Neutral Citation: **[2024] UKUT 00233 (TCC)**

Case Number: UT/2023/000049

UPPER TRIBUNAL
(Tax and Chancery Chamber)

The Royal Courts of Justice,
Rolls Building, London

INCOME TAX – umbrella company engaging temporary workers – reimbursement to workers of subsistence expenses by reference to scale rates – whether reimbursement payments deductible – whether each workplace attended by worker was a permanent workplace – whether contract was an overarching contract of employment or, if not, a single employment – whether payments using scale rates were deductible without an HMRC dispensation – establishing whether loss of tax brought about carelessly so that extended time limit for making an assessment applied

Heard on: 15 and 16 May 2024
Judgment date: 16 August 2024

Before

MR JUSTICE ADAM JOHNSON
JUDGE THOMAS SCOTT

Between

MAINPAY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Firth KC, instructed by The Independent Tax and Forensic Services LLP

For the Respondents: Sadiya Choudhury KC, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. Mainpay Limited ("Mainpay") appeals against the decision of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 21 December 2022 (the "Decision").

2. Mainpay is an "umbrella" company which engages temporary workers, principally in the education, health and social care sectors. Mainpay has contracts with employment agencies which are engaged by end users such as hospitals or schools.

3. Mainpay reimbursed subsistence expenses to workers using round sum or benchmark scales, and claimed that such reimbursements were deductible from each worker's earnings for the purposes of income tax and national insurance contributions ("NICs"). Broadly, such expenses are not deductible if they are expenses of travel to and from the worker's "permanent workplace". Mainpay took the position that because it engaged the workers on the terms of a single employment contract, each of the places where a worker carried out an assignment was a temporary rather than a permanent workplace, so the expenses were not prevented from being deductible.

4. HMRC disagreed, saying that each workplace was a permanent workplace, and, in any event, scale rates could not be used without agreeing a dispensation with HMRC. HMRC issued determinations for PAYE and decision notices for NICs, based on a denial of a deduction for the reimbursed subsistence expenses. For two of the relevant tax years, the assessments were validly issued only if any loss of tax could be shown to have been brought about carelessly by Mainpay.

5. In the Decision, the FTT dismissed Mainpay's appeal, deciding that the expenses were not deductible, and for the relevant years the assessments were validly issued.

SUMMARY OF RELEVANT FACTS

6. References below to paragraphs in the form FTT[x] are to paragraphs of the Decision.

7. Mainpay engaged temporary workers who supplied services to end users or clients. Mainpay did not enter into an agreement directly with the end client. Rather, the client entered into an agreement with an employment agency and the employment agency in turn entered into an agreement with Mainpay.

8. Mainpay changed the form of contract which it used to engage its workers on 6 April 2013. The contract in use between 6 April 2010 and 5 April 2013 is referred to as "the 2010 Contract" and the subsequent contract as "the 2013 Contract".

9. At FTT[32]-[71], the FTT made various findings of fact under the headings set out below, none of which are challenged in this appeal. The findings material to this appeal can be summarised as follows.

The 2010 Contract

10. The 2010 Contract was implemented with the assistance of the law firm, Mishcon de Reya ("Mishcon"). It was clear from Mishcon's advice that it was not intended to be a contract of employment. This is reflected in Clause 2(1), which states that it is a contract for services and in Clause 2(2), which states that it will not give rise to a contract of employment: FTT[32].

11. Under Clause 3(1) Mainpay agrees to try and obtain suitable assignments for the workers, but is under no obligation to offer any work and the worker is under no obligation to accept any work which may be offered to them by Mainpay: FTT[34]. The worker has no right to be paid anything by Mainpay when they are not working on an assignment: Clause 4(2).

12. Various obligations were imposed on the worker, including to co-operate with the end client's reasonable instructions and to accept the end client's direction, supervision and control: FTT[39].

The 2013 Contract

13. At FTT[42]-[45], the FTT stated as follows:

> 42. There is no dispute that the 2013 Contract is in fact a contract of employment and it is clearly intended to be one. It is headed "Employment Agreement" and clause 2.1 confirms that it is a contract of service. The key question in relation to the 2013 Contract is whether it is an overarching contract of employment (covering not only the assignments but also the gaps between assignments) or whether each assignment constitutes a separate employment.
>
> 43. The contract starts when the worker commences their first assignment and continues until it is terminated. It governs all assignments undertaken by the worker in the meantime (clause 2.1) and is stated to operate and be effective between assignments (clause 2.2). Should the worker wish to take up another employment or work for anybody else whilst the contract is in effect, Mainpay must give its prior written consent (clause 2.2).
>
> 44. Clause 3.1 imposes an obligation on Mainpay to obtain suitable assignments for the workers. It also imposes on the worker an obligation to consider any suitable assignment obtained by Mainpay.
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> 45. In addition to this, Mainpay guarantees to offer the worker a minimum of 336 hours of work a year (clause 5.2) although the contract does not provide for the worker to receive any payment if the guaranteed minimum number of hours is not offered.

Obtaining assignments

14. The FTT found that the arrangement operated such that a worker would agree an assignment with an agency, and the agency would then provide details of the assignment to Mainpay, which would complete an assignment schedule on its online portal, which workers could log into: FTT[51]. The assignment was agreed between the agency and the worker: FTT[53].

The process for paying subsistence expenses

15. The guide to claiming expenses produced for workers by Mainpay for 2010/11 stated as follows (FTT[56]):

> To claim your standard Daily subsistence Allowance, you are not required to do anything as Mainpay claims this for you automatically on your behalf based on how many days you have worked for each particular week.

16. At FTT[57], the FTT noted that this was supported by the "frequently asked questions" accompanying the guide, which stated:

> What is subsistence Allowance? Mainpay are able to account for a proportion of your income as subsistence Allowance. This means that typically £13 of your daily rate will be tax free. This is automatically allocated to your invoices and you are not required to send in supporting evidence. This allowance is specifically in relation to the cost you incur for breakfast and lunch.

17. The guide was amended in 2013/14 to say that workers should retain the original receipts for expenses for six years in case they were requested by HMRC: FTT[60].

18. The online portal for workers included by default a claim for subsistence expenses. If a worker did not want to make a claim, they had to log into the portal and amend the default amount claimed. Only about 10% of workers removed the default expense claim: FTT[61].

19. At FTT[63]-[64], the FTT stated:

> 63. On 2 April 2009, HMRC issued Revenue and Customs brief 24/09 ("the HMRC Brief") dealing with benchmark scale rates for day subsistence. It is this publication which first set out the £5 and £10 rates depending on whether the worker had been away from home for more than five hours or more than ten hours respectively. The HMRC Brief noted that the benchmark scale rates could only be used if the employee had actually incurred a cost on a meal and that, in order to use the benchmark scale rates, the employer would need to apply to HMRC for a dispensation.
>
> 64. It is common ground that Mainpay did not apply for a dispensation before reimbursing subsistence expenses using round sum or benchmark scale rates. It appears that at some point in 2013, there was discussion between Mainpay and HMRC as to the possibility of being granted a dispensation but, in February 2014, HMRC indicated that further procedures needed to be put in place before any dispensation could be granted.

The requirement for consent to other employment

20. Although the 2013 Contract (unlike the 2010 Contract) contained a requirement for Mainpay to consent before a worker undertook work for somebody else, the FTT found that in practice there was no expectation that such consent in fact had to be obtained: FTT[65]. As a matter of practice, workers did not seek consent if they wanted to do other work and Mainpay did not expect them to do so: FTT[68].

Statutory benefits

21. Mainpay considered itself to be under an obligation to pay statutory benefits such as sick pay, maternity pay and paternity pay, and made such payments: FTT[69].

Length and number of assignments

22. Mainpay produced a summary for the periods under appeal which on its face showed that most workers only undertook one assignment in a year and the average length of an assignment was between 8 and 13 weeks. However, the FTT made no specific finding as to the accuracy of these figures: FTT[70]-[71].

THE FTT'S DETERMINATION OF THE ISSUES

23. HMRC issued determinations under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 for the years ending 5 April 2010 – 5 April 2014 relating to income tax under the PAYE system and notices of decision under section 8 Social Security Contributions (Transfer of Functions) Act 1999 in respect of NICs for the year ended 5 April 2011. The determinations for the tax years ended 5 April 2011 and 5 April 2012 and the notices of decision for the tax year ended 5 April 2011 were all issued more than four years after the end of the relevant tax year. They were therefore only valid if HMRC could establish that any loss of tax has been brought about carelessly by Mainpay, so that the extended six year time limit for assessments in section 36 Taxes Management Act 1970 ("TMA") applied.

24. The FTT summarised the issues to be determined at FTT[72]:

> The main question of course is whether the subsistence expenses are deductible for PAYE/NIC purposes. However, in coming to a conclusion on this question, the cases put forward by the parties require the Tribunal to determine a number of issues which can be summarised as follows:

> (1) Is the 2010 Contract a contract of employment? If it is, Mainpay accepts that it is not an overarching contract of employment but we will still have to consider whether all of the assignments carried out under the contract are part of a single employment or whether each assignment is a separate employment;
>
> (2) If the 2010 Contract is not a contract of employment, we need to consider whether it is an agency contract giving rise to a deemed employment. If so, we need to decide whether all of the assignments carried out under the terms of that contract form part of a single deemed employment or whether the relevant legislation deems each assignment to be a separate employment;
>
> (3) As far as the 2013 Contract is concerned, the first question is whether it is an overarching contract of employment which continues during the gaps between assignments (it being accepted by HMRC that a contract of employment exists in respect of each separate assignment). If there is no overarching contract, we again need to determine whether all of the assignments form part of a single employment, despite the breaks between the assignments;
>
> (4) Even if each assignment is a separate employment, Mainpay argues that the places of work are not permanent workplaces. If they are not, subsistence expenses would still be deductible. Based on the legislation, the question is whether the workers attend the workplaces regularly;
>
> (5) If there is some basis on which subsistence expenses are, in principle, deductible, we still need to decide whether round sum or benchmark scale rates can be deducted without any evidence of the actual expenses incurred in circumstances where Mainpay has not applied for or been granted a dispensation under s 65 of [the Income Tax (Earnings and Pensions) Act 2003] (" ITEPA");
>
> (6) Finally, if we conclude that subsistence expenses are not deductible, in relation to the tax years ended 5 April 2010 and 5 April 2011, we will need to decide whether any loss of tax has been brought about carelessly by Mainpay.

25. We will consider the FTT's reasoning in detail below, but in summary the FTT determined these six issues as follows:

(1) In relation to the 2010 Contract, notwithstanding that it was expressed not to be a contract of employment, and was drafted on the basis that it was intended to be an agency contract, it was a contract of employment in relation to each individual assignment.

(2) The provisions contained in sections 44 to 47 ITEPA deal with situations where an individual secures assignments with an end client through an agency, and, where they apply, deem the worker to hold an employment with that agency. If, contrary to the FTT's conclusion, the 2010 Contract had not been a contract of employment, but rather an agency contract within these provisions, then there would have been a single deemed employment between Mainpay and its workers which covered all assignments.

(3) The 2013 Contract was agreed by the parties to be a contract of employment in relation to each individual assignment. The question was whether (as Mainpay contended) it was a global or overarching contract of employment, including during the gaps between assignments. The FTT decided that the necessary mutuality of obligation did not exist between assignments, because of the absence of any obligation on workers to accept any assignment, meaning that the 2013 Contract was not a global or overarching

contract of employment. The FTT stated that workers had "an absolute and unfettered discretion" whether or not to accept any work which might be offered.

