



Neutral Citation: [2022] UKFTT 181 (TC)

Case Number: TC08506

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2018/07976

*PAYE & NIC – travel and subsistence expenses – whether ordinary commuting or travel to temporary workplace – ss 338 & 339 Income Tax (Earnings & Pensions) Act 2003 – Regulation 25 and paragraph 3 of part VIII of schedule 3 Social Security (Contributions) Regulations 2001 (SI 2001/1004) – series of assignments – whether overarching/umbrella contract of employment or separate employment for each assignment – whether the manner in which the employees provided their services was subject to the right of supervision, direction or control by the Appellant – s 339A Income Tax (Earnings & Pensions) Act 2003 – validity of determinations issued under Regulation 80 Income Tax (Pay As You Earn) Regulations 2003 – whether the relevant class of employees was specified in the notice of determination – entitlement to use benchmark scale rates in respect of subsistence expenses in the absence of a dispensation from HMRC under s 65 Income Tax (Earnings & Pensions) Act 2003 – whether the reimbursement of expenses for subsistence and travel in respect of a permanent workplace represents earnings for the purposes of s 3(1) Social Security (Contributions & Benefits) Act 1992*

**Heard on:** 9-12, 18 & 19 May 2022

**Judgment date:** 7 June 2022

**Before**

**TRIBUNAL JUDGE ROBIN VOS**

**Between**

**EXCHEQUER SOLUTIONS LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: **Giles Goodfellow QC** and **Philippe Freund** of counsel, instructed by Fieldfisher

For the Respondents: **Adam Tolley QC** and **Sadiya Choudhury** of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. The way in which individuals are engaged in the construction industry is not straightforward. In many cases, the individual is not employed directly by the contractor who is responsible for the construction project. Instead, the contractor will enter into an agreement with an agency so that workers can be found when they are needed. The agencies however may not want to take on the responsibility of acting as an employer. They will therefore enter into an agreement with companies such as the appellant, Exchequer Solutions Limited (“ESL”) under which the agency becomes a client of ESL. ESL fulfils its obligations to the agency by providing the services of the construction workers which it takes on as employees.

2. ESL and other companies providing similar services are often referred to as umbrella companies. One of the reasons for this is that these companies aim to act as the employer of the relevant individuals across multiple assignments and not just in respect of one particular job.

3. The key issue in this appeal is whether ESL employs the relevant individuals on a continuous basis under an overarching or umbrella contract of employment which covers all of the various assignments undertaken by a particular employee through ESL and includes any gaps between those assignments (including periods where the individual may be working for another employer) or whether there is a series of separate contracts of employment in respect of each individual assignment.

4. The importance of the distinction lies in the entitlement of the employees to be reimbursed for travel and subsistence expenses without that reimbursement being subject to tax or national insurance contributions (“NIC”). If there is an overarching contract of employment, each place of work is a temporary workplace and the expenses can be paid tax free. However, if there is a separate employment contract for each assignment, the workplace is a permanent (albeit possibly short-lived) workplace and any payment in respect of expenses remains within the scope of tax and possibly NIC.

5. Having carried out investigations, HMRC’s conclusion in this case is that there is no overarching contract of employment so that the payments relating to expenses are subject to income tax under the PAYE system and to NIC.

6. In addition, HMRC have identified that ESL has reimbursed subsistence expenses based on HMRC’s benchmark scale rates. HMRC say that ESL is not entitled to use benchmark scale rates as it has not been given a dispensation under s 65 Income Tax (Earnings and Pensions) Act 2003 (“ITEPA”). Their position is therefore that, in the absence of any evidence of the amount of the expenses which have actually been incurred, these payments are in any event subject to income tax and NIC even if there were an overarching contract of employment.

7. The relevant tax years are 2013/14-2016/17 inclusive. HMRC have issued determinations for these years relating to the tax due under the PAYE system in accordance with Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 and have also issued a sample notice of decision under s 8 Social Security Contributions (Transfer of Functions) Act 1999 relating to NIC which they say is due.

8. Although the amount of expenses in relation to each employee is relatively small, ESL had many thousands of employees during the relevant period. The result of this is that the total amount of tax and NIC at stake is in excess of £11m.

9. ESL has appealed against the Regulation 80 Determinations and against the NIC Notice of Decision. It maintains that there is an overarching or umbrella contract of employment with

its employees so that each place of work is a temporary workplace. It also challenges the validity of the Regulation 80 Determinations on the basis that they do not identify the employees or class of employees affected. In addition, ESL believes that it was entitled to use benchmark scale rates in relation to subsistence expenses, having notified HMRC of its intention to do so.

10. In its statement of case, HMRC also placed reliance for the 2016/17 tax year on s 339A ITEPA which, even if there is a continuing contract of employment, treats each engagement as a separate employment unless it is shown that the manner in which the worker provides the services is not subject to the right of supervision, direction or control by any person. ESL's position is that this condition is satisfied so that s 339A does not apply.

## **PROCEDURAL MATTERS**

### **Further evidence**

11. This appeal had been listed for a hearing between 16-18 March 2022. Around two weeks before that date, ESL appointed a new legal team, including Mr Goodfellow QC. This was followed by a further witness statement made by the director of ESL, Michael Lowndes on 11 March 2022 and an application received just before 5pm on 15 March 2022 (i.e. the day before the scheduled hearing) seeking, amongst other things, permission for ESL to rely on Mr Lowndes' second witness statement and a direction that the hearing should deal only with issues of principle and should not deal with matters relating to the amount of any deductible travel and subsistence expenses.

12. Unfortunately, the planned hearing had to be postponed as Mr Goodfellow notified the Tribunal early in the morning on 16 March 2022 that he had tested positive for Covid, was feeling unwell and was unable to participate in the hearing.

13. However, a case management hearing was held on 18 March 2022 at which I gave permission for ESL to rely on Mr Lowndes' second witness statement subject to ESL disclosing further documents which were, directly or indirectly, referred to in the witness statement. As a result of this, ESL has disclosed significant further documents amounting to approximately a further 2,500 pages of evidence.

14. Although ESL was not able to provide all of the documents requested by HMRC (either on the basis that the documents did not exist or could not be located within the time available), there is no suggestion from HMRC that ESL has not complied with its obligations and that Mr Lowndes' second witness statement should not be admitted. For the record, I confirm that I am satisfied that ESL has substantially complied with its obligations and that the witness statement should be admitted along with the additional documents which have now been disclosed.

### **Further ground of appeal**

15. At the case management hearing on 18 March 2022, my directions included permission for the parties to provide supplementary skeleton arguments. The skeleton argument on behalf of ESL raised a new ground of appeal to the effect that, whether or not there was an overarching contract of employment, a genuine reimbursement of expenses is not "earnings" for NIC purposes within the definition contained in s 3(1) Social Security (Contributions and Benefits) Act 1992 ("SS(CB)A"). The skeleton argument did not acknowledge that this was a new ground of appeal, nor was an application made by ESL to rely on the new ground of appeal.

16. There was some suggestion from Mr Goodfellow that the new ground of appeal was in fact covered by the grounds of appeal set out in ESL's notice of appeal which states in rather general terms that:

“The expenses reimbursed to its employees were correctly paid free from tax and national insurance following all applicable legislation, established case law and HMRC guidance.”

17. However, the grounds of appeal cross-referred to attached correspondence from which it is clear that the new ground of appeal was not one of the points raised by ESL. I am therefore entirely satisfied that the argument now being put forward is a new ground of appeal and that permission is required in order to rely on it.

18. Unsurprisingly, HMRC objected to the introduction of a new argument at such a late stage. I therefore had to decide at the start of the hearing whether ESL should be permitted to rely on the new ground of appeal. In the event, I allowed it to do so and gave detailed reasons for my decision at the time. However, as it will no doubt be helpful if there is an appeal against that decision, I will explain those reasons here.

19. Looking first at the principles that should be applied, the starting point is clearly that this is a matter for judicial discretion, taking into account the overriding objective of dealing with cases fairly and justly, which includes dealing with cases in ways which are proportionate, avoiding delay, avoiding undue and unnecessary formality and seeking flexibility.

20. This chimes with the first point made by Carr J (as she then was) in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) when considering a late application to amend pleadings where she says at [38(a)] that this:

“...is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance...Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted”.

21. Mr Goodfellow suggested that the Tribunal should not slavishly follow the principles set out in *Quah Su-Ling*, given that that it is an authority that relates to the Civil Procedure Rules and of course the Tribunal’s procedures are not governed by the Civil Procedure Rules. He mentioned, for example, that the same formality in relation to pleadings is not something that is required in the Tribunal.

22. Mr Goodfellow also drew attention to the fact that the Tribunal has a different function to that of a court (which is to adjudicate on the dispute between the parties), referring to the “venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax” - a comment made by Henderson J, as he was, in *Tower MCashback LLP 1 and another v Revenue and Customs Commissioners* [2008] EWHC 2387 (Ch) at [116] and approved by the Supreme Court in that case ( [2011] STC 1143 at [15]). The point being that part of the function of HMRC and the Tribunal is to ensure that a taxpayer pays the correct amount of tax.

23. That this is the case is apparent from the relatively recent decision of this Tribunal in *Lockheed Martin UK Ltd v HMRC* [2021] UKFTT 448 where the Tribunal decided at [13-25] that it was perfectly possible for the Tribunal to raise points of its own motion but stressed the need for that to be done in a way which achieved procedural fairness between the parties.

24. In any event, I think the suggestion that the Tribunal should not be guided by the Civil Procedure Rules is perhaps overstated. The Upper Tribunal in the case of *First Class Communications v HMRC* [2014] UKUT 0244 (TCC), said at [44] that “although the CPR do not apply to tribunals, they are a useful guide, especially when considering procedural matters not covered in detail or at all by the FTT Rules or the UT Rules.”

25. This is reinforced by the comments of the Supreme Court in *BPP Holdings v HMRC* [2017] UKSC 55 which made it clear at [26] that cases on time limits and sanctions in the CPR do not directly apply but that tribunals should generally follow a similar approach.

26. So, despite the fact that I accept Mr Goodfellow's submission that, in the Upper Tribunal decision in *Denley v HMRC* [2017] UKUT 340 (TCC), the principles in *Quah* were not specifically approved or said to apply in the context of the tribunals, it is clear to me, and I would certainly accept, that cases that relate to procedural matters in respect of the Civil Procedure Rules are relevant and should be taken into account by the Tribunal.

27. *Quah Su-Ling*, of course, was a case dealing with a situation where the trial date had been lost as a result of the proposed amendment and it has to be seen in that context. Notwithstanding that, it is clear from the principles set out at [38] by Carr J that the later a new point is raised, the higher the burden on the applicant to justify its ability to be able to rely on that new point.

28. However, lateness, as Carr J said, should not be looked at purely in absolute terms. That is one factor to take into account, but it must also be looked at in relative terms, taking into account the nature of the new point that is being raised, including its merits, the reasons why it has only been raised at the point that it has been raised and the consequences for the parties and for other court or, in this case, tribunal users.

29. It is in my view also right that the Tribunal should bear in mind its role in determining the correct amount of tax as an additional factor to take into account, although that factor on its own cannot, of course, be decisive as it is just as important in the Tribunal as it is in a Court that appeals are dealt with in a way which is efficient, procedurally fair and in accordance with the overriding objective.

30. Looking at the factors in this case, it is quite clear and is not disputed by ESL, that the reason why this point is now being raised is that ESL has appointed new advisers who have identified the point. Carr J did not consider that to be a particularly good reason in support of an application to be able to rely on new grounds (see paragraph 47 of her decision in *Quah Su-Ling*).

31. The new ground is also directly contrary to the statement that ESL had already made in its previous skeleton argument at paragraph 3.3 that the parties had agreed that there is no material difference between the tax legislation and the NIC legislation for the purposes of determining the issues in this appeal.

32. It is also apparent that this point could have been notified to HMRC sooner than it was. It was clearly identified, at the latest, by 15 March when the cases supporting this particular point were referred to by ESL. I accept that Mr Goodfellow's illness does justify the delay to some extent, but it does not justify saying nothing about this point or explaining what the new ground of appeal or the new point being relied on was until ESL's supplementary skeleton argument was served on 14 April. Mr Goodfellow may have been busy dealing with other matters but that is not a good reason for not having notified HMRC of the point at an earlier stage, which would, of course, have given them more of an opportunity to consider it.

33. So overall, looking at the history behind the application, that would certainly weigh against granting permission to rely on the new ground of appeal.

