Appeal No. UKEATS/0024/13/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 12 December 2013

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR STEPHEN CONROY — APPELLANT

SCOTTISH FOOTBALL ASSOCIATION LTD — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MS E GORDON WALKER (Counsel) Instructed by: Anderson Strathern LLP 6th Floor, Lomond House 9 George Square Glasgow G2 1DY
For the Respondent	MR R MACKAY (Solicitor) Burness Paull & Williamsons LLP 120 Bothwell Street Glasgow G2 7JL

SUMMARY

JURISDICTIONAL POINTS – Worker, employee or neither

WORKING TIME REGULATIONS – Worker

CONTRACT OF EMPLOYMENT – Whether established

Employment status. The Claimant lodged a claim of unfair dismissal, age discrimination and a claim for holiday pay. The Respondent denied that he was an employee, arguing that he was a self-employed independent contractor. The Respondent is a private company limited by guarantee. It is the governing body of football in Scotland. It is responsible for administration of football refereeing in Scotland. All referees who officiate at matches under its jurisdiction have to register with it. The Claimant was registered and was a category 1 referee, having passed examinations and fitness tests. The Employment Judge found that the Claimant was not an employee for the purposes of section 230 of the **Employment Rights Act 1996**; she found that he was an employee for the purposes of the **Equality Act 2010** and a worker for the purposes of the **Working Time Regulations 1998**. **Held**: the EJ was entitled to find as she did. She considered all of the circumstances of the Claimant's connection with the Respondent. She correctly analysed the facts and applied the law.

THE HONOURABLE LADY STACEY

1. This is a case about the status of the Claimant as an employee or otherwise. I shall refer to the parties as Claimant and Respondent as they were in the Employment Tribunal (ET).

2. The decisions of an ET Judge F Eccles sitting alone at Glasgow, sent to parties on 13 February 2013, were to the effect that the Claimant's relationship with the Respondent was as follows:-

(i) The Claimant was a worker within the meaning of regulation 2(1) of the **Working Time Regulations 1998**.

(ii) The Claimant was an employee for the purposes of section 83(2) of the **Equality Act 2010**.

(iii) The Claimant was not an employee within the meaning of section 230(1) of the **Employment Rights Act 1996** (ERA).

The Claimant appealed against the decision that he is not an employee within the meaning of **ERA 1996**.

Background

3. The Respondent is a company limited by guarantee. It is the governing body of football in Scotland. The Claimant is a medical doctor and a football referee. He lodged a claim of unfair dismissal and age discrimination, and a claim in respect of holiday pay. The Respondent disputed that the ET had jurisdiction; it disputed the Claimant's claim to be an employee and put him to proof of his employment status. It argued that the Claimant was an independent contractor. The ET heard evidence. It decided that the Claimant was not an employee for the purposes of section 230 of ERA. It set out findings in fact which were not in dispute at the

appeal; the dispute was on the inferences to be drawn from the facts. In this judgment I set out the facts found and discuss the inferences drawn from them.

4. The Respondent is "responsible for the administration, delivery and development of football refereeing in Scotland". It carries out that function through its Referee committee. That committee draws up a list of referees annually. In order to referee a match under the Respondent's jurisdiction it is necessary to be registered with the Respondent. It is also necessary to be a member of a Referees' Association. There are twelve such associations, covering different areas of Scotland. The Respondent's Referee Committee appoints managers to each association. The associations are involved in recruitment, training, and development of referees. The managers make recommendations to the Referee Committee on the classification of referees from their association and their promotion or demotion.

5. There are categories of referees, the top being category 1. The Claimant was a category 1 referee for consecutive seasons between 2000 and 2012. He is a doctor employed by NHS and undertook refereeing in his spare time or when he was allowed to take leave to referee. In advance of each football season the Claimant received a letter from the Respondent confirming his classification as a referee. The most recent letter is quoted in full by the ET as follows:

