

## Personal tax round up (Lecture P1461 – 19.61 minutes)

### Football referee employment status

*Summary – The minimum requirements of mutuality of obligation and control necessary for a contract of employment between the referees and PGMOL were satisfied in relation to the individual contracts. The case was remitted back to the First Tier Tribunal to decide if, in the light of all relevant circumstances, the individual contracts were contracts of employment.*

Professional Game Match Officials Limited (PGMOL) trained and provided referees and other match officials for football matches. Premier League matches were usually being refereed by full-time referees who were employed by the company.

This case involved the status of 'National Group' referees, who officiated matches in the Championship, Leagues 1 and 2, as well as cup matches. Typically, 'National Group' referees were paid, part-time referees who had other full-time employment or occupations, but chose to referee in their spare time. The issue was whether they were employed or self-employed for income tax and national insurance purposes.

'National Group' referees were subject to an annual, overarching contract signed at the start of the season that required them to pass a fitness test and attend an introductory seminar. This did not guarantee them any matches. Individual match contracts were then offered and accepted on a match-by-match basis, with referees required to:

- follow PGMOL's match-day procedures and code of conduct;
- wear kit supplied by PGMOL but supplied their own boots, whistles, and cards.

Match appointments were offered online on a Monday for matches the following weekend, and referees could choose whether or not to accept. If rejected, PGMOL would typically want to know the reason.

Once accepted, a contract was formed whereby the referee agreed to officiate at the match and submit a match report, in return for PGMOL paying the referee a match fee. Both parties were entitled to terminate the contract prior to the match without penalty. Typically, this only due to injury or illness. Once the match report had been submitted, the referee's engagement was at an end. If the referee did not attend the match, the contract was effectively cancelled, without penalty, and no match fee would be payable.

PGMOL treated these part-time referees as self-employed and so did not treat the fees paid to them as employment income. HMRC argued the referees were employees with match fees taxable as employment income.

By the time of the appeal to the Supreme Court, it had been agreed that the overarching contract was not an employment contract and so the issue left to decide was whether the requirements for mutuality of obligation and control were satisfied in connection with the individual match contracts.

### *Decision*

Remember, the Supreme Court was only considering the contracts for individual matches.

The Supreme Court confirmed, following the tests from with the Ready Mixed Concrete case, that for employment to exist both mutuality of obligations and a sufficient degree of control needed to exist.

### Mutuality of obligations

The Supreme Court stated that for mutuality of obligations to exist, the referee must provide their personal service in return for payment by PGMOL. The payment of match fees meant that this was satisfied.

The Court confirmed that sufficient mutuality of obligations could exist by considering both parties' obligations in the period from when the referee arrived at the ground to the submission of their match report on the following week. It was not necessary to show that the referees were under contractual obligations before their arrival at the ground. However, in this case the parties were under mutual contractual obligations from when the referee accepted the match offer. It did not matter that the parties had a right to cancel without penalty. While the contract remained in place, mutuality of obligations existed.

### Control

When considering control, the Supreme Court stated that it was not necessary for PGMOL to give direct instructions to referees throughout the contract period or to have a contractual right to intervene in every aspect of the referee's performance or during the performance of the employee's duties. The Supreme Court gave the analogy of a hospital manager having little or no control over a surgeon during an operation but that did not prevent them from being in employment. There just needed to be a sufficient framework of control throughout each contract. Each case was fact dependant. In this case, PGMOL controlled the referees through their fitness requirement, the match-day procedures document and FA Regulations. There was a strict code of conduct in place. Referees could be coached, assessed and could receive performance bonuses at the end of the season. Equally they could be dropped.

### Contracts of employment?

Having concluded that both mutuality of obligations and control were present, this was not sufficient to be able to conclude that an employment relationship existed. The Supreme Court remitted the case back for the First Tier Tribunal to consider, based on its original findings of fact, the third stage test from the Ready Mixed Concrete case. The Tribunal must take all of the circumstances into account, including the level of mutuality and control discussed here, and apply the guidance given in the Atholl House case. When considered in the round, were these contracts of employment? We will have to wait and see.

*HMRC v Professional Game Match Officials Limited [2024] UKSC 29*

### **No arguable grounds for appeal**

*Summary – The 'highly contrived' scheme involving an employee benefit trust and gold bullion did not work. The gold bullion formed part of the directors' employment earnings.*

Wired Orthodontics Limited established an employee benefits trust and undertook to contribute £300,000 worth of gold bullion for the benefit of its two director- shareholders, Ms Bessant and Mr Hutchinson, within the next ten years.

