



Appeal number: UT/2018/0161

PAYE AND NATIONAL INSURANCE CONTRIBUTIONS – whether Level 1 National Group football referees are employees of PGMOL – whether the FTT erred in concluding that insufficient mutuality of obligation existed under the overarching contracts and individual match contracts – no – whether the FTT erred in concluding that insufficient control existed under individual match contracts - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S Appellants
REVENUE AND CUSTOMS

- and -

PROFESSIONAL GAME MATCH OFFICIALS Respondent
LIMITED

TRIBUNAL: MR JUSTICE ZACAROLI
JUDGE THOMAS SCOTT

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane,
London WC2 on 28 and 29 January 2020

Akash Nawbatt QC and Sebastian Purnell, instructed by the General Counsel
and Solicitor to HM Revenue and Customs, for the Appellants

Jonathan Peacock QC and Georgia Hicks, instructed by McCormicks Solicitors,
for the Respondent

DECISION

A. Introduction

- 5 1. The question in this appeal is whether certain referees engaged to officiate at football matches by the appellant, Professional Game Match Officials Limited (“PGMOL”), were at the relevant time employees of PGMOL (being engaged under contracts of service) or were self-employed (being engaged under contracts for services).
- 10 2. The referees to whom this appeal relates are engaged by PGMOL to officiate at matches primarily in Leagues 1 and 2 of the Football League, but also in the Championship and the FA Cup, and by way of “Fourth Official”, in the Premier League. They are referred to as the “National Group” referees. They undertake refereeing duties in their spare time, typically alongside other full-time
15 employment.
3. PGMOL also employs a number of other referees under full-time written employment contracts. These individuals primarily referee matches in the Premier League and are referred to as the “Select Group” referees. This appeal does not relate to them.
- 20 4. The question arises in the context of the following determinations and decisions issued by HMRC in respect of PGMOL in relation to the tax years 2014-15 and 2015-16: (1) determinations under Regulation 80 of the Income Tax (Pay as You Earn) Regulations 2003 in respect of income tax deductible under the PAYE system, and (2) decisions under section 8 of the Social Security (Transfer of
25 Functions) Act 1999 in respect of Class 1 National Insurance Contributions.
5. These determinations and decisions, relating to payments, mostly by way of match fees and expenses, made to the National Group referees, were issued on the basis that PGMOL is the employer of the National Group referees.
- 30 6. PGMOL appealed to the First-tier tribunal (the “FTT”) against the determinations and decisions. In a decision published on 30 August 2018 (the “Decision”) the FTT (Judge Sarah Falk and Member Janet Wilkins) allowed the appeal, concluding that the National Group referees were not employed under contracts of service during the relevant periods.
- 35 7. On 13 November 2018, the FTT (Judge Greg Sinfield) granted HMRC permission to appeal to the Upper Tribunal.

B. Summary of the issues

8. Before the FTT, PGMOL contended there was no contract at all between it and the National Group referees. The FTT dismissed that contention, concluding that there was both an overarching annual contract between PGMOL and each of the

National Group referees (an “Overarching Contract”) and a series of separate contracts between PGMOL and each National Group referee in relation to each specific match for which that referee was engaged (“Individual Contracts”).

5 9. HMRC contended before the FTT that one, other or both of the Overarching Contract and each Individual Contract was a contract of employment.

10 10. We discuss below in greater detail the legal test for determining whether a contract is one of service or one for services. For present purposes it is sufficient to note that it was common ground that the essential test remains that stated by MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (“RMC”) at p.515C-D:

15 “A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.”

20 11. We refer to the first element as the “mutuality of obligation” requirement and the second element as the “control” requirement. Applying the *RMC* test, the FTT concluded that:

- 25 (1) There was no mutuality of obligation outside individual engagements and on that basis the Overarching Contract was not a contract of employment;
- (2) There was insufficiency of mutuality of obligation and insufficiency of control in the Individual Contracts, such that they also were not contracts of employment.

12. HMRC appeal against each of those conclusions.

30 13. PGMOL also contended before the FTT that even if there were contracts of employment with the National Group referees, it had been improperly assessed because it had not made the relevant payments to the referees. The FTT did not need to deal with this issue, but made some comments in case the issue became relevant on appeal. The point is not pursued on this appeal, so we make no further reference to it.

14. There are accordingly three grounds to HMRC’s appeal, namely that the FTT:

- 35 (1) erred in law and/or took into account irrelevant considerations and failed to take into account relevant considerations and/or reached a perverse conclusion in considering whether there was the necessary mutuality of obligation during the individual assignments for them to be contracts of service;

(2) erred in law and/or took into account irrelevant considerations and failed to take into account relevant considerations and/or reached a perverse conclusion in considering whether there was sufficient control during the individual assignments for them to be contracts of service; and

5 (3) erred in law and/or took into account irrelevant considerations and failed to take into account relevant considerations and/or reached a perverse conclusion when considering whether there was the necessary mutuality of obligation during the season-long overarching contracts required for them to be contracts of service.

10 15. It was common ground that, applying the test of employment in *RMC*, HMRC needed to show that the FTT had erred in law in finding that there was no contract of employment under either or both of the Overarching Contract and the Individual Contracts.

15 16. The remainder of this decision is divided into the following sections. In section C, we summarise the findings and conclusions of the FTT. In section D, we explain the approach to be taken in considering whether to interfere with the conclusions of the FTT. In section E, we consider two issues of law which arise in relation to Grounds 1 and 3 of HMRC's grounds of appeal, concerning the concept of mutuality of obligation. In particular, we consider: (1) whether that concept applies only when
20 determining whether a contract exists or whether it applies when determining whether the contract is one of employment; and (2) the content of the mutual obligation. In sections F, G and H, we address, in the following order, the third, first and second Grounds of appeal. In section I we state our overall conclusion.

C. The findings and conclusions of the FTT

25 17. The FTT was provided with witness statements from 10 witnesses, five of whom were cross-examined. It was also provided with a significant amount of documentary evidence, including documents relating to PGMOL's dealings with National Group and Select Group referees and notes of interviews undertaken with a number of other referees during 2015.

30 18. On the basis of that evidence, it made detailed findings of fact (see, in particular, [29] to [108] of the Decision), of which the following is a very brief summary.

35 19. PGMOL was established in 2001. Its function is to provide the services of match officials to the Football Association ("FA") recognised competitions and to organise courses, conferences, training and other programmes for match officials. The FA is, in effect, the regulator of referees. Its responsibilities include ensuring that match officials uphold standards and apply the Laws of the Game. Law 5 of the Laws of the Game provides that "Each match is controlled by a referee who has full authority to enforce the Laws of the Game in connection with the match to which he has been appointed". It also provides that "the decisions of the referee regarding facts
40 connected with play, including whether or not a goal is scored and the result of the match, are final."

20. Referees are appointed to the National Group on an annual basis before the start of each season. Those that PGMOL proposes to appoint are sent a number of documents, some of which require signature. One of the most important of these is a Code of Practice. The FTT described the essential parts of the Code of Practice at [61] to [65] of the Decision:

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“61. This document refers to the invitation made to join the list, and states that if the invitation is accepted then “you are not an employee of PGMOL and will be treated as being self-employed”. It goes on to say that match officials “who have accepted an appointment to the List will be expected to adhere to the Code of Practice outlined below”. The document requires signature and return by the referee, who by signing confirms:

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“I am pleased to accept the invitation to join the Professional Game Match Officials List for Season 2015/16 on the terms outlined above and in the Fitness Protocol.”

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62. The content of the document is relatively brief, and deals with topics under a number of subheadings. Under “Appointments” it is stated that appointments will be made by PGMOL, and that there is:

“...no guarantee that Match Officials on the List will be offered any appointments to matches and Match Officials are not obliged to accept any appointments to matches offered to them.”

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63. A number of points are listed under “Expectations”, all introduced by the words “Match Officials shall be expected to...”. The points covered are: being readily and regularly available for appointment to matches, reaching and maintaining a satisfactory level of fitness as determined by PGMOL, undergoing fitness testing and any other assessment in accordance with the Fitness Protocol, observing and obeying the FA and competition rules and regulations, and carrying out “all instructions, procedures and directives relating to Match Officials” issued by PGMOL. It states that sanctions related to breach of FA regulations relating to referees will be carried out only under those procedures.

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64. Under “Conflicts of Interest”, the documents state that a “Match Official shall at all times act impartially”, and that he must decline to act where there is a materially conflicting interest and declare it to PGMOL, whose decision will be final. Under the heading covering fees and other matters, it is stated that:

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“The Football Association, Premier League and Football League will set the fees and expenses for matches in their individual Competitions. Match Officials will be advised on the amount and claiming procedures separately.”

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This section also provides that Match Officials may be invited to assist in promoting products or services of sponsors or official partners of competitions (and may receive additional payments for that), but may not enter into arrangements under which PGMOL, the FA, the Premier League or the EFL [English Football League] may be associated with any product or service, in particular if it is in competition with

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5 sponsors or official partners of any of them. Referees are permitted to speak to the media immediately after a game to clarify fact or points of Law, but otherwise media work may only be undertaken with the approval of PGMOL. If media work is undertaken with approval referees may receive additional payment for it. (We did not see any evidence of additional earnings from sponsorship or media work in practice.)

10 65. The document also has a heading briefly describing the match assessment and feedback system, referring to “continuous monitoring” of performance with “individual appraisals being made when appropriate”. The training programme and coaching system is also referred to briefly and it is stated that referees “will be required to attend meetings arranged by coaches at specific times throughout the season”. There is also reference to the provision of match kit and health insurance.”

