Neutral Citation: [2023] UKFTT 16 (TC)

Case Number: TC08678

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2018/07894

*INCOME TAX – Temporary workers – deductibility of subsistence expenses – ss 338 and 339 Income Tax (Earnings and Pensions) Act 2003 – whether working under a contract of employment or an agency contract – if an agency contract, whether all engagements form part of a single deemed employment – ss 44 and 45 Income Tax (Earnings and Pensions) Act 2003 – existence of global or overarching contract of employment – whether, even if no overarching contract of employment, all assignments form part of a single (discontinuous) employment within s 4 Income Tax (Earnings and Pensions) Act 2003 – whether a workplace was not attended regularly and was not therefore a permanent workplace – reimbursement of subsistence expenses using round sum or benchmark scale rates without a dispensation – whether employer nevertheless required to provide evidence of the actual expenses incurred – s 65 Income Tax (Earnings and Pensions) Act 2003 – whether loss of tax brought about carelessly by the appellant and so extending the time limit for making an assessment to six years – ss 36 and 118 Taxes Management Act 1970 – appeal dismissed.*

**Heard on:** 14-16 November 2022
**Judgment date:** 21 December 2022

**Before**

**TRIBUNAL JUDGE ROBIN VOS**
**DUNCAN MCBRIDE**

**Between**

**MAINPAY LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: **MICHAEL FIRTH** of Counsel, instructed by The Independent Tax and Forensic Services LLP

For the Respondents: **SADIYA CHOUDHURY** of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. The appellant, Mainpay Limited ("Mainpay") describes itself as an employment business or umbrella company which supports temporary workers with all of their contracting needs, providing a fully compliant and tax efficient salary service.

2. Workers are engaged by Mainpay principally in the education, health and social care sectors. Mainpay has contracts with various employment agencies which in turn are engaged by end users such as hospitals or schools.

3. Mainpay's position is that, as it engages workers on the terms of an ongoing contract, each of the places where the workers carry out an assignment is a temporary workplace (or at least is not a permanent workplace) with the result that the reimbursement of travel and subsistence expenses is deductible from the individual's earnings for the purposes of income tax and national insurance contributions ("NICs").

4. In addition, Mainpay says that, as far as subsistence expenses are concerned, they are entitled to reimburse such expenses without liability to tax or NICs using round sum or benchmark scale rates rather than insisting that each worker provides evidence of the precise amount of their expenditure even though it has not applied for, or obtained, a dispensation in accordance with s 65 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") confirming that no tax liability will arise as a result of such payments.

5. HMRC disagree. They say that each assignment undertaken by a worker is a separate employment involving attendance at a permanent workplace and that travel and subsistence expenses are not therefore deductible at all. Even if they are in principle deductible, they argue that, in the absence of a dispensation, benchmark scale rates cannot be used and that an expense is only deductible if there is evidence of the amount of the expense which has been incurred.

6. As a result of this, HMRC have 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 Pay As You Earn ("PAYE") system and notices of decision under s 8 Social Security Contributions (Transfer of Functions) Act 1999 in respect of NICs for the year ended 5 April 2011, in each case based on the denial of a deduction for subsistence expenses reimbursed by Mainpay to its workers.

7. The total amount involved was originally just under £150,000 although this has been reduced by HMRC following a discovery of an error in the calculations to around £135,000. The true amount at stake is however higher than this as the decisions relating to NICs relate only to a sample of the workforce for the year ended 5 April 2011. If successful, HMRC will issue further decisions in relation to the other workers and the subsequent three tax years.

8. The Regulation 80 determinations for the tax years ended 5 April 2011 and 5 April 2012 as well as 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 will therefore only be valid if HMRC can show that any loss of tax has been brought about carelessly by Mainpay so that the extended six year time limit for assessment in s 36 Taxes Management Act 1970 ("TMA") applies.

9. Although, in principle, the issues raised by HMRC affect both travel and subsistence expenses, it was accepted by the parties that the determinations and the decision notices related only to subsistence expenses. We do not therefore address the question of the deductibility of travel expenses as a separate issue (for example in relation to the use of benchmark scale rates).

10. The position during the tax years ended 5 April 2011 – 5 April 2013 and the position for the tax year ended 5 April 2014 is not the same as, on 6 April 2013, Mainpay changed the

contract under which it engaged its workers. Some of the issues which we need to determine for each of these periods are therefore different.

11. 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.