> **"CLASSIFICATION AS REFEREE (2011 – 2012) ('the Season')**
>
> **This letter is to confirm your classification as a Category 1 Referee for the Season on the following terms and conditions:-**
>
> **1. Your classification shall be effective from 26th May 2011 and will expire on 30th June 2012, or such other date as determined by the Referee Committee in its reasonable discretion, subject to the terms of Clause 7 hereunder.**
>
> **2. For the duration of the Season you hereby undertake as follows:-**
>
> **2.1 to comply with and be bound by the Articles of Association of the Scottish Football Association ('SFA') as amended from time to time;**
>
> **2.2 to accept the annual grading approved by the Referee Committee of the SFA;**
>
> **2.3 to maintain a level of performance to the reasonable satisfaction of the Referee Committee of the SFA and its sub-committee;**

2.4 **to satisfy the requirements of the SFA for fitness by passing the fitness test as may be set by the Referee Committee of the SFA; the number of such tests per year shall be determined by the Referee Committee of the SFA;**

2.5 **to agree to accept any age limits applicable to eligibility for referees as approved by the Referee Committee of the SFA;**

2.6 **to comply with the Laws of the Game as laid down by the International FA Board and as amended from time to time;**

2.7 **to comply with and be bound by all reasonable instructions, directions and guidelines issued by the SFA including but not limited to the child protection procedures;**

2.8 **to make yourself available to attend no less than 75% of training and monthly meetings as organised by the SFA and/or your Referees' Association.**

2.9 **to maintain high standards of on and off field behaviour commensurate with your standing as a referee;**

2.10 **in the event that kit is provided by the SFA, to wear it in all senior matches in Scotland; such kit includes sponsors' logos;**

2.11 **to use your reasonable endeavours to promote, develop and protect the business, interests, goodwill and reputation of the SFA and not act in any way that is, or may reasonably be considered to be, in conflict with the business, interests, goodwill and reputation of the SFA or which brings, or is reasonably considered likely to bring, the SFA into disrepute;**

2.12 **to give promptly to the SFA all such information and reports as it may reasonably require in connection with matters relating to your undertaking of duties as a Category 1 Referee and any refereeing appointments undertaken by you;**

2.13 **to act at all times with honesty and integrity in relation to the performance of your duties as a Category 1 Referee. You acknowledge that acts of bribery or corruption by any person under the jurisdiction of the SFA are strictly prohibited. Such conduct will be treated with the utmost seriousness by the SFA and may result in penalties, including (but not limited to) demotion, suspension or expulsion, being imposed;**

2.14 **that you will not for the Season hold a season ticket for any club in membership of the SFA and that you will not constitute a shareholder; lender; or investor (such terms to be construed broadly) in or to any club in membership of the SFA.**

3. You agree to make yourself available wherever practicable for refereeing appointments from the SFA or Associations or Leagues affiliated to the SFA in Scotland or elsewhere.

4. Your relationship to the SFA will be that of independent contractor and nothing in this letter shall render you an employee, worker, agent or partner of the SFA and you shall not hold yourself out as such. This letter constitutes a contract for the provision of services and not a contract of employment. You hereby agree that you shall be responsible for all Income Tax or National Insurance or similar contributions exigible in respect of any match fees and/or expenses you receive in the course of and as a result of the classification. You hereby undertake to full indemnify the SFA or such affiliated Association or League in respect of any payments properly made by any of them to the relevant authorities in respect of such contributions.

5. You must not, either during or after the period of your classification hereunder, divulge, make public comment or otherwise make known to any third party any information or opinion relating to the SFA's affairs, practices, operation, finance or dealings with any person or persons of which you may have become aware as a result of the classification or any other association with the SFA. This includes, but is not limited to, decisions of the SFA, its Board or Committees. The contents of this letter are confidential.

You agree to accept the terms of the guidelines issued by the SFA from time to time in relation to Article 117 of the Articles of Association (copy enclosed).

6. Without prejudice to Paragraph 7 below, you acknowledge that the SFA may, at its sole discretion, demote, suspend or not allocate refereeing appointments to you or impose such other penalties or conditions as it deems appropriate in the event that you materially breach the terms contained herein.

7. The SFA may terminate your classification by giving immediate notice to you in the event of any of the following:-

7.1 you commit a breach of the terms contained herein which cannot be remedied.

7.2 you commit a breach of the terms contained herein which is capable of remedy and shall not have been remedied within 7 days, or such other time limit as may be deemed appropriate by the SFA, of the receipt by you of a notice from the SFA identifying the breach and requiring its remedy; or

7.3 you are unable to render the services required under the classification due to illness or incapacity.