Mainpay argued in the alternative that even if the 2013 Contract was not an overarching contract of employment, it nonetheless created a single (albeit not continuous) employment relationship, with the result that each workplace was only a temporary workplace. The FTT rejected this argument, agreeing with HMRC that the contract between Mainpay and its workers should be analysed as a framework agreement which provided for the basis on which consecutive contracts of employment arose each time an assignment was entered into.

(4) Mainpay argued in the alternative that even if each workplace attended by a worker was not a temporary workplace, it was not a "permanent" workplace either, because the definition of permanent workplace required "regular" attendance. The FTT rejected this argument, and concluded that, even if this was wrong, an employee who attended a workplace during every day during which the employment subsisted attended that workplace "regularly".

(5) In relation to Mainpay's use of round sum or benchmark rates, the FTT rejected Mainpay's argument that, if the payments were otherwise deductible, it was irrelevant that Mainpay had not obtained a dispensation from HMRC. Since Mainpay had not obtained a dispensation, any amounts which were otherwise deductible could only be deducted if the particular expenses had in fact been incurred.

(6) In relation to the tax years ended 5 April 2011 and 5 April 2012, for which HMRC needed to establish that any loss of tax was brought about carelessly, the FTT considered that the alleged carelessness related to whether the expenses were deductible at all, and that Mainpay did fail to take reasonable care, which caused a loss of tax. The relevant determinations and decisions were therefore validly issued.

GROUNDS OF APPEAL

26. Mainpay has permission to appeal, from the FTT on certain grounds and from the Upper Tribunal on the remainder, on the grounds that the FTT made the following errors of law:

(1) **Ground 1**: in concluding that the 2013 Contract was not an overarching contract of employment.

(2) **Ground 2**: in concluding that successive assignments under the same overarching contract represented single employments.

(3) **Ground 3**: in its interpretation of "regularly attends".

(4) **Ground 4**: in concluding that taxpayers are not permitted to use reasonable estimates of expenditure to calculate deductions.

(5) **Ground 5**: in concluding that any loss of tax for 2010/11 and 2011/12 was brought about carelessly by Mainpay.

27. Matters of quantum are not being determined in this appeal. At FTT[11] the FTT stated as follows:

> If the subsistence expenses are in principle deductible, there may still be issues arising as to the amount of the expenses which can be deducted and what evidence is needed to substantiate the deduction. The parties agreed that, to the extent that these issues need to be decided, this should be the subject of further discussions between the parties but with the ability to return to the Tribunal if no agreement can be reached.

28. In their response to Mainpay's Notice of Appeal, HMRC sought permission to rely on an additional argument. This is that there was a further reason why the 2013 Contract lacked the necessary mutuality of obligation to be an overarching contract, namely that applying a purposive construction of the legislation the necessary mutuality was also lacking on the part of Mainpay. Mainpay objects to HMRC being allowed to run this additional argument. We address this below.

DEDUCTIBILITY OF SUBSISTENCE EXPENSES: RELEVANT LEGISLATION

29. Before the FTT and in this appeal, the parties proceeded on the basis that the legislation applying for the purposes of NICs[1] was materially similar to that applying for income tax, and so, as did the FTT, we focus in this decision on the income tax position.

30. The relevant income tax legislation is contained in Chapter 2 of Part 5 of ITEPA. References to sections below are to sections of ITEPA unless stated otherwise. In relation to an expense falling within one of the provisions of that chapter, the effect of sections 333 and 334 is that the expense is deductible from an individual's earnings. Where the expense is reimbursed by the employer, the reimbursement constitutes taxable earnings but the expense is deductible from those earnings, so that the reimbursement is effectively tax-free.

31. Subsistence expenses fall within the provisions relating to travel expenses which, so far as material, provide as follows:

> **338 Travel for necessary attendance**
>
> (1) A deduction from earnings is allowed for travel expenses if-
>
> (a) the employee is obliged to incur and pay them as holder of the employment, and
>
> (b) the expenses are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment.
>
> (2) subsection (1) does not apply to the expenses of ordinary commuting or travel between any two places that is for practical purposes substantially ordinary commuting.
>
> (3) In this section 'ordinary commuting' means travel between-
>
> (a) the employee's home and a permanent workplace, or
>
> (b) a place that is not a workplace and a permanent workplace.
>
> **339 Meaning of 'workplace' and 'permanent workplace'**
>
> (1) In this Part 'workplace', in relation to an employment, means a place at which the employee's attendance is necessary in the performance of the duties of the employment.
>
> (2) In this Part 'permanent workplace', in relation to an employment, means a place which-
>
> (a) the employee regularly attends in the performance of the duties of the employment, and
>
> (b) is not a temporary workplace.
>
> This is subject to subsections (4) and (8).

[1] The NICs legislation is contained in paragraph 3 of Part XIII in Schedule 3 to the Social Security (Contributions) Regulations 2001 (SI 2001/1004).

> (3) In subsection (2) 'temporary workplace', in relation to an employment, means a place which the employee attends in the performance of the duties of the employment—
>
> (a) for the purpose of performing a task of limited duration, or
>
> (b) for some other temporary purpose.
>
> This is subject to subsections (4) and (5).
>
> (4) A place which the employee regularly attends in the performance of the duties of the employment is treated as a permanent workplace and not a temporary workplace if–
>
> (a) it forms the base from which those duties are performed, or
>
> (b) the tasks to be carried out in the performance of those duties are allocated there.
>
> (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) lasting more than 24 months, or
>
> (ii) comprising all or almost all of the period for which the employee is likely to hold the employment, or
>
> (b) at a time when it is reasonable to assume that it will be in the course of such a period.

32. So, no deduction is available for "ordinary commuting", which is, broadly, travel to and from a permanent workplace. HMRC maintain that each assignment undertaken by a worker was a separate employment, so each workplace was a permanent workplace as a result of section 339(5)(a)(ii), the employee's attendance comprising all of the period for which they held the employment. Mainpay maintains that, because all of the assignments were carried out under the terms of a single employment, each workplace was a temporary workplace.

GROUND 1: THE 2013 CONTRACT WAS AN OVERARCHING CONTRACT OF EMPLOYMENT

What the FTT decided

33. In considering both the 2010 Contract and the 2013 Contract, the FTT began by setting out the well-known principles described by McKenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497 ("*RMC*") at page 515:

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

34. These three criteria are generally referred to as mutuality of obligation, control and the "third stage". In this case, the battleground was mutuality of obligation.

35. In relation to the 2013 Contract, the FTT explained, at FTT[42]:

> There is no dispute that the 2013 Contract is in fact a contract of employment and it is clearly intended to be one. It is headed "Employment Agreement" and clause 2.1 confirms that it is a contract of service. The key question in relation to the 2013 Contract is whether it is an overarching contract of

> employment (covering not only the assignments but also the gaps between assignments) or whether each assignment constitutes a separate employment.

36. The FTT considered what features were required in the gaps between employments for the 2013 Contract to be a continuing or overarching contract of employment. The parties disagreed on whether control must exist, but the FTT found it unnecessary to determine that question, as it decided that the necessary mutuality of obligation did not exist between assignments.

37. In terms of the obligation on Mainpay under the 2013 Contract, the FTT decided that there was an obligation on Mainpay to provide work, stating as follows, at FTT[126]-[128]:

> 126. Looking at the terms of the 2013 Contract, there is little doubt that Mainpay was required to provide work. Clause 3.1 provides that Mainpay is obliged to obtain suitable assignments for the worker. In Clause 5.2, Mainpay guarantees to offer the worker a minimum of 336 hours of work a year.
>
> 127. Based on our findings of fact, we do not accept that these contractual provisions reflect the true agreement between the parties. It is clear to us that, taking into account the circumstances known to the parties at the time of entering into the contract, it was the expectation and understanding of both parties that the workers would obtain assignments directly from the employment agencies and not from Mainpay. Whilst, as Mr Firth notes, the assignments are offered to the workers by Mainpay in the sense that Mainpay is the only entity with which the workers have a contractual relationship, we do not consider that this can be viewed as Mainpay obtaining assignments or offering work in any real sense.
>
> 128. However, we are conscious of the warning in *Arnold v Britton*[2] that, in interpreting a contract, the factual matrix cannot override the clear words of the contract. In this case, the words of the contract are clear. We therefore accept that there is a contractual obligation on Mainpay to obtain assignments and to provide a minimum number of hours of work.

38. HMRC seek to challenge that conclusion; we return to this below.

39. At FTT[130]-[136], the FTT then turned to mutuality of obligation from the perspective of the workers, after having discussed the respective submissions of the parties. It stated that the only relevant provision in the 2013 Contract was Clause 3.1, which requires the worker to "consider any suitable Assignments obtained by the Company". It rejected Mr Firth's "tentative" suggestion that an obligation to give good faith consideration to a suitable assignment should be implied into this provision. The FTT construed Clause 3.1 against the factual background known to the parties when they entered into the contract.

40. Mr Firth argued before the FTT that the position in this case was analogous to that in *ABC News Intercontinental Inc v Gizbert* [2006] All ER (D) 98 ("*Gizbert*"), in which mutuality was found to exist. The FTT rejected that argument at FTT[133]:

> …unlike in *Gizbert*, although Mainpay guaranteed to offer the workers a minimum number of hours of work, there was no corresponding obligation to pay the workers in respect of those hours even if no work were offered. In these circumstances it is difficult to see on what basis there could be any corresponding obligation to accept work if it was in fact offered.

41. The FTT's conclusion was set out at FTT[135]:

[2] [2015] UKSC 36.

> Our conclusion therefore is that the necessary mutuality of obligation does not exist. Although Mainpay does have a contractual obligation to obtain work and to provide a minimum number of hours of work each year, there is no obligation on the workers to accept any work which may be offered. They have an absolute and unfettered discretion whether or not to do so.

Mainpay's argument

42. Mr Firth argued that the FTT erred in law in concluding that (1) workers had an unfettered right to refuse any assignment, and (2) there was no obligation on Mainpay to pay for a minimum number of hours of work if that work was not offered by Mainpay. These errors, said Mr Firth, led to the FTT erroneously concluding that there was no mutuality of obligation for employment purposes during the gaps between assignments.

43. In relation to the obligation on a worker to consider a proposed assignment, Mr Firth argued that the FTT was wrong to conclude that this obligation was not one that had to be performed in good faith. He relied in this respect on *Brogden v Investec Bank plc* [2014] EWHC 2785 (Comm) ("*Brogden*") and *Braganza v BP Shipping Limited* [2015] UKSC 17 ("*Braganza*"). The principle that a contractual obligation must be exercised in good faith, said Mr Firth, applies to all contractual discretions unless there is clear language to the contrary.

44. In relation to the obligation on Mainpay, Mr Firth argued that there was in fact an obligation to pay for the stated minimum number of hours of work, because if the obligation to offer the stated minimum of hours was breached, then Mainpay would have to pay damages for that breach, and that does not need to be spelt out in the contract.

45. Mr Firth said that the implied requirement for employees to consider proposed assignments in good faith combined with the effective obligation on Mainpay to pay for a minimum number of hours of work meant that the position under the 2013 Contract was the same as that in *Gizbert*. The necessary mutuality of obligation therefore existed and the FTT was wrong to conclude otherwise.