The directors immediately sold the bullion they had been awarded and used the proceeds to discharge the company's payment obligation.

This created corresponding credits in the directors' loan accounts which they later drew on when the company had profits to make cash payments to them. In addition, the directors agreed to take on the company's obligation to pay £300,000 into the trust.

The general anti-abuse rule advisory panel concluded that the arrangements were 'abnormal and contrived'.

HMRC concluded the gold bullion constituted 'money or money's worth' and formed part of the directors' earnings in relation to their employment (s.62 ITEPA 2003).

The directors argued that the arrangements were loans rather than earnings because the award of the bullion and/or the money from the sale of the bullion was received on the basis that they had an obligation to pay equivalent amounts to the EBT in the future.

After the First Tier Tribunal dismissed the taxpayers' appeal, they applied to the Upper Tribunal for permission to appeal.

#### *Decision*

The Upper Tribunal found that the taxpayers were wrong to claim the First Tier Tribunal attached no weight to the directors' obligation to pay the EBT as the First Tier Tribunal:

1. explained why it accepted HMRC's argument and rejected the taxpayers' – it found there was no actual loan (as accepted by the taxpayer) and the obligation to the EBT did not have the effect suggested by the taxpayer;
2. had correctly directed itself as to the law on earnings and properly understood the decision in *RFC 2012 (in liquidation) (formerly the Rangers Football Club plc) v Advocate General for Scotland* [2017] STC 1556.

On the taxpayers' argument that the directors never had any entitlement to the gold – they paid market price for it and it was 'pre-ordained' that they would sell it and pay the purchase price as the company had no funds to pay for the gold – The Upper Tribunal considered the First Tier Tribunal's findings of fact to be 'unarguable'. The directors received the gold.

Finally, on whether the payment was deductible, the Upper Tribunal stated that it was 'not arguable that a decision that earnings arose for tax purposes mandates a decision that the payment was deductible; it all depends on the facts'. The Tribunal agreed with the First Tier Tribunal that the scheme was 'highly contrived and could scarcely have been more artificial, and did not cease to be so because it did not work'. Nor did the Upper Tribunal accept the taxpayers' suggestion that, because the scheme did not work, one should 'effectively ignore the contrived steps of the scheme and treat the payment as "normal" remuneration'.

Permission for the taxpayers to appeal was refused.

*Wired Orthodontics Limited and others v [2024] UKUT 00266 (TCC)*

*Adapted from the case summary in Taxation (12 September 2024)*

## **Benefit of the statutory residence test**

*Summary – The taxpayer was deemed to be UK resident as under the Belgium/UK Double Tax Convention his 'centre of vital interests' remained in the UK.*

This case considered the old regime's subjective test of residential status and shows why there was a need for the introduction of the current statutory residence test, which provides a more mechanistic test to apply when determining a taxpayer's residential status.

At the beginning of April 2006 Kevin McCabe, former chairman of Sheffield United FC, relocated to Belgium to create the European Headquarters of his successful building business, claiming this was to facilitate the expansion of his company's international business. He bought a flat in Brussels, replaced some UK bank accounts with accounts in Belgium, resigned from various boards and clubs and changed his address with various contacts and organisations. He transferred his UK property into his wife's name (who remained living in the UK with their sons). He returned to the UK regularly, staying in hotels rather than the family home. He returned at Christmas, to watch a good number of Sheffield United matches and to attend key social events. As owner of the Scarborough Group, he continued to be director of the holding companies and some of the other companies within the group.

HMRC argued that Kevin McCabe had relocated to Belgium in an attempt to avoid the capital gains tax that would become payable on the gift of shares in the Scarborough Group to his sons, which he made in 2008. HMRC claimed that he had been advised to become non-UK resident for at least five tax years (s10A TCGA 1992). HMRC argued that putting their home into his wife's name and sleeping in a hotel just down the road but continuing to use the home to spend time with his family was wholly artificial.

The First Tier Tribunal found in HMRC's favour. Despite spending significantly less time in the UK than before his move to Belgium, he made frequent visits and had not loosened of his UK ties sufficiently. His family remained in the UK in the family home, which he visited despite staying in hotels overnight. He continued to attend sports fixtures and saw friends in the UK.

Kevin McCabe appealed to the Upper Tribunal.

### *Decision*

The Upper Tribunal upheld the First Tier Tribunal's decision.

Although Kevin McCabe's work entailed long working hours (more than a normal working week) in Belgium and other countries outside of the UK, he also worked in the UK. The Upper Tribunal stated that the First Tier Tribunal could not just ignore his UK work. His overseas hours did not indicate that he had made a distinct break in the pattern of his life in the UK.