8. You may terminate your classification on giving immediate notice in writing to the SFA

9. To the extent that there is any conflict between (i) the terms of this letter (ii) any or all of the Articles of Association of the SFA, the Laws of the Game as laid down by the International FA Board and any other instructions, directions and guidelines issued by the SFA (or any committee of the SFA) (all as amended from time to time), then the latter (i.e (iii) shall prevail.

10. You consent to the SFA holding and possessing data relating to you for legal, personnel, administrative and management purposes of the SFA and in particular to the processing for the foregoing purposes of any 'sensitive personal data' as defined in the Data Protection Act 1998 relating to you including, as appropriate:-

(a) information about your physical or mental health or condition in order to take decisions as to your fitness for work;

(b) your racial or ethnic origin or religious or similar beliefs in order to monitor the SFA's compliance with equal opportunities legislation; and

11. This letter shall be governed by and construed in accordance with the Law of Scotland."

6. The ET found that individual referees do not play any part in negotiating the terms of the letter of appointment, but are represented in any such negotiations by the Scottish Senior Football Referees' Association. The EJ found that the letter set out above expressly stated that the Claimant was an independent contractor; she appreciated that such a statement was not decisive of the question before her, but was a matter which she had to take into account. Having set out the terms of the letter, she went onto analyse the relationship by describing the way in which the referee function was organised. She set out that description as findings in fact and then went on to discuss the law as it applied to those facts and to explain her reasoning.

7. Category 1 referees can officiate at matches in the Scottish Premier League and Scottish Football League, which are the top leagues in Scotland. World football is governed by FIFA

and European football by UEFA. Most of the guidance provided by the respondent to referees is based on UEFA or FIFA development programmes.

8. The respondent's Head of Referee Administration and Head of Referee Development are responsible for the appointment of referees to matches. It depends on a number of matters including categorisation, level of experience, availability and past performance. Referees are not entitled to choose at which match they will officiate. They are not entitled to send a substitute for any match at which they are asked to officiate.

9. Referees are asked to keep in touch with the Respondent about availability and to complete a note about their availability when appointed each year. When the schedule of matches is set, the Respondent compiles a list of officials for matches and the referees are asked to confirm availability. The Respondent draws up a provisional outline of SPL and SFL fixtures and officials for a 6 to 8 week period, known as the 'six week ballot'. The list is then issued for the following week. If a referee should become unavailable after he has been appointed to a match he is asked to contact the Respondent's Referee Administration department.

10. At paragraph 12 the ET found "There was no obligation on the part of the respondent to offer the claimant any matches at which to officiate". He could however expect to get a match most weekends and sometimes during the week, all in the season. Referees are not disciplined for withdrawing from a match but if they were to do so regularly, or were to cancel at a late stage without a good reason they would be unlikely to get many matches allocated. The Claimant rarely withdrew and when he did it was due to holiday and family commitments, which were regarded as valid reasons.

11. Referees have to retain their fitness which is tested regularly. No sickness pay is offered in event of inability to referee due to illness or injury. If a referee suffers a "loss of form" this may be reported and he can be offered help, but may not get so many matches and may be re-categorised. The Respondent organises a winter and summer training camp and other training which is time consuming. The Claimant was not able to go to them all. There is no pay for going to the training. The referees are required to maintain high standards of off field behaviour. Referees are not subject to the Respondent's disciplinary procedure. They have been since June 2011 liable to disciplinary action taken by an independent Judicial Panel, to which they may be referred by a compliance officer of the Respondent. The Panel has power to fine, suspend, expel and censure a referee.

12. There is a role called "fourth official", which the Claimant carried out for UEFA games, having been nominated by the Respondent's Referee Committee. UEFA would contact the Respondent and seek nomination of a fourth official. UEFA would pay him direct. When the referee is on the pitch he is autonomous and makes independent decisions. The Respondent cannot interfere during a match. The fourth official (if one is appointed) may confer with the referee during match. He is not under the control of the Respondent.

13. The Respondent has an Observer at each SPL match and some SFL and lower league games. His job is to assess the performance of the referee and report to the Respondent. His report is shown to the referee. The Observer has a communication system allowing him to listen to the referee and match officials during the match. He gives the referee a mark from 1 to 10. He may confer with the Respondent's head of referee development, if that person has seen the match on TV. He takes part in a de brief after the match but does not express a view during the match.