Discussion

46. The Upper Tribunal has recently considered mutuality of obligation in the context of an overarching contract in *Exchequer Solutions Ltd v HMRC* [2024] UKUT 00025 (TCC) ("*Exchequer*"). We agree with the following principles summarised at [11] of that decision:

> As to the nature of the obligations required to constitute the necessary mutuality, the FTT noted the following principles…which we do not understand to be in dispute:
>
> (1) The mutuality of obligation is not simply that required for a contract to exist but must be mutuality which is such as "to locate the contract in the employment field" (Elias J in *James v Greenwich LBC* [2007] ICR 577 at [16] and *Carmichael v National Power Plc* [1999] 1 WLR 2042 per Lord Irvine of Lairg LC [2047A-B].
>
> (2) The mutuality must exist throughout the whole of the period of the contract including the gaps between assignments (Elias LJ in *Quashie v Stringfellows Restaurant Limited* [2013] IRLR 99 at [12]).
>
> (3) There is some scope for flexibility around the nature and extent of the obligation to work. An obligation to do the work if offered and an obligation to pay a retainer if no work was offered would be sufficient (*Clark v Oxfordshire Health Authority* [1998] IRLR 125 at [41]). The obligation on the employer could include "the provision of work, payment of work, retention upon the books, or the conferring of some other benefit which is non-pecuniary". 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" (Langstaff J in *Cotswold Developments* (at [41] and [55]).

47. Regardless of whether it "locates the contract in the employment field", there must be a mutuality of **obligation**. In *Cotswold Developments Construction Limited v Williams* [2006] IRLR 181, Langstaff J said this, at [54]-[55] (emphasis added to original):

> …Regard must be had to the nature of the obligations mutually entered into to determine whether a contract formed by the exchange of those obligations is one of employment, or should be categorised differently. **A contract under which there is no obligation to work could not be a contract of employment.** It may be a contract of a different type: it might, for instance, be a contract of licence (see Royal Hong Kong Golf Club v Cheng Yuen [1998] ICR 131(Privy Council) or even carriage, as was the contract in Ready Mixed. However, the phrase 'mutuality of obligations' is most often used when the question is whether there is such a contract as will qualify a party to it for employment rights or holiday pay. In this situation a succession of contracts of short duration under each of which the person providing services is either an employee or a worker will give rise to no rights (for instance to pay unfair dismissal or holiday pay) unless (i) the individual instances of work are treated as part of the operation of an overriding contract, or (ii) s.212 (continuity of employment) or, arguably, a continuing employment relationship sufficient to satisfy the principal of effectiveness applies (for holiday pay). **Such an overriding contract cannot exist separately from individual assignments as a contract of employment if there is no minimum obligation under it to work at least some of those assignments.**
>
> We are concerned that tribunals generally, and this tribunal in particular, may, however, have misunderstood something further which characterises the application of 'mutuality of obligation' in the sense of the wage/work bargain. That is that it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. **The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it. Stevenson LJ in *Nethermere* put it as '... an irreducible minimum of obligation ...'.**

48. We consider that the FTT properly directed itself as to the law relating to mutuality of obligation, both in relation to these and other applicable principles. The FTT also referred (at FTT[78], [79] and [81]) to the guidance regarding mutuality given recently by the Court of Appeal in *HMRC v Atholl House Productions Limited* [2022] EWCA Civ 501.[3] The FTT found that there was a sufficient obligation on Mainpay in the gaps between assignments, but not on the workers. In order to succeed under Ground 1, Mr Firth must establish that, although the FTT correctly directed itself as to the applicable law, it erred in law in reaching this conclusion by erroneously finding that there was no obligation on workers to accept work, and that there was no obligation on Mainpay to pay workers in respect of the minimum number of hours of work which Mainpay was obliged to offer them.

49. Mr Firth accepted that there was no explicit obligation on workers to accept work under the 2013 Contract. However, he argued, a sufficient obligation arose under the 2013 Contract by virtue of the requirement for workers to consider proposed assignments in good faith considered together with Mainpay's obligation to pay for the stated minimum number of hours

[3] Further guidance may be given by the Supreme Court when its decision is released in the appeal from *HMRC* v *Professional Game Match Officials Ltd* [EWCA] Civ 1370 ("*PGMOL*"), but the parties agreed that we should reach our decision on the basis of the law as at the date of this decision.

worked. Those features, he said, meant that the necessary mutuality existed on the part of workers, as shown in *Gizbert*.

50. *Gizbert* is an unreported decision of the Employment Appeal Tribunal (the "EAT") (UKEAT/0160/06/DM) concerning a war reporter who worked for the broadcaster ABC. One of the issues was whether during a particular period Mr Gizbert was continuously employed by ABC under an overarching contract of employment. The Employment Tribunal concluded that "there was no mutuality of obligation in respect of the assignments in that [Mr Gizbert] was not bound to accept assignments". The EAT disagreed, describing the facts as differing materially from earlier decisions. It stated (at [21]) that under the relevant contracts the position was as follows:

> …there was an obligation on the employer to provide 100 days worked, or if not, 100 days pay at the agreed rates. For his part the Claimant could decide whether or not to accept assignments offered to him but was to do so in good faith. Thus the Respondent did not have an unfettered right to offer no work or pay; the Claimant did not have an unfettered right to refuse assignments; he was obliged to act in good faith.

51. The EAT concluded on this basis that "as a pure matter of construction of those written contracts the necessary mutuality was present": [22].

52. It is not clear from the transcript of the EAT's decision whether or not Mr Gizbert's obligation to act in good faith in deciding whether to accept an assignment was explicitly stated in the relevant contracts. At [6] the decision records that under one of the contracts he was "[not] bound to accept any assignment offered", but the terms of [21] and the reference at [22] to the construction of the written contracts might suggest otherwise. The decision in *Gizbert* was considered by the Upper Tribunal in *Reed Employment plc v HMRC* [2014] UKUT 160 (TCC) ("*Reed*"). The Tribunal said this, at [319]-[320] (emphasis added to original):

> …In *Gizbert*, the employer did not have an unfettered right to offer no work or pay and the claimant did not have an unfettered right to refuse assignments. There was a commitment for the employer to offer 100 days work per annum and a commitment on the employee to consider assignments in good faith and the EAT considered that this did amount to sufficient mutuality to found a contract of employment.
>
> 320. In our judgment Reed fails the *Nethermere* test. There was no real obligation on Reed which was capable of founding mutuality. The Employed Temp who never accepts an assignment, or who only accepts the first one, would not stay on Reed's books for long, but he or she would never have had any obligation to do any work. In the period when the individual is not working, he or she has not only not accepted an assignment but he or she is not even under an obligation to consider in good faith an offer to work. Such an obligation is only appropriate if coupled with a commitment to offer a certain amount of work, as in *Gizbert*, **because if there is a commitment to offer 100 days' worth of work, or to pay for it if it is not done, there has to be a corresponding obligation on the employee who otherwise would receive the pay for nothing.**

53. We fully agree with the analysis of *Gizbert* in *Reed*. Whether or not the obligation on Mr Gizbert to act in good faith which was found to exist by the EAT was an explicit contractual obligation or was implied, it was critical to the EAT's conclusion on the facts in that appeal that ABC was found to have a contractual obligation to pay Mr Gizbert for 100 days work a year at $1,000 a day: [6] and [21] of *Gizbert*. As the Upper Tribunal put it in *Reed*, a contractual obligation to pay regardless of whether work is accepted or done implies an obligation on the

employee to act in good faith in considering a proposed assignment as otherwise the employee "would receive the pay for nothing".

54. We have no hesitation in rejecting Mr Firth's argument that Mainpay was in the same position as ABC in *Gizbert* simply because it would be potentially liable in damages if it failed to offer the specified minimum amount of work. There is a material difference between such a potential liability for breach (which would be measured in terms of damage by conventional principles including mitigation) and what is in commercial terms a quantified and guaranteed retainer. In *Exchequer* the Upper Tribunal correctly referred in this context to *Clark v Oxfordshire Health Authority* as an example of when "an obligation to do the work if offered and an obligation to pay a retainer if no work was offered would be sufficient [to create mutuality]". There was no obligation amounting or equivalent to a retainer under the 2013 Contract, meaning that the factual position is materially different to that in *Gizbert*. Thus, in our view, the implied obligation on a worker in considering a proposed assignment under the 2013 Contract was materially less onerous.

55. As we have explained, it is not clear whether the good faith obligation in *Gizbert* was express, or implied in light of the guaranteed payment obligation. In this appeal, we know with certainty that there was no express good faith obligation. In relation to Mr Firth's argument that such a term must in any event always be implied into any contractual power, we consider that proposition is much too broad, and in any event has not been shown to apply in relation to the 2013 Contract.

56. We note that the argument was not put by Mr Firth to the FTT in the same terms. The FTT stated at FTT[130]:

> On the face of it, there is no obligation on the worker to accept any assignment. There is not even an express obligation to give good faith consideration to a suitable assignment as there was in *Gizbert*. Although Mr Firth tentatively suggested that such an obligation should be implied, he did not pursue this with any force. In our view, there is no justification for implying such a term. It is not necessary to give the contract business efficacy.

57. The reference to business efficacy shows that the argument before the FTT was considered on the basis of conventional principles as to implied terms in a contract, as summarised in Lord Neuberger's judgment in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, at [18] to [21].

58. Since, however, it raises a pure point of law, and Ms Choudhury confirmed that she took no procedural objection on this basis, we have considered the argument.

59. Mr Firth relied in particular on *Brogden* and *Braganza*. We gratefully adopt the following summary of the *Braganza* principle provided recently by Falk LJ in *HMRC v HFFX LLP* [2024] EWCA Civ 813, at [35]-[39]:

> **The Braganza principle**
>
> 35…The essence of what is now commonly referred to as the *Braganza* principle is that a contractual discretion may be subject to an implied term that the discretion is exercised rationally.
>
> 36. The context in *Braganza* was a decision by an employer that an employee had committed suicide and was thereby excluded from death in service benefits, and the relevant issue was the approach that needed to be taken in reaching that decision. Baroness Hale, with whom Lord Kerr agreed, said this at [18]:

> "Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given."
>
> 37. Baroness Hale then drew an analogy with the court's approach in reviewing decisions of a public authority. As Lord Hodge picked up at [52] and [53], what was required was a rationality review, applying *Wednesbury* principles. Like Baroness Hale, Lord Hodge noted the significance of the employment context as well as the nature of the particular decision (at [54] onwards). He said at [57] that in the context of bonuses where there were no specific criteria, the courts had decided that the employee is entitled to a "bona fide and rational exercise by the employer of its discretion", with "little scope for intensive scrutiny of the decision-making process". In contrast, a fact-finding determination such as the one in issue in *Braganza* justified greater scrutiny. Lord Neuberger (and Lord Wilson) agreed with the other members of the court on this point at [103].

60. In *Brogden*, another case concerning a discretion regarding employee bonuses, which preceded the Supreme Court's decision in *Braganza*, Leggatt J referred (at [91]) to "the now well established principle that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith for the purpose for which it was conferred, and must not be exercised arbitrarily, capriciously or unreasonably (in the sense of irrationally)…". Leggatt J described the rationale for that principle in relation to a discretion given to an employer.

61. We do not accept Mr Firth's argument that, in effect, the *Braganza* principle applies to any contractual discretion unless excluded by specific wording. That is clear from Falk LJ's summary set out above. Whether or not a contractual power must be exercised in good faith or rationally is fact-specific: as Baroness Hale said in *Braganza* any implied restriction on the exercise of a contractual power "may vary according to the terms of the contract and the context in which the decision-making power is given." A good faith obligation is more likely to apply in relation to a discretion exercisable by an employer (because of what was described in *Braganza* as the "imbalance of power" between the parties).