21. The other documents consisted of the following:

- 20 (1) “PGMOL Guidelines”, the purpose of which was to bring together key FA requirements and guidelines of particular relevance to PGMOL officials;
- 25 (2) “Match Day Procedures”, setting out certain procedures to follow on match days, designed to protect officials from perceived or real threats to their integrity, and also to provide protection to PGMOL. It includes an instruction to behave appropriately at all times;
- 30 (3) “Declaration of Interests” form, requiring match officials to declare any material conflict of interest (in respect of which PGMOL’s decision is final and binding);
- (4) “Fitness test and fitness training protocol”, requiring referees to pass an annual fitness test before they are permitted to officiate. It recommends that referees regularly submit training data to PGMOL’s sports scientists and obliges referees who become injured to inform their sports scientist immediately;
- 35 (5) “Promotion and reclassification criteria”, setting out the way in which individuals will be selected for promotion or reclassification between the various lists that PGMOL maintains. These are largely performance-based;
- (6) “Code of Conduct”, introduced for the 2015-16 season, applying to all match officials, coaches and assessors, who are required to sign a declaration confirming they have read and will comply with the code and with the requirements of FA rules and regulations;
- 40 (7) “Goal Decision System Protocol”, detailing the procedures to be followed in respect of the electronic system provided by Hawk-eye;
- (8) “Match assessor guidelines”, providing guidelines as to how the assessor should interact with match officials. The FTT concluded that the clear tone of

the interactions with referees was one of “advice and assistance on personal development, rather than instruction”;

5 (9) The covering email (enclosing the other documents). The 2015-16 version referred to the Code of Practice as setting out “the basis of your relationship with PGMOL”. The 2014-15 equivalent stated that the Code “sets out PGMOL’s requirements of you”;

(10) “Merit payment distribution”, which informs referees of the merit payments available. It states the total pot available for the season and how payments will be calculated;

10 (11) “National List Development Groups Protocol”, issued to those referees and the national group regarded as having potential for Select Group status. This sets out a stronger level of commitment, including fitness requirements, but still recognises that attendance at training sessions is not obligatory.

15 22. PGMOL operates its own disciplinary procedures, which exist in parallel to the FA’s own procedures. In case of a serious breach, there would be a discussion with the FA as to who was better placed to take action. PGMOL could suspend an official, or remove him from its lists, but that individual would still be registered as a referee with the FA until action was taken by the FA.

20 23. Match appointments are offered to National Group referees via a Match Official Administration System (“MOAS”). This is dealt with by PGMOL’s Operational Management Team. The matches are typically offered on the Monday before the weekend when the matches are to take place. Account is taken of referees’ availability, conflicts of interest and geographical preferences. Once appointments are allocated, referees need to go on to the MOAS system to accept the appointment.
25 There is no obligation on them to accept the appointment, although if they did not PGMOL would typically want to understand why that happened.

30 24. Following acceptance of an appointment it was still open to PGMOL to revoke the appointment and still open to the referee to withdraw, at any point before the scheduled match. We will return to the precise findings made by the FTT as to the circumstances in which this could happen when dealing with Ground 1.

35 25. Training sessions are offered to National Group referees and a physical training programme sent out each week. Participation is not compulsory. The FTT concluded, however, that “most do follow the 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.”

26. PGMOL also provides coaches and other support for referees. Levels of engagement vary, but may include offering advice before and after a match and at half-time. Other support includes an annual pre-season training conference.

27. PGMOL provides National Group referees with match and training kit, together with suits, ties and overcoats to be worn to and from matches. They must, however, provide their own boots, trainers, watches, cards and whistles.

5 28. The National Group referees were paid match fees for those matches they attended, travel expenses and a training attendance allowance. Depending on their performance during the season they might also qualify for a share of the “merit payment pot”.

10 29. In an important paragraph ([104] of the Decision), which it is worth setting out in full, the FTT recorded its findings as to the overall nature of the relationship between PGMOL and the National Group referees:

15 “The general picture from the notes of interviews with referees and the witness statements and oral evidence provided by referees was one of committed, driven individuals who are passionate about football, refereeing and about their performance as referees, and who have a continual desire to improve. Certainly at National Group and below, they are not refereeing 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. This 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 that 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. But the evidence shows that National Group referees could and did close off dates when they wanted to do so. It was also clear that cover would be arranged by PGMOL even late in the day if something arose that conflicted with an appointment (typically, but not only, work commitments, illness or injury), and there would be no sanction for pulling out. In such a case the referee would not receive the fee.”

40 30. Having rejected PGMOL’s contention that there were no contracts at all with National Group referees, the FTT reached the following conclusions in relation to the Overarching Contract:

- (1) Its terms were to be found largely in the pre-season documents. The Code of Practice and covering email amounted to a written offer to include the referees

on the National Group list for the relevant season, which the referee accepted by signing and returning the Code of Practice. The written terms could then be found in various places in the Code of Practice, the Fitness Protocol, the Declaration of Interests form, the merit payment document, the Match Day Procedures and (for 2015-16) the Code of Conduct.

(2) Although much of the documentation was written in terms of expectation rather than legal obligation, there were some provisions which amounted to express legally enforceable rights and obligations. The relevant obligations are set out at [142] and [143] of the Decision. These include, from PGMOL's perspective, its agreement to include the referees on the list; to provide a system of continual assessment and feedback; to provide a training programme and a coaching system, and to provide match kit, health insurance and access to sports scientists. For their part, the referees agreed to act impartially; to declare conflicting interests; not to enter into sponsorship or promotion arrangements, and not to undertake media work except as permitted. The Match Day Procedures document also contained a number of obligations, as to arrival time at grounds, turning off mobile phones, and behaving appropriately.

(3) What was lacking from the Overarching Contract, however, was any legal obligation on PGMOL to provide work or on the referee to accept work offered.

(4) HMRC had submitted, on the basis of the Supreme Court decision in *Autoclenz v Belcher* [2011] UKSC 41 and numerous other authorities to which we refer below, that where the Code of Practice referred to "expectations" upon the referees these were in substance and reality to be regarded as legal obligations. The FTT rejected that contention, expressing its conclusion (at [145]) as follows:

"The terms of the Code of Practice are clear that there was no such obligation, and we do not think that this is overridden by the parties' conduct, the practical realities or (in *Autoclenz* terms) the true intentions of the parties. We accept that ordinarily an entity the function of which is to provide the services of a number of highly qualified individuals, from a limited pool of available talent, on a regular basis for important commercial events (here professional football matches) 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 a legal obligation. The referees simply place obligations on themselves: see the discussion in paragraph 104 above. PGMOL has control over the size of the National Group and has doubtless tailored that to ensure that in practice it has a sufficient number of referees available, and that referees are generally content with the number of matches they are offered and accept. It is not surprising from this perspective that the

question of the appropriate size of the National Group is covered in consultation discussions.”

5 (5) The FTT considered whether the existence of the merit payment arrangement implied some level of obligation on PGMOL to offer match appointments, but considered that was not the case.

10 (6) Finally, the FTT rejected HMRC’s reliance on *St Ives Plymouth Limited v Haggerty* UKEAT/0107/08, unreported 22 May 2008 and *Addison Lee v Gascoigne* [2018] ICR 1826 (indicating that expectation of being offered work, resulting from the practice over a period of time, can result in a legal obligation to provide some work or perform work provided), both on the basis that each case must turn on its own facts and on the absence in those cases of an express term negating an obligation to provide or accept work.

31. As to the mutuality of obligation requirement in the Individual Contracts, the FTT reached the following conclusions:

15 (1) The existence and terms of the Overarching Contract were factors to which regard must be had in determining the obligations under the Individual Contracts.

20 (2) Each individual match appointment gave rise to a contract, constituted by the offer of the appointment made by PGMOL and its acceptance by the referee using the MOAS system. Under the contract, the referee would agree to officiate and PGMOL would agree to pay fees and expenses at the specified rates.

25 (3) There was, however, no sanction if the referee, having accepted an appointment, was unable to get to the match. Nothing in the documentation or the parties’ conduct was consistent with non-attendance amounting to a breach of contract. Invariably, given referees’ personal commitment levels, there would in practice be a good reason for the failure to attend. The referee did not have the right to substitute another to do their task: if he could not attend, the contract simply fell away without sanction, and without payment.

30 (4) Similarly, PGMOL was free, if it felt it needed to do so, to cancel a particular appointment and replace the referee with another person, without breach of contract. There was no suggestion that there was any limit on PGMOL’s rights in this respect.

35 (5) Subject to these points, there would be some level of mutuality “during the actual engagement”, 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”.

40 (6) The relevant mutuality must subsist throughout the whole period of the contract and, in contrast with *Weight Watchers (UK) Ltd v HMRC* [2012] EWCA Civ 1155 and *Cornwall County Council v Prater* [2006] EWCA Civ

102, the referee was entitled to withdraw from the engagement before he arrived at the ground and PGMOL was entitled to cancel the appointment.

(7) Accordingly, there was “insufficient mutuality of obligation” to give rise to a relationship of employment.

5 32. The FTT also concluded that there was insufficient control in the Individual Contracts to satisfy the test of an employment relationship. We set out the FTT’s findings in more detail on this issue at paragraphs 121 to 123 below.

D. The nature of this appeal

10 33. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, a right of appeal to this tribunal arises only in respect of any error of law in the Decision. An appellate court, in an appeal against a decision of a first tier tribunal on the question whether a person is “employed” under a “contract of employment”, may interfere with that decision only if (1) it determines that the FTT has made an error of law in determining the relevant legal test to be applied, or (2) it is satisfied that no reasonable
15 tribunal, properly directing itself on the law, could have reached the conclusion it did, within the principles of *Edwards v Bairstow* [1956] AC 14.