14. After a match on 03/12/11 the Claimant was told that he had to co-operate with post-match compliance procedures.

15. At paragraph 21 the ET found that the Respondent provided clothes to wear during matches, which were provided by sponsorship, but did not provide stopwatch, flags, red and yellow cards, whistles, and notebooks, all of which the referees provided themselves. The Claimant spent about £1000 per annum on these items.

16. At paragraph 22 the payment facts are set out. The referee is paid a fee for officiating at a match, the amount being dependent on the league involved. If a match was cancelled before the referee travelled to it he would not be paid; if cancelled after travelling the fee would be one half; if the referee was injured or became he is paid the full fee. The ET made the following findings at paragraph 22:-

> **"Fees are subject to negotiation between the SSFRA, SPL and Referee committee. …The respondent contracts with SPL and SFL for the provision of Referee services. Payment between the SPL and the respondent is governed by an agreement. In terms of the agreement the respondent undertakes to ensure that each match official is sufficiently skilled, experienced and qualified to discharge his duties."**

At paragraph 23 it found

> **"The fee and expenses paid to the claimant for officiating at SPL and SFL games is reclaimed by the respondent from the SPL and SFL as appropriate. The respondent does not benefit financially from this arrangement. A similar arrangement exists for friendly matches for which the fee is paid by the home club. Referees' fees for officiating at Scottish Cup games are administered and paid for by the respondent. FIFA pay the referee a daily allowance through the respondent which they reclaim from FIFA. Since 2007, UEFA have paid match officials a fee direct. Fourth officials are paid a daily living allowance by UEFA. A referee's income will vary according to the number and level of matches at which they officiate. The claimant's income from refereeing varied from season to season. The claimant was paid around £213,000 each season for officiating at matches. The claimant did not claim or receive sick pay, either contractual or statutory, from the respondent.**
>
> **24. The respondent pays match fees gross without deduction of tax or national insurance. The claimant was responsible for any tax liability arising from his income as a match official. He declared it to HMRC as income from self-employment.**

At paragraph 26 the ET set out the statutory provisions and the many cases she was referred to. She then set out the submissions made to her.

17. The EJ gave her reasons in paragraph 54 onwards. She began by considering whether there was a contract of any sort between Claimant and Respondent. Having concluded that there was, she subjected it to analysis. In considering the terms of section 230(1) of ERA, she directed herself in terms of **Readymix Concrete v Minister of Pensions and National Insurance** [1968] 2QB 497 setting out the well-known guidance from that case. The EJ rejected the submission on behalf of the Claimant that it is irrelevant whether or not the Respondent had to offer work if available, and the Claimant was required to accept work if offered. She found there was no obligation on the Respondent to offer work. Further, the Claimant was under no obligation to accept work if and when it was offered to him. While it was expected that matches would be offered and accepted, there was no obligation to do so.

18. The EJ found that the conduct of the parties was inconsistent with any intention that the Claimant would be the employee of the Respondent. The tax treatment of the income was not consistent with employment.

19. The EJ did not accept that the requirement on the Claimant to attend training and monthly meetings was indicative of employment. She found that no payment was made for such attendance. The requirement to be bound by reasonable instructions was not indicative of employment as it would be just as likely to be found as a term in a contractor's contract. The EJ found that the consequence of cancellation by the Claimant was that the Respondent would reduce the offers made to him in future; that was described in evidence "a practical response to scheduling difficulties caused by the referee's approach".

20. The EJ considered the case of **Cotswold Developments Construction Ltd v Williams UK** EAT/0457/05 and found that the contract between the parties did not 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'.

21. The alternative submission for the Claimant was that a contract of employment existed between the parties on the publication of the six week ballot to the completion of post-match obligations. The EJ considered that the Claimant was 'working' when he was officiating. She found however that for the contract between the parties to be one of employment it was necessary that that there was a second element, namely control, which must exist and which did not. She found that way in which the referee conducted the game was governed by the Laws of the Game, set by the international governing bodies and applying to all referees. Any discipline to which the Claimant was subject was that of the Judicial Panel, a body separate from the Respondent. The role of the Observer was to monitor the referee's performance for the purpose of classifying his grade and future selection as opposed to directing his conduct during a match.

