

A question of Control

Seb Maley explains how the impact of a long-running and undecided employment status case is already playing out

The issue of employment status never seems far from the news. One moment it's a high-profile freelancer contesting it and an eye-watering tax bill. The next it's a Supreme Court case that has the potential to set a precedent for determining the employment status of millions going forward.

You may know of this particular case: HMRC v Professional Game Match Officials Ltd (PGMOL). It's a long-running dispute over the employment status of professional football referees – a case carrying much more than the £584,000 in tax liability alone.

But why, out of all of the cases we've seen in recent years, is this considered so important? And what are the potential wider implications of the eventual verdict?

A brief history

The verdict is currently undecided and has made its way from First and Upper Tier Tribunals to the Court of Appeal to the Supreme Court before being sent to be reheard at a First Tier Tribunal.

The case itself hinges on Mutuality of Obligation (MOO) and Control. MOO focuses on whether an employer is obliged to offer work and a worker is obliged to accept it. If the answer is yes, the relationship could reflect that of employment. For many years it has been a subjective test, with taxpayers, experts and HMRC forming different views on how it can be argued and demonstrated in practice.

Control is more self-explanatory (albeit with its own complexities). It revolves around the level of control an employer has over a worker – in respect of how they carry out their work, but also what's carried out, when and where from.

Through various hearings, the PGMOL case covered these elements in great depth. Prior to the Supreme Court hearing, many commentators were already championing it as a seminal case in employment status history, with the prospect of new case law providing clarity in an increasingly convoluted area.

While the case has been remitted back to the First Tier for a fifth hearing, the Supreme Court judgment has nevertheless set new precedent – and HMRC has been quick to react...

Manual swiftly updated

HMRC's Employment Status Manual (ESM) is technically an internal resource designed for use by Revenue officers. It is, however, published publicly and has been used by practitioners for many years as a key point of reference.

While some refer to it as a 'bible' for determining status, it's key to point out that the ESM is simply HMRC's interpretation of case law – and obviously designed to assist officers when mounting arguments around the subject.

The ESM is therefore useful to build up a picture of how HMRC would litigate on a particular factor. But it's far from a guiding light when trying to form an impartial view.

HMRC made no secret of the fact it was waiting for the PGMOL Supreme Court verdict with baited breath and, unsurprisingly, shortly after the judgement made a raft of updates to its ESM.

Six sections of the manual were amended, with the majority of changes covering MOO, Control and the evaluative exercise required once these two factors have been considered. These areas stem back to a decades-old case which has served as the bedrock of status – which brings me onto my next point...

Ready Mixed Concrete (RMC)

As with every status case, the judges in the PGMOL case used the 1968 Ready Mixed Concrete (RMC) case as the foundation for building their view. The fact that we are still using a case from 1968 to determine employment status nearly 60 years on is a subject I have spoken about many times – but, as things stand, that's how we have to play the game.

RMC resulted in a three-stage approach for determining status, which covers the following:

1. For an employment contract to exist there must be a level of personal service and MOO.
2. For an employment contract to exist there must be a sufficient level of Control over the worker.
3. If 1 or 2 do not point conclusively to an absence of employment, all other factors must be considered in an evaluative exercise.

There are, naturally, many grey areas in these three stages. Another key judgment of recent years involved the broadcaster Kaye Adams and her company Atholl House Productions Limited, which was heard at the Court of Appeal. Atholl House focused heavily on stage 3 – considering the 'factual matrix' and questions around whether Adams was in business on her own account. PGMOL, on the other hand, was largely focused on stages 1 and 2 – and what constituted a sufficient 'level' in each.

Where does this leave us?

The intricacies of the arguments put forward throughout PGMOL could be discussed at length, but for the purposes of this article (and word count), these are my key takeaways:

- HMRC has long held a very narrow view when it comes to MOO, effectively taking the position that such an obligation exists if an individual accepts and is paid for work. The PGMOL judgement largely ratified this view, dismissing the fact that referees could terminate the engagement prior to it starting.
- Whilst the level of MOO would be considered again at stage 3 of RMC, the reality is that there are limited practical arguments that could be used in a taxpayer's favour.
- PGMOL also provides further precedent around the area of Control. Given the nature of how a football referee works – and the fact that nobody can step in to control them during a match – the case looked at the broader framework of Control. Of course, referees are fairly unique when compared to the wider world of work, but this framework of Control is important and will have an impact on status more generally.
- In practical terms, it's vital to consider not only whether Control is actually exercised, but whether a would-be employer has a right to control a worker – even if that never happens.

This is an angle HMRC is already homing in on in compliance activity, so it's vital that engagers of flexible workers are prepared.

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