34. Moving on to the nature of the new ground on which ESL seeks to rely, my view is that this is essentially a pure point of law. The question is whether the reimbursement of expenses of the particular nature that we are talking about here (travel from home to work and subsistence expenses) is in fact earnings for national insurance purposes on general principles. It is a point which, based on the authorities which have been referred to, is clearly arguable and so it meets the threshold test referred to in in *Quah Su-Ling* at [36] that there is an arguable point.

35. Mr Tolley has sought to suggest that, in reality, this is a question of mixed fact and law and he puts forward a number of points in relation to that.

36. The first is whether this is a genuine scheme to reimburse expenses, and in that context he refers to paragraph 55 of the decision in *Cheshire Employer and Skills Development Ltd v Revenue and Customs Commissioners* [2012] EWCA Civ 1429. However, it is clear that what Etherton LJ (as he then was) was dealing with in that paragraph was whether the payments in question were to be treated as taxable earnings because they involved a profit element or whether they were to be ignored because they were a reimbursement of expenditure. That would no doubt require a factual enquiry.

37. However, this is not such a case. This is a case where what is said to be reimbursed, admittedly on scale rates rather than necessarily precise claims, are expenses which have actually been incurred. It does not involve the same sort of issue in relation to whether or not the payment in question is a true reflection of the expenses which have been incurred, and which is what Etherton LJ is dealing with in paragraph 55 of *Cheshire*.

38. Whilst, of course, it is still necessary for ESL to be able to demonstrate that the expenses have been incurred, that is something which in any event would be dealt with in a further hearing in relation to quantum if such a hearing is necessary following the decision that the Tribunal makes in relation to the relevant points of principle.

39. The second point which Mr Tolley referred to is the question as to whether the payments which are said to be in relation to expenses are in fact simply part of the remuneration that the employees receive, in a similar way to that which the Court of Appeal decided was the case in *Reed Employment v HMRC* [2014] EWCA Civ 32. Whether or not this is the case would of course require a different factual enquiry. However, that has never been part of HMRC's case in this appeal and there has been no application by HMRC to amend the grounds that they rely on in defending the appeal to include such an argument.

40. Mr Tolley also criticises ESL for not having formulated with sufficient precision the ground of appeal on which they now seek to rely. I reject that criticism. In my view, it is set out in sufficient detail and with sufficient clarity in paragraphs 17-19 of ESL's supplementary skeleton argument bearing in mind that, in the tribunals, there is not the requirement to plead a party's case with the same formality as is required under the Civil Procedure Rules.

41. Moving on to the degree of lateness, it is clear that this application is late in absolute terms. The argument was only made apparent to HMRC on 14 April when ESL's supplementary skeleton argument was served. No application was made to rely on further grounds of appeal until the beginning of the hearing. Given what I said earlier, I do not accept that there is any good explanation for this point not having been raised earlier.

42. Having said that, there is no suggestion that the hearing would need to be postponed in order to accommodate this additional ground of appeal. As I have already said, it is, in my view, a pure point of law and does not affect the evidence which the Tribunal needs to have before it in order to determine this particular point.

43. I also do not consider that it carries any significant risk of a disruption to the hearing timetable. Mr Tolley has referred to the decision of the High Court in *Kimathi & Ors v The Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) where Stewart J decided that the principles in *Quah Su-Ling* in relation to a very late application should apply where an application is made during the trial if there is a risk of disruption to the trial timetable. But the context of that decision was a hearing which had already lasted for ten months and which was expected to carry on for another year; it involved the risk of recalling witnesses and having to

search for further documents. The potential for disruption and delay was clearly very significant.

44. In this case, perhaps as luck would have it, an extra half a day has been built in as a contingency in relation to submissions, and in my view, that is perfectly adequate to be able to deal with this additional point. There is, in my view, no real risk of any disruption to the hearing timetable.

45. Moving on finally to the prejudice to the parties, on behalf of HMRC Mr Tolley has drawn attention to the risk of disruption to the hearing. As I have just said, I do not see that as a real risk. I was, to some extent, concerned about HMRC's ability to respond to the new ground of appeal, but given that this is a pure point of law, that HMRC have already had notice of it for over three weeks, that it is a further week until HMRC will have to make any submissions and that they are represented by two experienced counsel, I do not consider that there would be any serious prejudice to HMRC if I were to allow the application. Indeed, Mr Tolley, very fairly, has not suggested that HMRC would not be able to respond to the argument.

46. As far as the Appellant is concerned, there is clearly a significant amount of tax at stake; the NICs are said to be over £5 million. That, on its own, is not sufficient to persuade the Tribunal that the application should be granted, and there are many examples of situations where the Tribunal has refused to grant applications, even though it would mean that the taxpayer is saddled with a liability that could be significant. But it is in my view relevant to the Tribunal's consideration as to the proportionality or otherwise of allowing or refusing the application.

47. Given what I have said about the lack of any significant risk to the trial timetable and the fact that there would be no need to postpone the hearing, it is apparent that there is no significant prejudice to other Tribunal users.

48. In summary, although I have found that there are no good reasons for the lateness of the application, and even bearing in mind that there is these days a stricter approach to compliance with rules and directions and time limits, given that I consider this to be a pure point of law which is arguable, that it has no effect on the evidence that will be required, that as a result of that there will be no disruption to the hearing timetable, that there is no significant prejudice to HMRC or other court users and also bearing in mind the Tribunal's role in determining the correct amount of tax, it would, in my view, be in line with the overriding objective of dealing with cases fairly and justly to allow the application.

49. In response to my decision, Mr Tolley made an application for HMRC to be allowed to run the argument I have mentioned at paragraph [39] above to the effect that the payments relating to expenses were, in reality, payments of earnings. I refused that application. Again, I gave my reasons at the time but will repeat them here in case of any appeal.

50. I apply the same principles as are set out above in respect of ESL's application. The application by HMRC has clearly come about as a result of ESL's application. However, ESL's intention to rely on the point which I have now given them permission to rely on was very clear in ESL's supplementary skeleton argument which was sent to HMRC on 14 April 2022. So HMRC have had since then to make an application to rely on this additional ground had they wished to do so.

51. No application has been made until today. Some advance notice of HMRC's thinking is provided in paragraph 28 of their own supplementary skeleton argument produced on 29 April 2022. However, in my view, that paragraph is somewhat opaque and certainly does not evidence a clear intention to rely on the argument that, looking at the true contractual position

between ESL and its employees, the payments in question were in fact simply part of the remuneration of those employees as opposed to being a reimbursement of expenses.

52. Secondly, looking at the nature of the new ground that HMRC wish to rely on, it is much more significant in terms of the consequences than the new ground of appeal put forward by ESL. It would result in a new factual inquiry as to the basis of the agreement or the bargain between ESL and its employees which would, in my view, require a consideration of what evidence would be needed in order to reach a fair and just determination in relation to that particular issue.

53. The result is that I agree with Mr Goodfellow that if permission were granted it would be likely to require a postponement of this hearing. It would be necessary for HMRC to set out in a reasonable level of detail, in the same way as it would in its statement of case, what it is relying on in support of this argument. ESL would need to consider that and would need to decide what, if any, additional evidence should be produced in order to deal with the argument which was being put forward. If the application were granted but there were no postponement, that would, in my view, lead to procedural unfairness as far as the ESL is concerned.

54. I have taken account of Mr Tolley's proposals as to how this could be dealt with in terms of setting out in more detail exactly what is being relied on, but I am afraid I do not consider that in the circumstances and in the time available that would be sufficient to overcome the procedural unfairness that would otherwise arise.

55. As far as prejudice is concerned, it follows from what I have said that there would, in my view, be significant prejudice to ESL if I were to give permission for HMRC to rely on this additional reason for defending the appeal and to go ahead with the hearing. Clearly, if I were to postpone the hearing, that in itself would provide prejudice to ESL as it would not have this issue determined for a considerable time.

56. It would also impact on other users of the Tribunal as it would lead to Tribunal resources being wasted and it would affect the access to justice for other Tribunal users, which, as Carr J said at [38(g)] in *Quah Su-Ling*, is a material factor to take into account in these sorts of situations.

57. I do accept that there is a significant prejudice to HMRC in not being able to run this argument, but of course they do have other arguments which they are deploying, and which no doubt they are confident they will succeed on. That cannot be guaranteed, but the key issue it seems to me is that if this was an argument that HMRC thought they had a reasonable chance of succeeding in, it has always been open to HMRC to put forward that argument, just as it did in *Reed*, and which would obviate the need, if it were successful, to rely on the question as to whether or not there is an overarching contract of employment.

58. So, despite the prejudice to HMRC, for the reasons that I have given it does seem to me that the only answer to this application, in accordance with the overriding objective of dealing with cases justly and fairly, is to refuse permission for HMRC to rely on this additional argument.

#### **ISSUES TO BE DETERMINED**

59. As I have already mentioned, it was agreed at the case management hearing on 18 March 2022 that this hearing would deal only with issues of principle. The Tribunal will not at this stage seek to determine whether any expenses which, in principle, are allowable have in fact been incurred and, if so, the amount of those expenses. It will also not seek to determine the amount of any expenses which, as a matter of principle, are found not to be allowable. These are matters which the Tribunal would hope the parties are able to agree once the matters of principle have been determined. If it turns out that no agreement is possible, the parties will



be able to return to the Tribunal for a further hearing in relation to these matters in order to finally dispose of the appeal.

60. The issues to be determined by the Tribunal at this stage are therefore as follows:

(1) Whether or not in the tax years 2013/14 to 2016/17 there was an overarching contract of employment between ESL and its employees and, as a result, whether the sites at which the employees worked were permanent or temporary workplaces.

(2) The validity of the regulation 80 determinations.

(3) Whether or not ESL was entitled to use benchmark scale rates in the tax years 2014/15 to 2016/17 without a dispensation issued by HMRC.

(4) Whether, for the tax year 2016/17, ESL had the right of supervision, direction or control over the manner in which its employees provided their services to the end clients for the purposes of s 339A ITEPA.

(5) Whether the reimbursement of travelling and subsistence expenses incurred by employees of ESL in attending a permanent place of work comprises “earnings” for the purposes of s 3 SS(CB)A.

61. Point (3) is only relevant if the Tribunal finds, in favour of ESL, that there was an overarching contract of employment so that subsistence expenses are, in principle, deductible. Similarly, point (4) is only relevant if there is an overarching contract of employment as it provides an alternative reason (solely for the tax year 2016/17) why the expenses may not be allowable.

62. Point (5) becomes relevant if the Tribunal finds, in favour of HMRC, that there is no overarching contract of employment as, if ESL are able to make good their argument, the reimbursement of expenses would nonetheless be outside the scope of NIC.

63. The second point, relating to the validity of the Regulation 80 determinations, will be relevant whatever conclusion the Tribunal reaches in relation to the existence of an overarching contract of employment given HMRC’s position that, even if the expenses are in principle allowable, ESL must show that the expenses reimbursed have actually been incurred.

#### **THE EVIDENCE**

64. The documentary evidence consisted of a bundle of documents and correspondence which had been prepared for the hearing which was scheduled to take place on 16 March 2022 together with a supplementary bundle containing the further documents disclosed by ESL in connection with Mr Lowndes’ second witness statement. The supplementary bundle contains extensive extracts from ESL’s customer relationship management (“CRM”) system which is the system used by ESL for recording certain interactions and information relating both to its employees and to the various employment agencies which are clients or prospective clients of ESL.

65. In addition, the Tribunal heard evidence from Mr Lowndes on behalf of ESL and from three HMRC officers involved in the HMRC investigation, Glyn Jones, Gary Roberts and Neal Attwood.

66. Mr Lowndes came across as a straightforward and truthful witness. He chose his words carefully and, at times, was clearly trying to frame his answers in a way which best supported ESL’s case but I have no doubt that he was answering the questions put to him as best he could. The main area where I have some hesitation in accepting his evidence at face value, in the light of the other evidence he had given and other available evidence, is his explanation of his

understanding of the obligations imposed on ESL by some of the terms of the proforma employment contract between ESL and its employees. I will come to this later.

67. Mr Jones was an unsatisfactory witness. He retired from HMRC in 2020 having been on sick leave since the Summer of 2020. Although he told the Tribunal that his illness had no effect on his memory, he appeared to have a poor recollection of events. He also had a tendency not to answer the question put to him but instead provided a long narrative which generally speaking was irrelevant to the question which had been asked. As a result, I have placed very little weight on the evidence which he was able to give.

68. Whilst Mr Roberts appeared to be trying to answer the questions put to him truthfully, he was at times quite defensive in his approach to answering questions and did not come across as someone simply trying to tell the Tribunal what he could remember. Again, this has affected the weight which I have put on Mr Roberts' evidence.

69. Mr Attwood on the other hand was a straightforward and honest witness. I have no hesitation in accepting his evidence. There were one or two occasions where he attempted to make comments on other aspects of the evidence which he was not being asked about and in respect of which he had no personal knowledge but was, quite rightly, cut short by Mr Goodfellow.