22. When she considered the payment arrangements the EJ noted that the Respondent arranged referees for games for which the referees were not paid, as well as arranging referees for games such as those involving the Claimant, for which he was paid. She considered the arrangements for payment, which were essentially that the Respondent was obliged to pay for SPL and SFL matches, and she did not accept that they were only responsible for administration of payment. That is a reference to the system whereby the Respondent made the payment but reclaimed it from elsewhere. The EJ considered whether that amounted to the Claimant being paid by a third party as in the case of **Quashie v Stringfellow Restaurants Ltd** [2012] IRLR 536; **Stringfellow Restaurants Ltd v Quashie** [2012] EWCA Civ 1735 and rejected that submission. She weighed in the balance the provision by the Claimant of the necessary

equipment such as flags and whistles and decided no significant weight attached to that. She also noted the provision of BUPA medical care and insurance as consistent with employee status. On the other side of the scale she weighed the lack of sick pay, which she found was not indicative of the existence of a contract of employment.

23. At paragraph 66 the EJ set out her reasoning in deciding that the Claimant was not employed by the Respondent either in terms of a single contract of employment or a number of separate contracts of employment. She stated that she had heeded guidance from Mummery LJ quoted in the case of **Hall (Inspector of Taxes) v Lorimer** [1994] 1 WLR 209, to consider the whole picture. While that case was concerned with income tax, it involved the court deciding whether or not the taxpayer worked under a contract of employment. The EJ was correct to regard it as a case from which she could direct herself on the test she should apply, and the way in which she should go about her task. I cannot improve on the advice quoted thus:-

> **"In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted by viewing it from a distance, and by making an informed considered qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another."**

24. Finally she rejected a submission that there was an overarching or umbrella contract in existence when the Claimant was not working. She found the lack of payment for attendance at training and meetings and lack of disciplinary sanction for non-attendance to be fatal. In considering all of the circumstances, in noting what might be seen as an indication of employment and what might be seen as an indication of self-employment, the EJ carefully applied the direction she had given to herself.

Arguments on behalf of the Appellant

25. Ms Gordon-Walker argued that it had been accepted or established that there was a *prima facie* relationship of employment for the duration of a football match between the referee and the SFA. The EJ erred in law in finding that there was insufficient control by the SFA of the referee and she further erred in law by finding that there was no umbrella contract. Her argument on disposal was that the EAT should substitute its decision for that of the ET.

26. Counsel argued that from **Readymix Concrete** at page 515(c) there are three things that require to be considered:

1. Mutuality of obligations.
2. Control.
3. Whether all other terms are consistent with employment.

Thus she argued that the first question was, was there a contract? She said that was accepted by the Employment Judge at paragraphs 54, 55 and 57. She said that for every contract there must be consideration and that in this case there was; the referee gave his personal service and in return he was paid. This was dealt with by the Employment Judge at pages 23 to 25, paragraph 66 to 70. She noted that at paragraph 68 the Employment Judge found that there was no delegation allowed, at 69 there was an obligation of personal service and at 70 that the **Equality Act 2010** applied. The question is, what more is needed for the **Employment Rights Act 1996** to apply? The answer is that everything else needs to be consistent with employment as in the third category set out in the case of **Readymix Concrete**. Ms Gordon-Walker argued that all the factors except the lack of sick pay were consistent with employment. She argued that categorisation as self-employed for tax purposes was not determinative of the issue. It was now accepted, as found by the EJ, that the Claimant was a worker in terms of the **Working Time Regulations 1998** and so entitled to holiday pay. He took some financial risk as he would not be paid if a match was called off in advance, but the EJ had correctly not put much weight