62. In this case, particularly given the absence of any contractual obligation on Mainpay to pay a worker a minimum fee, we are clear that the obligation in Clause 3.1 of the 2013 Contract for a worker to "consider any suitable Assignments obtained by the Company" does not create the necessary mutuality of obligation on the part of a worker.

63. The FTT was therefore fully entitled to reach the decision which it did on this issue.

64. In light of our conclusion, we do not need to consider the relevance of control during the gaps in assignments, and it would be appropriate for that to be considered in a case where it makes a difference to the outcome.

65. Nor do we need to consider HMRC's additional argument challenging the FTT's decision that there was the necessary obligation on Mainpay in relation to mutuality of obligation.

66. The appeal under Ground 1 is dismissed.

GROUND 2: A SINGLE EMPLOYMENT CONTRACT

67. Mainpay argued in the alternative that even if the 2010 Contract and the 2013 Contract (the "Contracts") were not overarching contracts of employment, they nevertheless gave rise in each case to a single employment relationship. As a result, workplaces where workers carried out their assignments could not be "permanent workplaces" because they would not be workplaces for that single employment. This was the case even though the single employment was not continuous, because there were gaps between assignments.

The FTT's decision

68. The FTT considered this issue at FTT[138]-[150]. It set out Mr Firth's arguments, noting that Mr Firth accepted that there was no authority to support his proposition. It stated that Ms Choudhury described the submission as "surprising", and that in her submission "the contract between the agency and the worker is best understood as a framework agreement under the terms of which separate contracts of employment are entered into". The FTT referred to the brief dismissal of the argument by the Upper Tribunal in *Reed,* and considered that the Tribunal had reached the right conclusion. The FTT noted that ITEPA linked the concept of "employment" to particular types of contract, and that on a natural reading of the statutory provisions each assignment under the Contracts, governed by a separate contract of service, was a separate employment.

69. The FTT concluded as follows, at FTT[149]-[150]:

> 149. In our view, Ms Choudhury is right to analyse the contract between Mainpay and its workers as a framework agreement which provides the basis on which consecutive contracts of service arise each time an assignment is entered into. There is a separate contract in existence throughout the entire period but this contract is different to and separate from the contracts of employment which come into existence for each individual assignment. Looked at in this way, the "employment" does not arise under the framework agreement but instead comes into existence as a result of each separate contract of service, as envisaged by s 4 ITEPA.
>
> 150. We therefore reject Mr Firth's submission that the assignments collectively form part of a single employment simply because they are linked by a single agreement.

Relevant legislation

70. The term "employment" is defined in s 4 ITEPA as follows:

> **4 'Employment' for the purposes of the employment income Parts**
>
> (1) In the employment income Parts 'employment' includes in particular—
>
> (a) any employment under a contract of service,
>
> (b) any employment under a contract of apprenticeship, and
>
> (c) any employment in the service of the Crown.
>
> (2) In those Parts 'employed', 'employee' and 'employer' have corresponding meanings.

Mainpay's arguments

71. Mr Firth argued as follows:

(1) In determining whether a contract gives rise to employment, the same contract can be classified in different ways at different times. It was entirely natural to consider each

assignment within the arrangement as part of the same employment relationship, and artificial to consider each assignment as a distinct, separate employment.

(2) HMRC's approach would give rise to the anomaly of a need to issue a P45 at the end of each assignment.

(3) There would be no apparent legislative purpose in an analysis based on how the contract was classified between assignments.

(4) The "single employment" analysis is consistent with the approach in relation to agency contracts in sections 44 to 47 ITEPA. It is perverse that the position would be better in Mainpay's case if the contract had been an agency contract.

(5) Where there is an overarching contract of employment, each assignment is part of the same employment. Logically, this cannot be due to the position in the gaps between assignments and must be due to the classification as an employment contract of that overarching contract. The FTT's analysis of the Contracts as framework agreements, providing the basis for separate contracts of service, could be applied equally to an overarching contract of employment. Neither HMRC nor the FTT has properly explained why there should be a difference.

(6) The Upper Tribunal in *Reed* gave no reasons for rejecting this argument.

Discussion

72. While Mr Firth deserves credit for his ingenuity and tenacity in devising and pursuing this argument, to a large extent his submissions were made to and properly dealt with by the FTT.

73. As a preliminary observation, we agree with Ms Choudhury's statement in HMRC's skeleton argument, as follows:

> In essence, the Appellant is seeking to get round the difficulty of not having overarching contracts in place which would enable it to reimburse its workers' subsistence expenses tax-free by arguing for the same result in a different way. While a different legal relationship may be characterised as giving rise to an employment contract (e.g. if an overarching contract had been in place or the statutory deeming in relation to agency contracts), it does not follow that the relationship the Appellant argues for should be regarded as existing and having the same consequences.

74. Put another way, we do not accept that it is inherently surprising or illogical that an umbrella contract may be capable, depending on its terms, of being an overarching employment contract, or an agency contract, or neither. Nor is it surprising or illogical that the applicable categorisation could bring with it different tax and employment law consequences.

75. We consider that the FTT made no error of law in determining this issue, for the following reasons.

76. First, while the absence of any authority supporting Mr Firth's analysis does not mean it must be wrong, it would nevertheless be surprising if it was correct, or arguably correct, but had not been the subject of argument in any of the numerous decisions (up to and including *PGMOL*) relating to contracts argued by one party or another to be overarching contracts.

77. Second, as the FTT noted at FTT[146], it appears that the only authority which does deal with the argument, albeit in a somewhat elliptical fashion, is *Reed*, in which the argument was rejected. At [321]-[323] of *Reed*, the Upper Tribunal said this:

> 321. Reed's fallback case is that even if there was no continuing contract of employment, there was a continuing employment relationship which covered successive assignments.
>
> …
>
> 323. Reed's best point under this head is that section 4 of ITEPA defines "Employment" as being inclusive of (in particular) (a) any employment under a contract of service, (b) any employment under a contract of apprenticeship, and (c) any employment in the service of the Crown. However in our view the employment must be under a contract of some description to satisfy the definition as otherwise it would be so wide as to have no principled boundaries.

78. Third, the definition of "employment" in section 4 ITEPA, while not exclusive ("includes in particular") focusses on particular types of contract, in this case a "contract of service", and we agree with the FTT (at FTT[148]) that section 4 provides no support for the suggestion that a single employment may encompass more than one contract of service. In agreement with the FTT, we consider that the more natural reading of section 4 in relation to an umbrella contract such as the Contracts is that a contract of service could arise either under the contract itself, if it were an overarching contract of employment, or under separate contracts of service arising pursuant to the umbrella contract. It is not evident that the definition encompasses Mr Firth's suggestion of a contract which gives rise to a single employment but is not itself an overarching contract of service.

79. Fourth, we reject Mr Firth's assertion that the "natural" analysis of the Contracts is that they give rise to a single continuous employment, and the FTT's and HMRC's contrary analysis is "artificial". The FTT correctly stated, at FTT[144]:

> In the absence of any authorities supporting it, Ms Choudhury suggests that Mr Firth's submission is a surprising one. She refers to the decision of the Court of Appeal in *Quashie v Stringfellows Restaurant Limited* [2013] IRLR 99 where Elias LJ observed at [10] that where a worker works intermittently for an employer:
>
> > "There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed: see the decisions of the Court of Appeal in *McMeechan v Secretary of State for Employment* [1997] IRLR 353 and *Cornwall County Council v Prater* [2006] IRLR 362."

80. In relation to the Contracts, we consider that the FTT was entitled to reach the conclusion, for the reasons which it gave, that each contract was properly construed (as HMRC suggested) as a framework agreement which provided the basis on which consecutive contracts of service for individual assignments could arise.

81. Fifth, we do not agree with Mr Firth's suggestion that it is somehow anomalous or unfair that Mainpay is in a worse position than if the Contracts had fallen within the definition of an "agency contract". ITEPA provides a specific regime for certain agency contracts, and deems them to be employment contracts. That does not support Mr Firth's submission.

82. Sixth, the authorities make it clear that it is perfectly possible to have a succession of short employments, so the position in relation to the issue of a P45 in relation to individual assignments is simply a function of the distinction between a contract of service and a contract for services.

83. Finally, we do not accept Mr Firth's submission that it is not possible to discern any legislative purpose in distinguishing between the Contracts and an overarching employment contract. Nor do we accept his assertion that "the critical point which HMRC are still unable to explain…is why each assignment (which may be on different terms as to pay, duration, location) is part of the same employment if there happens to be mutuality in the gaps between employment, but not if there is not mutuality in the gaps"[4]. The short answer is that, as we have set out above, that is what the law says, and, in our view, a dividing line which takes into account the presence or absence of mutuality in the gaps between assignments when considering an umbrella contract is entirely logical; it is the status of the contract during those gaps which determines whether there is a single overarching contract of employment.

84. The FTT reached the right conclusion on this issue and the appeal under Ground 2 is dismissed.

GROUND 3: MEANING OF "PERMANENT WORKPLACE"

85. To recap, section 338 ITEPA prevents a deduction for expenses of "ordinary commuting", which is, broadly, travel to and from an employee's "permanent workplace". A permanent workplace is defined by section 339(2) as "a place which (a) the employee regularly attends in the performance of the duties of the employment, and (b) is not a temporary workplace". "Temporary workplace" is defined by section 339(3) and, by virtue of section 339(5)(a)(ii), a place is not regarded as a temporary workplace if the employee's attendance is in the course of a period of continuous work at that place comprising all or almost all of the period for which the employee is likely to hold the employment.

86. The FTT decided that there was no overarching contract of employment and that each assignment was a separate employment. We have rejected Mainpay's appeals against those decisions. As a consequence, each workplace at which a worker carries out an assignment is prevented from being a temporary workplace by s 339(5)(a)(ii) on the basis that the period of "the employment" is the period of the assignment and that the individual will attend the workplace for all or almost all of that period.

87. One might be forgiven for thinking that if each workplace was not a temporary workplace, it must necessarily be a permanent workplace, so triggering the disallowance of deductibility of travel expenses. Before the FTT, however, Mr Firth argued that this did not follow. His submission was helpfully summarised at FTT[152]-[153] as follows:

> 152. The question however is whether the workplaces are permanent workplaces. On the face of it, s 339(2) ITEPA lays down two requirements in order for a workplace to be a "permanent workplace". The first is that the employee must attend the workplace regularly in the performance of their duties. The second is that the workplace is not a temporary workplace.
>
> 153. Mr Firth submits that if all workplaces which are not temporary workplaces are permanent workplaces, there would be no need for the first condition. There must therefore, he says, be a third category workplace which is neither a permanent workplace nor a temporary workplace. He therefore suggests that, where there is a short assignment, the worker cannot be said to attend the workplace "regularly" as required by s 339(2)(a) ITEPA and so, although the workplace is a temporary workplace, it is nonetheless not a permanent workplace.

88. The FTT rejected this argument. It decided that (1) as a matter of statutory construction, a workplace which was prevented from being a temporary workplace was necessarily a permanent workplace, and (2) even if this was wrong, an employee who attended a workplace

[4] Mr Firth's Reply to HMRC's Skeleton at paragraph 11.

every day during which an employment subsisted must be taken to "regularly attend" that workplace.