34. Subject to one exception, the determination of the question depends not only on reference to written documents but also on an investigation and evaluation of the factual circumstances in which the work is performed: see *Clark v Oxfordshire Health Authority* [1998] IRLR 125, per Sir Christopher Slade at [36]. The one exception is where the existence or otherwise of the relationship is dependent solely on the true construction of a written document. Even then, if the construction of the contract requires the intention of the parties, objectively ascertained, to be gathered partly from documents and partly from oral exchanges and conduct, then that too is a question of
20 fact, not law: see *Carmichael v National Power* [1999] ICR 1226, per Lord Hoffmann at p.1233B-C. As the Court of Appeal stated in *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735, approving Sir Christopher Slade’s analysis:

30 “9. Where the contract...is to be gleaned from a mixture of written documents and working practices, an appellate court should not readily interfere with the determination of the first instance court. Absent some misdirection from the tribunal, it can only do so if no reasonable tribunal, properly directing itself, could have reached the decision it did.”

35 35. In applying the *Edwards v Bairstow* test, the burden on the appellant is fourfold: (1) identify the finding which is challenged; (2) show that it is significant in relation to the conclusion; (3) identify the evidence relevant to that finding; and (4) show that that finding, on the basis of the evidence, was one which the tribunal was not entitled to make. An appellant is not permitted to conduct “a roving selection of evidence coupled with a general assertion that the tribunal’s conclusion was against the weight
40 of the evidence and was therefore wrong”: *Georgiou v Customs and Excise Commissioners* [1996] STC 463, per Evans LJ.

E. Mutuality of obligation

36. Grounds 1 and 3 both relate to the mutuality of obligation requirement (Ground 3 relates to the Overarching Contract and Ground 1 relates to the Individual Contracts). Mr Nawbatt submitted 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”. Provided it does, the only question is whether the other two limbs of the *RMC* test are satisfied. As that argument was developed by Mr Nawbatt, we see it as giving rise to the following two questions of law (which we address in this section):

- 10 (1) whether (aside from the fact that the services must be provided personally) the requirement of mutuality of obligation is relevant only to the question whether there is a contract of any kind, and is of no assistance in determining whether the contract is an employment contract or a contract for services; and
- 15 (2) whether the required content of the relevant obligations is merely that they be sufficiently “work-related” and, in particular, whether it is unnecessary that the employer commits to provide work, or payment in lieu of work, or that the individual commits to accept work.

(1) The relevance of mutuality of obligation

37. No contract of employment can exist in the absence, as Sir Christopher Slade put it in *Clark v Oxfordshire Health Authority* (above at [22]), of “mutual obligations subsisting over the entire duration of the relevant period”. In *Carmichael v National Power PLC* (above, at p.1230G-H) Lord Irvine cited this passage with approval in support of the proposition that if there were no obligation on the putative employer to provide casual work and no obligation on the putative employee to undertake it, there would be “an absence of that irreducible minimum of mutual obligation necessary to create a contract of service.”

38. HMRC nevertheless contend 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 contract is one of employment or a contract for services. The contention stems principally from the decision of the Employment Appeal Tribunal (“EAT”) (Elias J) in *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471, a case concerned with a tri-partite arrangement between a worker, an agency and the agency’s client for whom work was performed. The EAT concluded that the industrial tribunal had been correct to find that there was no mutuality of obligation such as to create any contractual obligation at all as between the worker and the client company, since there was no ground for suggesting that the client company had ever intended to enter into a direct contractual relationship with the worker. At [11], Elias J said that the significance of mutuality was solely that it “determines whether there is a contract in existence at all”. He noted (at [12]) that the question of mutuality of obligation had arisen most frequently in the case of casual workers, where the issue was whether there was an overarching contract of employment in existence even when the individual concerned was not

working. He said: “It is in that context in particular that the courts have emphasised the need to demonstrate some mutuality of obligation between the parties but, as I have indicated, all that is being done is to say that there must be something from which a contract can properly be inferred. Without some mutuality, amounting to what is sometimes called the ‘irreducible minimum of obligation’, no contract exists.”

39. At [13], Elias J said that during the period when the individual is actually working, a contract must exist, since the “individual clearly undertakes to work and the employer in turn undertakes to pay for the work done.” He considered that the issue whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work as available, was irrelevant to the question whether a contract exists at all during the period when the work is actually being performed. In such a case, he said, the “only question” was whether there was sufficient control.

40. In *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, however, the EAT (Langstaff J) took a different view. In that case a carpenter was engaged by the company to work as and when work was available. He worked regularly throughout the 21 months that he was engaged. The Industrial Tribunal concluded that he was a “worker”, within the meaning of Regulation 2(1) of the Working Time Regulations, but that he was not an employee. The EAT concluded that the Industrial Tribunal had applied the wrong test in holding that he was not an employee, and remitted the case back to it. In the EAT, the focus was on whether there was an overarching contract (and not, therefore, on whether each engagement constituted a separate contract of employment).

41. Langstaff J reviewed the relevant authorities, including the passage from *Stephenson* to which we have referred above, and a decision of the EAT in *Bamford v Persimmon Homes North West Limited* [2004] All ER (D) 14. In the latter case, as Langstaff J noted at [45], HHJ Clark had rejected a submission, based in part on *Stephenson*, that the principle of mutuality was not a criterion for determining whether an individual was an employee (or worker) but was a criterion for determining only whether there was a contract at all. Langstaff J concluded as follows, at [47] to [48]:

“47. Mutual obligations are necessary for there to be a contract at all. If there is a contract, it is necessary then to determine what type of contract it is. If it is a contract of employment, consequences will follow of the greatest significance — not only in terms of whether the employee is entitled to, and the employer subject to, those rights and duties conferred by statute upon employees and employers alike, but also common law considerations such as whether the employer may be, for instance, vicariously liable for the torts of the employee. The concept may be essential in determining whether there has been actionable discrimination on the ground of sex, race or disability. These matters are determined by the nature of the mutual obligations by reference to which it is to be accepted that there is a contract of some type.”

5 48. We therefore do not see any necessary inconsistency between paragraph 18 of the judgment in *Bamford* when contrasted with paragraphs 11–14 of *Stephenson* or paragraphs 60 and 86 in *Dacas*. It cannot simply be control that determines whether a contract is a contract of employment or not. 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”.” (emphasis added).

10 42. At [54], Langstaff J reiterated this conclusion: “Regard must be had to the nature of the obligations mutually entered into to determine whether a contract formed by the exchange of those obligations is one of employment, or should be categorised differently.”

15 43. Elias J returned to this question in *James v Greenwich LBC* [2007] ICR 577 (EAT). The issue in that case was whether there was a contract of employment between the council and the claimant who worked for the council through an employment agency. The employment tribunal found that as there was no obligation on the claimant to provide her services to the council, or on the council to provide her with work, sick pay or holiday pay, there was no irreducible minimum of mutuality of obligation necessary to create a contract of service. The EAT dismissed the claimant’s appeal. Elias J cited *Cotswold Developments*, noting that Langstaff J had pointed out that the employer’s duty is sometimes said to be to offer work and sometimes to provide pay and said (at [16] – [17]):

25 “...The critical feature, it seems to us, is 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 then there is simply no contract at all, as *Carmichael v National Power plc* [1999] ICR 1226 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 the control is sufficient, it will be a contract of employment.

30 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 contract is a contract of employment or not.”

35 44. HMRC submitted that Elias J, in referring to the need for mutual obligations relating in some way to the provision of, or payment for, work which must be personally provided by the worker “so as to place the contract in the employment field”, meant only that this placed it in a field which covered both employment contracts and contracts for services. We think this is unlikely, given that Elias J cited Langstaff J’s judgment in *Cotswold Developments* without criticism. In any event, the point was put beyond doubt in the Court of Appeal in the same case ([2008] ICR 545) by Mummery LJ at [45]: “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.”

45. The dual purposes of the mutuality of obligation requirement was reiterated in *Weight Watchers (UK) Ltd v Revenue and Customs Commissioners* [2012] STC 265. Briggs J noted (at [22]-[23]) that mutuality of obligation can serve one of two distinct purposes. First, it can determine whether there is a contract at all, for example in tri-
5 partite cases where work is provided through an agency. 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 with each other, but the question was whether the mutual obligations were sufficiently work-related (citing, in particular, Mummery LJ in *James v Greenwich*).

10 46. HMRC further rely on *Quashie v Stringfellow Restaurants Ltd*, where Elias LJ (as he by now was) qualified the comments he made at [11] to [14] of his decision in *Stephenson*. He said, at [14]:

15 “On reflection, it is clear that the last sentence of paragraph 14 [of *Stephenson*] is too sweeping. Control is not the only issue. 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 an individual engagement. *O’Kelly* and *Ready Mixed* provide examples.”

20 47. HMRC contend that the only respect in which he was “rowing back” in this passage from what he said in *Stephenson* was to recognise that the third limb of the *RMC* test was still required. Accordingly, he was otherwise endorsing his comments at paragraphs 11 to 14 of *Stephenson* (summarised above). The problem with this
25 view (aside from the clear statement to the contrary by the Court of Appeal in *James v Greenwich*) is that when reaching his conclusion on the facts of the *Quashie* case, Elias LJ expressly recognised as legitimate the two different senses in which “mutuality of obligation” is relevant. The criticism which the EAT had levelled at the employment tribunal’s decision was that it had concluded (based on its finding that there was an absence of mutuality of obligation) that there was no contract at all, and
30 this was contrary to the evidence. The Court of Appeal overturned the EAT’s decision, Elias LJ refusing to attribute to the employment tribunal the “elementary error of concluding that this relationship was not contractual at all.” At [42] he recognised the two distinct senses in which the employment tribunal had used the concept of mutual obligations: “sometimes it means that there are no obligations of
35 any kind, and sometimes it means there were no obligations of the kind necessary to establish a contract of employment.”

