PGMOL could not impose any sanction for breach during the individual contract reasonably open to it?
113. The UT quoted paragraphs 40 and 41 of the judgment of the EAT in *White v Troutbeck*. That case concerned caretakers who looked after a house during its owner's long absences. The question was whether there was, to a sufficient degree, 'a right of contractual control over the worker'. It was not whether 'in practice the worker has day-to-day control over his own work'. Many workers 'especially the professional and skilled' have substantial autonomy, but are still employees. The owners had 'retained the right to step in and give instructions'. The fact that the absent master had entrusted day-to-day control to the caretakers did not mean that he had 'divested himself of the contractual right to give instructions to them'. The caretakers were not, themselves, skilled, so there was no difficulty in their employer 'stepping in'. There were circumstances in which an employer cannot 'step in' during the performance of an employee's duties. The EAT had also given examples of skilled employees, like surgeons and footballers, who are engaged to 'exercise their own skill and judgment'.
114. In paragraphs 131-134 the UT referred to several authorities, including the decision of the High Court of Australia in *Zuijs v Wirth Brothers Proprietary Limited* [1955] 93 CLR 561. In paragraph 132 it quoted the passage at p 570 which I have already cited (in paragraph 69, above). The UT recognised that 'some sufficient framework of control' was nevertheless essential. What mattered was not 'the granular mechanics' of control, but 'whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's orders and directions' (paragraph 134).
115. The UT held that the authorities showed that 'a practical limitation on the ability to interfere in the real-time performance of a task by a specialist, whether that be as a surgeon, a chef, a footballer or a live broadcaster, does not of itself mean that there is not sufficient control to create an employment relationship' (paragraph 135). The UT noted that those cases did not involve single engagements. It added that in a long-term contract, even if the employer could not step in and interfere with performance in real time, 'there is nevertheless scope to step in and give directions and to impose sanctions between engagements and while the contract subsists (paragraph 136). The UT said that the 'critical question' was whether in this case, PGMOL's inability to step in and tell a referee how to officiate during a game, or to impose a sanction (at least, not until after the engagement had ended) meant that there was not enough control (paragraph 137). It added that the authorities gave no direct help on this question. It then put forward its own approach 'as a matter of principle'. Its view was

that in such a case, the test required the putative employer to have a contractual right of control to direct the way the employee does his work, and that those directions should be enforceable, in the sense that there is an effective sanction for their breach. A right to give directions cannot be ignored just because 'there is no ability to step in and give directions during the performance of the obligations (where the nature of the obligations precludes it) or because the sanctions for the breach of the obligations could only be imposed once the contract has ended …The existence of an effective sanction (irrespective of when its impact would be felt by the employee) is sufficient to ensure that the employer's directions constitute enforceable contractual obligations' (paragraph 138).

116. For those reasons, the UT decided that in relying, in paragraphs 168 and 169, on PGMOL's inability to step in while the referee was officiating during a game and could only impose sanctions after the end of the engagement, the FTT took into account irrelevant considerations (paragraph 139). The UT also held that the FTT separately erred in the last two sentences of paragraph 169 in its conclusion that if an issue emerged between the start of the contract and match day, PGMOL's only remedy was to end the contract, with the result that there was no control 'during an engagement'. On the contrary, in such a case, PGMOL would be 'stepping in *during* the period of the contract' (original emphasis). The FTT therefore erred in holding that 'PGMOL was unable to impose, during the period of an Individual Contract, *any* sanction for breach by a referee' (original emphasis) (paragraph 140).

117. The conclusion that the FTT erred in those respects did not mean that PGMOL did exercise sufficient control over the NGRs during the individual contracts to make them employees. It did mean, however, that the answer to question 112.iii (above) was that 'the FTT erred in the weight which it gave to PGMOL's rights of control under the Overarching Contract during the term of the Individual Contract'. The FTT accepted (at [166]) that elements of those rights of control did apply to the individual contracts, but, because of the conclusions it reached in [168] and [169], 'it appears not to have given them any, or any sufficient weight in reaching its conclusions on control'. That meant that if it was necessary to reach a conclusion on the question whether there was sufficient control, the various elements of control would have to be evaluated 'on the totality of the available evidence on the point.' That was not necessary, however, because of the UT's conclusions on mutuality of obligation (paragraph 141).

*Discussion*

*Mutuality of obligation*

118. *McMeechan*, *Clark*, *Carmichael* and *Prater*, which bind this Court, are all cases in which this Court considered, in one way or another, the relationship between mutuality of obligation in an overarching contract and in a single engagement. They establish at least three propositions.

    i. The question whether a single engagement gives rise to a contract of employment is not resolved by a decision that the overarching contract does not give rise to a contract of employment.

    ii. In particular, the fact that there is no obligation under the overarching contract to offer, or to do, work (if offered) (or that there are clauses expressly negativing such obligations) does not decide that the single engagement cannot be a contract of employment. The nature of each contract is a distinct question.

iii. A single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment.