70. It is right to record that, although the HMRC witnesses confirmed that they had each prepared their own witness statements, there were some similarities between the words used by Mr Jones and Mr Roberts which cannot be explained simply by the fact that they may have used a similar template. The paragraph in question however has no material relevance and so does not in my view have any significant impact on the weight that I should give to the evidence of those witnesses.

71. A large part of the evidence given by the three HMRC witnesses relates to interviews which, between them, they carried out with 14 employees or ex-employees of ESL. Notes of those interviews form part of the evidence before the Tribunal.

72. Mr Goodfellow invites the Tribunal to give little, if any, weight to what was said by these employees. He submits that the evidence is unsafe and is unlikely to be representative of ESL's employees as a whole. Mr Goodfellow gives a number of detailed reasons for this, including the fact that the relevant individuals are not witnesses and cannot therefore be cross examined.

73. In the event, I have not found it necessary to rely on the evidence contained in the interview notes in reaching my decision and so the question as to the weight to be given to that evidence does not arise.

#### **OVERARCHING CONTRACT OF EMPLOYMENT**

74. It is common ground that individuals engaged by ESL are working under a contract of employment whilst they are carrying out individual assignments. The question is whether the contract with ESL is a single, overarching contract of employment so that the individuals remain employees of ESL, even during the periods when they are not working on an assignment.

#### **The legal framework**

75. Section 338 ITEPA allows a deduction for travel expenses (which, for this purpose, includes subsistence expenses) if the employee is obliged to incur the expenses and they are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment. However, no deduction is allowed for the expenses of ordinary commuting (s 338(2) ITEPA). This therefore excludes expenses incurred travelling between the employee's home and a permanent workplace.

76. Section 339 ITEPA explains what is meant by a permanent workplace and contrasts this with a temporary workplace. In particular, s 339(5) ITEPA provides as follows:

“(5) A place is not regarded as a temporary workplace if the employee’s attendance is-

(a) In the course of a period of continuous work at that place-

(i)...

(ii) comprising all or almost all of the period for which the employee is likely to hold the employment...”

77. It can be seen from this that, if each engagement represents a separate period of employment, the site at which the individual works will not be a temporary workplace as the employee’s attendance at that place will compromise all of the period for which the employee is likely to hold the employment. On the other hand, if there is an overarching contract of employment, each individual site will not be excluded by this provision from being a temporary workplace.

78. I have been referred by both parties to numerous authorities in relation to what is necessary to give rise to a contract of employment both in general terms and where there is a series of engagements. It is however apparent that, allowing for slight differences of emphasis, there is broad agreement as to the principles to be applied. The real dispute is as to the results of applying those principles to the facts of this case.

79. There is no doubt (see for example Lord Clarke JSC in *Autoclenz Limited v Belcher* [2011] UKSC 41 at [18] and Elisabeth Laing LJ in *Professional Game Match Officials Limited v HMRC* [2021] EWCA Civ 1370 at [3]) that the starting point is the description of a contract of service given by MacKenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497 at [515 C-D] as follows:

“A contract of sale 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”.

80. The importance of the description in *Ready Mixed Concrete* is in the three principles encapsulated in the description rather than the precise words used. As Sir David Richards said in *HMRC v Atholl House Productions Limited* [2022] EWCA Civ 501 at [72]:

“...there has been a tendency in some later cases... to treat the words of the judgment as if they were a statute, laying down an exhaustive and immutable test. No judgment should be treated in that way, and it is apparent that the RMC test has itself undergone modification.”

81. It has for example become clear that the first element required for a contract of employment is what has become known as a mutuality of obligation between the employer and the employee. The description given by MacKenna J (that the employee will work and that the employer will pay for the work) is simply one example of the necessary mutuality of obligation. Sir David Richards for example noted at [73] in *Atholl House* that:

“It has become clear in subsequent authorities that this is correct as far as it goes but that it is not a full statement of the mutuality of obligation required **in all cases** for a contract of employment”.

82. In relation to the existence of an overarching contract of employment, Sir David Richards went on to observe at [74] that:

“It is now established that, while a single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment, an overarching or umbrella contract lacks the mutuality of obligation required to be a contract of employment if the putative employer is under no obligation to offer work: see *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, *Carmichael v National Power plc* [1999] 1 WLR 2042 at 2047A-B per Lord Irvine of Lairg LC, *Usetech Ltd v Young* [2004] EWHC 2248 (Ch) at [55]-[65], *Professional Game Match Officials Ltd v HMRC* at [120]-[124].”

83. It is clear that the first two elements of the description in *Ready Mixed Concrete* must be present in order for there to be a contract of employment (see *Atholl House* at [71]). This has been described in some cases as the “irreducible minimum” required for the existence of a contract of employment (see for example *Montgomery v Johnson Underwood Limited* [2001] EWCA Civ 318 at [46]).

84. Once these two requirements have been satisfied, it is then necessary to look at all other relevant factors to see whether, taken as a whole, they are consistent or inconsistent with the existence of a contract of employment.

85. Following an exhaustive review of the authorities, Sir David Richards concluded at [122-123] in *Atholl* that the factors to be taken into account may include matters other than the terms of the contract itself (despite the wording used in *Ready Mixed Concrete*) but that the factors which could legitimately be taken into account were limited to those which formed part of the factual matrix for the interpretation of the contract itself being, as explained by the Supreme Court in *Arnold v Britton* [2015] UKSC 36 at [21] the “facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties”.

### ***Mutuality of obligation***

86. Given its central importance to this case, it is helpful to explore in a little more detail the cases dealing with mutuality of obligation in the context of an overarching or umbrella contract of employment where there is a series of engagements.

87. The first point to note is that, confusingly, the term “mutuality of obligation” is used in two senses in some of the relevant authorities. The first is whether there are sufficient rights and obligations on either side for a contract to exist at all during the periods when no work is being done. The second sense in which the term is used is to refer to obligations, the nature of which is such as to “locate the contract in the employment field” (see Elias J in *James v Greenwich LBC* [2007] ICR 577 at [16]). It is however clear from the authorities (see for example Lord Irvine of Laing LC in *Carmichael v National Power Plc* [1999] 1 WLR 2042 at [2047A-B]) that, in order for there to be an overarching contract of employment, it is mutuality of obligation in the second sense which must exist.

88. It is equally clear that mutuality of obligation in this sense must exist throughout the whole of the period of the contract, including any gaps between assignments (see the judgment of Elias LJ in the Court of Appeal in *Quashie v Stringfellows Restaurant Limited* [2013] IRLR 99 at [12]).

89. Turning to the nature of the obligations which will locate the contract in the employment field, Elias J observed at [16] in *James v Greenwich* that they must “relate in some way to the provision of, or payment for, work which must be personally provided by the worker”.

90. Whilst the authorities have generally referred to an obligation on the employer to provide work or pay the employee and an obligation on the employee to do the work (see for example *Nethermere* at [623]; *Carmichael* at [2047A-B]; *Clark v Oxfordshire Health Authority* [1998] IRLR 125 at [41]), it is clear that there is some scope for flexibility both in relation to the nature and extent of the relevant obligations.

91. In *Clarke* for example it was accepted at [41] that an obligation on the employee to do work if offered and an obligation on the employer to pay a retainer if no work was offered would be sufficient.

92. Langstaff J, in *Cotswold Developments Construction Limited v Williams* [2006] IRLR 181 at [49], considered that the obligation on the employer could include “the provision of work, payment for work, retention upon the books, or the conferring of some other benefit which is non-pecuniary”. This does however need to be read in context. Langstaff J had, earlier in his judgment, referred at [20] to the decision in *Clarke* and, in particular, to the acceptance at [41] that an obligation to pay a retainer when no work was offered would be sufficient. Langstaff J’s reference to retaining an employee on the books or conferring a non-pecuniary benefit is, no doubt, a reference to paying a retainer or providing something of value in lieu of such a retainer.

93. A further element of flexibility which emerges from the authorities and which is emphasised by Langstaff J in *Cotswold Developments* at [55] is that it is not necessary for the employee to be under an obligation to accept all of the work which is offered, nor is it necessary for the employer to have an obligation to offer a certain minimum level of work. Instead, it is enough that “there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it”.

94. What emerges from these authorities in relation to the requirement for mutuality of obligation in relation to an overarching contract of employment can be summarised as follows:

- (1) There must be ongoing obligations on the part of both the employer and the employee throughout the whole of the duration of the contract, including any period when the employee is not working.
- (2) There must be an obligation on the employer to provide some work or to pay a retainer or to provide some other meaningful benefit whilst the employee is not working. There is however no requirement for the employer to guarantee a minimum level of work.
- (3) The employee must be under an obligation to accept at least some of the work offered even though they may be free to turn down work for any reason.

### ***Interpretation of the contract***

95. The question as to whether there is sufficient mutuality of obligation (in the sense described above) and whether there is a sufficient level of control on the part of ESL to satisfy the irreducible minimum requirements for a contract of employment must be determined by reference to the contract in place between ESL and its employees.

96. It is now clear that, in the field of tax (as opposed to the determination of workers’ rights under statute), normal principles of contractual interpretation should apply.

97. In *Autoclenz*, Lord Clarke JSC concluded at [35] that the relative bargaining power of the parties should be taken into account in deciding whether the written contract set out the true terms of the agreement and that this question would often have to be answered by looking at

all of the relevant circumstances. However, Lord Leggatt JSC confirmed in *Uber BV v Aslam* [2021] UKSC 5 at [69] that the principle in *Autoclenz* is not a principle of contractual interpretation but instead is a principle of statutory interpretation and simply gives effect to the requirement for legislation to be interpreted purposively. In that case it was necessary to determine whether, “viewed realistically”, the individuals in question were workers within the meaning of the relevant legislation.

98. Sir David Richards confirmed at [156] in *Atholl House* that, as tax legislation provides no special definition of an employee, there is no issue of statutory interpretation which would engage the *Autoclenz* principle.

99. The normal principles for interpreting a contract were set out by Lord Neuberger JSC in *Arnold v Britton* at [15-22]. Essentially this involves identifying the intention of the parties by reference to the facts and circumstances known to the parties at the time as well as the commercial context for the agreement (including commercial common sense).

### **Is the required mutuality of obligation present?**

100. As I have explained, if there is not the required mutuality of obligation throughout the duration of any relationship between ESL and an employee, there will be no overarching contract of employment. This is therefore the logical starting point. Even if the required mutuality exists, it will still be necessary to consider whether there is a sufficient level of control by ESL over its employees and, if so, whether taking all relevant factors into account, the contract is one of employment.

101. My conclusion however is that the terms of the contract, interpreted in the light of the facts and circumstances known to the parties and the relevant commercial context, does not impose any obligation on ESL to provide work to the relevant individuals or to pay them or provide any other valuable benefit to them whilst they are not working and does not impose any obligation on the individuals to accept an engagement if one were to be offered to them by ESL.

102. Before looking at the terms of the contract, it is necessary to look first at the relevant facts and circumstances which explain the commercial context in which the contracts are entered into.

103. As I have mentioned, the individuals in question are construction workers. They work on a series of assignments at different construction sites on projects managed by different contractors. It appears that there are a few cases where the contractor has entered into a direct contract with ESL but no evidence has been given to the Tribunal as to the nature of such relationships. I have not therefore been able to take such arrangements into account but I have seen nothing which would indicate that any such arrangement would affect the conclusions which I have reached.

104. In the vast majority of cases, the contractor will enter into an agreement with an employment agency to find the workers which it needs to carry out the project. The agencies in turn enter into contracts with ESL (and/or its competitors) under which ESL agrees to provide services to the agency in return for a fee to be agreed. The services which ESL agrees to provide are carried out by the individuals who it engages as employees.

105. Both ESL and the individuals who work for it are in frequent contact with the agencies. However, it is clear from Mr Lowndes’ evidence that the nature and purpose of those communications was very different.

106. In the case of the employees, Mr Lowndes accepts that the agency and the employee would discuss individual assignments including the type of project, the end client, the location, the duration and the headline hourly rate which the agency would be willing to pay to ESL.

107. If the individual wished to accept the engagement, the agency would then need to get in touch (or put the individual in touch) with an umbrella company such as ESP or one of its competitors. Each agency would have a “preferred supplier list” (PSL) and would only allow an individual to work on an engagement if they were employed by a company which was on their PSL.