40 48. Finally, HMRC relied on a sentence in the judgment of Lewison J sitting in the Court of Appeal in *Cornwall County Council v Prater* [2006] ICR 731. The claimant was engaged by the council to home-tutor children. She was not obliged to accept a particular engagement but, once she had accepted an engagement with a particular
45 pupil, she was obliged to fulfil her commitment in respect of that pupil and the council was obliged to continue to provide that work until the engagement had ceased. The claimant claimed that each engagement was an employment contract and that the periods between the engagements were abridged by the provisions of s.212(3) of the Employment Rights Act 1996. The employment tribunal found in her favour. The

EAT dismissed an appeal against that finding, and the Court of Appeal dismissed the council's further appeal. Mummery LJ identified the "important point" as "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 expressed some doubt as to whether the question of mutuality of obligation went to the question whether there was a contract of employment, commenting that he "would have thought that the question of mutuality of obligation goes to the question whether there is a contract at all." Since the point was not in issue and was not argued in the case, however, and *Cotswold Developments* was not cited, Lewison J's comment does not carry the weight it otherwise might.

49. In light of these authorities, we reject HMRC's contention that the requirement that there be mutuality of obligation is irrelevant to the categorisation of the contract as one of employment or one for services, beyond merely requiring that the services be performed personally. (HMRC's acceptance that the services must be in some way "work related" is irrelevant to categorisation given they do not suggest that this differentiates between contracts of service or contracts for services.) It is an essential requirement in categorising a contract as one of employment.

(2) *The content of the mutual obligations*

50. HMRC contend that the first limb of the *RMC* test is satisfied wherever the individual provides the services through his personal work or skills and the employer pays him for any work actually done. PGMOL, on the other hand, contends 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 to carry it out personally.

51. In *RMC* itself, the first limb of the test was not in issue. There was undoubtedly a contract which both required the driver to make himself available at all times to drive his truck for the company (unless he had a valid excuse) and required the company to pay the driver at least a minimum annual amount. All that was said by MacKenna J in relation to the first limb was, at p.515E:

"The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be."

52. We have already referred to the statement by Sir Christopher Slade in *Clark v Oxfordshire Health Authority* that mutual obligations are an essential requirement in any employment contract. He regarded *Nethermere (St Neots) Ltd v Gardiner* [1984] IRLR 240 (CA) as one of two binding Court of Appeal authorities for that proposition. He noted (at [22]) that "all three members of the court were agreed that

there must be mutual legally binding obligations on each side to create a contract of service”, and went on to cite passages from all three judgments relating to the nature of the mutual obligation required.

53. Stephenson LJ (in a passage in *Nethermere* referred to in passing, but not quoted, by Sir Christopher Slade in *Clark*) said, in relation to the obligations on the employer, at p.623:

“For the obligation required of an employer we were referred to old cases where the courts had held that justices had jurisdiction to convict and punish workmen for breaches of contracts to serve masters under the statute 4 Geo. 4, c. 34. For that purpose the court had to decide that there was mutuality of obligation, an obligation on the master to provide work as well as wages, complementing an obligation on the servant to perform the work: *Reg. v. Welch* (1853) 2 E. & B. 357; Bailey Case (1854) 3 E. & B. 607 and *Whittle v. Frankland* (1862) 2 B. & S. 49. But later cases have shown that the normal rule is that a contract of employment does not oblige the master to provide the servant with work in addition to wages: *Collier v. Sunday Referee Publishing Co. Ltd.* [1940] 2 K.B. 647, 650, per Asquith J. An obligation to provide work was not implied by this court in a salesman's contract: *Turner v. Sawdon & Co.* [1901] 2 K.B. 653; it was in a pieceworker's contract: *Devonald v. Rosser & Sons* [1906] 2 K.B. 728.” (emphasis added)

54. We note that in the passage from the judgment in *Collier* quoted by Stephenson LJ, Asquith J was considering whether, for an employment contract to exist, the employer must be under an obligation to provide work *in addition to* the obligation to pay. He said: “It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out.”

55. So far as the obligations of the employee are concerned, Stephenson LJ said, at p.623C-D, that it had been “concisely stated by Stable J. in a sentence in *Chadwick v. Pioneer Private Telephone Co. Ltd.* [1941] 1 All E.R. 522, 523D: “A contract of service implies an obligation to serve, and it comprises some degree of control by the master.””

56. Dillon LJ, who agreed with Stephenson LJ, said, at p.634G, “For my part I would accept that an arrangement under which there was never an obligation on the outworkers to do work or on the company to provide work could not be a contract of service.”

57. Kerr LJ, dissenting in the result, but agreeing as to the essential requirement of mutuality of obligations, said this, at p629D-F: “The inescapable requirement concerning the alleged employees however—as Mr. Jones expressly conceded before this court—is that they must be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer.”

58. In *Clark* itself, the only issue was whether a nurse who worked as “bank staff” did so under a global contract of employment. The nurse was offered work as and when a temporary vacancy arose. She had no entitlement to guaranteed or continuous work. At [41] Sir Christopher Slade concluded that on the basis of the findings of the industrial tribunal (that the authority was at no relevant time under any obligation to offer the applicant work nor was she under any obligation to accept it) there was no sufficient mutuality of obligations. As to the required content of those obligations, in a reflection of the passages cited above from *Stephenson*, he added:

“I would, for my part, accept that the mutual obligations required to found a global contract of employment need not necessarily and in every case consist of obligations to provide and perform work. To take one obvious example, an obligation by the one party to accept and do work if offered and an obligation on the other party to pay a retainer during such periods as work was not offered would in my opinion, be likely to suffice. In my judgment, however, as I have already indicated, the authorities require us to hold that some mutuality of obligation is required to found a global contract of employment.”

59. In *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, Buckley J emphasised the flexibility of the *RMC* test. At [23], he noted that “as society and the nature and manner of carrying out employment continues to develop, so will the court’s view of the nature and extent of ‘mutual obligations’ concerning the work in question...”. He said that the *RMC* test remained the best guide, in that it “permits tribunals appropriate latitude in considering the nature and extent of “mutual obligations” in respect of the work in question and the “control” an employer has over the individual”.

60. This passage was cited to the EAT in *Cotswold Developments* (above) in support of the proposition that the obligations which identified a contract as one of employment were flexible. HMRC relies in particular on Langstaff J’s response, at [49]:

“Although we accept that there is room for the obligation resting upon an employer to vary, as between the provision of work, payment for work, retention upon the books, or the conferring of some benefit which is non-pecuniary, we cannot see that such elastic as there may be in the idea of mutuality of employment obligations can be stretched so far that it avoids the necessity for the would be employee to be obliged to provide his work, personally.”

61. Mr Nawbatt submitted that this demonstrated it was sufficient to constitute an employment contract if the obligation on the employer was to do no more than retain the worker on its books. We consider, however, that this comment needs to be read in light of the authorities referred to earlier in the same judgment. In particular, at [19], Langstaff J, in noting that the nature of the employer’s obligation had been variously stated in different authorities, referenced the fact that in some cases it was described as an obligation to provide work, but in others as an obligation to pay. At [20], he said: “It is unnecessary, however, to approach the definition of the obligation which is required on the employer’s side upon too narrow a basis”, citing [41] of the judgment

of Sir Christopher Slade in *Clark v Oxfordshire Health Authority* (which itself contained the example, said to be sufficient to constitute mutuality, of an employer who was not obliged to provide work but was obliged to pay a retainer when work was not offered). In the context of these earlier passages in the judgment, we consider
5 that Langstaff J, in the passage at [49] relied on by HMRC, was referencing the possibility that the minimum obligation on the employer might be satisfied by an obligation to pay the employer a retainer, as opposed to an obligation to provide work.

62. PGMOL, for its part, relies on [55] of Langstaff J’s judgment where he sought to correct a misunderstanding among tribunals generally as to what characterises the
10 application of mutuality of obligations to the wage/work bargain “... that is that it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation on the other party to
15 provide or pay for it.” Since Langstaff J was here addressing solely the *extent* of the relevant obligation (i.e. *some* obligation to provide or pay for work and an obligation to do *some* work) it is difficult to draw any conclusions from this passage as to the type of obligation which the employer must be under before a contract can be characterised as an employment contract. Nevertheless, this passage is at least
20 consistent with the proposition that the minimum obligation required of an employer is that it provides work or payment in lieu.

63. The high point of PGMOL’s case on this issue is *Usetech v Young* [2004] STC 1671, where Park J expressly concluded that the employer’s obligation, necessary to
25 found an employment contract, must be either to provide work or to pay for it in lieu. In that case, so far as is relevant to this appeal, 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. The Special Commissioners determined that it did. On appeal, Park J noted (at [63]) that the company was obliged to offer a minimum number of hours of work to the worker. He
30 described that obligation as a “fundamental objection to the whole of the want of mutuality argument”. At [64] he said:

“The cases indicate, and (as I recall) Mr Devonshire accepted, that the mutuality requirement for a contract of employment to exist would be
35 satisfied by a contract which provided for payment (in the nature of a retainer) for hours not actually worked. It is only where there is both no obligation to provide work and no obligation to pay the worker for time in which work is not provided that the want of mutuality precludes the existence of a continuing contract of employment. See especially the *Clark* and *Stevedoring & Haulage* cases...”