on that. Anticipating the argument from counsel for the Respondent, Ms Gordon-Walker argued that the Claimant had a full time job as doctor, employed by the NHS, but that was not indicative of his employment status with the Respondent as a person could have more than one job. It was not significant that the Respondent organised other matches with volunteers who were not paid, as the Claimant was not a volunteer, and was paid. Therefore she argued that there is mutuality of obligation during an individual assignment. Then there is a succession of assignments creating an umbrella contract. Counsel referred to the case of **McMeechan v Secretary of State for Employment** [1997] IRLR535 as an example of a case in which the label chosen by parties of self-employment was not decisive. She referred to the cases of **Stephenson v Delphi Diesel Systems Ltd** [2003] ICR 471, **Cornwall County Council v Prater** [2006] IRLR 362 and **Drake v Ipsos Mori UK Ltd** UKEAT/0604/11/ZT. She argued that the case of **Stephenson** had recently been affirmed in the case of **Quashie** and also in the case of **Cotswold Developments Construction Ltd v Williams** [2005] UKEAT 0457. Counsel argued that **Cornwall** was authority for the proposition that an umbrella contract may exist in a series of engagements even if there is no obligation to offer any further work at the end of each engagement. In the case of **Drake**, a further example was found. The EAT found that there were two inter-linked questions: was there a contract, and if there was, having regard to its terms, was it a contract of employment? She said that in order for there to be contract of employment, there must be a wage/work bargain. She submitted that the EJ found that there was just that. Her findings were such as to indicate that there must be an employment contract.

27. Counsel argued that the test set out in **Readymix Concrete**, was met. There is personal service; there is mutuality of obligation; and the other provisions of the arrangement between parties are consistent with a contract of employment.

28. Counsel turned to the case of **Cheng v Royal Hong Kong Golf Club** [1998] ICR 131 concerning the employment status of a caddy at a golf club, and argued that it was not open to the Respondent to argue that the present case was a licence case because that had not been argued in the Tribunal below. No reasons were given for advancing a new argument.

29. Ms Gordon-Walker argued that the EJ had erred in law in so far as she held that her findings about independence, autonomy, lack of the Respondent's power to remove the Claimant during a game and lack of ability to subject him to disciplinary procedures were indicative of his not being an employee. She argued that many employees have autonomy; for instance a surgeon is employed by a health board but he has autonomy in carrying out an operation. The Respondent did retain control over the way in which the referee carried out the refereeing of the match. In any event she argued that the Employment Judge had gone wrong in law by focussing firstly on control of the manner over which something is done and secondly, focusing on day to day control. Rather she should have looked to see whether there was a general contractual right of control. She referred to the case of **Troutbeck SA v White & Todd** [2013] EWCA Civ 1171. She also referred to the case of **Cassidy v Ministry of Health** [1951] 1 All ER 574. She said that the Judge had gone wrong by relying on the manner in which something was done and not focusing on the right to do it. She referred to the case of **Johnston v Ryan** [2000] ICR 236.

30. Counsel developed her argument that the EJ erred in law in focusing on day to day, minute to minute control, arguing that the real point is that there requires to be a contractual right whether or not it is exercised. That was clear, she argued from **Troutbeck** and **Autoclenz Ltd v Belcher** (2011) UKSC 41 She argued that there are contractual rights of control in the agreement that is set out in the letter appointing the referee. She reminded me that the letter refers to various things including fitness, and the requirement to turn out for training. In

clause 6 of the agreement the referee agrees that he may be subject to being demoted. So while the Respondent SFA do not have any scope to control for example when the referee awards a penalty, they do have plenty of scope to control the referee. It was wrong to find that he could not be removed because to take an extreme example, if he assaulted a player in the middle of a match the SFA would remove him. Ms Gordon-Walker reminded me that the case of **Troutbeck** came out after this case had been decided. I should also note that the case of **Quashie** was decided by the EAT before the present case, but the Court of Appeal decision came out later. However, the parties had put in written submissions about **Quashie**.

31. Counsel argued that an umbrella contract existed. She referred to the case of **Clark v Oxfordshire Health Authority** [1998] IRLR 125. She also referred to the case of **Quashie** at the EAT, submitting that the point was not dealt with on the appeal; therefore it is still good law in the EAT judgment. The requirement on the dancer to turn up every Thursday for a meeting for which she was not paid was enough to make it an umbrella contract.