89. By Ground 3 Mainpay appeals against the FTT's decision on both of these issues.

90. Before we discuss this ground of appeal, we record that we have some concern that it might be academic, or very largely academic, on the facts of this appeal. Even if one accepts the submission that there is a "third category" of workplace, Mr Firth's argument then relies on an employee not being in "regular attendance" for a "short assignment". However, as the FTT noted, at FTT[168], Mainpay's own evidence appeared to show that the average assignment lasted eight weeks, so there would be "few instances" where the workplace would not have been regularly attended. It is not part of the appeal process, including the time and resource of this Tribunal, to determine issues which are not relevant on the facts. In our view it would have been preferable if Mainpay's application for permission to appeal on this ground had been considered against evidence of specific assignments (and corresponding expense reimbursements) said by Mainpay to be so short as not to have resulted in regular attendance.

91. Mainpay appeals against the FTT's decision that, as a matter of statutory construction, there was no third category of workplace, so that a workplace which was not a temporary workplace must be a permanent workplace. However, if we were to agree with the FTT's interpretation of the phrase "regularly attends", that would be sufficient to dispose of this ground of appeal. Therefore, we begin by considering that question.

92. We proceed, for this purpose only, on the assumption that in order for a workplace to be a "permanent workplace", section 339(2) requires that, in addition to not being a temporary workplace, the workplace must be one which "**the employee regularly attends in the performance of the duties of the employment**".

The FTT's decision

93. Before the FTT, Mr Firth referred to the alternative meanings of "regularly" in relation to statutory obligations regarding school attendance by a child suggested by the Supreme Court in *Isle of Wight Council v Platt* [2017] UKSC 28. He suggested that the relevant alternative meaning in section 339(2) must be attendance "sufficiently often", and an employee could not be said to attend a workplace sufficiently often if "only there for a day or for a week". He suggested that attendance for a month might be "sufficiently often". Mr Firth acknowledged that this would lead to the odd result that an employee who expected to attend a workplace for several months would nevertheless be able to claim travel and subsistence expenses for the first month of the assignment.

94. The FTT considered that such an anomaly demonstrated why Mr Firth's construction could not be correct, and also referred to the problem that his construction "requires an arbitrary line to be drawn in order to determine the point at which attendance qualifies as regular". The FTT stated as follows, at FTT[165]:

> If the requirement for regular attendance is to be given some meaning it must, in our view, be interpreted in the overall context of the engagement in question. We consider that this must inevitably include the length of the assignment. If this is right, on any basis attendance must, in our view, qualify as regular if an individual attends the same workplace for the duration of the employment however long or short that period is.

95. The FTT rejected Mr Firth's argument that this could not be correct for an assignment of one day because attendance on only one day could not be "regular".

Mainpay's argument

96. On the meaning of "regularly attends", Mr Firth argued as follows:

(1) "Regularly" means sufficiently often, which requires some level of frequency.

(2) The FTT appeared to think that regular attendance meant "attendance when required to do so", but how could that interpretation apply to a worker who (say) could choose to work from home on an assignment?

(3) The FTT's interpretation renders the wording of section 339(2)(a) irrelevant and otiose.

(4) It is misconceived to suggest that Mainpay's interpretation leads to an arbitrary distinction when that is clearly what the words of the legislation require.

(5) HMRC offer no meaning for "regularly", and Mainpay's suggested meaning is plainly the intended meaning.

Discussion

97. We do not agree with Mr Firth's arguments, and we are clear that the FTT reached the right decision on the meaning of "regularly attends".

98. The starting point is that, as with any statutory language, section 339(2) must be construed purposively, by reference to the words chosen by Parliament, and in context. Mr Firth's submissions focus on the words "regularly attends" in isolation, but the wording which requires construction is "regularly attends in the performance of the duties of the employment". It is critical to consider the wording in its entirety, and in context, because the words "regularly attends" looked at in isolation inevitably beg the question: regularly attends for what purpose?

99. In section 339(2), we are told by the drafter that the regular attendance must be "in the performance of the duties of the employment". Here, in light of our dismissal of Grounds 1 and 2, "the employment" is that arising under the separate contract of service for a particular assignment. That assignment might last hours, days, weeks or months. Therefore, it follows that the FTT was correct to construe the language as referring to attendance at a workplace "every day during which the employment subsists", even if that is only for one day. We accept that for a one-day assignment, "regular" is not the most obvious choice of word, but in that context it simply means regular attendance during that day in the performance of the employment duties.

100. Mr Firth's interpretation seeks to measure and define "regularly attends" by reference either to the length of time of an assignment and/or the number of days of attendance. There is no warrant in the language (construed in its entirety) for such an approach. The measurement and definition of regular attendance in section 339(2) is by reference to the duties of the employment in question. It is entirely sensible that what it requires therefore varies with the length of that employment and the attendance necessary and is sufficiently flexible to accommodate any assignment giving rise to a contract of service.

101. The FTT's interpretation, which we consider to be entirely consistent with the language in section 339(2) looked at in its entirety, avoids the anomalies and uncertainties generated by Mr Firth's interpretation.

102. For our part, we do not find the discussion in *Isle of Wight Council v Platt* to offer any great assistance in interpreting section 339(2), since it concerns the phrase "regular attendance" in the context of completely different legislation. In any event, if one accepts Mr Firth's suggestion that that discussion supports the interpretation of the wording in this case as meaning "sufficiently often", that is consistent with the interpretation of the FTT: attendance is regular if it is attendance which occurs sufficiently often to perform the duties of the particular employment.

103. Mr Firth's assertion that the FTT considered "regularly attends" to mean "attendance when required to do so" is not made out. The FTT refers to that formulation of "regularly attends" only at FTT[166] and only for the purpose of addressing an argument of Mr Firth regarding attendance on an assignment of a single day.

104. Our conclusion as to the meaning of "regularly attends" means that the appeal under Ground 3 fails. It is not necessary for us to determine the question of whether section 339 contemplates that a third category of workplace may exist which is neither temporary nor permanent as defined, and we express no view on that question.

105. The appeal under Ground 3 is dismissed.

GROUND 4: USE OF BENCHMARK SCALE RATES

106. In 2009, HMRC introduced a system of benchmark scale rates which employers could use to make subsistence payments to employees who had incurred such expenses. Subject to various conditions, the rates could be reimbursed without a tax liability. It is necessary under that system for employers to apply for and obtain from HMRC a dispensation.

107. Mainpay did not apply for or obtain such a dispensation, and the determinations and decision notices which HMRC issued to Mainpay were issued for the additional reason that scale rates could not be utilised without a statutory dispensation. Before the FTT, Mainpay argued that such a dispensation was unnecessary and it was nevertheless open to Mainpay to reimburse expenses to workers using the benchmark scale rates as long as the workers had in fact incurred some expense. The FTT rejected that argument and by Ground 4 Mainpay appeals against that decision.

108. Given the conclusions which we have reached on Grounds 1 to 3, it is not necessary for us to address this issue, but as it was fully argued and we can set out our conclusions fairly briefly, we will do so.

109. We were asked by the parties to determine this issue as matter of principle, such that if we were to agree with Mainpay's submission, our decision would relate only to reimbursements by Mainpay to workers who did in fact incur some subsistence expenses. We have proceeded on that basis, but we note that the FTT found at FTT[193] that even if they had accepted Mainpay's argument as to the position in principle, "we do not consider that the arrangements operated by Mainpay were a genuine attempt to reimburse subsistence expenses actually incurred". We return to this finding below.

Relevant legislation

110. The normal requirement in obtaining a deduction for an expense that there is evidence that the expense was incurred was modified for the years relevant in this appeal[5], in cases where a dispensation agreement is reached with HMRC under section 65 ITEPA. So far as relevant this stated as follows:

> **65 Dispensations relating to benefits within provisions not applicable to lower-paid employment**
>
> (1) This section applies for the purposes of the listed provisions where a person ('P') supplies an officer of Revenue and Customs with a statement of the cases and circumstances in which—
>
> (a) payments of a particular character are made to or for any employees, or

[5] The dispensation regime was abolished for the tax year 2016-17 and subsequently by section 12 Finance Act 2015.

(b) benefits or facilities of a particular kind are provided for any employees,

whether they are employees of P or some other person.

(2) The 'listed provisions' are the provisions listed in s 216(4) (provisions of the benefits code which do not apply to lower-paid employments).

(3) If an officer of Revenue and Customs is satisfied that no additional tax is payable by virtue of the listed provisions by reference to the payments, benefits or facilities mentioned in the statement, the officer must give P a dispensation under this section.

(4) A 'dispensation' is a notice stating that an officer of Revenue and Customs agrees that no additional tax is payable by virtue of the listed provisions by reference to the payments, benefits or facilities mentioned in the statement supplied by P.

(5) If a dispensation is given under this section, nothing in the listed provisions applies to the payments, or the provision of the benefits or facilities, covered by the dispensation or otherwise has the effect of imposing any additional liability to tax in respect of them.

(6) If in their opinion there is reason to do so, an officer of Revenue and Customs may revoke a dispensation by giving a further notice to P.

(7) That notice may revoke the dispensation from—

(a) the date when the dispensation was given, or

(b) a later date specified in the notice.

(8) If the notice revokes the dispensation from the date when the dispensation was given—

(a) any liability to tax that would have arisen if the dispensation had never been given is to be treated as having arisen, and

(b) P and the employees in question must make all the returns which they would have had to make if the dispensation had never been given.

(9) If the notice revokes the dispensation from a later date—

(a) any liability to tax that would have arisen if the dispensation had ceased to have effect on that date is to be treated as having arisen, and

(b) P and the employees in question must make all the returns which they would have had to make if the dispensation had ceased to have effect on that date.

The FTT's decision

111. Mr Firth argued that the ability of an employer to set up an arrangement which is intended to provide a genuine reimbursement of expenses which are then deductible was supported by section 65 itself and by the decision of the Court of Appeal in *Cheshire Employer and Skills Development Limited v HMRC* [2012] EWCA Civ 1429 ("*Cheshire*"). The FTT did not accept those arguments. It concluded as follows, at FTT[183]-[189]:

> 183. In our view, s 65 ITEPA is essentially an administrative provision. Its purpose is to reduce work both for the employer and HMRC by removing the need for certain expense payments to be notified to HMRC. However, it serves an important function. Expenses can only be reimbursed tax free without notifying HMRC if the employer has applied for a dispensation. This allows HMRC to confirm that adequate procedures are in place on the part of the

employer to ensure that the relevant employees have actually incurred expenses and that any other relevant conditions (such as the workplace not being a permanent workplace) are complied with.

184. However, attractively as Mr Firth made his submissions, we cannot accept that a deduction is automatically available in respect of expenses reimbursed by an employer where the employer has chosen to do so based on set rates rather than actual expenses incurred in circumstances where no dispensation has been obtained.

185. As Mr Firth accepts, *Cheshire* was decided in a very different context, being the question as to whether a genuine reimbursement of business expenses is earnings for NIC purposes. This is not a matter of statutory interpretation but is a matter which was decided based on the authorities. We have to interpret the relevant provisions of ITEPA. Looking at these provisions (and in particular ss 333, 334, 336 and 338 ITEPA) it is quite clear that a deduction is only available for expenses which have actually been incurred. There is no suggestion that an employer or an employee can claim a deduction for estimated expenses. The same principles do not therefore apply.

186. We accept that s 65 ITEPA only allows (and indeed requires) HMRC to grant a dispensation where it is satisfied that no tax liability arises. However, HMRC under its general care and management powers have a certain degree of latitude in applying the relevant tax provisions. They are no doubt entitled to take a pragmatic approach to the reimbursement of expenses if it were to be impractical or administratively burdensome to insist on proof of each individual item of expenditure.