40 64. HMRC also relied on *Cornwall County Council v Prater* (above), contending that the true ratio of the case is to be found in Mummery LJ’s statement at [40] (echoed by Longmore LJ at [43]) that “The important point is that, once a contract was entered into and while the 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
45 available to her by the council under that contract.” We do not accept that the Court of

Appeal was here 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. We note that it was not in issue in that case that the council was obliged to continue to provide the work until the particular engagement ceased (see [11] of the judgment of Mummery LJ).

65. Finally, in *Weight Watchers* (above), Briggs J quoted Smith LJ in *Cable & Wireless plc v Muscat* [2006] EWCA Civ 220, at [32]: “it has been said on more than one occasion that the irreducible minimum of mutuality of obligation necessary to support a contract of employment is the obligation on the “employer” to provide work and the obligation on the worker to perform it”, before qualifying this by reference to Langstaff J’s comment in *Cotswold Developments* that the focus was on there being *some* obligation to do work and *some* obligation to provide it or pay for it. He reiterated that those mutual obligations must subsist for the whole of the period of a discrete contract (see [31]).

66. So far as the obligations resting on the employee are concerned, which in the *Weight Watchers* case focused on the right to substitute an alternative team leader, Briggs J distinguished between a clause which permitted the “employee” to substitute another person to perform his obligations under the contract (which would be inconsistent with the personal service required under a contract of employment) and a “qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he finds a substitute to contract directly with the employer to do the work instead.” In some cases, the right to avoid doing any particular piece of work may be so broadly stated as to be destructive of any recognised obligation to work. He identified the relevant question (at [37]) as being: “whether the ambit of the substitution clause, purposively construed in the context of the contract as a whole, is so wide as to permit, without breach of contract, the contractor to decide never personally to turn up for work at all.”

67. On the basis of the above authorities, we derive the following propositions as to the required content of the mutual obligations.

68. First, so far as the obligations on the *employee* are concerned, the minimum requirement is an obligation to perform at least some work and an obligation to do so personally. It is consistent with such an obligation that the 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*.

69. Second, the minimum requirement on an *employer* is an obligation to provide work or, in the alternative, a retainer or some form of consideration (which need not necessarily be pecuniary) in the absence of work. We think it is insufficient to constitute an employment contract if the only obligation on the employer is to pay for work if and when it is actually done. We consider this to be 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*.

70. Third, in both cases (and as reiterated in a number of the authorities, for example *Clark* (at [22]) and *Weight Watchers* (at [31])), the obligations must subsist
5 throughout the whole period of the contract.

F. Ground 3: the requirement of mutuality of obligation in relation to the Overarching Contract

71. Applying the above principles, in our judgment the FTT was clearly correct to conclude, as a matter of law, that in the absence of an obligation on PGMOL to
10 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.

72. HMRC contend, however, that the FTT was wrong to conclude that there was in
15 fact no obligation on PGMOL to offer work and no obligation on the referee to accept it.

73. Mr Nawbatt submitted, first, as a matter of construction of the pre-season documents, that the references in the Code of Practice to referees being “expected” to
20 adhere to it, and being “expected” to do various specific things, including “be readily and regularly available for appointment to matches” are to be construed as legal obligations.

74. Second, he submitted that the tribunal, adopting the “realistic and worldly wise” approach mandated by *Autoclenz Ltd v Belcher* (above), should have determined that mutual legal obligations existed.

25 75. Whether this argument is put on the basis of the *Autoclenz* approach to the Overarching Contract or on the basis of the construction of the Code of Practice, we are permitted to interfere with the conclusions of the FTT only if we are satisfied that no reasonable tribunal, properly directing itself on the law, could have reached the conclusion it did for the reasons set out above at paragraphs 31 and 32 above. This is
30 a case where the intention of the parties is to be found in their oral exchanges and conduct as well as documents. The identification of the terms of the contract is accordingly a question of fact.

76. Even if the Code of Practice were to be viewed without reference to the wider context, we are in any event not persuaded that the use of the term “expected” is to be
35 read as “obliged”. The fact that the drafter of the Code of Practice has used both “obligation” (stating expressly that the referees are “not obliged to accept any appointments to matches offered to them”) and “expectation” (stating what referees are nevertheless expected to do) demonstrates an understanding of the difference in meaning between the two phrases, and an intention that each is respectively to be read
40 according to that different meaning.

77. In support of this argument Mr Nawbatt referred us to *Pimlico Plumbers v Smith* [2017] ICR 657. In that case, the Court was faced with two apparently conflicting documents. The written contract contained a provision (clause 2.2) which expressly stated that the company was under no obligation to offer work and that the individual
5 was under no obligation to accept work. On the other hand, a procedures and working practice manual (which it was common ground applied to the relationship) contained a provision for a normal working week of five days and a minimum of 40 hours. Sir Terence Etherton MR (at [113]) concluded that on the true construction of the agreement as a whole, including both clause 2.2 and the procedures manual, while the
10 company did not have to offer any work if there was none to offer, and the individual was not obliged to accept a particular assignment on a particular day for any reason if he was unable or unwilling to do so, the individual was normally obliged to be available 40 hours a week. That was consistent with legal obligations on both sides sufficient to satisfy the requirement for mutuality of obligation.

15 78. We do not find this decision helpful in the circumstances of this case, where the terms of the written contract are different, and there is nothing equivalent to the terms of the procedures manual in the *Pimlico Plumbers* case.

79. HMRC's argument stands or falls, therefore, on the wider point that the FTT should, adopting the *Autoclenz* approach, have concluded that what were expressly
20 said to be expectations were in fact obligations.

80. In *Autoclenz* itself, the Court of Appeal had determined that workers who carried out car cleaning services for a company under contracts which specifically stated that the company was not obliged to provide them with work and that they were not
25 obliged to work were nevertheless employees. Lord Clarke JSC, at [25] cited with approval the following passage of the judgment of Elias J in the EAT in *Consistent Group Ltd v Kalwak* [2007] IRLR 560, at [58]:

30 "…if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless."

81. The reason is that, while employment is a matter of contract, the factual matrix in
35 which that contract is cast (including the relative bargaining power of the parties) is different from that of normal commercial relationships, so that it is more common for a court or tribunal to investigate allegations that the written contract does not represent the actual terms agreed, and the court must be "realistic and worldly wise when it does so": see Lord Clarke in *Autoclenz* at [33] to [35].

40 82. HMRC referred us to a number of cases in which the relevant tribunal or court had concluded that, notwithstanding terms in the written contract to the effect that one party was not obliged to provide work and the other was not obliged to perform it, on a 'realistic and worldly wise' approach there was an obligation to provide and to

undertake *some* work so that the arrangement could be characterised as an employment contract: see *Addison Lee Ltd v Lange* [2019] ICR 637; *St Ives Plymouth Limited v Haggerty* UKEAT/0107/08 MAA (22 May 2008); *Addison Lee v Gascoigne*, UKEAT/0289/17/LA (11 May 2018); *Pimlico Plumbers v Smith* [2017] ICR 657; *Uber B.V. v Aslam* [2019] ICR 845.

83. In *Addison Lee v Lange*, a decision of the EAT which concerned the status of private hire car drivers, the contract contained the following clause (5.2): “For the avoidance of doubt, there is no obligation on you to provide the Services to Addison Lee or to any Customer at any time or for any minimum number of hours per day/week/month. Similarly, there is no obligation on Addison Lee to provide you with a minimum amount of, or any, work at all.” The employment tribunal had concluded nevertheless that the drivers were “workers” within limb (b) of the definition in regulation 2(1) of the Working Time Regulations 1998. Limb (b) defined a worker as someone who has entered into or works under any contract, other than an employment contract, “whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual...”. Accordingly, unlike the test for an employment contract, the focus was solely on the nature of the *employee’s* obligations.

84. The EAT held that this was a conclusion that the employment tribunal had been entitled to come to.

85. Mr Nawbatt placed particular reliance on the EAT’s conclusion as to the relevance of market forces and commercial imperatives. At [58] the EAT held that it was “fanciful” to suppose that the company could rely merely on the expectation that drivers would be required by economics or market forces to accept individual bookings. At [63] it concluded that, although the arrangements left both the company and the drivers with a great deal of leeway as to the time and place where they logged on to work:

“...it is difficult to suppose that either side engaged in these arrangements in the belief that the other undertook no obligation at all. No honest driver would put the Respondent to the expense of considering his application to join, checking his credentials, training him and putting him on its system unless he was undertaking to do some work for the Respondent; and the Respondent, as an honest and reputable company, would not encourage drivers to commit very substantial time and money to its training and to the hire of a vehicle if it was not undertaking to put them on its system and give them a fair opportunity of obtaining bookings. These obligations are not spelt out on either side within the Driver Agreement; but it is difficult to believe that they did not exist. We consider that the ET, applying the “realistic and worldly wise” approach mandated by *Autoclenz*, was entitled to reach the conclusion it did.”

86. The EAT was satisfied that the employment tribunal had reached its conclusion by application of the *Autoclenz* principles. It cited with approval, as to the approach to be adopted by an appellate court, Elias J in *St Ives Plymouth Ltd v Haggerty* (at [28])

“...the only issue is whether the Tribunal in this case was entitled to find that there was a proper basis for saying that the explanation for the conduct was the existence of a legal obligation and not simply goodwill and mutual benefit. The majority consider that it is important to note that the test is not whether it is necessary to imply an umbrella contract, or whether business efficacy leads to that conclusion. It is simply whether there is a sufficient factual substratum to support a finding that such a legal obligation has arisen. It is a question of fact, not law...”. Adopting that approach, the EAT concluded that the employment tribunal had been entitled to conclude that “the work done by the drivers was not merely as a result of the pressure of market forces or commercial imperatives”.