32. Counsel referred to the case of **Nethermere (St Neots) Ltd v Gardiner** [1984] ICR 612 where it was said that:

> **"I cannot see why well founded expectations of continuing home work should not be hardened or refined into enforceable contracts by regular giving and taking of work over periods of a year or more, and why outworkers should not thereby become employees under contracts of service like those doing similar work at the same rate in the factory."**

She argued that the situation was similar where the Respondent offered matches and the Claimant accepted and officiated at them. The EJ had accepted that, but had found that there was no umbrella contract because the training and attendance at meetings between matches which he relied on to set up an umbrella contract were not paid. Counsel argued that was an

error; there was no requirement that such activity had to be paid. She relied on the case of **Quashie**.

33. Counsel referred to the case of **Carmichael v National Power** [1999] WLR 2042 in which there was held to be no umbrella contract, and argued that the present case could be distinguished on facts.

34. In anticipating argument in light of the skeleton submitted by the solicitor for the Respondent, counsel submitted that the argument that the referees' union did not support this claim was irrelevant. I agree with her in that submission. Nor is it relevant that the Claimant is a professional man who had entered into a contract rather than being an oppressed individual who had had a contract imposed on him by a corporate entity. I agree with her in that submission also. She argued that there was no conflict in the Claimant having two jobs. Once again, I agree with her. She argued that the correct disposal would be to allow the appeal and substitute a finding that the Claimant is an employee with continuity of service because he has an umbrella contract. She said that there was no need to remit the case.

Arguments for the Respondent

35. Mr Mackay submitted that the Claimant needs to establish that he was an employee and that he had an umbrella contract. The ET had considered both of these matters and had not found either of them to be proved. He argued that the Judge had not erred in law and therefore I could not interfere with her decision. He argued that the EJ had correctly painted a picture, then had stood back and considered the whole circumstances. Mr Mackay submitted that it was relevant that the Claimant had a full time post as a doctor in the NHS; he was a full-time employee and a requirement to attend training and matches would lead to a conflict of interest. As stated above I do not think that submission has any bearing on this case as it is clear on the

facts that the Claimant has been able to manage his professional commitments and his attendance at matches and at a sufficient number of training events. Mr Mackay maintained that the fact that some referees are volunteers put things into context, while acknowledging that the Claimant was not a volunteer. The agreement between the parties includes a plain statement that they are not employer and employee. Mr Mackay argued that the fitness requirements are set by UEFA and not by the Respondent.

36. He argued that no one claimed that the letter of appointment was a sham. He emphasised that the referee is autonomous when officiating; that he does not have to take any matches that he is offered; that the Respondent does not have to offer him any matches. Thus the Claimant could not be said to be in a similar position to others who enjoy autonomy in carrying out work. For example, a ship's captain is engaged to sail from one port to another and has complete charge of the ship when doing so, but is still employed. Similarly a consultant surgeon carries out an operation in the way he thinks fit but is still an employee of a health board. The vital difference, in his submission, is that the Respondent had no obligation to offer any work at all to the Claimant. Thus the Respondent was in a different position from the ship owner or the health board. Mr Mackay argued that there was a clear picture of the Claimant during the period not being under the control of the Respondent. He accepted that in light of the case of **Troutbeck** one had to consider if there was a right of control rather than find that the control was actually exercised day by day. The EJ had appreciated that and had said at paragraph 64, the following:

> **"There was no contractual right of control over the claimant sufficient to allow the respondent to issue directions during the course of a game."**

Thus the EJ had asked herself the correct question. She had reached the correct answer, as could be seen by contrasting the situation in this case with the situation in **Troutbeck**. In this

case no one had the right to step in and redirect whatever was happening during a match whereas in **Troutbeck** the owner of the property could do just that.

37. Mr Mackay argued that if one asked the question, was there mutuality of obligation, which is necessary as well as control, then a proper assessment points to there being no mutuality of obligation. He referred to the case of **Quashie** in the Court of Appeal at paragraph 51 where the court noted that 'it would be an unusual case where a contract of service is found to exist when the worker takes the economic risk and is paid exclusively by third parties'. He said the economic risk was an important factor as one would not expect a person who was an employee to be taking an economic risk. In the present case the Claimant took the economic risk of the match being cancelled and no payment being made. He referred to the analogy made in the **Stringfellow** case with the case of **Chen v Royal Hong Kong Golf Club**. He said he was not arguing a new point or seeking to argue that the present case was a 'licence case' as suggested by Ms Gordon-Walker; but was looking at mutuality of the obligation. He referred to paragraph 49 which is in the following terms:-