108. Assuming ESL was identified as the employer, the agency would normally get in touch with ESL. The amount of information provided by the agency varied. Often it would just be the name and contact details of the relevant individual. In some cases it might include an hourly rate and/or a description of the role. Occasionally, it also included details of the site, the start date and the hours to be worked. In a minority of cases (Mr Lowndes estimated approximately 15%) the agency would not contact the ESL and so the first they would know about the possible assignment was when the individual contacted ESL.

109. Following the contact from the agency, ESL would get in touch with the individual in order to obtain the full details of the assignment. There is no evidence that ESL at any stage discussed or negotiated the terms of an assignment with its agency client. Mr Lowndes’ evidence was that this happened very rarely but it is clear (and I find as a fact) that, in the overwhelming majority of cases (if not all cases), the terms were simply agreed between the agency and the relevant individual and then notified to ESL by the agency or, more often, by the individual.

110. When ESL became aware of a new assignment it would discuss with the individual what Mr Lowndes referred to as the likely “outflow amount”. By this he means the net amount the employee was likely to receive based on the hourly rate being paid by the agency to ESL after taking into account tax, NICs and the margin retained by ESL (generally in the region of £5-£20 per week depending on the level of pay and the agreement with the relevant agency). This was not expressed as an hourly rate as the total amount which would be received by the individual at the end of the week would depend on the arrangements for holiday pay and the extent to which the individual claimed expenses.

111. ESL would carry out checks to ensure that the individual had the right to work in the UK, that appropriate insurance cover was in place and that, based on the rate offered by the agency, the individual would receive at least the national minimum wage. If ESL were not satisfied on any of these points, it would refuse the assignment.

112. Based on Mr Lowndes’ evidence, the nature and purpose of the communications between ESL and the agencies was very different to the communications between the agencies and the individuals. ESL had one team of people whose job was to bring new agencies onto their books as clients. This would mean gaining a place on the PSL for that agency. Of course, the more agencies which included ESL on their PSL, the greater the likelihood that any given assignment would be carried out through ESL by one of its employees.

113. ESL had a second team in its head office whose job was to maintain relationships with existing agency clients and to try and ensure that as many assignments as possible were referred to ESL.

114. Mr Lowndes accepted in his evidence that it would be extremely unusual for an agency to get in touch with ESL with details of a particular assignment and then leave it to ESL to identify a specific individual to carry out that assignment. Indeed, from the documents provided, there is no evidence that this ever happened and I find as a fact that it did not (or at least it was so rare that it makes no difference to my overall conclusions).

115. It was clear from Mr Lowndes’ evidence that ESL has no process for identifying when a particular individual’s assignment is due to end and for getting in touch with that individual

before the end of an assignment in order to make arrangements for a new assignment. Mr Lowndes' evidence was that, in these circumstances, most individuals would be in touch direct with the agencies to identify a new assignment in order to avoid having any gaps between their work.

116. ESL does however have a process which generates an alert if an individual has not been paid for a week. ESL will then get in touch with the individual to see what their plans are. If an individual is looking for work, ESL will tell them to get in touch with the agencies. This could be an agency which ESL knows the individual has found work through before or alternatively could be an agency which ESL knows is busy and is therefore likely to have assignments available.

117. If an individual accepted an assignment through an agency which did not have ESL on its PSL, it might be that the individual or ESL would ask the agency if the individual could nonetheless carry out the assignment as an employee of ESL. However, if the agency refused, ESL would not be offered the assignment. Instead, the assignment would be offered to one of its competitors and the individual would need to be employed by that competitor.

118. Mr Lowndes' evidence was that the individual was expected to seek permission from ESL to work for another employer. However, it is clear from the documentary evidence provided that, in these circumstances, whilst an individual might notify ESL that they would be carrying out an assignment through an agency which did not have a relationship with ESL, the individual did not seek permission from ESL to work for another employer and ESL did not give such permission. Instead, it was simply understood that, as a practical matter, this is what would need to happen so that the individual could carry out the assignment.

119. It is also clear that, in these circumstances, ESL would try to encourage the individual to carry out future assignments through an agency which had an agreement with ESL. One incentive offered to individuals was that ESL would not take any margin for the first week in which the individual returned to ESL. It referred to this as the "one week free incentive" or "OWFI".

120. In terms of the commercial imperatives, Mr Goodfellow identifies the fact that ESL had a strong incentive to find as many agencies and end users as possible to transact with it. This is because, the more contracts for the supply of labour which it could secure, the greater its gross profit (and therefore its net profit) was likely to be. I accept that this was a commercial imperative for ESL and part of the background against which the contracts with the relevant individuals must be considered.

121. Mr Goodfellow also suggests that, in order to be able to satisfy its obligations under the contracts it had with the various agencies, ESL needed to recruit and retain employees. I do not however accept this. Mr Lowndes acknowledged in his evidence that ESL did not, in the contracts it entered into with its clients (whether agencies or end users), undertake an obligation to carry out any particular project or deliver any specification of works. Instead, the obligation was simply to supply the services of a construction worker with particular skills in order to fulfil a given assignment.

122. There was therefore no need for ESL to have employees on hand ready to complete an assignment as the agency would already have identified an individual to do the work before ESL was approached with a view to it accepting the assignment.

123. Mr Tolley suggests that the true relationship between ESL and the individuals who worked for it was no more than ESL effectively providing payroll services in return for a fee (being the margin retained by ESL representing the difference between what it was paid to ESL by the agency and what it then has to pay out by way of wages, holiday pay, expenses, pension



contributions, tax and NICs). I accept Mr Lowndes' evidence that this mischaracterises the relationship.

124. There is no doubt that ESL acted as the employer of the relevant individuals during the periods whilst they were undertaking assignments. It took on significant obligations and responsibilities in that capacity including giving effect to the employees' statutory rights (for example sick pay), responsibility for losses caused by the employees and, as a result, ensuring that appropriate insurance was in place as well as the obligation to ensure that the individual had the right to work in the UK.

125. However, none of this answers the question as to whether there was a continuing and overarching contract of employment or whether there was a series of separate employments each time an individual undertook an assignment through ESL.

***The terms of the contract between ESL and the individuals***

126. With that background in mind, I turn now to the specific terms of the contract.

127. The Tribunal has been provided with a pro forma document headed "statement of main terms and conditions of employment". It is accepted that this sets out the terms agreed between ESL and each of the individuals it employed during the relevant period. Clause 24 confirms that it contains the whole of the agreement between ESL and each employee.

***Obligation to provide work or other benefits***

128. I will consider first whether the contract imposes any obligation on ESL to provide work to the relevant individuals or to pay them or provide some other valuable benefit whilst they are not working if there is no obligation to provide work.

129. In terms of an obligation to provide work, ESL relies principally on clause 3.2 of the contract. This provides as follows:

"3.2 The Employer will endeavour to provide you with work and procure work for you at various sites during the course of your employment. Due to the nature of the services provided by the Employer, while your duties of employment may vary, the Employer has a continuing need for skilled employees and as such by virtue of your employment you can reasonably expect to be provided with ongoing work at various sites."

130. On the face of it, this clause does not impose on ESL an obligation to provide any work at all. An obligation to endeavour to provide work is not the same as an obligation to provide work. Neither does an expectation on the part of the employee that they will be provided with work give rise to an obligation to provide any work.

131. Mr Lowndes' evidence was that he considered that clause 3.2 did impose an obligation on ESL to provide work for its employees. However, as I have described above, his explanation as to how ESL fulfilled its obligation was that it invested time and effort in developing and maintaining its relationship with the agencies and ensuring that it was on the PSL for as many agencies as possible. This then meant that when an individual found a suitable engagement through an agency, that individual would be able to carry out the engagement as an employee of ESL.

132. Mr Tolley, on behalf of HMRC, suggests that Mr Lowndes and ESL have misunderstood what is meant by "work" in this context. In my view, he is right that this is the real issue. The question is whether the work is the specific assignment identified by an individual in discussion with an agency or whether it is the opportunity to carry out that assignment as a result of being an employee of ESL.

133. In one sense of course, ESL does provide work since, as Mr Lowndes pointed out, an individual cannot carry out an assignment without the involvement of a company such as ESL to act as their employer. However, to my mind, providing a structure through which an individual can carry out work is not the same as providing the work itself. The work is the underlying assignment and that work is provided by the agency to the individual, albeit through the intermediary of ESL. ESL itself has no involvement in finding or providing the work other than agreeing to act as the employer for the assignment in question.

134. Another way of looking at this is that, once an assignment is agreed in principle between the individual and the agency, it is entirely up to the agency and the individual as to who should be asked to act as the individual's employer for the purposes of that assignment. No doubt there will be a number of companies on the agency's PSL. The fact that the individual could ask a competitor to act as their employer reinforces the conclusion that ESL is in no real sense providing the work.

135. I accept of course that, if ESL is asked to act as the employer, it takes on responsibilities and could decline to do so if its requirements were not satisfied. However, at the time the assignment is offered to ESL, it is already clear what the work is and who is going to do it if the assignment is accepted.

136. That this is the right interpretation of clause 3.2 is therefore supported by the facts and circumstances known to the parties when the agreement is entered into between ESL and a prospective employee. It is clear from Mr Lowndes' evidence that the expectation and understanding is that the individual will find their own assignments and that the individual will not be introduced to any assignments by ESL.

137. This is also apparent from the documentation provided by ESL to its employees when they first register with ESL. They are sent a document headed "Welcome to Exchequer Solutions Limited". The first section of this document answers the question "what's so good about being an employee of Exchequer Solutions?" The response mentions the security of being an employee in terms of workers' rights, the ability to claim expenses and ensuring that they are paid promptly. However, there is a conspicuous absence of any suggestion that ESL might provide the individual with any work.

138. The lack of any obligation to provide work is also consistent with the way in which individuals are dealt with by ESL in practice. There is no process for contacting an individual who is getting near the end of an assignment in order to discuss new work opportunities. Instead, it is left to the individual to contact the agencies in order to make their own arrangements.

139. Of course, ESL are keen to do what they can to ensure that any assignment identified by an individual is carried out through ESL but, for the reasons set out above that does not constitute the provision of work. In addition, if an individual were to ask ESL for work, its only response would be to direct the individual towards one or more employment agencies. Again, that is not providing work. It is simply referring the individual to somebody else who might be able to provide work.

140. Given my conclusion that there is no obligation on ESL to provide work, the next question is whether it has any obligation to pay the individuals or to provide other valuable benefits to them during periods when they are not working

141. It is clear from the contract between ESL and the relevant individuals that there is no obligation on ESL to pay them whilst they are not working. In particular, clause 6.1 contains a specific right for ESL not to provide an individual with work and to ask them to remain at home without pay.

142. This is of course consistent with the facts and circumstances known to the parties at the time of entering into the agreements, the basic structure being that the individual will secure an engagement through an agency, the agency will pay an agreed rate to ESL and the individual will then receive an amount equal to the sum paid to ESL less deductions for tax, NIC and ESL's margin. Both parties will be well aware that ESL will not pay wages when an individual is not working on an assignment as ESL would not be receiving any income from the agency in order to enable it to do so.

143. The contract also provides for the payment of holiday pay. In principle, individuals are entitled to 28 days holiday a year. However, clause 12.3 provides that this entitlement is satisfied by ESL paying to its employees an amount calculated as 12.07% of their wages. This is funded by ESL out of the amount paid to it by the relevant agency and so does not affect the net amount received by an employee. Instead, it means that the amount received by the employee represents partly wages and partly holiday pay.

144. Mr Lowndes accepts that the net effect of this is that employees in fact only accrue holiday during the periods when they are actually working. So, if an employee worked for nine months in a year, they would only be paid for 21 days holiday rather than 28. This benefit therefore only relates to the periods when the employee is working. There is no benefit in terms of holiday or holiday pay during any period whilst an individual is not working on an assignment.

145. The contract also refers to statutory rights in relation to sick pay, maternity, paternity and adoption leave and pensions. Mr Lowndes confirmed that these reflect ESL's understanding of an employee's statutory rights and are not intended to provide anything beyond those statutory rights.

146. The entitlement to statutory rights is, to some extent, dictated by the period for which an individual has been employed. For example, pension rights arise once an individual has been employed for three months. The contract specifies a start date for the employment and then provides that, subject to a probationary period, the employment will continue until retirement or until it is terminated by notice given by ESL or the employee.

147. Mr Lowndes' evidence was that entitlement to statutory benefits is calculated by reference to the period which has elapsed since the start of the contract irrespective of whether there have been multiple assignments or whether there have been any gaps between assignments.

148. In addition, it is clear from the evidence provided that statutory sick pay has, for example, been paid to individuals both during the course of assignments and during periods where there have been gaps between assignments. Mr Lowndes' understanding is that ESL does not get reimbursed for the statutory sick pay which it is required to pay. Instead, this is one of the costs which it has to meet out of the margin that it retains between the amount it receives from the agencies and the amount it pays out in respect of wages, holiday pay, pension contributions, reimbursement of expenses, tax and NIC.