87. Mr Nawbatt also relied on the parts of the judgments in the Court of Appeal in *Pimlico Plumbers* (above) where account was taken of “practical realities” in disregarding the express term in the contract which purported to negate any obligation on the employer to provide, or the employee to accept, work. At [112], for example, Sir Terence Etherton MR referred to evidence before the employment tribunal that the relationship would “only work” if the individual was given and undertook a minimum number of hours’ work, and that the success of the business of both the company and the individual depended on the individual working sufficient hours. Similarly, at [140], Underhill LJ referred to the practical reality that the individual was required to incur the cost of hiring a van and was subject to restrictive covenants.

88. Mr Nawbatt accepted that in this case the FTT correctly identified the approach to be followed (as set out in *Addison Lee v Lange*) but contends that it wrongly applied that test (at [144] to [151] of the Decision). He argues that it was perverse of the FTT to rely on the existence of “highly motivated individuals” to take this case out of the ordinary and that the FTT failed to take account of the onerous contractual obligations undertaken by PGMOL in the context of determining whether there was a corresponding obligation on the referees to do at least some work. He said that the analysis seen in *Lange* is missing from the FTT’s decision.

89. We disagree. We have set out in full the critical findings made by the FTT at [104] of the Decision, which formed the basis of the conclusion at [145] that this case was to be contrasted with an ‘ordinary’ situation, where an entity whose function is to provide the services of a number of highly qualified individuals from a limited pool of talent on a regular basis for important commercial events would wish to impose a legal commitment on its staff to work. In contrast, in the present case, the referees were highly motivated and wished to make themselves available as much as possible such that “there is no need for a legal obligation”.

90. In our judgment, this demonstrates the FTT applying the *Autoclenz* approach correctly, by having regard to the commercial realities in order to test whether the express term in the contract, which negated an obligation to provide or accept work, was to be overridden. The FTT clearly had in mind those matters which PGMOL was legally obliged to provide under the Overarching Contract, having set them out at [141] to [142]. We find no basis for concluding that the FTT failed to take these into account when having regard to the ‘reality of the arrangement’ just three paragraphs further on in the Decision (at [145]). Moreover, we disagree that the FTT’s reliance

on the high level of motivation of referees was perverse. The FTT was uniquely placed to evaluate the totality of the evidence presented to it, including oral testimony from and numerous notes of interviews with referees. HMRC's reliance on the conclusions reached by tribunals or courts in other cases that commercial reality overrode express provisions negating obligations, or that expectations were to be read as obligations, is of little assistance. Given that the determination whether a contract is, on a realistic and worldly-wise basis, a contract of employment is a highly fact dependent and multi-factorial question, it is inevitable that different fact-finding tribunals reach different conclusions without committing errors of law, notwithstanding the presence of similar features in the cases before them.

91. Mr Nawbatt separately contended that the FTT erred (at [149]) in distinguishing *St Ives Plymouth* and *Addison Lee v Gascoigne* on the basis that (contrary to the FTT's reason for distinguishing them) in neither case was there an express provision negating an obligation to accept or provide work. We do not accept this contention.

92. In *St Ives Plymouth*, while the employment tribunal had found that it was "part of the arrangement" that the casual workers were free to decline particular offers, there was, as the FTT in this case said, no such express provision.

93. In *Addison Lee v Gascoigne*, the question was whether cycle couriers working for the company were – during the time that they were actually logged on to work via the company app – workers within limb (b) of the Working Time Regulations 1998. As explained above, therefore, the focus was solely on the obligations of the employee. The contract contained the same clause 5.2 that appeared in the contract in the *Lange* case, negating an obligation on the courier to provide the services at any time or for a minimum number of hours, and negating an obligation on the company to provide the courier with a minimum amount of work. In the circumstances of *Gascoigne*, however, that clause was of no direct relevance, since the only contract relied upon was that which existed when the courier was actually logged on to the app. For that period, as expressed in clause 5.1, the courier agreed that he or she was "deemed to be available for work and willing to provide services." The EAT considered, at [37], that the employment tribunal was fully entitled to conclude that clause 5.1 was not overridden by clause 5.2. Accordingly, although it is true to say that there was an express term in one of the documents in the *Gascoigne* case negating an obligation to accept work, it was not relevant to the decision of the EAT, given that it did not apply to the particular contract under consideration.

94. We do not accept, therefore, that there was any error in the manner in which the FTT distinguished these two cases. Moreover, the FTT's principal ground of distinction was that "each case turns on its own facts" and little was to be gained by comparing the conclusion of an employment tribunal on facts very different to those before the FTT in this case. We endorse that view. As the FTT noted in [150] of the decision, there are examples of cases going the other way, where the circumstances did not justify ignoring express terms negating the relevant obligations.

95. Mr Nawbatt also criticised the FTT's reliance, at [151], on *Usetech v Young*, *Stevedoring*, *Carmichael v National Power* and *Clark v Oxfordshire Health Authority*,

on the basis that these predated *Cotswold Developments v Williams* and *Pimlico Plumbers*. We do not find this point persuasive. For the reasons we have set out above, those cases remain good law. Further, as we point out above, it is relevant that decisions such as *Addison Lee* and *Pimlico Plumbers* concern limb (b) worker status, where the focus is on the obligations owed by the employee. The significance of this in terms of the mutuality of obligation test for employment is discussed by the Court of Appeal in *Windle v Secretary of State* [2016] EWCA Civ 459 at [24] of that decision.

96. We consider that HMRC's real complaint is that it disagrees with the conclusion the FTT reached. For the reasons we have already stated, even if we agreed with HMRC in this respect, that would be insufficient to permit us to interfere with the Decision. We have found no error in either the FTT's identification or application of the relevant legal test. Adopting the words of Elias J in *St Ives Plymouth*, the only question for us is, therefore, whether there was a "sufficient factual substratum" to support the FTT's finding at [150] that the express terms negating any obligations to offer and take on work reflect the true agreement. In our judgment, there was. Accordingly, we reject Ground 3 of the Grounds of Appeal.

G. Ground 1: the requirement of mutuality of obligation in relation to the Individual Contracts

97. We have set out the FTT's findings in relation to the Individual Contracts at paragraph 31 above. In short, it found that each engagement constituted a separate contract in which there was some level of mutuality of obligation, "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", but that this was insufficient to render them employment contracts.

98. Specifically, the FTT found that (1) PGMOL could cancel an appointment without contractual limit and without committing a breach of contract and (2) the referee could decide not to take up the appointment if, in addition to reasons such as injury or illness, his work commitments changed at the last minute or he encountered traffic problems getting to the match. At [159], the FTT concluded that "we do not think that anything in the documentation or the parties' conduct is consistent with non-attendance amounting to a breach of contract."

99. HMRC's first contention in relation to the Individual Contracts is that the FTT erred in law in its conclusion as to what constitutes mutuality of obligation. It contends that, even if it is wrong as to the content of the relevant obligations in relation to the Overarching Contract, "the question of mutuality of obligation under the first [RMC] condition poses no difficulties when an individual is actually working and a contract clearly exists." This argument is based on the passage at [13] of the judgment in *Stephenson v Delphi Diesel Systems* we have quoted above, in which Elias J said that for the period when work was actually being carried out, a contract must clearly exist, because "for that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done."

100. As we have noted above, Elias J was there considering the concept of mutuality of obligation as being relevant only to the question whether a contract existed. In that context, it is clear that where a person is actually working for someone who has agreed to pay them for such work as they carry out, then there is a legally enforceable contract. As we have already concluded, however, mutuality of obligation is not only relevant to determining whether there was a contract at all, but is a critical element in delineating a contract of service from a contract for services. In that context, for the reasons we have given under section E above, 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.

101. We do not accept, in this regard, Mr Nawbatt's submission 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.

102. In any event, the analysis of Elias J is inapposite on the facts of this case where it is common ground that the period of each Individual Contract extends beyond the time that the referee is "actually working" in the sense of refereeing the match: the contract commences upon the referee accepting the match appointment, which is typically on the Monday before a game the following Saturday, and does not end until submission by the referee of the match report.

103. Mr Nawbatt further submitted that the FTT's conclusion as to an absence of mutual obligations was inconsistent with its finding (at [159]) that there were legally binding Individual Contracts: if both PGMOL and the referee were entitled to withdraw from each individual engagement after the referee had accepted it, then there was no contract at all. We reject that submission. There is no doubt that PGMOL had an obligation to pay the referee if the referee officiated at a match. That is enough to create a contract, albeit a unilateral contract and not one which (for reasons we have already given) contains sufficient mutuality of obligation to constitute an employment contract.

104. In its skeleton argument HMRC contended that the FTT took into account irrelevant considerations both as regards the circumstances in which a referee was unable to get to a match and in which PGMOL might cancel an appointment. It contended that in so doing the FTT misdirected itself in law and erred in its contractual analysis of the relevance and/or effect of non-performance and/or termination.

105. So far as the right of a referee to withdraw is concerned, Mr Nawbatt submitted, on the basis of the findings at [51] to [52] of the Decision, that the FTT is to be read as having concluded (at [159]) that referees may decide not to turn up at a match only

if they had a reasonable excuse. As such, the grounds on which they could do so were not unfettered and were indistinguishable from the grounds upon which an employee could refuse to work. We do not think that this is a correct reading of the FTT's conclusion as to the nature of the referee's contractual obligations. Although the FTT
5 referred to the "invariable" position that a referee would have a good reason not to attend, we do not consider that it concluded that this amounted to a contractual restriction on its right not to attend. Moreover, although the FTT cited (at [52]) illness, injury or work commitments as typical reasons for a referee stepping down, when read together with its conclusions in [159] the FTT was not identifying these as
10 the only bases – so far as contractual rights are concerned – on which a referee was permitted to withdraw.