119. Those authorities do not support any suggestion that the criterion of mutuality of obligation is the sole, qualifying test for the existence of a contract of employment, so that if there is some mutuality, but it is not the right kind of mutuality, there can be no contract of employment. On the contrary, those authorities, and the other authorities to which we were referred, suggest that the court has to look at all the circumstances in the round before deciding whether or not there is a contract of employment. The Court of Appeal in *McMeechan* specifically rejected a submission to that effect by the Secretary of State. The Court of Appeal in *Prater* rejected similar submissions by the appellant council in that case.

*The FTT*

120. There was no appeal against the FTT's conclusions that there was an overarching contract and a contract for each individual engagement. The FTT was entitled, in my judgment, on the authority of *Carmichael*, to conclude that the overarching contract was not a contract of employment, as, properly understood, it did not require PGMOL to offer work, or the NGRs to do it. A crucial factor in its decision was the FTT's finding, recorded in FTT paragraph 104, about the NGRs' extraordinary personal motivation. That is not a conclusion with which the UT, or the Court of Appeal, could interfere in an appeal on point of law.

121. The FTT recognised, correctly, that the question whether the individual contracts were contracts of employment was legally distinct from the question whether the overarching contract was a contract of employment. It held, correctly, that the terms of the overarching contract could be relevant to the question of the status of a putative employee under a contract for an individual engagement, relying on the judgment of Underhill LJ in *Windle v Secretary of State for Justice* [2016] EWCA (Civ) 459; [2017] 3 All ER 568 (in which he, in turn relied on paragraphs 10-12 of the judgment of Elias LJ in *Quashie v Stringfellow Restaurant Ltd* [2012] EWCA (Civ) Civ 1735; [2013] IRLR 99). Those terms could not be decisive, of course, as the authorities which I have summarised show, but the FTT did not say that they could be.

122. The first of the FTT's two main reasons for deciding that there was no contract of employment as respects the individual engagements was lack of mutuality of obligation. It considered that the fact that either side could pull out of the engagement before a game, without any breach of contract, or any sanction, negated the necessary mutuality of obligation. In my judgment, the FTT erred in law in deciding that the ability of either side to pull out before a game negated the necessary mutuality of obligation. The authorities which I have referred to above, in paragraph 68, show that that is not the correct legal analysis. The correct analysis is that if there is a contract, the fact that its terms permit either side to terminate the contract before it is performed, without breaching it, is immaterial. The contract subsists (with its mutual obligations) unless and until it is terminated by one side or the other.

*The UT*

123. The UT analysed the authorities on mutuality of obligation at some length. I mean no disrespect to the UT, but I consider that, perhaps led in that direction by the parties' elaborate submissions, it overcomplicated that analysis. It found a conflict between *Cotswold Developments* and *Stephenson* when, in my judgment, those two authorities are consistent with one another. I consider that the UT's reasoning confuses 'a contract in the employment field' (which could be a contract of employment or a contract for services) with a contract of employment. It also wrongly elides the

mutuality of obligation which is necessary to show that an overarching contract is a contract of employment with the mutuality which is necessary to show that a single engagement is a contract of employment.

124. The authorities I have summarised above show that the UT erred in law in concluding in paragraph 100 that the individual contracts could not be contracts of employment if they merely provided for a worker to be paid for the work he did, and, in paragraph 101, in concluding that the statements about the mutuality of obligation which is necessary to found an overarching contract also apply to individual engagements. The UT also erred in law in upholding the conclusion of the FTT that provisions in a contract which enabled either side to withdraw before performance negated the necessary mutuality of obligation. The UT's statement that the analysis in paragraph 13 of *Stephenson* was inapposite is also wrong in law. The fact that the individual contract lasted longer than the match (that is, from the Monday morning until the submission of the match report) is irrelevant, both because of the nature of the performance required by the contract, once made, and because the performance required included the submission of the match report.

125. I also consider that the UT's observations in paragraph 103 were wrong in law. The fact that both sides could withdraw before performance did not negate the existence of a contract, as I have already explained. The suggestion that there was a unilateral contract is contradicted by the FTT's finding (apparently acknowledged by the UT in paragraph 102) that a bilateral contract came into existence on the Monday when the referee accepted the offer on MOAS, and ended with the submission of the match report.

*Control*

*The FTT*

126. The FTT's second reason for holding that the individual engagements were not contracts of employment was that there was no sufficient framework of control. The FTT directed itself correctly in paragraphs 16 and 163. However, in paragraph 168, I consider that the FTT misdirected itself, by considering whether PGMOL had 'an even theoretical right to step in' while the referee was actually officiating. It asked itself the wrong question, in the context of work which, it had earlier recognised, was not susceptible of practical control, since it required the exercise of the NGRs' individual judgment. Many authorities, including *Zuijs*, show that that approach is wrong in law. The FTT seems to have treated this as a decisive consideration, and not to have asked whether the relationship between PGMOL and the NGRs, including the terms of the overarching contract, amounted to a sufficient framework of control.