149. Whilst I accept that ESL provided these statutory benefits, that at least some of those benefits were a cost to ESL and that the entitlement to benefits was calculated by ESL on the basis that there was an overarching contract of employment, that cannot, in my view, convert a contract which would not otherwise be a contract of employment into a contract of employment once it is found as a matter of contractual interpretation that the relevant clauses in the contract do no more than confer on the individual whatever statutory benefits they are, by law, entitled to.

150. The fact that the employer may operate the provisions based on the existence of an ongoing, overarching contract of employment does not mean that such an overarching contract exists. It may say something about the subjective understanding of the employer but the subjective intentions of the parties is not something which can legitimately be taken into account in interpreting the contract.

151. In any event, I do not consider that an obligation on the part of ESL to pay these sorts of benefits between assignments would, taking into account all the other circumstances, give rise to a sufficient mutuality of obligation to give rise to an overarching contract of employment given that it provides no benefit to the vast majority of individuals working for ESL who are healthy and who are not taking maternity or paternity leave. By way of example, ESL have identified 52 individuals who were paid statutory sick pay in the 2014/15 tax year out of a total number of employees of just under 20,000 and only nine who received statutory sick pay in-between assignments.

152. The only other financial benefit which Mr Goodfellow has highlighted is the requirement on ESL to give notice or to provide payments in lieu of notice. These requirements are in clause 5 of the contract and, as with other provisions of the contract, follow the minimum statutory requirements.

153. Despite being asked to do, ESL was not able to provide documentary evidence of any situation in which notice had been given or a payment in lieu of notice had been made. As far as the receipt or giving of notice is concerned, the explanation was that such records were not retained. In the case of payments in lieu of notice, the explanation is that, as payments in lieu of notice are not identified separately on the payslips, it would be impossible to find those situations where a payment in lieu of notice had been made.

154. Mr Lowndes confirmed in his evidence that, in the vast majority of cases, employment was terminated by agreement without notice. He also accepted that it was extremely rare for any payment in lieu of notice to be made. Given the lack of any documentary evidence, on the balance of probabilities, my conclusion is that, as a matter of practice, any agreement between ESL and the individuals was terminated by mutual agreement without notice and without any payment in lieu of notice.

155. However, to the extent that there was any contractual obligation to give notice or to make a payment in lieu of notice this, again, only reflects the statutory requirement. For the reasons I have already explained in relation to sick pay and other statutory benefits, even if the terms of the contract entitle individuals to these minimum benefits that would not, of itself, turn the contract into an overarching contract of employment given that the entitlement to notice itself depends on the very answer to the question as to whether the contract is a continuous, overarching contract of employment or whether it gives rise to a series of separate periods of employment.

156. Mr Goodfellow does refer to other matters such as the benefit of ESL retaining the individual on its books which he suggests makes it easier for the individuals to convert opportunities into paid work but, given the fact that the individual could work for another umbrella company and that whichever company is used retains a margin which reduces the amount the individual receives at the end of the week, I do not consider this to be the sort of valuable benefit which gives rise to the necessary mutuality of obligation.

*Obligation to accept work*

157. The other side of the coin as far as mutuality of obligation is concerned is whether the individuals are obliged to accept any work which may be offered to them. As I have already

mentioned, it is not a requirement that the individuals are obliged to accept all of the work which is offered to them but there must be an obligation to accept some work.

158. ESL has been unable to provide documentary evidence showing the precise number of individuals who have carried out more than one assignment for ESL. It has however, at the request of HMRC, provided some sample information from which it is clear that a significant number of individuals have had more than one assignment. The sample does also show that there were also a significant number of individuals who, during the period assessed, only had one assignment. In any event, the fact that an individual may have carried out more than one assignment through ESL does not answer the question as to whether that individual has an obligation to accept any of the work which they are offered.

159. Given that I have found that ESL does not, in any real sense, provide work to the relevant individuals, the simplistic answer to the question is that there cannot be any obligation on the individuals to accept any work which is offered as there is none. It is however necessary to look at the terms of the contract in the light of the relevant facts and circumstances in order to determine whether there would be an obligation to accept some work if it were offered.

160. When asked about this, Mr Lowndes referred to clauses 15.1 and 15.2 of the contract. Clause 15.1 requires the individuals to comply with all reasonable and lawful instructions of ESL. Clause 15.2 requires an individual to devote the whole of their time, attention and abilities to their duties during their working hours.

161. Mr Goodfellow, in his submissions, focussed more on clauses 8.1 and 8.2 of the contract. Clause 8.1 requires an individual to work 35 hours per week although allows ESL to vary the hours of work “to meet clients’ needs and to meet changing business requirements”. Clause 8.2 simply says that normal working hours are 9am to 5pm on Monday to Friday.

162. It will be noted that none of these provisions state in terms that an individual has an obligation to accept any work which may be offered to them. In circumstances where the commercial background is that opportunities for assignments are identified by the individuals themselves and not by ESL, it is in my view impossible to infer from these provisions that there is somehow an obligation on the individuals to accept some work if it were in fact to be offered by ESL.

163. Mr Goodfellow submits that a course of dealing between the parties which evidences an expectation that the employer will provide a certain amount of work and that the individual will accept some of the work which is offered can give rise to a legal obligation. This was the case in *St. Ives, Plymouth v Haggerty* [2008] 5 WLUK 509.

164. *St. Ives* was a publishing business which had a bank of casual workers which they employed for particular shifts, as and when required. The question was whether one of the casual employees could bring a claim for unfair dismissal. This would only be the case if there were an overarching contract of employment which, in turn, required there to be the necessary mutuality of obligation.

165. The Employment Appeal Tribunal concluded at [26] that, even though there was no contractual obligation on the employer to provide a minimum amount of work, nor on the employee to accept any work which was offered, a course of dealing involving an expectation that some work would be provided and some work would be accepted could take on a legally binding nature. However, the EAT emphasised at [28] that this required there to be a “sufficient factual substratum to support a finding that such a legal obligation has arisen.”

166. The key difference here of course is that *St. Ives* was the end user of the services of the casual employees and was the one which was providing the opportunity to work. In this case,

ESL is neither the end user of the services nor is it, based on the findings which I have made, the entity which is providing the assignments to the individuals in question.

167. Therefore, although there is a course of dealing in the sense that ESL provides the opportunity for individuals to carry out assignments through ESL and the individuals choose to carry out various assignments through ESL as opposed to other umbrella companies, that cannot in this case give rise to any legal obligation on the individuals to carry out work through ESL. Indeed, on the contrary, it is quite clear from the documentary evidence that individuals can and do carry out work through other employers should they wish to do so, for example, where ESL is not on the PSL for a particular agency.

168. It is perhaps worth noting at this point that ESL's position is that an individual is required to seek permission from ESL should they wish to work through another employer. This is said to be the case as a result of clause 15.2 (the requirement to devote the whole of the individual's time and attention to their duties during their working hours) and clause 15.4 which asks (but does not require) an individual to inform a director of ESL if they undertake any other work outside their contracted hours of work.

169. Again, these clauses do not impose a specific obligation to obtain ESL's consent if an individual wishes to do some work for another employer. Indeed, taken together, the more natural reading of these clauses is that the individual should inform ESL if they are doing additional work outside the contracted hours of 9am to 5pm on Monday to Friday. The justification given for this in clause 15.4 is so that ESL can check that there are no problems from a health and safety point of view and also that the individual is complying with the obligation of clause 15.2 to devote the whole of their time during working hours to their duties.

170. A requirement for the individual to devote the whole of their time to their duties during working hours could of course be seen as an obligation not to work for any other employer. However, given the factual background which I have already described it would be unrealistic to interpret this provision as preventing an employee from carrying out an assignment for a different employer. Instead, the proper interpretation in my view is that it simply requires the individual not to do any other work between 9am and 5pm on a Monday to Friday during periods when that individual is undertaking an assignment through ESL.

171. This interpretation is consistent with the documentary evidence as to what happens in practice where an individual carries out work for another employer. ESL was asked to provide evidence of circumstances in which an individual had sought permission to work for another employer. However, the only documents which have been provided are extracts from the CRM system which show individuals informing ESL that they either are or have been working for another employer.

172. There is no suggestion in any of those CRM entries that the individual is asking for permission to do that work nor that ESL is giving permission to do the work. Mr Lowndes' evidence is that it is implicit from the documents that permission has been sought and granted but I do not accept this. It is clear to me from what is shown in the documents that there is no expectation that permission is needed.

173. In relation to this aspect, Mr Tolley makes a point that, in substance, what ESL is saying is that, unless ESL gives permission for an individual to work elsewhere, that individual is required to be available for work on a continuous basis between 9am and 5pm on Mondays to Fridays. He submits that this lacks any commercial common sense in circumstances where, even on ESL's case, there is no guarantee of providing any minimum amount of work nor any obligation to pay an individual if there is no work to do. In effect, the individual would be signing away their right to make a living and would instead be entirely reliant on ESL to give permission to work elsewhere.

174. Whilst Mr Lowndes stressed that ESL would never refuse a request to carry out an assignment for another employer as long as it did not clash with an assignment which had already been undertaken through ESL, I accept that such an interpretation of clauses 8 and 15 would give rise to rights and obligations which were entirely one-sided and would indeed lack commercial common sense and, as a result, should be rejected. As Mr Tolley noted, the Court of Appeal approved the rejection by the Upper Tribunal of a similar point in *Kickabout Productions Limited v HMRC* [2022] EWCA Civ 502 at [59].

***Other points relevant to mutuality of obligations***

175. Mr Goodfellow suggested in his written submissions that, since it is agreed that there is a contract of employment between ESL and an individual whilst the individual is actually carrying out an assignment, there can be little doubt that there is a continuing contract of employment between ESL and its employees.

176. However, in my view, the authorities show that this does not necessarily follow. The mutuality of obligation necessary for a contract of employment to exist during a specific assignment is different to the mutuality of obligation which must be shown in order for there to be a continuing and overarching contract of employment (see PGMOL at [123-124]).

177. It is not enough that there are ongoing obligations on both sides. Instead, the nature of those obligations must be such as to locate the overarching contract in the field of employment. This will only be the case if there was some continuing obligation on the employer to provide some work or benefit and there is some continuing obligation on the employee to carry out at least some of any work which is offered.

178. In a similar vein, Mr Goodfellow places reliance on the fact that both the contractual provisions and the way the arrangements were operated in practice show a common intention that the contract should continue between assignments.

179. I accept that, for example, the contract is expressed to continue until it is terminated. In addition, it is clear from the evidence that a form P45 was only issued where an individual asked for one or following a conversation between ESL and the employee as a result of the employee not having carried out any assignments through ESL for some weeks. In the meantime, the individual was kept on ESL's books. However, this does not give rise to the necessary mutuality of obligation for any ongoing contract to be a contract of employment.

180. Mr Tolley on the other hand draws attention to a number of features which support his submission that the contract is essentially a framework for a series of separate contracts of employment. Perhaps the most telling is the arrangements in relation to pay. The contract simply provides (at clause 10) that pay will be performance related and will be calculated according to fees which ESL charges to the agency for the individual's services. The only right is that the individual will receive at least the national minimum wage.

181. It is of course impossible for an employee to know from this how much they will be paid. It is apparent that, on signing up with ESL, each individual was given a sample payslip which explained in broad terms how the amount which they would be paid was to be calculated. This sample payslip generated much discussion during the hearing. Based on the payslip, it would in my view be very difficult for an individual to have any real understanding as to how the net amount they received would be calculated.

182. However, in his evidence, Mr Lowndes explained that, prior to the start of each assignment, there would be a conversation between ESL and the individual during the course of which the individual would be given an estimate of the likely "outflow amount". As I have mentioned above, this represents the net amount which would be paid to the individual after deduction of tax, national insurance and ESL's margin.

183. The need for this conversation together with the need for ESL to accept the assignment as part of its agreement with the agency is, in my judgment, strong evidence that each engagement gave rise to a separate contract of employment between the individual and ESL.

184. Some evidence provided was as to the extent to which there were gaps between the assignments undertaken by the employees. Overall, the evidence was somewhat unclear and there is no doubt that it contained some inaccuracies. Part of reason for this is that, as I have explained, ESL did not keep a record of the start and the end of each assignment and so the evidence was put together based on assumptions relating to changes in the rate of weekly pay and the amount of expenses claimed.

185. There is however no doubt that on some occasions individuals would have a number of consecutive assignments without any gaps (other than weekends) whilst, in other cases, there may be a gap between assignments which could be as a result of the individual taking some holiday or simply that they had not been able to find work for a particular week (or period of weeks).