The Upper Tribunal confirmed that the First Tier Tribunal had not erred in its approach to the days and part days spent in the UK by Kevin McCabe or its assessment of the quality of his presence in the UK. The Upper Tribunal also accepted the analysis undertaken by the First Tier Tribunal when considering the extent to which his business meetings were in fact held in the UK as opposed to elsewhere abroad. There was no error of law in their approach.

The Upper Tribunal stated that the First Tier Tribunal had not erred in finding that Kevin McCabe had a permanent home available to him in the UK. Despite transferring the house into his wife's name, he made frequent trips to the UK and although he slept in hotels when he visited, he was able to stay in the family home and did actually use the property during the day.

The final ground for appeal concerned whether the First Tier Tribunal had erred in law in finding that Kevin McCabe had his centre of vital interests in the UK, rather than in Belgium (Article 4(2)(a) of the Double Tax Convention). This article provides for an individual with a permanent home available to him in both the UK and Belgium to be resident in "the State with which his personal and economic relations are closer". The First Tier Tribunal had accepted that Kevin McCabe had various connections to Belgium but placed greater weight on his personal and economic relations in the UK including:

- the time spent by Mr McCabe in the UK with family and friends;
- his attendance at numerous football matches, both home and away;
- his continued involvement in the Scarborough Group, including a substantial amount of this work being done from the UK;
- the fact that the Belgian personal service company derived its revenue from consultancy contracts with UK businesses.

The Upper Tribunal dismissed the appeal.

*Kevin McCabe v HMRC [2024] UKUT 280 (TCC)*

### **Late application for fixed protection**

*Summary – The taxpayer's late application was refused as the First tier Tribunal had no jurisdiction to consider a late application. Its only jurisdiction was in an appeal over whether the conditions for fixed protection were satisfied or not.*

The taxpayer, a retired dentist, made an application for fixed protection against the lifetime allowance under the 2012 regime on 24 July 2022. However, the time limit for such an election expired on 5 April 2012 so the application was more than 10 years late.

HMRC refused to accept the election and the taxpayer appealed to the First Tier Tribunal on the grounds that it was unfair and unjust for him to have known about the deadline for fixed protection 2012 and that he was not informed about the deadline by his pension providers.

#### *Decision*

The First Tier Tribunal noted that, unlike the original 2006 fixed protection regime, the legislation for fixed protection 2012 did not make provision for a reasonable excuse defence where a late claim was made.

The Tribunal confirmed it had no jurisdiction to consider a late application as its only jurisdiction was in an appeal over whether the conditions for fixed protection were satisfied.

The taxpayer was attempting to raise a public law challenge over the way in which HMRC had exercised its care and management powers and the tribunal could not address such matters.

Finally, for the sake of completeness, the First Tier Tribunal confirmed that, in its view, HMRC had no obligation to notify taxpayers of changes in the law. The application was refused.

*Paul Haigh v HMRC (TC09284)*

*Adapted from the case summary in Taxation (19 September 2024)*

## **EIS - not ready to trade**

*Summary – Enterprise Investment Scheme (EIS) relief was denied as neither company was ready to trade by the required deadline.*

Putney Power Limited and Piston Heating Services Limited both issued shares on 4 April 2016 with the intention that the individuals who subscribed for those shares would be entitled to the 30% Enterprise Investment Scheme (EIS) income tax reduction on the amount subscribed.

Both of these investment opportunities were developed by the same investment manager, Triple Point Investment LLP. There are three other companies whose appeals are stayed behind the appeals of Putney and Piston.

In January 2020 HMRC decided the shares were ineligible for EIS relief and denied the claims, principally because the companies had not commenced trading by the statutory deadline of 4 April 2018, two years after the shares were subscribed as required by s.179(2)(b)(ii) ITA 2007.

HMRC argued that neither company was trading as the power stations that were to be used to produce and supply electricity were not constructed and ready for operation by 4 April 2018. The companies argued that they were ready to face and find customers and indeed had entered into contracts to do so. Construction did not need to be completed.

The companies appealed.

### *Decision*

Having reviewed the case law, the First Tier Tribunal stated that trading starts when a restaurant is open for business or, when a factory starts to make things. To arrive at this point, a trader will need to have set up their business infrastructure and taken operational steps to be ready to trade. The Tribunal stated that case law does not suggest that “it is necessary to have achieved a sale, but it is necessary to be “open for business”, to be ready, willing and able to supply the relevant goods or services.”

The Tribunal clarified that the trade infrastructure does not need to have been completed before trading starts as long as the infrastructure is operational, even if not on the scale or in the manner ultimately planned). For example, where a restaurant is to operate over two floors, the owners could open only the downstairs to start bringing in income, while construction on the second floor is completed.