12. As it is, we have decided that the subsistence expenses are not deductible on the basis that the workplaces were permanent workplaces. No question as to the precise amount of the expenses or the evidence needed to prove that the expenses had been incurred therefore arises.

**DEDUCTION FOR SUBSISTENCE EXPENSES**

13. It is helpful at this stage to summarise the key legislative provisions relating to the deduction of subsistence expenses. We will look at the provisions contained in ITEPA which of course relates to the deduction for income tax purposes. There are materially similar provisions contained in paragraph 3 of part XIII in schedule 3 to the Social Security (Contributions) Regulations 2001 (SI 2001/1004) which apply for NIC purposes. Neither party has suggested that the result should be any different for NICs as compared to income tax and so we shall focus only on the income tax provisions.

14. Chapter 2 of part 5 of ITEPA sets out various provisions allowing deductions for certain expenses of employees. As long as the expense falls within one of the provisions of that chapter, the effect of ss 333 and 334 ITEPA is that the expense is deductible from the individual's earnings. Where the expense is reimbursed by the employer, this means that the reimbursement is effectively tax free (more accurately, the reimbursement counts as earnings but the expense is deductible from those earnings).

15. Subsistence expenses fall within the provisions relating to travel expenses which, to the extent relevant, are contained in ss 338 and 339 ITEPA. These provide (so far as material) 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).

(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."

16. As can be seen, no deduction is available for expenses attributable to an employee's attendance at a permanent workplace (as this is ordinary commuting within s 338(2) and (3)). The key question therefore is whether the workplaces attended by Mainpay's workers in the course of their assignment are permanent workplaces.

17. HMRC's position is that, as each assignment is a separate employment, each workplace is a permanent workplace as a result of s 339(5)(a)(ii) (the employee's attendance comprising all of the period for which they hold the employment).

18. Mainpay on the other hand say that, as all of the assignments are carried out under the terms of a single employment, each workplace is a temporary workplace. Even if they are wrong on this, their fallback argument is that each assignment is relatively short and so it cannot be said that the employee attends the workplace "regularly" within the meaning of s 339(2)(a).

19. In effect, they suggest that it is possible to have a workplace which is neither a permanent workplace nor a temporary workplace. Expenses incurred in attending such a workplace would, they say, qualify for deduction as s 338 only denies a deduction for attending a permanent workplace.

**THE EVIDENCE AND THE WITNESSES**

20. The evidence consisted of a bundle of documents and correspondence together with the evidence of a number of witnesses. On behalf of Mainpay, the witnesses were Graeme Harker,

a director of the company at the relevant time and Andre Hugo, a consultant who advised Mainpay in respect of accounting and finance, including the operation of PAYE. Both of them provided witness statements and were cross-examined.

21. The main witness was Mr Hugo. Our overall impression is that whilst he answered the questions put to him truthfully, there was more that he could have told us. For example, on numerous occasions, he referred to the fact that he was not involved in the day-to-day operational side of the business and could not therefore say how certain aspects of the business worked in practice.

22. However, we find this very surprising. He was clearly the key person tasked with advising Mainpay on whether its operations complied with the relevant tax provisions and, to that end, was the liaison between external advisers and Mainpay. As the ability to deduct expenses depended on ensuring that the business followed the correct procedures, we have little doubt that he knew more than he was letting on.

23. One example of this is the way in which assignments are allocated to individuals who work for Mainpay. When asked whether individuals found assignments through agencies or whether an agency might contact Mainpay with the offer of an assignment, leaving Mainpay to identify an individual to fulfil the assignment, Mr Hugo was not really sure he could answer the question but speculated that assignments might be allocated to an individual in either of these ways.

24. Given the importance (as we shall see) of Mainpay being able to show that it provides work to its workers, we would have expected Mr Hugo to be able to give a more concrete answer to this question. In our view, he did not do so as the true answer, confirmed by Mr Harker (that individuals would generally find their own assignments through an agency), was unhelpful to Mainpay's case.

25. Mr Harker was asked very few questions but we are satisfied that he answered them honestly.

26. HMRC provided witness statements from two of its officers, Karen Connell and Ian Pumphrey, both of whom were involved in the investigation leading up to the notices of determination and the decision notices. However, by the time of the hearing, Mr Pumphrey had retired. Mrs Connell provided a second witness statement to say that she would be available to give evidence regarding the actions taken by Mr Pumphrey. However, in the event, she was not asked any questions in relation to this as it became clear that she had no first hand knowledge of what might have been in Mr Pumphrey's mind when taking the decisions which he made.