186. However, in my view, whether or not there was a gap between employments cannot affect the question as to whether or not there is an overarching contract of employment and, as a result, whether each individual place of work is a temporary place of work or a permanent place of work. If there is no overarching contract of employment, it follows that each individual assignment constitutes a separate employment and the fact that there is no gap (other than a weekend) between assignments does not convert those separate assignments into a single employment. I did not understand Mr Goodfellow to make any submissions to the contrary.

#### ***Conclusion on mutuality of obligations***

187. For the reasons I have explained, I am not satisfied that, under the contract between ESL and the relevant individuals, interpreted in the light of the facts and circumstances known to the parties, there was sufficient mutuality of obligation to mean that the contract was one of employment. Properly interpreted, ESL has no ongoing obligation to provide work or benefits and the individuals have no obligation to carry out any work for ESL.

188. On this basis, one of the prerequisites for an ongoing contract of employment is missing and so, irrespective of any control ESL may have had over the individuals in the periods between assignments and any other relevant factors, the contract cannot be a contract of employment.

#### **Control**

189. Given my conclusion in relation to the lack of the necessary mutuality of obligations, it is not strictly necessary to consider whether ESL had sufficient control over the relevant individuals during the periods between assignments. Whilst Mr Tolley submits that the required control is missing, Mr Goodfellow did not make any specific submissions either in writing or orally in relation to the question of control.

190. Mr Goodfellow's predecessor did make some references to control, suggesting that the contract provided ESL with a framework of control in respect of reporting to ESL and provided ESL with an ultimate right over what duties an individual would perform, where those duties would be performed and when they must be performed.

191. Mr Tolley, on the other hand, submits that ESL did not have the requisite level of control, noting that in reality it was the agencies who decided where an individual would be working, what they would be doing and when they would be doing it. In any event, given the findings I have made, this sort of control would only be relevant to an individual assignment in any event and says nothing about the control which ESL might have over an individual in the period between assignments.



192. Reference was made to the disciplinary and grievance procedures referred to in the contract. However, no evidence has been provided of any such procedures being invoked in relation to an employee who is not working on an assignment. In line with the findings I have already made, and without having seen the disciplinary or grievance procedures, it is in my view more likely that the correct interpretation of the contract is that the disciplinary and grievance procedures only relate to matters arising in connection with the performance of a specific assignment and not in relation to anything which might take place between assignments.

193. Other provisions of the contract which might be said to give ESL some control over the individuals between assignments are:

- (1) a requirement for holiday requests to be approved by ESL (clause 12.4);
- (2) an ability for ESL to decide whether an individual should be allowed to take any time off other than for holiday, sickness or other statutory rights (clause 14.1);
- (3) the obligation (mentioned above) for individuals to comply with reasonable and lawful instructions given by ESL (clause 15.1);
- (4) a requirement to report to a director or manager of ESL if required (clause 15.3).

194. Again, given the facts and circumstances in which the contracts were entered into, my conclusion is that these clauses must be interpreted as applying only to the extent that they relate to an assignment undertaken by an individual through ESL and do not apply to periods when there is no such assignment. So, for example, an individual would need to obtain agreement to take time off during the course of an assignment but would not need agreement to take time off (whether for holiday or any other reason) if no assignment had been accepted. Similarly, the ability of ESL to give instructions to the individuals or to require them to report to ESL would only apply if the reason for doing so had some connection with an assignment undertaken by the individual through ESL.

195. All of this is reinforced by the reality that, if an individual were undertaking an assignment through another employer, there is no practical basis on which ESL could exercise control over that individual whilst the other assignment continued.

196. Although I accept Mr Goodfellow's submission that, just because a contractual right is not exercised, does not mean that the right is not part of the contract (see *Autoclenz* at [19], my conclusion that, properly interpreted, the rights only apply in relation to the assignments undertaken by an individual is also supported by the fact that there is no real evidence of these rights being invoked during periods between assignments.

197. In relation to holiday for example, Mr Lowndes' evidence was that those employees who elected to have their holiday pay paid to them each week they worked (about 85% of employees) would not generally ask ESL if they could take holiday.

198. Of the remaining 15%, some might notify an intention to take a certain amount of holiday and ask for a payment of an appropriate proportion of their accrued holiday pay to be paid whilst others would simply ask for all accrued holiday pay to be paid to them in a lump sum without saying how much holiday they were planning to take or when. Mr Lowndes also conceded that ESL does not retain any record of how much holiday an individual takes.

199. Based on the above, my tentative conclusion, bearing in mind that the exploration of this issue was limited, is that ESL did not have a sufficient degree of control over the individuals during the period between assignments in order to satisfy the irreducible minimum for the overarching contract to qualify as a contract of employment.

200. In some respects it might be said that the assessment of mutuality of obligation and control goes hand in hand. In circumstances where it is found that the employer has no obligation to provide work or benefits and the employee has no obligation to accept any work which might be offered it would perhaps be surprising if whatever contract were in place gave the employer any realistic control over the employee during periods when no work was being carried out.

### **Conclusion in relation to the existence of an overarching contract of employment**

201. The contract in existence between ESL and the relevant individuals does not, on a continuing basis, satisfy the irreducible minimum requirements for a contract of employment. There is no mutuality of obligation and no sufficient element of control. The contract, such as it is, is not therefore a contract of employment. Instead, a separate contract of employment arises each time an individual identifies an assignment and ESL agrees to act as the employer in relation to that assignment.

202. The result of this finding is that the travel and subsistence expenses in question in each case relate to a permanent workplace and not a temporary workplace and are not therefore deductible or allowable for the purposes of s 338 ITEPA or paragraph 3 of part VIII of schedule 3 to the Social Security (Contributions) Regulations 2001.

### **SECTION 339A ITEPA – SUPERVISION, DIRECTION AND CONTROL**

203. For the tax year 2016/17, s 339A ITEPA treats each engagement as a separate employment for the purposes of s 338 ITEPA unless the manner in which the worker provides the services is not subject to a right of supervision, direction and control by any person (s 339A(3) ITEPA).

204. Given my conclusion that there is no overarching contract of employment, it is unnecessary to decide the question as to whether ESL had a right of supervision, direction or control over the manner in which their employees provided their services. However, in case I am wrong in my main conclusion I will address the point very briefly.

205. Part of the reason for addressing the point briefly is also that the submissions made by the parties in relation to this point were extremely brief.

206. Mr Tolley relies on clause 15.1 of the contract which, as mentioned above, requires individuals to comply with all reasonable and lawful instructions and requests made by ESL. He argues that, on a natural reading, this gives ESL the right to exercise supervision, direction or control over the manner in which an individual provides their services.

207. When asked about this in cross examination, Mr Lowndes stated that it would not be reasonable to give instructions or directions to a skilled employee as to how they should carry out their services. Mr Goodfellow submits that, taking into account the factual matrix, it would be wholly unrealistic in the circumstances for ESL to give any such direction. He notes that ESL have no representatives on the sites where the individuals are working and employs no specialists in the construction industry who would be capable of giving such directions.

208. Mr Lowndes also explained the process which ESL go through in determining whether an individual is subject to supervision, direction or control. This involves looking at the hourly rate paid by the agency in respect of an employee. If the rate is lower than a set figure, it is assumed that the individual is unskilled and that they are therefore subject to supervision, direction or control by some person and are not allowed to claim expenses.

209. If the individual is paid more than the threshold hourly rate, there is then an investigation as to whether the individual is subject to supervision, direction or control by the agency or the end user. This shows that, in the 2016/17 tax year, it was only those individuals who were

deemed to have the required level of skills (based on their hourly rate) who were allowed to claim expenses.

210. Looking at the facts and circumstances known to the parties at the time the contract was entered into, I accept Mr Goodfellow's submission that, in relation to such individuals, it would not be reasonable for ESL to give them directions as to the manner in which they should perform their services. The position might be different if ESL were directly responsible for providing individuals with their assignments and contracted with the end user in order to enable them to do this. However, that is not the case.

211. Based on these factors, it cannot in my view have been objectively intended that clause 15.1 of the contract should give ESL this level of control. Section 339A would not therefore prevent the expenses in question from being allowable had there been an overarching contract of employment.

#### **VALIDITY OF THE REGULATION 80 DETERMINATIONS**

212. HMRC issued four determinations under regulation 80 of the Income Tax (Pay as You Earn) Regulations 2003 ("Regulation 80"). Although HMRC used the standard form prescribed for such determinations, ESL says that the determinations are invalid as they do not contain all of the required information. More specifically, in the first column which is headed "Name and National Insurance number of employee", HMRC have inserted "payments of non-allowable expense".

#### **Legal framework**

213. To the extent relevant, Regulation 80 provides as follows:

##### **"80 Determination of unpaid tax and appeal against determination**

- (1) This regulation applies if it appears to HMRC that there may be tax payable for a tax year under regulation 67G, as adjusted by regulation 67H(2) where appropriate, or 68 by an employer which has neither been
  - (a) paid to HMRC , nor
  - (b) certified by HMRC under regulation 75A, 76, 77, 78 or 79.
- (1A) ...
- (2) HMRC may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.
- (3) ...
- (3A) ...
- (4) A determination under this regulation may-
  - (a) cover the tax payable by the employer under regulation 67G or, as adjusted by regulation 67H(2) where appropriate, 68 for any one or more tax periods in a tax year, and
  - (b) extend to the whole of that tax, or to such part of it as is payable in respect of-
    - (i) a class or classes of employees specified in the notice of determination (without naming the individual employees), or

(ii) one or more named employees specified in the notice.”

214. The key provision is regulation 80(4)(b), the effect of which is that a determination must either cover the whole of the tax payable by the employer or any part of the tax which is payable in respect of specific employees or a class of employees who are specified in the notice of determination.

215. As a preliminary point, I would note that there is, in my view, some uncertainty as to whether the reference to “that tax” in regulation 80(4)(b) is a reference to the entirety of the tax payable under the PAYE regulations by the employer in the relevant tax year or whether it is a reference to the amount of the unpaid tax which HMRC have determined in accordance with regulation 80(2).

216. The parties have referred to the decision of this Tribunal in *Trowbridge Office Cleaning Services Limited v HMRC* [2017] UKFTT 0501 (TC) where the Tribunal concluded (although without giving any detailed reasons) that it is a reference to the whole of the tax payable for the tax year and not just the amount of the unpaid tax. This is presumably on the basis that the reference in regulation 80(4)(b) to “that tax” is a reference to the tax mentioned in regulation 80(4)(a) which does not specifically state that it is limited to the unpaid tax.

217. However, an alternative reading is that the purpose of regulation 80(4) is simply to give HMRC flexibility to issue more than one determination in respect of any unpaid tax in relation to a tax year and allows HMRC to divide up the determinations either by tax period (regulation 80(4)(a)) or by employee or class of employee (regulation 80(4)(b)). If that were right, the determinations in this case would cover “the whole of that tax” as HMRC have issued a single determination for each tax year.

218. I note that the current version of regulation 80(4) (amended in 2019) now reads:

- “(4) a determination under this regulation may—
  - (a) cover any one or more tax periods in a tax year, and
  - (b) extend to the whole of that tax, or to such part of it as is payable in respect of—
    - (i) a class or classes of employees specified in the notice of determination (without naming the individual employees), or
    - (ii) one or more named employees specified in the notice.”

219. Following this change, it seems clear that the reference to “that tax” in regulation 80(4)(b) can only refer to the unpaid tax determined in accordance with regulation 80(2) given that regulation 80(4)(a) no longer contains a reference to any tax. Unless there is evidence of an intention to change the effect of regulation 80(4), this may well shed some light on the meaning of regulation 80(4) as it stood during the period in question in this appeal.

220. Having said this, although I raised the point during the hearing, it is not one on which Mr Tolley relies. I will therefore proceed on the basis that the determinations do indeed relate to only part of the tax referred to in regulation 80(4)(b). The question therefore is whether the notices of determination specify the class or classes of employees in respect of whom the tax is payable.

221. I have already mentioned *Trowbridge*. In that case, the wording used was “remuneration not previously accounted for”. The determinations in fact related to 41 alleged employees who HMRC had been unable to identify and who they believed to have been paid in cash. It appears

that HMRC accepted at [97] that they could have issued the determinations in respect of specific individuals by reference to a list provided to them by the appellant's advisers.

222. The Tribunal doubted that the determinations could be read together with correspondence between HMRC and the appellant's advisers but in any event concluded at [110] that this was not possible, partly due to the wording at regulation 80(4) but also due to the fact that the correspondence which might identify the relevant class of employees was a "rather convoluted trail of correspondence". The conclusion of the Tribunal at [111] was that:

"a valid Regulation 80 determination should, as a minimum, provide sufficient information on its face to identify the class or group of employees at which it is directed."