106. He further submitted that the FTT was wrong to find that the right of a referee to withdraw was different from the right of a typical employee to miss work. He submitted that the FTT was wrong in this respect to distinguish *Weight Watchers*
15 (above at paragraph 31(6)). In that case Briggs J concluded that the right of a team leader (where each individual contract related to a series of meetings) not to take a particular meeting was consistent with the contract being one of employment. The relevant clause in the contract ("Condition 10") provided that "if the Leader does not propose to take any particular meeting on any particular occasion and is unable to
20 fund a suitably qualified replacement, [Weight Watchers] will if so requested by the Leader, attempt to find such replacement and for this purpose the Leader will give the Area Service Manager as much prior notice as possible."

107. Briggs J noted, at [90], that a proposal by a leader not to take a particular meeting left her obligation to take the remainder of the series intact, and held: "it is in
25 my judgment absurd to suppose that a leader could, because of Condition 10, first agree to conduct a series of meetings and then, without notice to Weight Watchers, simply fail to attend to take any of them, without a breach of contract."

108. In our view, the FTT was correct to distinguish this decision. The leader's right not to attend a meeting was not unfettered: he or she was at least impliedly obliged to
30 try to find a replacement leader and it was only if no alternative was found or, in default, the meeting cancelled, that the leader's work-related obligations entirely ceased (see [89] of *Weight Watchers*).

109. Reading the Decision in its entirety, we consider that the FTT found that the only contractual fetter on a referee's ability to withdraw from an engagement without
35 breach was that he needed to notify PGMOL that he could not officiate at the match. That fetter is qualitatively much less than that imposed on the leaders in *Weight Watchers*. There was no obligation on a referee to find a replacement, and the cessation of work-related obligations of the referee was not dependent on a replacement being found by PGMOL or the match itself being cancelled.

40 110. The critical question, according to Briggs J, is whether the right not to attend is "so wide as to permit, without breach of contract, the contractor to decide never personally to turn up for work at all." In *Weight Watchers*, the contract related to a series of meetings. It was in that context that Briggs J concluded that the right to

withdraw from a particular meeting did not translate into a right to fail to turn up for all meetings in the series, without breaching the contract.

111. In contrast, each Individual Contract in this case relates to a single match. The focus, therefore, is solely on whether the right not to attend a single match without
5 breaching the contract, having accepted the engagement, is broad enough to negate the irreducible minimum level of obligation to constitute the referee an employee.

112. We accept that a referee's right not to attend the match in the case of illness, injury or (the other example given) inability to make it through traffic in time is no different from the implied qualification in many employment contracts that the
10 employee is not in breach of contract if he or she is *unable* to turn up to work. In this case, however, it is common ground that referees could also withdraw from an engagement if their other work commitments precluded it. That is a qualitatively different right to that of a typical employee. Indeed, as we state above, we consider that the FTT found that the only *contractual* fetter on the referee's right to withdraw
15 from an appointment was his obligation to notify PGMOL.

113. Mr Nawbatt submitted that this right must be construed against the background that this is a part-time contract. In that context, the right is not inconsistent with there being *some* obligation to work. We would accept that in a part-time contract to provide work from time to time then the fact that the work needed to be fitted around
20 the employee's other work commitments, such that the worker could not turn up on particular occasions due to work clashes, might not be inconsistent with the part-time contract being one of employment.

114. It is different, however, where there is a single engagement. In our judgment, the FTT was entitled to find that the right of the referee, who accepted an engagement
25 to officiate at a single match, to withdraw from that single engagement, was inconsistent with the obligations of an employee.

115. We turn now to the position of PGMOL. As to the right of PGMOL to cancel an appointment once made, Mr Nawbatt submitted that the FTT's conclusion in this respect is not clear, given that it had referred, at [52], to its understanding that
30 PGMOL might cancel an appointment if the referee received unhelpful media attention or there was a risk that integrity was compromised. These, however, were expressly offered as examples. At [159] the FTT clearly expressed its conclusion that there was no contractual fetter on PGMOL's right to cancel an appointment.

116. There was no challenge to this finding of fact in HMRC's skeleton on *Edwards v Bairstow* grounds. We were in any event not provided with sufficient material with
35 which to be satisfied (in accordance with the *Edwards v Bairstow* test) that the FTT made an error of law in reaching that finding. As developed in oral argument, HMRC's point was really that the requirement as to mutual obligation, so far as PGMOL was concerned, was satisfied by its obligation to pay if the referee worked.
40 We have rejected that argument, for the reasons set out in section E above.

117. Accordingly, even if the FTT was wrong to conclude that there was an absence of necessary obligation on the referees, it was in our judgment entitled to conclude that the absence of the required obligation on PGMOL meant that there was an insufficient mutuality of obligations.

5 118. In HMRC’s skeleton, it was also contended that the FTT erred in failing to take
account of the mutual obligations which it had already found existed in the
Overarching Contract. In oral argument, Mr Nawbatt accepted that if he was unable to
persuade us that there was sufficient mutuality of obligation in the Individual
10 Contracts he was unlikely to be helped by reference to the terms of the Overarching
Contract. We consider he was right to do so. It is clear that the FTT took account (in
determining whether there was sufficient mutuality of obligation in the Individual
Contracts) the existence and terms of the Overarching Contract. It referred expressly
(at [158]) to the need to do so. It is inconceivable that, having recognised that need, it
15 then failed to do so in the immediately following paragraphs, and there is nothing in
the Decision to suggest that it made such an error.

119. Finally, HMRC contends that the FTT failed properly to consider PGMOL’s
acceptance (for the 2017/2018 season onwards) that National Group referees were
“workers” under section 230(3) of the Employment Rights Act 1996. It contends that
the necessary mutuality of obligation required for a contract of service is the same as
20 that required for an individual to be a worker. We reject this contention. In the first
place, as we have already noted, the definition of “worker” under limb (b) of section
230(3) does not require there to be any obligation on the company to provide work.
Second, we agree with PGMOL that the question whether referees were employees in
the seasons 2013/14 to 2016/17 must be answered by reference to the facts as they
25 then existed, and not by reference to matters that occurred after the event.

120. For these reasons, we reject the first Ground of appeal. In light of our
conclusions in respect of Grounds 1 and 3, which are sufficient in themselves to lead
to the dismissal of the appeal, it is strictly unnecessary to consider the second Ground
of appeal (relating to control in the Individual Contracts) but since the point was fully
30 argued, we will do so.

H. Ground (2): Control in the Individual Contracts

The FTT’s decision on control

121. The FTT identified the test for establishing control, at [16], as requiring a
“sufficient framework of control” in the sense of “ultimate authority”, rather than
35 there necessarily being day-to-day control in practice. At [163] it expanded on the
need for a sufficient framework of control as follows:

40 “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: see *White and another v
Troutbeck SA* (EAT) at [40] to [42].”

122. The FTT applied this test at paragraphs [163] to [169], finding as follows:

- 5 (1) The pre-season documents, including the fitness protocol, the Match Day Procedures and (for 2015-16) the Code of Conduct, “imposed some obligations on referees which gave PGMOL elements of control”. Some of those obligations (particularly the Match Day Procedures) were directly relevant to the Individual Contracts: [165].
- (2) Although referees were subject to both FA and competition rules while at a match, the pre-season documents also imposed on referees direct commitments to PGMOL: [165].
- 10 (3) The FTT was not persuaded that the assessment and coaching systems themselves provided further elements of control in respect of individual match appointments. While important, on analysis they were “advisory rather than controlling in nature”. A coach at a match might offer advice at half time, before or after a match, “but that is simply advice and not an indicator of control”: [166].
- 15 (4) Referees “had the right not only to express geographical preferences on MOAS but also to refuse any particular appointment once it was offered, or even to back out later. They might well not have wanted to do that for their own reasons, but legally they were free to do so”: [167].
- 20 (5) PGMOL could not direct referees where to go or when to get there, or indeed what task to perform when they got there. In each case, the referees needed to agree to take on a particular task at a specified location, date and time: [167].
- 25 (6) The need to travel to the ground to officiate was determined by the nature of the task rather than any form of control in an employment sense: [167].
- (7) The referee is undoubtedly “the person in charge” on match day; he has full authority and his decisions are final. Fourth Officials answer to the referee: [168].
- 30 (8) The Code of Practice recognises that the FA alone will deal with breaches of its Referee Regulations. “In reality it is hard to see how PGMOL could retain even a theoretical right to step in while a referee is performing an engagement at a match...”. At most, they could offer advice at the time and take action after the engagement had ended: [168].
- 35 (9) The Laws of the Game make clear that the referee’s decision is final. PGMOL could not, for instance, remove a referee at half time and replace him: [168].
- (10) PGMOL “did have a level of control outside match appointments as a consequence of the overarching contract”, but there was “no mechanism

enabling PGMOL to exercise the correlative rights during an engagement”: [169].

(11) The only sanction which PGMOL could impose on referees was not to offer further match appointments, and to suspend or remove a referee from the National Group list. Between the time when a match appointment was made and the date of the match, the most PGMOL could do was to cancel that appointment. But that is not an exercise of control during an engagement: it is a termination of that particular contract altogether.