A trader opens for business “by taking a step which exposes them to real operational risk and reward (for example, producing goods “on spec”, buying food for a restaurant or other raw materials, incurring the staff or other costs of opening a restaurant or being ready to provide some other service, with or without a booking or client signed up, contracting to supply goods or services now or in the future).

However, where a trader takes such operational steps in anticipation of completing their infrastructure, that will not accelerate the commencement of their trade. Neither company had completed the construction of their infrastructure by the EIS Deadline of 4 April 2018, which meant that neither company had begun to carry on a qualifying trade.

The appeals were dismissed.

*Putney Power Limited and Piston Heating Services Limited v HMRC (TC09300)*

## **PAYE employment expense claims**

In response to the tax risk from ineligible employment expense claims, on 7 October 2024 HMRC published details of a new process for claiming PAYE employment expenses. These are effective from 14 October 2024.

From this date:

- taxpayers can no longer submit a PAYE employment expense claim using the digital form or by making a new claim over the phone. However, they will continue to be able to use GOV.UK to check they are eligible to claim employment expenses.
- claims must be made using a paper P87 form, together with supporting evidence to prove eligibility such as receipts, mileage logs, employment contracts for working from home expenses.
- Taxpayers must send their evidence to:

Pay As You Earn and Self Assessment  
HM Revenue and Customs  
BX9 1AS

Once the P87 form plus supporting evidence is received, HMRC will check all evidence and confirm whether individuals are entitled to tax relief.

HMRC recognises that an online claim route is a more convenient option and is working 'at pace' to reinstate the digital process as soon as possible. Indeed, for 'uniform, work clothing and tool' expenses, customers can claim these online from 31 October 2024. For all other expenses, HMRC expects a digital claim route to be available by April 2025.

HMRC will keep this updated process under review and will provide a further update in the future.

<https://www.gov.uk/government/publications/hmrc-issue-briefing-evidence-required-to-claim-payee-p87-employment-expenses/evidence-required-to-claim-payee-p87-employment-expenses>

## **No tax advice sought**

*Summary – The taxpayer had been careless by not seeking tax advice. PAYE determinations and penalties issued were payable by the company.*

Janet Bray trained and worked as a pharmacist for a number of years before becoming a consultant providing services to the pharmaceutical industry. She traded through her company, Janet Bray Limited, where she was the sole director-shareholder.

Janet Bray Limited paid a firm to recommend how best to remunerate its employees. Based on this advice, the company took part in a tax avoidance scheme.

Under the scheme, a sub-trust was set up for each employee and a funds were allocated to that sub-trust, which were then loaned to the employee.

No PAYE or National Insurance Contributions (NIC) were accounted for.

Janet Bray Limited claimed a corporation tax deduction for the initial advisory fee paid on the basis that it was a payment to an independent party who recommended how key employees should be rewarded.

By the time of this hearing, the Supreme Court had reached its decision in the Rangers case, finding that amounts contributed to an employee benefit trust to remunerate employees by way of loans were earnings at the time the contribution was initially made.

As a result, the company accepted that the scheme did not provide the anticipated tax savings but challenged the determinations on the basis that:

1. There had been no carelessness justifying an extension of the time limit for making an assessment but if there had been carelessness, it did not lead to the relevant loss of tax;
2. The penalties were challenged on the basis that any inaccuracies in returns had not been brought about carelessly.

### *Decision*

The First Tier Tribunal found that Janet Bray, on behalf of the company, had not taken the reasonable care that somebody in her position should have taken in relation to the scheme.

Despite the company's accountants, their network organisation and the scheme promoters being involved in the arrangements, none of them were engaged to provide tax advice. In fact, all of the professionals had specifically stated that they were not providing tax advice.

Janet Bray had asked questions of the parties involved but never sought any advice on the tax aspects of the arrangements. The tribunal said:

'we consider that a reasonable prudent taxpayer, entering into a tax-saving scheme of this nature with the caveats in the presentation and the engagement letter with Clavis and knowing that their accountant was not providing tax advice, would not have relied on (at best) an assumption that someone involved with the scheme must have been providing tax advice'.

The First Tier Tribunal also concluded that the failure to take reasonable care had brought about the loss of tax.

She had acted carelessly, which meant that the normal four year for assessments to be raised was extended to six years and the determinations were validly made.

The appeal was dismissed, and the PAYE determinations and penalties upheld.

*Janet Bray Limited v HMRC (TC09277)*

*Adapted from the case summary in Taxation (19 September 2024)*