223. The Tribunal decided that, in that case, the class of employees was not properly identified and so the determinations were not valid.

224. Mr Tolley also refers to the decision of the Special Commissioners in *Westek Limited v HMRC* [2008] STC (SCD) 169. It appears that this decision was not referred to in *Trowbridge*.

225. In *Westek*, the appellant company paid what was described as management charges to entities controlled by its three directors. HMRC took the view that these payments were earnings. The Regulation 80 Determinations referred to "employees in receipt of management charges from the company". The Special Commissioner concluded at [24] that this phrase was an adequate description of a class of employees and also placed reliance on the fact that nobody was in doubt as to which employees were included in the class. The determinations were therefore valid.

226. Mr Goodfellow, in his submissions, stressed the importance of identifying the employees in respect of whom the tax was payable. This is because the amount of tax in fact payable will depend (for example) on whether those employees are basic or higher rate taxpayers as well as the fact that it is important to know which employees should be given credit for the tax which the employer should have deducted under the PAYE system.

227. Based on this, Mr Goodfellow submitted that the question as to whether the class of employees is identified on the face of the Regulation 80 determination is a purely objective test. This means that it must be apparent to anybody looking at the Regulation 80 Determination as to which employees (or class of employees) that determination relates to.

228. However, I reject this to the extent that it means that the background knowledge of the taxpayer cannot be taken into account in determining whether the description is sufficient. The purpose of the determination, like any assessment, is to enable the person being assessed to know what it is that is being assessed. It does not have to be understood by a third party who has no background to the circumstances leading up to the determination.

229. In my view therefore there is both an objective and a subjective element to the enquiry. What must be shown is that a person equipped with the background knowledge possessed by the person to whom the determination is addressed (in this case ESL) can objectively understand from the wording of the determination that it relates to a particular class of employees and can accurately identify that class.

230. This is, in effect, the approach taken by the Special Commissioner in *Westek* and one which I would adopt for the reasons I have given. I accept that the Tribunal in *Trowbridge* may have taken a different approach although even that is not clear given the Tribunal's comments about the convoluted nature of the prior correspondence and the apparent dispute as to whether some individuals to whom payments were said to have been made even existed.

231. The effect of this approach is that correspondence between the taxpayer and HMRC can be taken into account in deciding whether the wording of the determination is sufficient to identify a class of employees to the extent that it is relevant to the knowledge held by the taxpayer. The class is still specified in the determination. The correspondence simply informs the taxpayer's understanding of the description contained in the determination.

232. Should the Tribunal find that the determination is defective in that it does not contain an adequate description of the class of employees to which the tax relates, HMRC say that the defect can be cured by s 114(1) Tax Management Act 1970 ("TMA").

233. Section 114(1) TMA provides as follows:

**"114 Want of form or errors not to invalidate assessments, etc**

- (1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."

234. Mr Goodfellow points out that there are two conditions which have to be satisfied in order for HMRC to be able to rely on s 114(1). The first is that the determination must be in substance and effect in conformity with the Taxes Acts. The second condition is that the person or property charged is designated in the determination according to "common intent and understanding". Mr Goodfellow submits that, in this case, those conditions are not met.

235. In the context of s 114 TMA, both parties have referred to the decision of the Court of Appeal in *R(aoa)Archer v HMRC* [2017] EWCA Civ 1962. That case involved a closure notice which did not, on the face of it, make the adjustment to the taxpayer's self-assessment to give effect to HMRC's conclusions which is one of the statutory requirements in relation to a closure notice.

236. The Court of Appeal concluded that, as a result of this, the closure notice did not comply with the relevant statutory provisions but that the closure notice was validated by s 114 TMA.

237. Lewison LJ referred in *Archer* at [35] to the decision of the Court of Appeal in *HMRC v Donaldson* [2016] EWCA Civ 761 (a case dealing with defects in a penalty notice relating to the dates for which the penalty was charged) in which Lord Dyson endorsed the observation of Henderson J in *Pipe v HMRC* [2008] EWHC 646 Ch at [51] that some mistakes may be too "fundamental" or "gross" to be saved by s 114(1) TMA before going on to conclude at [29] that, on the facts of that particular case, Mr Donaldson was not "misled or confused" by the relevant defect.

238. Mr Goodfellow refers to *Baylis v Gregory* [1987] STC 297 as an example of a case where the error was considered too fundamental to be cured by s 114(1). In that case, the assessment referred to the wrong tax year. Slade LJ considered at [323j] that it was:

"...impossible to read the wording of s 114(1), wide though it is, as justifying in any circumstances the treatment of an assessment made for one fiscal year as an assessment made for another fiscal year."

239. However, Lewison LJ notes in *Archer* at [35] that in *Donaldson*:

“Lord Dyson did not approach the question from some *a priori* categorisation of what kind of mistakes were fundamental or gross. Instead he concentrated on the nature and effect of the omission in the particular circumstances of the case.”

240. It is clear that what Lord Dyson focussed on at [29] was whether, despite the defects in the penalty notice, Mr Donaldson could be in any doubt as to the relevant dates and, in particular, whether he was confused or misled by the defects. The question as to whether an error or omission is too fundamental to be cured by s 114(1) must therefore be approached in this light.

241. Lewison LJ in *Archer* notes at [36] that, although the Court of Appeal in *Donaldson* referred to the question as to whether the taxpayer was confused or misled, the test under s 114(1) TMA is an objective test (referring to *Pipe* at [51]). He went on to say in the same paragraph that:

“However, in applying an objective test the reader of the closure notice must, I think, be taken to be equipped with the knowledge that Mr Archer and KPMG had, including knowledge of what had led to the enquiry and what HMRC’s conclusions were.”

242. Based on the fact that HMRC had set out the amounts due from Mr Archer in correspondence prior to the issue of the closure notices, the Court of Appeal concluded that Mr Archer could have been in no doubt what he owed HMRC and could not have been confused or misled. The defect (HMRC’s omission to amend Mr Archer’s self-assessment to accord with their conclusions) was therefore “a matter of form rather than substance”.

243. The question to be asked in deciding whether a mistake is too fundamental to be saved by s 114 TMA is therefore whether, on an objective basis, but taking into account the taxpayer’s knowledge of the enquiry and of HMRC’s conclusions, the taxpayer could have been confused or misled by the relevant defect.

244. Returning to the two threshold conditions highlighted by Mr Goodfellow, these were not mentioned by the Court of Appeal in *Archer*. Mr Goodfellow infers that this is because it was assumed they were satisfied. This may be true of the first condition (that the document must be in substance and effect in conformity with the Taxes Acts).

245. However, in my view, the principles applied by the Court of Appeal in substance were aimed at the second condition which tests whether the person or property charged is designated in the document according to “common intent and understanding”. The reference to common and intent and understanding raises similar issues as the question whether (objectively) a recipient of the document would be confused or misled. I do not therefore consider there is any additional hurdle to overcome in this respect.

#### **Do the Regulation 80 Determinations comply with regulation 80(4)?**

246. Mr Goodfellow’s primary submission is that the words “payment of non-allowable expense” do not identify a class of employees. He points out that the nature of the expenses are not described and so could include expenses other than the travel and subsistence expenses in question. It could also extend to employees other than the individuals working on assignments, for example the individuals working in ESL’s head office as well as individuals who are not in fact employees but are treated for this purpose as employees (such as agency workers or independent contractors).

247. Whilst, based on the correspondence with HMRC, ESL no doubt thought it knew what HMRC were trying to assess, based on the wording of the Regulation 80 Determinations, Mr Goodfellow submits that it could not be sure.

248. Mr Tolley suggests that, although the wording in question does not specifically refer to any class of employees at all, it can be inferred that the wording covers any employee who has received a payment of non-allowable expenses. This is based on the fact that the determination starts by stating that the determination “shows the amount of tax we consider is due from you as an employer”. It must therefore, he says, relate to employees.

249. For the reasons given by Mr Tolley, I accept that there is a necessary inference that what is being described is a class of employees who have received payments of expenses which are not allowable.

250. On the basis that the determination therefore relates to employees who have received payments of non-allowable expenses, Mr Tolley submits that this is a sufficient description of the relevant class given ESL’s understanding of HMRC’s investigation. In making this submission, he relies on the decision of the Special Commissioners in *Westek* where the description simply referred to “employees in receipt of management charges from the company”.

251. As I have said, the question is whether, on an objective basis, it would have been clear to ESL what class of employees was being referred to in the determinations. This objective determination must however be informed by the knowledge which ESL had of HMRC’s investigation and their conclusions. These were clearly set out by HMRC in a letter dated 26 February 2018 which accompanied the determinations. Based on the wording contained in the notices of determination, I am satisfied that it would therefore have been clear to ESL which class of employees was being referred to.

252. It would of course have been preferable for HMRC to state clearly in the notice of determination that it related to those employees of ESL who had been reimbursed travel and subsistence expenses in respect of assignments carried out by those individuals through ESL and it would no doubt be prudent for HMRC to make sure that any description contained in future determinations is as accurate as possible. However, on the facts of this case, I consider the description was sufficient to satisfy the requirement of regulation 80(4)(b)(i) so that all the Regulation 80 Determinations are valid.

253. Mr Goodfellow does also suggest that the determinations were not made to the best of HMRC’s judgment as HMRC could have given a more accurate description of the class of employees or, possibly, named them all. However, it is clear from regulation 80(2) that the requirement to use best judgment relates only to the amount of the assessment.

#### **Does s 114(1) TMA cure any defect?**

254. If, contrary to my conclusion, the description contained in the notice of determination must be assessed on a purely objective basis and without reference to any knowledge on the part of the taxpayer, it is in any event clear to me that the defect would be cured by s 114(1) TMA.

255. The determinations were in HMRC’s prescribed form. They were therefore in substance and effect in conformity with the Taxes Acts. That cannot be affected by the alleged defect in the description of a class of employees any more than would have been the case if HMRC had omitted to provide any description at all. This must follow from the fact that there was no suggestion in *Donaldson* or *Archer* that an omission of a statutory requirement for the document in question automatically rendered s 114(1) inapplicable.

256. As I have explained, the second threshold condition identified by Mr Goodfellow is not, in my view, a separate condition which must be satisfied in addition to the requirements identified in *Archer*. Instead, the test explained by Lewison LJ, which looks at whether, on an



objective basis, a taxpayer would be confused or misled as a result of the defect, is simply the way in which the satisfaction of that condition should be analysed.

257. The question therefore is whether, given ESL's knowledge of HMRC's investigation and their conclusions, it could have been in any doubt, or could have been misled or confused, as to the class of employees to which the determinations related.

258. Mr Goodfellow does not suggest that ESL was in fact misled or confused. There is no doubt in my mind that, on an objective basis, a taxpayer with the knowledge possessed by ESL cannot have been in any doubt that the class of employees which HMRC were trying to refer to in the notices of determination was those employees who had been reimbursed travel and subsistence expenses which HMRC considered not to be allowable for the reasons clearly explained in the correspondence which has passed between HMRC and ESL's advisers. The defect was therefore one of form rather than substance and the validity of the determinations is saved by s 114(1) TMA.

259. It follows from what I have said that I reject the argument that the Regulation 80 Determinations were invalid.

#### **REIMBURSEMENT OF EXPENSES – EARNINGS FOR NIC PURPOSES**

260. ESL's argument is that, despite the detailed provisions contained in paragraph 3 of part VIII of schedule 3 to the Social Security (Contributions) Regulations 2001, a reimbursement of expenses which have genuinely been incurred in order to perform their duties is not "earnings" within the meaning of s 3(1)(a) SS(CB)A.

261. Section 3(1)(a) SS(CB)A defines earnings for NIC purposes as "any remuneration or profit derived from an employment".

262. Regulation 25 of the Social Security (Contributions) Regulations provide that certain payments which are specified in schedule 3 to those regulations are to be disregarded in the calculation of earnings. Part VIII of schedule 3 deals with travelling and other expenses. Paragraph 3 of part VIII of schedule 3 in effect replicates ss 338 and 339 ITEPA. The effect of this is that expenses of travelling between home and a permanent workplace would not be disregarded if indeed the reimbursement of such expenses is earnings in the first place.

263. One difference between the income tax legislation and the NIC legislation is that ss 70-72 ITEPA specifically treat payments in respect of expenses as earnings for income tax purposes even if they would not otherwise constitute earnings. This does not however prevent a deduction being allowed in accordance with any relevant provisions, including s 338 ITEPA in respect of travel and subsistence expenses.