27. As far as her own evidence is concerned, Mrs Connell was straightforward in answering the questions put to her and we have no hesitation in accepting her evidence.

28. As part of their investigations, HMRC had interviewed five workers engaged by Mainpay in order to obtain their views as to the way in which the arrangements with Mainpay worked in practice. Notes of those interviews were included as part of the documentary evidence. At no stage did Mainpay object to this. However, Mr Firth, appearing on behalf of Mainpay, submitted that, in the absence of formal witness statements and the availability of the individuals for cross-examination, the weight to be placed on what they said during those interviews should be minimal.

29. In principle, we accept that this evidence carries less weight than would have been the case had the individuals appeared as witnesses. However, we do not think it can be discounted completely, particularly where it supports conclusions based on other evidence or inferences

which can be drawn from other evidence. Nonetheless, we have however been cautious in relying on the statements made by these individuals.

**BACKGROUND FACTS**

30. As we have already mentioned, Mainpay describes itself as an employment business or an umbrella company. It engages temporary workers who supply services to end users or clients. However, Mainpay does not enter into an agreement directly with the end client. Instead, the client enters into an agreement with an employment agency and the employment agency in turn enters into an agreement with Mainpay. The terms of those agreements are not material to the issues which we have to determine. The contracts between Mainpay and its workers are however central to the dispute.

31. As we have noted, Mainpay changed the form of contract which it used to engage its workers on 6 April 2013. We refer to the form of contract in use between 6 April 2010 – 5 April 2013 as "the 2010 Contract" and the subsequent contract a "the 2013 Contract".

***The 2010 Contract***

32. The 2010 Contract was put in place with the assistance of the law firm, Mishcon de Reya towards the end of 2007 and in early 2008. It is clear from Mishcon's advice that it was not intended to be a contract of employment. This is reflected in the terms of the contract which is headed "Terms of Engagement" and specifically states in clause 2(1) that it is a contract for services and in clause 2(2) that it will not give rise to a contract of employment.

33. The parties are however agreed (and we accept) that the label given to the contract is not determinative. Instead, the rights and obligations must be analysed in order to determine the true relationship between Mainpay and its workers. We address this further below but it is convenient to set out here the key terms of the contract.

34. 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.

35. Clause 4(1) requires Mainpay to pay the worker at a rate to be agreed in relation to the particular assignment subject to statutory deductions in respect of PAYE and NICs. Mainpay is required to pay the worker even if Mainpay has not been paid by the end client (clause 7(2)). There is a reference to the provisions of ITEPA which relate to agency workers (which deem the services of a worker supplied through an agency to be an employment (for income tax purposes) if this would not otherwise be the case).

36. The worker has no right to be paid anything by Mainpay when they are not working on an assignment (clause 4(2)).

37. Annual leave is dealt with in clause 5. This reflects the requirements of the Working Time Regulations 1998. The entitlement to leave is satisfied by Mainpay agreeing to make an additional payment to the worker for the periods whilst they are on assignment which reflects the entitlement to paid leave.

38. The contract also notes that workers may be entitled to statutory sick pay (clause 6).

39. As far as the operation of the actual assignments is concerned, clause 8 imposes the following obligations on the worker:

> (1) to co-operate with the end client's reasonable instructions and to accept the end client's direction, supervision and control;
>
> (2) to observe any relevant rules and regulations of the end client's establishment including any health and safety policies and procedures;

(3) not to engage in any conduct detrimental to the interests of the end client or Mainpay;

(4) not to disclose any confidential information relating to the end client or Mainpay;

(5) to inform the end client and/or Mainpay if they are unable to attend work and to inform Mainpay if they become aware of any reason why they are not suitable for the assignment.

40. Mainpay or the end client are entitled to terminate an assignment without notice. The worker is required to use best endeavours to give Mainpay either one or two weeks' notice depending on the length of the assignment if they wish to terminate the assignment. If the worker does not notify Mainpay that they are available for work for a period of at least three weeks, Mainpay will provide the worker with a P45 effectively terminating the contract.

***The 2013 Contract***

41. The 2013 Contract was again drafted with the assistance of external lawyers, in this case, Brebners. We do not however have any extracts of the correspondence with them and have little evidence as to what prompted the change. There was however a suggestion that this may have been triggered by HMRC's investigation of Mainpay's business which started in December 2011. Mr Hugo's evidence was that the sector was constantly evolving and that they were therefore taking advice on an ongoing basis.