187. However, this is a matter for HMRC and they are entitled to impose conditions in allowing the reimbursement of expenses on such a basis. One of the conditions of course is that they are satisfied that the benchmark scale rates are reasonable and that the employer has a proper system for monitoring whether all of the qualifying conditions for the deduction of the expenses which are being reimbursed have been met.

188. The discretion given to HMRC is apparent from the provisions of s 65 ITEPA which allow HMRC to revoke a dispensation if "in their opinion there is reason to do so". A dispensation may be revoked with retrospective effect. If so, any liability to tax which would have arisen if the dispensation had never been given becomes payable (s 65(8) ITEPA). In these circumstances, both the employer and the employees are required to make all the returns which they would have had to make if the dispensation had never been given. In our view, this would include providing evidence (if requested) of the actual expenses which had been incurred. It is only these expenses which would then be deductible in accordance with the relevant provisions of s 338 ITEPA.

189. Our conclusion therefore is that there is no automatic entitlement to deduct the amounts reimbursed by Mainpay from the earnings of its employees in the absence of a dispensation. The only amounts which could be deducted were the actual amounts of the expenses actually incurred.

Mainpay's argument

112. In this appeal, Mr Firth argued as follows:

(1) As a matter of law, it is possible for reasonable estimates of expenditure to be reimbursed, without any statutory dispensation. A reimbursement is deductible under section 338 ITEPA if it is possible to prove by evidence on the balance of probabilities that a reasonable estimate of the amount has been made. HMRC's benchmark rates

demonstrate what a reasonable estimate would be, so if they are followed, the absence of a dispensation is irrelevant.

(2) The statutory basis permitting HMRC to grant dispensations under section 65 ITEPA cannot authorise what would otherwise be impermissible deductions. It follows that the position described at (1) must be the basis for HMRC issuing the scale rates and granting dispensations.

Discussion

113. In short, we consider that the FTT reached the right decision on this issue, for the reasons which it gave. We respectfully agree with the FTT's reasoning and conclusions at FTT[183]-[189] set out above, and the FTT made no error of law in reaching those conclusions.

114. Mr Firth's submissions in this appeal reformulated and, to a significant degree, simply repeated the arguments put to the FTT, rather than identifying what are said to be errors of law in the FTT's decision. The relevant passages of Mr Firth's skeleton argument do not discuss the FTT's decision or reasoning at all.

115. Indeed, it is not clear that the two arguments formulated by Mr Firth would serve to identify any error of law in the FTT's decision on this issue. Mr Firth's first proposition is that it is possible to make a reasonable estimate of expenditure and still claim a deduction for it. That may be so, but the specific argument addressed and decided by the FTT was that "it is open to an employer to come up with an arrangement which is intended to provide a genuine reimbursement of expenses to an employee and that, as long as the arrangement does not contain any profit element, the amount is not taxable (or, more accurately, is able to be deducted) irrespective of whether it precisely equals the expenses actually incurred": FTT[175]. That is a much narrower question than the broad statement of principle formulated before us. The second proposition is that section 65 only permits HMRC to confirm that a payment which is not taxable is, in fact, not taxable. However, that proposition was accepted by the FTT in the course of its reasoning, at FTT[186].

116. Further, although we have not taken this into account in reaching our decision, while it may be acceptable to determine an issue as a matter of principle, with the consequences for quantum then agreed between the parties or remitted to the FTT, in this case there is no challenge to the FTT's finding of fact that that "the arrangements operated by Mainpay were [not] a genuine attempt to reimburse subsistence expenses actually incurred". It is not apparent what purpose would be served by a decision in principle on Mr Firth's two propositions in this appeal in light of this finding.

117. The appeal under Ground 4 is dismissed.

GROUND 5: LOSS OF TAX BROUGHT ABOUT CARELESSLY

118. The assessments and notices issued by HMRC to Mainpay for the tax years ended 5 April 2011 and 5 April 2012 were issued more than 4 years after the end of the relevant tax year. In those circumstances, they would have been out of time unless the extended 6-year time limit in section 36 TMA applied. Section 36(1) TMA provides as follows:

> (1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

119. Section 118(5) TMA states as follows:

> (5) For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation.

120. This issue related only to the 2010 Contract, since that was the contract which was relevant to the assessments for the tax years ended 5 April 2011 and 5 April 2012.

What the FTT decided

121. Before the FTT, Mr Firth argued that there was no failure to take reasonable care on the part of Mainpay in view of the advice which it took. He also criticised HMRC's statement of case as being vague on this issue and making no pleading at all in relation to causation (ie how HMRC alleged any carelessness by Mainpay "brought about" the loss of tax): FTT[198].

122. Having considered the position and the advice taken by Mainpay, the FTT rejected the complaint as to pleading and concluded that Mainpay did fail to take reasonable care and that this resulted in a loss of tax: FTT[207]. As a result, the six-year time limit in section 36 TMA for making the assessments and determinations applied, and they were as a result validly issued.

Mainpay's arguments

123. In this appeal, Mr Firth made the following arguments in relation to Ground 5:

(1) HMRC's pleading was totally inadequate for a case of carelessness and should not have been permitted to be relied on.

(2) Mainpay had engaged a law firm, Mishcon, and a contractor, Mr Hugo, to advise in relation to the scheme, and the FTT erred in law in concluding that Mainpay and/or Mr Hugo had been careless.

(3) The FTT erred in concluding that Mainpay's carelessness brought about the loss of tax.

(4) The FTT failed to deal with Mainpay's submission that Mr Hugo was an independent contractor and it was reasonable for Mainpay to rely on his advice.

(1) HMRC's pleading of carelessness

124. Before the FTT, this complaint was dealt with at FTT[198]-[200]:

> 198. Mr Firth was somewhat critical of the way this issue was approached in HMRC's statement of case. Mr Firth described the pleadings as vague and suggested that there was no pleading at all in relation to causation.
>
> 199. We accept that there is some force in this. The statement of case suggests that Mainpay failed to take reasonable care to ensure that the contract was an overarching contract of employment, that it should have taken steps to ensure that the contract was a reflection of what the workers would be doing and to confirm the correct treatment for travel and subsistence expenses with qualified personnel. Ms Choudhury's skeleton argument does not add much to this other than making some comments as to why HMRC consider that, in light of the advice received from Mishcon de Reya, Mainpay should have sought further clarification of the position.
>
> 200. It is however clear from HMRC's statement of case and from Ms Choudhury's skeleton argument that the carelessness alleged relates to the question as to whether or not subsistence expenses were deductible at all (on the basis that the contract was not an overarching contract of employment) and not the subsidiary question as to whether Mainpay was entitled to reimburse expenses based on benchmark scale rates without a dispensation…

125. Mr Firth argued in this appeal that HMRC's pleading was "totally inadequate". He said that a taxpayer faced with an allegation of carelessness is entitled to know what exactly it is alleged that it should have done and why it is said that it failed to do so, because only in those circumstances can a taxpayer prepare to meet the case against it. That is the whole purpose of a statement of case. He described HMRC's pleading as "so vague as to be meaningless". Further, it contains no explanation of the causation issue ie how the careless behaviour brought about the loss of tax. He submitted that, in any event, the FTT's conclusion on the pleading issue was wholly unreasonable.

126. Ms Choudhury pointed out that the question of whether HMRC ought to have been permitted to rely on their pleading in relation to carelessness was essentially a case management decision, and, as such, this Tribunal should be very slow to interfere with it. She also noted that at no stage prior to the hearing had Mainpay sought further particulars on this issue. As to the pleading regarding causation, Ms Choudhury said the FTT was correct to hold that it was implicit that it was the failure to take reasonable care to ensure that the 2010 Contract was an overarching contract of employment which caused the loss of tax. That was also clear, she argued, from the wording of section 118(5) TMA.

127. Consistently with the general principle that a party must be able to understand the case against it, Rule 25(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides as follows:

> (2) A statement of case must—
>
> (a) in an appeal, state the legislative provision under which the decision under appeal was made; and
>
> (b) set out the respondent's position in relation to the case.

128. Sub-paragraph (b) of Rule 25(2) means that the statement of case should set out the case which the appellant is expected to meet. In *HMRC v Ritchie* [2019] UKUT 71 (TCC), the Upper Tribunal said that it should set out HMRC's arguments "clearly and unequivocally with sufficient detail"[6]. In relation to the validity of an assessment under section 36 TMA, HMRC bear the burden of proof: *Burgess v HMRC* [2015] UKUT 578 (TCC) ("*Burgess*"). The practical effect of this is that HMRC should address the relevant validity issues in their statement of case regardless of whether the appellant has expressly challenged them.

129. Where, as in this case, the burden was on HMRC to establish that Mainpay had brought about the loss of tax by a failure to take reasonable care, the evaluation of whether or not HMRC should be permitted to rely on their pleadings in relation to carelessness involved an exercise of judicial discretion by the FTT. This Tribunal should be slow to interfere with such a decision unless the FTT applied the wrong principles, took account of the wrong factors, or otherwise reached a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion available to the FTT.

130. HMRC's consolidated Statement of Case relevantly stated as follows:

> **Time limits**
>
> 90. Regulation 80 Determinations for 2010/11 and 2011/12 have been issued more than four years after the end of the tax year, however, within 6 years of the end of the tax year. Therefore, consideration has to be given whether the behaviour was careless.
>
> 91. The law defines 'careless' as a failure to take reasonable care. It is simply a question of examining what the person did or failed to do and asking whether

[6] *Ritchie* at [42].

> a prudent and reasonable person would have done that or failed to do that in those circumstances. The Respondents contend that the Appellant should have taken reasonable case to ensure that the contract was an overarching contract of employment. The Appellant should have taken steps to ensure that the contact was a reflection of what the workers would be doing and confirmed the correct treatment for travel and subsistence with qualified personnel.

131. Mr Firth challenged as contradictory in this passage the reference to the contract reflecting what the workers would be doing. We think that this can readily be understood in context by the earlier statement of HMRC's position at paragraphs 85 and 86 of the Statement of Case:

> Overarching contracts
>
> 85. In relation to whether the contract was an overarching contract (as submitted by the Appellant) the Respondents considered the written contract and also interviewed a sample of workers to establish how the contract operated in practice. The Respondents contend that in order for to be an overarching contract certain conditions need to be fulfilled. One of conditions to be met first is mutuality of obligation during the gaps between assignments, if that has been satisfied other consideration needs to be given to the degree of control and other provisions in the contract. The Respondents contend that the obligations must be continuous in order to be an overarching contract rather than series of separate employment contracts. If obligations cease in the gaps between assignments there can be no overarching contract.
>
> 86. The Respondents contend that, for the reasons set out below, there is insufficient mutuality of obligation and therefore the contract is not an overarching contract.
>
> a. Clause 2.1 of the contract specifies that no contract shall exists between the Appellant and the worker between assignments,
>
> b. Most of the workers found work themselves through the places where they work,
>
> c. Many workers did the odd shift at whilst working full time, for example, at a hospital,
>
> d. Often the work undertaken was secondary employment as many were already employed on a full time basis,
>
> e. Offers of work came via the agencies but was often prompted by the workers themselves,
>
> f. Workers would work when it suited them and often turned down work.