10 123. At [169], the FTT concluded that “Overall, we are not persuaded that PGMOL had a sufficient degree of control during (and in respect of) the individual engagements to satisfy the test of an employment relationship”.

HMRC’s arguments

15 124. HMRC’s principal contention is that, although the FTT was correct to identify the critical requirement in the legal test as the *right* of control and not the exercise of control in practice, it nevertheless erred in law in equating the right of control as the right to “step in” during the performance of the referee’s duties under the contract.

20 125. The FTT carried that error through, HMRC contend, into its conclusion (at [168]) that there was an absence of control because the referee is “undoubtedly the person in charge on match day” and it is “hard to see how PGMOL could retain even a theoretical right to step in while a referee is performing an engagement at a match”, recognising that the referee’s decision is final and there was no suggestion that PGMOL could remove the referee at half-time or do anything more than offer coaching advice. In reaching this conclusion, HMRC contend that the FTT took into account irrelevant considerations and focussed too narrowly on the period between the first and final whistle of the match.

30 126. HMRC contend that the same error underlay the FTT’s overall conclusion at [169], where it identified as critical factors the absence of any “mechanism enabling PGMOL to exercise the correlative rights during an engagement” and the fact that the only sanction PGMOL could impose would be after the engagement, by not offering further appointments or suspending the referee from the National Group list. These errors, HMRC contends, led the FTT to reach a perverse conclusion.

35 127. In addition, HMRC contend that the FTT failed to take into account the elements of control set out in the pre-season documentation, including in particular the Match Day Procedures and the Code of Conduct, and the control exercised by PGMOL through its continuous assessment, training and coaching. Had the FTT taken proper account of these matters, then it ought to have concluded that ultimate control resided in PGMOL.

40 *PGMOL’s arguments*

128. PGMOL contends that the FTT’s evaluative exercise of weighing the factors is unassailable on *Edwards v Bairstow* grounds. It contends that the FTT did not focus only on the position between the first and final whistle, as it took into account the referee’s overall duties on match day and beyond, noting for example that this is not a case where PGMOL can direct referees when and where to go, because referees have the ability to back out having accepted an offer to officiate at a match. Mr Peacock in oral submissions questioned how useful control is as a factor in a case such as this, involving skilled persons over whose performance there is little scope for control.

Discussion

129. We do not accept that the FTT erred in dismissing the assessment and coaching systems as irrelevant to control, since it was open to the FTT reasonably to conclude, as it did, that those systems consisted, at most, of advice.

130. There is more force in the other arguments raised by HMRC. We consider there to be four related questions. First, did the FTT correctly apply the test of whether PGMOL had the right to “step in” and give instructions to referees? Second, was the FTT correct to rely on PGMOL’s inability to impose any sanction for breach until after an Individual Contract had ended? Third, did the FTT err in the weight which it gave to PGMOL’s rights of control under the Overarching Contract during the term of each Individual Contract? Fourth, was the FTT’s conclusion that PGMOL could not impose any sanction for breach during an Individual Contract one reasonably open to it?

131. The right to “step in” was referred to in the context of control in *White v Troutbeck* [2013] IRLR 286, at [41]. That case involved caretakers left in charge of the owner’s house during the owner’s long periods of absence. At [40] to [41] of the judgment, the EAT (Judge David Richardson, upheld on appeal by the Court of Appeal [2013] IRLR 949) said:

“40. Firstly, the key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The key question is not whether in practice the worker has day to day control of his own work.

41. It has often been observed that in modern conditions many workers – especially the professional and skilled – have very substantial autonomy in the work they do, yet they are still employees. But this has, I think, always been the case. There have always been great houses and estates left for long periods in the practical care and stewardship of servants while the owners and masters have been away. The fact that these servants have been left in charge has never prevented the law – and the parties – from regarding them as being retained under contracts of service. There would be no doubt that the owners retained the right to step in and give instructions concerning what was, after all, their property. It does not follow that, because an absentee master has entrusted day to day control to such retainers, he has divested himself of the contractual right to give instructions to them.”

132. It is important to note that the functions being performed by the caretakers in that case involved no particular skill, so that there was no inherent practical difficulty in the owner stepping in to direct the manner in which the caretakers should do their job. There are, however, many circumstances where an employer has no ability to
5 “step in” during the performance of the employee’s obligations, yet there is nevertheless found to be sufficient control for the purposes of an employment contract. In *Troutbeck* itself, at [42], the EAT referred to many kinds of employee, such as surgeons and footballers, who are engaged to exercise their own skill and judgment. In *Wright v Aegis Defence Services (BVI) Limited* (UKEAT/0173/17/DM),
10 the EAT (Langstaff J) cited with approval the following passage from the decision of the High Court of Australia in *Zuijs v Wirth Brothers Proprietary Ltd* [1955] 93 CLR 561, at 570:

15 “... a false criterion is involved in the view that if, because the work to be done involves the exercise of a particular art or 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 but an independent contract...”

133. Langstaff J continued, at [38]:

20 “It would be an error, such as identified by MacKinnon LJ in *Wardell v Kent County Council* [1938] 2 KB 769 (a binding authority), to hold that there may be workers such as chefs, cabinet makers, composers, professional football players and nurses whose skills and, therefore, the occasions in which they may be required to exercise them, often involve judgement, and as such are not susceptible to intimate direction
25 by an employer.”

134. Nevertheless, it remains essential, even in the case of such workers, that “some sufficient framework of control exists”: see *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, per Buckley J at [19]. That phrase was the subject of consideration in *Christa Ackroyd Media Ltd v Revenue & Customs Commissioners* [2019] UKUT 326,
30 at [53] to [54]. The Upper Tribunal (Mann J and Judge Thomas Scott) considered that Buckley J was not addressing the granular mechanics of control, but was simply making the point that “what mattered in determining control was not the practical exercise of day-to-day control and whether “actual supervision” was possible, but “whether ultimate authority over the man in the performance of his work resided in
35 the employer so that he was subject to the latter's order and directions”.”

135. In our judgment, these authorities establish 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.

40 136. It is important to note, however, that these authorities appear to be contemplating a relationship of a longer term than a single engagement. They were not contemplating a contract, for example, to perform a single operation, to cook a single meal, to play a single game or to give a one-off live performance. Where the contract subsists beyond a single engagement, then even though there is no ability to

interfere with the performance of the obligations in real time while they are being performed, there is nevertheless scope to step in and give directions and to impose sanctions between engagements and while the contract subsists.

5 137. The critical question in this case (where the period of the contract ends with the submission of the referee's match report shortly after the final whistle) is whether the absence of an ability to step in to regulate the referee's performance of his core obligation (officiating at the match), or to impose any sanction, until after the contract has ended means that there is not sufficient control.

10 138. The authorities do not provide direct assistance on this question, and we therefore address it as a matter of principle. We consider that, whether it is referred to as a right to step in or as a framework of control, the test requires that the putative employer has a contractual right to direct the manner in which the worker is to perform their obligations, and that those directions are enforceable, in the sense that there is an effective sanction for their breach. Provided that the right to give directions
15 relates to the performance of the employee's obligations during the subsistence of the contract, it is not to be disregarded 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 breach of those obligations could only be imposed once the contract has ended. The existence of an effective sanction
20 (irrespective of when its impact would be felt by the employee) is sufficient to ensure that the employer's directions constitute enforceable contractual obligations.

139. Accordingly, and in answer to the first two questions we have posed in paragraph 130 above, we consider that the FTT, in relying (at [168] and [169] of the Decision) on PGMOL's inability "to step in while a referee is performing an
25 engagement at a match", on PGMOL's lack of ability to "exercise the correlative rights during an engagement", and on the fact PGMOL could only impose sanctions (being not to offer further engagements or to suspend or remove a referee from the National Group list) after the end of the engagement, took into account irrelevant considerations.

30 140. Separately, we consider that the FTT also erred in the final two sentences of [169] in concluding that, if an issue emerged between the commencement of the contract and the match day itself, there was no control "during an engagement" because PGMOL's only remedy was to terminate the contract altogether. In such a case, PGMOL would be stepping in *during* the period of the contract. The sanction of
35 terminating a contract is one that can only be exercised, by definition, during the continuance of the contract even though the effect of the sanction is to bring it to an end. In answer to the fourth question we have posed above, therefore, we conclude that it was not open to the FTT to conclude that PGMOL was unable to impose, during the period of an Individual Contract, *any* sanction for breach by a referee.

40 141. The conclusion that the FTT erred in the respects we have identified does not necessarily mean that PGMOL did exercise sufficient control over the referees in the context of each Individual Contract to render them employees. It does mean, however, in answer to the third question we have posed in paragraph 130 above, that the FTT

erred in the weight which it gave to PGMOL's rights of control under the Overarching Contract during the term of each Individual Contract. It accepted (at [166]) that elements of those rights of control did apply to 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. Accordingly, in order to reach a conclusion on this issue, the process of evaluating those elements of control to determine whether they were sufficient for the purposes of the second limb of the *RMC* test would need to be undertaken, based on the totality of the available evidence on the point. Given our conclusion in relation to the lack of mutuality of obligation, however, it is unnecessary either to remit the case to the FTT for this purpose or to undertake the task ourselves.

I. Disposal

142. For the above reasons, we conclude that there was no error of law in the FTT's conclusions that there was insufficient mutuality of obligation in relation both to the Overarching Contract and the Individual Contracts. It follows that there was no error of law in its conclusion that the referees in the National Group were engaged under contracts for services and were not employees. Accordingly, we dismiss this appeal.

**MR JUSTICE ZACAROLI
JUDGE THOMAS SCOTT**

RELEASE DATE: 6 May 2020