127. I further consider that the FTT erred in law in concluding that the coaching and assessment systems could not be relevant to the question of control. The FTT considered the assessment system in the context of individual match appointments; but that was not the only relevant question, as the terms of the overarching contract were also potentially relevant to the question whether there was a sufficient framework of control as respects individual appointments. As the FTT acknowledged, the assessment system had wide ramifications. I also consider that by asking itself whether the assessment system was advisory, the FTT was asking itself the wrong question. The point is that the assessment system gave PGMOL a significant lever with which to influence the performance by NGRs of their individual engagements, and was, thus, plainly capable of being relevant to the question of control. I also consider that the coaching system is potentially relevant to the question of control.

NGRs now have one coach each. They discuss areas for improvement and targets with NGRs. They might make a written report after a match. One possibility is that PGMOL has set up this system in order to ensure that the referees it supplies to officiate at matches perform to a consistent standard, and in a consistent way. Of course a coach cannot tell a referee what decisions to make on the pitch, but by giving advice afterwards, a coach can influence a referee's approach to decisions in later games. PGMOL has a direct interest, as the FTT recognised, in supplying and replenishing a pool of independent-minded match officials who are of a high quality and well trained to officiate at senior games (paragraphs 42 and 125).

*The UT*

128. The UT considered that the FTT was entitled to decide that the assessment and coaching systems were irrelevant to control, because it was open to the FTT to hold that those systems consisted of 'at most, advice'. For the reasons given above, I consider that the FTT erred in law in its conclusion that the assessment and coaching systems were irrelevant to the question of control.
129. The UT held, however, that the FTT had erred in law, by taking into account irrelevant considerations, in concluding that PGMOL's inability to 'step in' during a match or to impose any sanction until after a match was ended were relevant to control. It also held that it was not open to the FTT to decide that PGMOL was unable to impose any sanction, during the period of an individual contract, for breach by a referee. Finally, it held that the FTT had erred in not giving the elements of control conferred by the overarching contract 'any, or any sufficient, weight'.
130. With two qualifications, I consider that the UT's analysis was correct. The first qualification is that, as the UT recognised, the authorities do not require that an employer's directions 'be enforceable in the sense that there is an effective sanction for their breach'. I do not consider that there is any such requirement, or that, for the purposes of the control criterion, an employer's directions are only enforceable contractual obligations if there is an effective sanction for their breach. First, control may be exerted by positive, as well as by negative, means. Second, the UT's formulation assumes, wrongly, in my judgment, that a contractual obligation is only enforceable if the employer has an effective sanction in relation to it. A contractual obligation is by its very nature enforceable, if necessary by legal action, whether or not the contract enables the employer to apply a sanction for its breach.
131. The second qualification is that it is not an error of law to give insufficient weight to a relevant matter. Questions of weight are for the first-instance decision-maker, not for the appellate body. In my judgment, the better reading of the FTT's decision may be not so much that it did not give 'sufficient' weight to the elements of control conferred by the overarching contract, but that it gave decisive weight to irrelevant considerations, that is, to PGMOL's inability to step in during a match, and PGMOL's supposed inability to apply sanctions during the currency of the individual contract.
132. I consider that there are many features of the relationship between PGMOL and the NGRs which could show that there was a sufficient framework of control, particularly when the terms of the overarching contract are taken into account. Examples are PGMOL's power to promote and demote NGRs (see FTT paragraph 78), the existence of the performance merit pot (FTT, paragraph 84), some of the 'expectations' in the Code of Practice, the provisions about promoting products and services, the PGMOL guidelines, the Match Day Procedures, the procedure for declaring interests, the NGRs' agreement to 'abide by' the fitness and training protocol, the framework for annual fitness tests, the relationship between NGRs and

PGMOL's sports scientists, the fact that NGRs had to sign and agree to comply with the Code of Conduct (FTT paragraph 75), PGMOL's ability to act quickly if the Code of Conduct is breached (see FTT paragraph 78), and PGMOL's disciplinary role in relation to NGRs, which sits alongside that of the FA (FTT, paragraphs 14 and 90). The position summarised in FTT paragraph 103(5) from the interviews is that 'The referee has total control on the field, subject to the FA's Referee Regulations. Off the field, PGMOL rules apply...').

*Conclusions*

133. For these reasons, I would allow HMRC's appeal and dismiss PGMOL's Respondent's Notice. The FTT and the UT each erred in law in their approaches to the question of mutuality of obligation in the individual contracts, and the FTT erred in law in its approach to the question of control in the individual contracts. It is not necessary for me to reach a view about the overarching contracts. If the other members of this Court agree with those conclusions, my provisional view, subject to any submissions which the parties may wish to make about disposal, is that the appeal should be remitted to the FTT for the FTT to consider, on the basis of its original findings of fact, whether there were sufficient mutuality of obligation and control in the individual contracts for those contracts to be contracts of employment. I do not consider that it would be appropriate for this Court to make those assessments, which are assessments best made by a specialist fact-finding tribunal, not an appellate Court.

**Sir Nicholas Patten**

134. I agree.

**Lord Justice Henderson**

135. I also agree.