132. In relation to the question of whether HMRC's pleading identified the relevant carelessness sufficiently for Mainpay to know what case it had to answer, we consider that the FTT reached a decision which was within the range of reasonable decisions available to it. As to the applicable test, the second sentence of paragraph 91 of the Statement of Case summarised in general terms what HMRC would seek to establish, namely looking at what Mainpay did or failed to do and asking whether a prudent and reasonable person would have done that or failed to do that in those circumstances. If nothing more had been said, then the pleading would in our view have been deficient. However, paragraph 91 went on to identify ways in which or reasons why HMRC asserted that Mainpay had failed to take reasonable care not to bring about the loss of tax. It stated that Mainpay (1) had failed to take reasonable care to ensure that the 2010 Contract was an overarching contract of employment, (2) had failed to take steps to ensure that the contact was a reflection of what the workers would be doing, and (3) had failed to confirm the tax treatment of the reimbursements with qualified personnel.

133. Read in the context of the Statement of Case in its entirety, we consider that this did justify the FTT's decision, set out above, to permit HMRC to rely on its pleading. Mr Firth was critical of the factors identified by HMRC in its Statement of Case and argued that some issues were directly contradictory to others, but that is beside the point. The question for the FTT on this point was whether Mainpay was sufficiently aware of the case which it had to answer, not whether that case was strong or weak.

134. We agree with the FTT that there was some force in Mr Firth's criticisms before the FTT. However, we also see some force in Ms Choudhury's observation that at any stage prior to the hearing Mainpay could have made an application to the FTT for HMRC to be directed to provide further and better particulars, but did not do so.

135. Mr Firth said that the FTT did not in fact limit the carelessness issue to the overarching contract question, because at FTT[209] it criticised Mr Hugo in relation to information regarding particular expenses and their reimbursement. However, that paragraph in its entirety is responding to Mr Firth's argument that one of the aspects demonstrating reasonable care taken by Mainpay was the advice taken from Mr Hugo. In context, it is part of the FTT's discussion of the overarching contract issue. At FTT[206], to take one example, the FTT dismissed an argument raised by HMRC in relation to the use of scale rates as irrelevant because it was not part of the case put forward by HMRC in relation to carelessness.

136. Therefore, we do not accept Mr Firth's argument on the pleadings issue. The complaint that HMRC did not particularise the issue of causation is best addressed in the context of the argument that the FTT erred in finding that Mainpay's carelessness brought about the loss of tax. Therefore, we deal with this under issue (3) below.

(2) Failure to take reasonable care

137. At FTT[196]-[197], the FTT stated as follows:

> 196. Mr Firth submits that there was no failure to take reasonable care on the part of Mainpay as it took advice from Mishcon de Reya in relation to the 2010 Contract, having explained the context and the importance of obtaining a deduction for the relevant expenses.
>
> 197. In this context, Mr Firth referred to the decision of the Upper Tribunal in *Bella Figura Limited v HMRC* [2020] UKUT 120 (TCC). The Upper Tribunal observed at [61] that even though advice may not deal with a specific point, it may contain implicit reassurance in relation to that point…

138. Mainpay had also taken advice from Mr Hugo, who the FTT described as "a consultant who advised Mainpay in respect of accounting and finance, including the operation of PAYE": FTT[20]. The FTT summarised Mr Hugo's discussions with Mishcon beginning in November 2007, noting that the individuals he was dealing with were members of Mishcon's employment group. The FTT set out the parties' arguments as to whether there had been a failure to take reasonable care on the part of Mainpay. Its conclusion, at FTT[207], was that "Mainpay did fail to take reasonable care and that, as a result of this, there was a loss of tax".

139. The FTT explained its conclusions in relation to the advice taken by Mainpay at FTT[208]-[211]:

> 208. We accept that Mainpay did take advice from Mishcon in relation to the appropriate form of contract between Mainpay and its workers. We also accept that, in instructing Mishcon, Mainpay referred to the reimbursement of expenses which would either be allowable or deductible. However, there was no detailed explanation as to what these expenses were and the basis on which they might be deductible or allowable for tax purposes. Mr Hugo knew that he was dealing with employment lawyers and not tax advisers. Mr Hugo

himself was an accountant with significant experience in the operation of umbrella companies. He was therefore well aware of the complexities of ensuring that expenses could be reimbursed on a tax free basis.

209. With this background in mind, we do not accept that it was reasonable for Mr Hugo (and therefore Mainpay) to rely on the vague assurance from Mishcon that the form of the contract did not affect Mainpay's ability to reimburse the workers for "deductible business expenditure". This is very far from either an explicit or implicit reassurance that the reimbursement of subsistence expenses to the relevant individuals would, based on a particular contract produced by Mishcon, be deductible for tax purposes. Mr Hugo cannot realistically have expected Mishcon to give such a reassurance as they clearly did not have the information relating to the particular expenses and the circumstances in which they would be reimbursed in order for them to provide definitive advice in relation to this.

210. As we have already mentioned, it is in any event apparent that Mainpay was taking separate tax advice in relation to the reimbursement of expenses from a Dr M. J. O'Brien of UK and International Tax Consultants. Mr Hugo's own evidence in cross-examination was that umbrella companies were a relatively new sector which was constantly evolving as learning developed and that Mainpay was, throughout the period, taking tax advice on an ongoing basis. This is no doubt the context for the advice sought by Mainpay from Dr O'Brien in December 2008 in relation to the appropriate rates which could be used for the reimbursement of subsistence expenses.

211. The fact that Mainpay had a separate tax adviser who was being consulted on an ongoing basis but who does not appear to have been consulted about the new form of contract or the ability to deduct subsistence expenses based on that contract in our view confirms that reliance on brief statements from the employment team at Mishcon who did not have the full background facts demonstrated a failure on the part of Mainpay to take reasonable care.

140. Stepping back from the detail, Mainpay's primary argument was that it had taken reasonable care because it had taken appropriate advice. What the FTT essentially did was to test that proposition, by scrutinising what advice was given, by whom, with what qualifications, and on the basis of what information, assumptions and draft documentation. Having carried out that exercise, the FTT effectively concluded that the advice was deficient, because none of Mishcon, Mr Hugo or Dr O'Brien had been asked the right questions, with sufficient clarity and provided with the necessary draft documents, to advise Mainpay whether the 2010 Contract and the proposals were effective to create a single employment, which was the essence of the arrangement.

141. Mr Firth challenged virtually every aspect of the FTT's reasoning and conclusions on this issue, as set out above. However, we do not agree that the FTT made any error of law in reaching its decision. The extent to which taking advice provides a reasonable care defence depends on the facts, in particular whether the relevant questions were the subject of advice by someone with appropriate expertise who had knowledge of all the relevant facts, including the relevant documentation.

142. What are described as "errors of law" by Mr Firth in relation to the FTT's reasoning are on examination not errors of law but disagreement with that reasoning or the weight afforded by the FTT to different factors. In particular, Mr Firth raised the following objections:

(1) "The FTT's approach to advice received from a major law firm was wholly unrealistic, unreasonable and inconsistent with the approach in *Bella Figura* at [61]-[62]". Mr Hugo was entitled to rely on the assurances given by Mishcon. In particular, if

Mishcon's lawyers did not have the necessary tax expertise, "the burden would be on them to either tell the client that in clear terms or obtain any additional advice needed".

We reject these assertions. The FTT dealt with these issues at FTT[208]-[209], and reached a conclusion which was clearly reasonably open to it. Although it is not the relevant test, we would have reached the same conclusion.

(2) The FTT "entirely fails to explain what the categorical assurance from Mishcon should have been interpreted as meaning", and the failure not to identify an alternative meaning was a "fundamental gap".

We disagree. We do not consider that the advice from Mishcon (set out in the quote at [139] above) can be described as giving any "categorical assurance". We agree with the FTT that in context it was at best a somewhat vague assurance. Beyond that, we do not consider it was necessary for the FTT to speculate on alternative meanings.

(3) The FTT does not actually identify what it says Mr Hugo (or Mainpay) should have done differently.

It is obvious from the FTT's decision read as a whole that the failure to take reasonable care essentially arose from a failure by Mainpay to obtain advice from a qualified tax adviser as to whether the 2010 Contract reviewed by that adviser was an overarching contract of employment. That was HMRC's case, and the FTT accepted it.

(4) The FTT "relied on a finding that Mr Hugo had not consulted a separate adviser (Dr O'Brien) about the drafting of the contract" and that was "wholly impermissible" as it was not pleaded or argued.

This presumably refers to FTT[211]. The task of the FTT was to evaluate the nature and quality of the advice said by Mainpay to demonstrate that it had taken reasonable care. In carrying out that task, the FTT was entitled to refer to the facts which it found. Ironically, the FTT was here indulging in speculation as to what Mainpay/Mr Hugo could have done differently, said in the argument summarised at (3) to be a necessary task for the FTT.

(5) The standard of reasonableness does not require a taxpayer to instruct one adviser to review the advice of another adviser.

We agree, but the FTT did not say it was.

143. In conclusion, we consider that the FTT was entitled to find that Mainpay had failed to take reasonable care.

(3) Causation

144. As we have mentioned, Mr Firth argued that HMRC had failed adequately to plead its position on the causation issue. He also argued under Ground 5 that the FTT had erred in law in finding that Mainpay's failure to take reasonable care had brought about the loss of tax. Both of these arguments relate to what is necessary for HMRC to meet the burden of proof that the relevant failure to take reasonable care has "brought about" the loss of tax.

145. The FTT set out its conclusions in relation to the causation issue at FTT[212]-[213]:

> 212. Although no specific pleading is made by HMRC in relation to the question as to whether the failure to take reasonable care caused the loss of tax, it is in our view implicit in the suggestion that there was a failure to take reasonable care to ensure that the contract was an overarching contract of employment, that this was what had caused the loss of tax given HMRC's case

> that the reimbursement of expenses was not deductible if the contract was not an overarching contract of employment.
>
> 213. It is in our view clear that the failure to take reasonable care to ensure that the contract in question was an overarching contract of employment led directly to the loss of tax as a result of Mainpay treating the reimbursement of expenses as deductible when, in the absence of an overarching contract, they were not.
>
> 214. Had Mainpay sought advice from Dr O'Brien on the terms of the contract and the ability to reimburse expenses on a tax free basis, there seems little doubt that he would at the very least have alerted Mainpay to a potential problem given that the letter from Dr O'Brien which is contained in the evidence (sent in December 2008), is written on the basis that the individuals in question were (contrary to what appeared to be the terms of the 2010 Contract) employees and also bearing in mind Mainpay's acceptance that, even though the 2010 Contract, properly interpreted, is a contract of employment, there is no basis on which it could be said to be an overarching contract of employment.
>
> 215. Mr Firth observes that the concept of an overarching contract of employment may well not have been understood in 2007 in the same way as it is now understood. This may possibly be right given Mr Hugo's evidence that the whole area was constantly evolving at that time. However, in our view, this is another reason why specialist advice should have been taken. We do also note that many of the cases to which we were referred dealing with overarching contracts of employment were decided before 2007.

146. Mr Firth argued in this appeal that HMRC failed to explain at all or in sufficient detail:

(1) What was it that HMRC were alleging Mainpay should actually have done or known?

(2) When is it said that Mainpay should have done or known that?

(3) Why is it said that Mainpay should have done or known that?

(4) If Mainpay had done or known the thing in question, how would matters have been any different in relation to the loss of tax?

147. Mr Firth said that the FTT "had to create its own case" on these questions, and HMRC's pleading on the issues was wholly inadequate. He said that the FTT's decision that Mainpay's carelessness brought about the loss of tax also contained the following errors of law:

(1) The FTT failed to identify what Mr Hugo should have done differently in seeking advice from Mishcon, and the evidential basis for any such conclusion. *Bella Figura* confirms the importance of deciding what would have happened if the careless behaviour had not happened. It is necessary for HMRC to establish with precision the "counter-factual" situation in order to prove causation.