> **"It is to their Lordships clear that the only reasonable view of the facts is that the arrangements between the club and the claimant went no further than to amount to a license by the club to permit the claimant to offer himself as a caddie for individual golfers on certain terms dictated by the administrative convenience of the club and its members. Thus he was required to wear a uniform, to behave well in the club premises and to charge a fee per round at a skill uniform for all caddies which was fixed and collected by the club and paid to the caddies. The club was not, however, obliged to give him work or to pay him other than the amount owed by the individual golfer for whom he caddied. Conversely he was not obliged to work for the club and he had no obligation to the club to attend in order to act as a caddie for golfers playing in the club premises. He did not receive any of the sickness, pension and other benefits enjoyed by employees of the club or indeed any pay over and above that resulting from particular rounds of golf for which the golfer was debited by the club even if as a matter of machinery the club handed the fee to the claimant."**

He argued that the E J had considered all of the relevant factors. She was entitled to come to the view that there was no contract of employment.

38. Mr Mackay submitted that there was no umbrella contract. He referred to the case of **Carmichael** where it was found that there was no mutuality of obligation outwith the assignments. He argued that the circumstances of the present case were echoed at page 2045 where it was noted that the Tribunal had adopted the correct approach when they found that the documents did no more than provide a framework for a series of successive ad hoc contracts of service or for services which the parties might subsequently make; and that when they were not working as guides they were not in any contractual relationship with the CE G B. 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. He referred to the case of **Clark** where the Court of Appeal found that no mutuality of obligation existed and referred to the payment of a retainer as one way in which such mutuality of obligation might be created. He also referred to the case of **Nethermere**, noting that it dealt with the expectation of work. He referred to the case of **Hellyer Brothers v McLeod** [1987] ICR 526 which he argued was authority for the proposition that even if separate contracts go on for some time, that does not necessarily harden into an employment contract. He noted that at page 21, paragraph 59 of the current judgment the Judge referred to the love of the game as being the reason that some of the people did it. She also found that one had to retain one's fitness in order to maintain the classification, but that did not support an inference that one became an employee. He argued that the letter is not a contract to do any work at all. Rather, it is concerned with the regulation of football. Therefore he submitted there was no umbrella contract.

39. In a brief reply, Ms Gordon-Walker referred to the case of **Hellyer**, arguing that it was found as a matter of fact that there were no expectations of a continuing contract. She made reference once again to **Nethermere**. She said that Mr Mackay had not engaged with the authorities of **Stevenson**, **Cornwall** or **Drake**. He was trying to open up points that had already

been decided. She also noted that the referee was not paid exclusively by a third party, unlike the caddy.

Conclusion

40. As the discussion of the cases shows, these matters are fact specific. It is a question of fact as to whether there is for example control of the Claimant by the Respondent. It cannot in this case be argued that the EJ made findings in fact which she was not entitled to make. Having made those findings it is in my view not made out that she made any error of law in drawing the inferences in law which she drew from the facts which she found. She considered all of the matters as she had directed herself she should do, as part of a big picture. It is clear that she found some facts which could be indicative of employment, for example the provision of BUPA healthcare for the claimant ., She found other matters pointing away from a contract of employment, such as the lack of disciplinary procedures, and the ability of the Claimant to decline games and the ability of the Respondent to refrain from offering any games to him, and the purchase by the Claimant of the flags and other paraphernalia necessary for the game.. She carefully weighed all of her factual findings up and came to a decision which she was entitled to reach.

41. There is no error of law in the decision of the EJ. She considered all of the relevant material. She was entitled to find there was no contract of employment. I accepted the arguments put up by Mr Mackay. It was clear to me from the judgment that the EJ had considered all of the indications of employment carefully and had indeed considered the bigger picture as she was bound to do. It seemed clear to me that the arrangement between the Claimant and the Respondent was correctly categorised by the EJ in light of her findings. In my view the categorisation of the parties is that the Respondent is a governing regulatory body for the provision of referees for football matches which are played under its jurisdiction. It is

perfectly possible for such a body to have standards and rules which a referee must meet and adhere to without his being employed by it.

42. It follows that the appeal is dismissed.