264. Mr Goodfellow refers to the decision of the Supreme Court in *Forde & McHugh Limited v HMRC* [2014] UKFC 14. The question in that case was whether payments to an unapproved retirement benefits scheme constituted earnings for NIC purposes. That is of course a very different question to the issue in this appeal. However, the point of principle which Mr Goodfellow seeks to derive from the decision is that the concept of earnings (or emoluments as it used to be called) for income tax purposes is different to the concept of earnings for NIC purposes. Mr Goodfellow refers in particular to the observation of Lord Hodge at [7] that:

"National insurance contributions ('NICs') have been levied on the basis which is different from the 'emoluments' on which income tax has been raised."

265. It is perhaps worth noting that this observation was made in the context of an acceptance by counsel for the taxpayer at [6] that "earnings" for NIC purposes had a wider meaning than

“emoluments” for income tax purposes. ESL’s argument in this case is that, in relation to reimbursement of expenses at least, it has a narrower meaning.

266. Mr Goodfellow also refers to the decision of the Court of Appeal in *Cheshire Employer and Skills Development Limited v HMRC* [2013] STC 2121. Although this decision was listed as an authority in *Forde & McHugh*, it was not referred to by Lord Hodge in his judgment.

267. In *Cheshire Employer*, the employees were required to travel to various sites where apprentices and trainees had been placed. The employer paid employees a lump sum in reimbursement of their travelling expenses. The question was whether the lump sum constituted earnings for NIC purposes. The key question was whether the lump sum was a genuine estimate of the expenses incurred by the employees and was not intended to provide any profit to them. However, the first question which Etherton, LJ had to consider was whether, assuming there was no profit element, the reimbursement of expenses constituted earnings on general principles.

268. For this purpose, it was accepted at [50] that, leaving aside the effect of ss 70-72 ITEPA, the question as to whether a reimbursement of expenses was earnings for NIC purposes was the same as whether it would constitute emoluments for income tax purposes.

269. Etherton, LJ did not consider the answer to this preliminary question to be controversial. He states at [22] that:

“It is implicit in the concept of earnings, remuneration and profit that there is some overall net financial benefit to the recipient. In the context of income tax it has long been recognised as a general principle that the reimbursement by an employer to an employee, whether in whole or in part, of an expense that the employee has had to incur in order to perform his or her duties is not, without more, an ‘emolument’ of the employee’s employment.”

270. It should be noted that, although Etherton LJ refers to expenses incurred “in order” to perform the employee’s duties, it is clear that he is not talking about expenses incurred by an employee to put themselves in a position to perform their duties (such as travelling from home to a permanent place of work). That is not what the case was about. The reference must instead be taken to be to expenses incurred in the performance of the employee’s duties. This is confirmed by the fact that, in relation to NICs, Etherton, LJ goes on to refer at [23] to:

“acceptance that the genuine reimbursement of expenditure necessarily incurred by employees on business travel does not constitute ‘earnings’.”

271. Later on in his judgment, Etherton, LJ refers to the decision of the House of Lords in *Owen v Pook* [1970] AC 244 and to the decision of Walton J in the High Court in *Donnelly v Williamson* [1982] STC 88, both cases dealing with the reimbursement of travel expenses and both cases in which it was held that the reimbursement of the expenses in question did not constitute emoluments for income tax purposes.

272. Whilst I accept that it is clear from these authorities that the reimbursement of expenses incurred in the performance of an employee’s duties do not constitute earnings for NIC purposes, what Mr Goodfellow’s submission ignores, as Mr Tolley points out, is that the expenses in question in this appeal are, on the assumption that there was no overarching contract of employment, expenses incurred in ordinary commuting between home and a permanent place of work and not in the performance of their duties.

273. In *Owen v Pook*, whilst the travelling expenses in question were incurred by Dr Owen in travelling from his home to hospitals where he held part-time employments, this was in a situation where he was on standby at weekends and evenings to deal with emergencies and against a background of a finding that his responsibility for a patient began when he received a phone call (see Lord Guest at [253E-F]).

274. The expenses in question did therefore relate to the performance of Dr Owen's duties. Lord Donovan explicitly reaches his conclusion at [260E] on the basis that "the travelling expenses paid to Dr Owen simply reimbursed what he had spent... on travelling in performance of his duties...". Lord Pearce gives the example at [259D] of a teacher incurring expenses in taking children out for a school treat (i.e. in the performance of the teacher's duties) and concludes that "a mere reimbursement of necessary expenses" is not an emolument.

275. In *Donnelly v Williamson*, a teacher was reimbursed expenses for voluntarily attending out of school functions. Walton J based his decision in favour of the taxpayer primarily on the basis that, as the attendance was voluntary, the reimbursement was not in return for acting as an employee. However, he also concluded, having referred to *Owen v Pook*, that the reimbursement of the expenses was not an emolument in any event as long as the amount paid was a genuine estimate of the expenses incurred. It is clear though that this conclusion was based on an assumption (if he was wrong in his primary reason for allowing the appeal) that the travel was indeed in the performance of the teacher's duties (see [94g] and [95f-g]).

276. Walton J clearly considered that the position was different in relation to ordinary commuting from home to work as he stated at [94a-b] that:

"... if an employer pays the expenses of the employee's travel to work, simply because the person concerned is an employee, as must frequently happen, once again there cannot be any dubiety as to the status of the cost of such provisions as an emolument."

277. In *Cheshire Employer*, it is clear that the expenses related to travel between various sites rather than travel from home to work and so were incurred in the performance of their duties.

278. Based on these authorities, the principle which emerges is that it is only a reimbursement of expenses genuinely incurred in the performance of an employee's duties which is not earnings (or emoluments) on general principles and so, in the absence of a deeming provision, is also not earnings for NIC purposes.

279. On this basis, I have little hesitation in concluding that payments relating to the reimbursement of travel and subsistence expenses representing the normal costs of attending a permanent place of work do constitute earnings for NIC purposes (and indeed for income tax purposes). Although the payment is a reimbursement of expenses, it is a profit derived from the employment (in the words of s 3SS(CB)A) as the expenses were not incurred in the performance of the employee's duties.

280. Mr Tolley notes that the Upper Tribunal in *Reed* reached a similar conclusion at [274] although, as Mr Goodfellow points out, the Upper Tribunal does not appear to have been referred to the Court of Appeal decision in *Cheshire Employers*. In addition, given the reliance placed by the Upper Tribunal on the decision of the House of Lords in *Taylor v Provan* [1975] AC 194, it is not clear whether the Upper Tribunal may have had in mind not solely the question as to whether the reimbursement of expenses constituted earnings or emoluments but also whether those expenses were in principle deductible for income tax purposes (which is a different test).

281. As an aside, given the reference in *Reed* to *Taylor v Provan* (which was not a case referred to by either party in their submissions) I should mention that Lord Simon of Glaisdale commented in his dissenting judgment in that case at [281E-F] that:

“If the expense in respect of which the reimbursement is made is not deductible under paragraph 7, its reimbursement to the taxpayer would, in my view, be an emolument, making him so much better off than another employee or office holder who has to bear such an expense out of his own pocket. But in *Pook v Owen* [1970] A.C. 244 a majority of your Lordships' House (Lord Guest, Lord Pearce, Lord Donovan) held otherwise.”

282. However, the facts of that case were somewhat unusual and it is not at all clear whether Lord Simon considered that the expenses were incurred by Mr Taylor in the performance of his duties. In any event, it was not a point that Lord Simon had to decide as the reimbursement was deemed to be an emolument by the predecessor to ss 70-72 ITEPA. There was therefore no analysis of the decision in *Owen v Pook* and it is not a point mentioned by any of the other judges. I do not therefore consider that it affects the conclusion which I have reached as to the principle for which that case is authority.

283. The only other point I would make in relation to this aspect is that, although it is not permissible to interpret legislation by reference to subsequent subordinate legislation (see *Forde v McHugh* at [729e-f]), the conclusion I have reached does of course have the consequence that paragraph 3 of part VIII of schedule 3 to the Social Security (Contributions) Regulations is not deprived of any real effect, as would be the case if ESL's argument were correct.

#### **USE OF BENCHMARK SCALE RATES**

284. Since 2014, ESL has used HMRC's benchmark scale rates for the reimbursement of subsistence expenses. The benefit of this is that, although it is still necessary to show that the employees have incurred subsistence expenses, it is not necessary to show the precise amount of expenses which have been incurred.

285. ESL accepts that, in accordance with s 65 ITEPA, an employer may only use benchmark scale rates if HMRC grants a dispensation in accordance with s 65(3) ITEPA. It is common ground that, whilst ESL sent a letter to HMRC on 12 March 2014 notifying them of its intention to use benchmark scale rates with effect from 6 April 2014, it did not apply for or receive a dispensation.

286. ESL's case is that, at the time, it was HMRC's practice to allow an employer to use benchmark scale rates based purely on such a notification without a formal dispensation.

287. Although this is one of ESL's formal grounds for appeal, in his closing Mr Goodfellow accepted that ESL was, in effect, relying on a legitimate expectation based on HMRC's prevailing practice and guidance and that, in these circumstances, the Tribunal could not grant any relief. Instead, it will be necessary for ESL to make an application for judicial review.

288. Mr Goodfellow however, whilst accepting that there was limited evidence available, urged the Tribunal to determine that there was in fact a practice on the part of HMRC that employers would be permitted to use benchmark scale rates as long as they notified HMRC that they intended to do so. Mr Goodfellow suggested that the purpose of the Tribunal in doing this would be to cause HMRC to reconsider their position in relation to the use of benchmark scale rates and therefore potentially avoid the need for ESL to commence judicial review proceedings.

289. As I have mentioned at the start of my decision, this point is only relevant should the Tribunal conclude that there is an overarching contract of employment so that travel and subsistence expenses are, in principle, allowable. That is not the determination I have made.

290. In any event, it would in my view, be wholly inappropriate for the Tribunal to take the course suggested by Mr Goodfellow. On the basis that the point is not one in relation to which the Tribunal has jurisdiction as it has no general judicial review powers, it would be wrong for the Tribunal to make findings in relation to the very points which would form the basis for any application for judicial review. This is particularly the case in circumstances where the HMRC officers who gave evidence were unable to shed any light on HMRC's practice in relation to this point.

291. As far as the point of principle is concerned, the Tribunal must therefore proceed on the basis that ESL was not authorised to reimburse subsistence expenses on the basis of benchmark scale rates and that any investigation as to the amount of tax and NIC due should be approached on the basis that ESL would have to demonstrate the actual amount of any expenses reimbursed.

#### **SUMMARY OF CONCLUSIONS AND DIRECTIONS AS TO NEXT STEPS**

292. There is no overarching contract of employment between ESL and those individuals who carry out assignments through ESL. Instead, a separate employment comes into existence in respect of each assignment. As a result of this, any reimbursement of expenses incurred in attending those places of work is not available as a deduction from earnings for income tax purposes in accordance with s 338 ITEPA and is not to be disregarded for NIC purposes in accordance with paragraph 3 of part VIII of schedule 3 to the Social Security (Contributions) Regulations 2001.

293. The Regulation 80 Determinations issued by HMRC on 26 February 2018 are valid as they contained an adequate description of the class of employees in respect of whom the tax is payable or, if the description is not adequate, any defect is cured by s 114(1) TMA.

294. A payment representing the reimbursement of expenses incurred by an employee in attending a permanent place of work is a profit derived from an employment and is therefore earnings for the purposes of s 3(1)(a) SS(CB)A.

295. ESL does not have a right of supervision, direction or control over the manner in which any relevant individual who has received a reimbursement of expenses in the 2016/17 tax year provides their services.

296. ESL was not entitled to reimburse subsistence expenses on the basis of benchmark scale rates as it had not applied for or received a dispensation in accordance with s 65 ITEPA.

297. As will be apparent, the key points of principle have been decided in favour of HMRC. However, it is now necessary in accordance with direction 3 of the directions issued by the Tribunal on 23 March 2022 for the parties to endeavour to agree the amount of any liability to income tax and NIC based on the amount of the travel and subsistence expenses paid by ESL to its employees.

298. The parties are directed to inform the Tribunal if agreement is reached so that the necessary action can be taken to finalise these proceedings.

299. Should there be no agreement by 30 November 2022, the parties are directed to inform the Tribunal and, if possible, to provide agreed directions with a view to a hearing in relation to the amount of any liabilities. If no agreement is possible, each party should provide their own proposed directions, highlighting any areas of difference. Either party may, of course, apply for an extension of time for compliance with this direction (with reasons) if it considers

that an agreement on the amount of any liabilities can be achieved without the need for a further hearing.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

300. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with any of the decisions contained in this notice has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this notice of decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ROBIN VOS  
TRIBUNAL JUDGE**

**Release date: 13 JUNE 2022**