(2) There was no evidence that at the relevant time anyone was aware of the need for an overarching contract, as that was a developing concept.

(3) It was necessary to show that the taking of reasonable care would have in fact led to a contract that was an overarching contract of employment. The changes made in the 2013 Contract failed to achieve that, suggesting this would not have been achievable.

(4) Any supposed carelessness in not consulting Dr O'Brien, and what he might have advised, (FTT[211] and [214]) was pure speculation.

(5) The FTT fundamentally failed to realise that the burden of proof in respect of causation was on HMRC.

148. Ms Choudhury challenged all of these arguments, and advanced an additional "knockout" argument. This was that because section 118(5) TMA provides that "a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation"; thus, once a failure to take reasonable care is established, it inevitably follows that the taxpayer brought about the loss or situation. Ms Choudhury relied in this respect on the Upper Tribunal's decision in *Atherton v HMRC* [2019] UKUT 41 (TCC) ("*Atherton*"). As she put it in her skeleton argument, given section 118(5) "there is no need to establish a separate causal link between the alleged carelessness and the loss of tax". In her oral submissions, Ms Choudhury argued that there was support for this interpretation in the changes made to the relevant statutory provisions in 2008. She said that as result of these changes, causation could not be approached as a "but for" test.

149. In *Atherton*, one of the issues was whether the insufficiency in Mr Atherton's tax return was brought about by the carelessness of Mr Atherton or a person acting on his behalf. Mr Atherton argued that the insufficiency in his return was attributable only to the relevant numerical entry in a box on the form, and that the lack of explanation of that entry had no causal effect, because even if a full explanation of the use of the relevant box had been provided in the white space on the tax return, the insufficiency would still have arisen by virtue of the presence of the figure in that box: *Atherton* at [57]. The Upper Tribunal considered that "as a matter of legal causation…there appears to be force in Mr Atherton's argument", but that section 118(5), which had not been referred to by the FTT, had made specific provision for this issue. The Upper Tribunal then said this:

> 61. Accordingly, the relevant question is not that which would arise under the general law, nor whether the tax return was carelessly submitted, but whether the taxpayer and those acting on his behalf took reasonable care to avoid creating the insufficiency in the assessment.
>
> 62. When the question is asked in that way, the answer becomes clear. The duty of the taxpayer is to take reasonable care to avoid bringing about an insufficiency and if he does not do so then the insufficiency is brought about carelessly.

150. *Bella Figura* was concerned with a pension scheme which had made a loan to a company called Falken Ltd. HMRC had decided that the loan was an "unauthorised payment" for pension scheme purposes and a "scheme chargeable payment" and assessed Bella Figura to a scheme sanction charge, an unauthorised payments charge and an unauthorised payments surcharge. Bella Figura's response was that it was not careless since it had been advised by a firm of pension administrators (PPCL) that the loan was not an unauthorised employer payment or a scheme chargeable payment. The FTT held that HMRC could use its extended time limits since Bella Figura had not discharged its burden of showing that supportive advice had actually been received from PPCL. The Upper Tribunal stated, at [61(2)]:

> [The FTT] did not take into account the fact that s36 of TMA is concerned with the question of whether a failure to take reasonable care causes a loss of tax. The FTT identified the failure to obtain advice as a careless omission. However, it did not go on to consider what would have happened if BFL had asked PPCL if the Falken 1 loan qualified. That was a relevant consideration because, if PPCL would have replied that it believed the documentation it had drafted would be effective, that might well have demonstrated that BFL's carelessness did not cause the loss of tax.

151. After considering another issue, the Upper Tribunal went on to allow the appeal, in part because, as explained at [85(4)]:

> In our judgment, given the FTT's finding as to the background to PPCL's appointment, it is reasonable to infer that, if PPCL had been asked whether the documentation they were producing would produce the desired result, they would have given that confirmation.

152. There is no escaping the fact that *Atherton* and *Bella Figura* are very difficult to reconcile in their approach to the causation issue. *Bella Figura* was decided over a year after *Atherton*, but does not refer to that decision. We note that in *Strachan v HMRC* [2023] UKFTT 617 (TC), the FTT directly addressed the two conflicting decisions, and decided that because the burden of proof did lie on HMRC to establish causation, this meant that HMRC effectively needed to show what the taxpayer's advice would have been if reasonable care had been taken[7]. Contrastingly, in *Delphi Derivatives Ltd v HMRC* [2023] UKFTT 722 (TC), the FTT addressed the need for a "causal link", and the difference which a second opinion to the taxpayer would have made in this context. The FTT decided that a "but for" test was inappropriate, and refused to make a finding as to what such an opinion might have said, as that would have been "pure speculation": [248] of that decision.

153. In determining the position, and addressing these conflicting decisions, we start from the proposition that HMRC bear the burden of proof in relation to establishing that the careless behaviour brought about the loss of tax. That much is clear from *Burgess*, and the decision in *HMRC v Household Agents* [2007] EWHC 1684 (Ch) which was relied on in *Burgess*. For our part, we do not read *Atherton* as disputing that proposition; when the Upper Tribunal said at [12] of that decision that "the burden of proof is on HMRC to establish on the balance of probabilities that the discovery assessment was validly made", it was doing so by reference to its citation in the preceding paragraph of the statement in *Burgess* regarding the "relevant conditions" for assessments outside the normal time limits.

154. The more difficult question is what HMRC need to do to discharge that burden, and whether they did enough in this case.

155. We accept that it is possible to read the passages we have referred to in *Atherton* as meaning that once HMRC have established careless behaviour and a loss of tax, they need do nothing more to establish causation, simply because of the wording of section 118(5). If that is what was being said, then we respectfully disagree. Nor do we accept Ms Choudhury's argument that section 118(5) can be said to have such an effect by reference to the changes in statutory terminology in 2008. Such a reading would have the result that in practice there was no additional burden of proof on HMRC in relation to causation, and that cannot in our opinion be right.

156. What the Upper Tribunal was pointing out in *Atherton* was that the important word to focus on in section 118(5) was "avoid". If a taxpayer failed to take reasonable care to avoid the loss or situation, then they would have brought about the loss of tax. The point being emphasised was that that was not the same as a common law test of causation. However, the Upper Tribunal was not, in our view, saying that HMRC did not bear the burden of establishing that different test of causation. As we have said, if it was, then we would disagree.

157. As to what precisely HMRC must show in order to establish that a taxpayer has failed to take reasonable care to avoid the loss of tax, that depends entirely on the facts. To the extent that the carelessness which has been found relates to a deficiency in advice taken by a taxpayer,

[7] The FTT reached a similar conclusion in the context of penalties in *Magic Carpets (Commercial) Ltd v HMRC* [2023] UKFTT 700 (TC).

we consider that HMRC do need to establish that the relevant deficiency could have been avoided by the taxpayer. How it could have been avoided will depend on the facts and on the nature of the deficiency. If, for instance, no advice was taken on a material issue, then the carelessness could have been avoided by taking advice on that issue. If the advice was from an adviser on whom it was unreasonable for that taxpayer to rely, then it could have been avoided by taking advice from a qualified adviser. If the relevant advice did relate to a material issue but was given on the basis of incomplete information or documentation, or of assumptions found not to be applicable in practice, then it could have been avoided by supplying the information or documentation or clarifying the position in relation to the assumptions.

158. To that extent, HMRC does in our view need to show what the taxpayer "should have done differently". Insofar as *Bella Figura* endorses the position we have just set out, we agree with its approach.

159. However, we do not consider that the burden on HMRC carries with it an obligation to prove a particular counter-factual outcome. In particular, in relation to carelessness said to result from deficient advice, it does not require HMRC to establish to the balance of probabilities what the result of remedying the deficiency would have been. For example, it does not require HMRC to establish that if the deficiency had been remedied, a failure in the arrangement to achieve its intended tax purpose, which led to the loss of tax, would have been remedied. Not all problems (or arrangements or schemes) can be "fixed", and the FTT should not be placed in the position of having to speculate as to a taxpayer's precise response to advice to a standard of reasonable care. If the Upper Tribunal in *Bella Figura* was indicating to the contrary, then we respectfully disagree.

160. We should make clear that nothing in section 118(5) removes the need for a connection (to use a more neutral term) between the carelessness and the loss of tax. It is not enough for HMRC to show that the taxpayer was careless; that carelessness must have been a failure to avoid bringing about the loss of tax. So, for instance, a general lack of reasonable care by a taxpayer in completing a tax return or in keeping records which did not contribute to the loss of tax is not enough.

161. In this case, we consider that the FTT was entitled to find as it did at FTT[212]-[213] in relation to the causation issue. Some of Mr Firth's specific criticisms are adequately dealt with by the FTT at FTT[213]-[215]. More generally, the FTT was entitled to conclude that it was Mainpay's failure to take reasonable care in ensuring that the 2010 Contract was an overarching contract of employment which caused the loss of tax. On the facts found, what Mainpay "should have done differently" was to have asked an appropriately qualified adviser whether the 2010 Contract as drafted (including a provision stating that it was not a contract of employment) was an overarching contract of employment, or otherwise effective to achieve the aim of the arrangements in relation to reimbursed expenses. In our view, the FTT was not required, by *Bella Figura* or otherwise, to put HMRC to proof of establishing what course of action Mainpay would have taken if that had been done, namely whether it would have amended the contract, introduced a retainer in an effort to create mutuality in the gaps, or decided not to claim the deductions which gave rise to the loss of tax.

162. It follows from what we have said that we do not accept Mr Firth's argument that HMRC's pleading was inadequate. The FTT's conclusion at FTT[212] on this issue was reasonably open to it.

(4) Reliance on Mr Hugo

163. Mr Firth argued that "the FTT wholly failed to deal with the Appellant's submission that Mr Hugo was an independent contractor and it was reasonable for Mainpay to rely on him to obtain the appropriate advice". The FTT described Mr Hugo as "an accountant with significant

experience in the operation of umbrella companies…well aware of the complexities of ensuring that expenses could be reimbursed on a tax free basis": FTT[208]. It followed, he said, that it was reasonable for Mainpay to rely on Mr Hugo to ask the right questions of Mishcon and obtain the right form of contract.

164. We do not agree. The FTT clearly understood that Mr Hugo was not an employee of Mainpay but an accountant who acted as a consultant. Like most advisers (including Mishcon) he was independent of Mainpay. It described him, at FTT[20], as "a consultant who advised Mainpay in respect of accounting and finance, including the operation of PAYE". The mere fact that Mr Hugo was a consultant does not, however, establish that Mainpay took reasonable care in relying on his advice, any more than it did from the mere fact that Mishcon was a respected law firm. We agree with HMRC that it is not sufficient for Mainpay simply to say that it was relying on an adviser when it did not establish that Mr Hugo had himself given advice of his own as to the employment status of the 2010 Contract, including the provision in the 2010 Contract stating that it was not an employment contract. The FTT found that notwithstanding the absence of such advice Mainpay had failed to ask Mr Hugo, Mishcon or anyone else for advice which was crucial to the effectiveness of the proposed arrangements. The FTT was entitled to find that that was a failure to take reasonable care to avoid bringing about the loss of tax.

Ground 5: Conclusion

165. The appeal under Ground 5 is dismissed, and the FTT's decision that the determinations and decisions for the relevant tax years were made within the relevant statutory time limit in section 36 TMA is upheld.

DISPOSITION

166. The appeal is dismissed.

MR JUSTICE ADAM JOHNSON
JUDGE THOMAS SCOTT

Release date: 16 August 2024