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. Again, this is addressed below, but we set out the key terms of the contract here.

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.

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.

46. The provisions relating to payment for hours worked, annual leave and sick pay are broadly the same as with the 2010 Contract.

47. As far as the worker's obligations are concerned, these are slightly different and include (in clause 8) the following:

(1) The worker must undertake their assignments professionally, promptly, efficiently, with due care and in good faith using their skill and expertise to the best standards expected of them.

(2) The worker must not engage in any conduct detrimental to the interests of the client or Mainpay.

(3) The worker must abide by the relevant rules and regulations of the client's establishment including health and safety requirements.

(4) The worker is required to co-operate with the client's requests to the extent reasonably required to enable the client to progress its work requirements but not to the extent that the client is acting as the worker's employer or that the worker considers that they would have a direct contractual obligation with the client.

(5) The worker must keep Mainpay informed of any complaints made by the client and furnish Mainpay with any progress reports if requested to do so.

(6) As with the 2010 Contract, the worker must inform the client and/or Mainpay if they are unable to attend work and must notify Mainpay if they become aware of any reason why they may not be suitable for the assignment.

48. Clause 9 contains the termination provisions. Again, Mainpay can terminate an assignment without notice but the worker must give one or two weeks' notice depending on the length of the assignment. There is no provision for the client to terminate an assignment.

49. The agreement as a whole may also be terminated by Mainpay by giving notice to the worker. Whilst this provision seems to be general in its application, there is a specific provision (clause 9.6) which permits Mainpay to terminate the agreement under this provision if the worker does not notify their availability for work for a period of three weeks. The worker may terminate the agreement by giving one week's notice expiring on any day following the last day of an assignment.

50. The worker agrees to keep information relating to the client and to Mainpay confidential (clause 11).

***Obtaining assignments***

51. Based on the evidence, it is clear that the way the arrangement is operated is that a worker would agree an assignment with an agency, the agency then provides details of the assignment to Mainpay which in turn completes an assignment schedule as part of its online portal which workers can log into.

52. As we have mentioned, in cross-examination, Mr Hugo speculated that there may have been situations in which an agency approached Mainpay with a particular assignment and then left it to Mainpay to identify an individual to carry out the assignment. We do not however accept that this is how the arrangement is worked in practice. There is no documentary evidence to suggest that Mainpay had assignments available to it which it was free to allocate to any individual it chose. For example, there were no emails or other correspondence between Mainpay and any of its workers asking if a worker was willing to take on a particular assignment.

53. What little documentary evidence there is, supports the assignment being agreed between the agency and the worker. For example, the extract from the online portal with an example of an assignment schedule contains a note stating that, when an agency places an employee at an end client, they provide assignment details which the employee can see on the portal. Whilst this does not exclude the possibility that the agency may notify Mainpay of the existence of an assignment and that Mainpay then offers it to its workers, we think it is fair to infer from the note that it is the agency which places the worker and not Mainpay. It might otherwise have been expected that there would be an explanation of this in the note.

54. This conclusion is also supported by the worker interviews which speak with one voice about assignments being agreed between the worker and the agency and not with Mainpay. Finally, as we have mentioned, Mr Harker agreed in response to a question put to him by the

Tribunal that it was the agency which agreed an assignment with the worker rather than the agency asking Mainpay to find a worker to carry out a particular assignment.

***The process for paying subsistence expenses***

55. Turning to the way in which subsistence expenses are dealt with, Mainpay produces an expense claim guide and frequently asked questions ("FAQs") which are regularly updated.

56. The guide for 2010/11 states that subsistence expenses can be claimed at a flat rate without the need to retain supporting documentation. The rate is stated to be £13 (incorrectly shown in one place as £3) for a full day on assignment although it does go on to say that, whilst Mainpay considers this rate to be a reasonable estimate of the actual costs incurred, if the worker considers this to be in excess of the actual cost incurred, they can reduce the claim to £5 if they are on assignment for more than five hours or £10 if they are on assignment for more than 10 hours in a day. The guide notes that:

> "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."

57. This is supported by the FAQs which contain the following:

> "**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."

58. It appears that the amounts able to be claimed were amended at some point during the 2010/11 tax year as there is a further expense claim guide for that year which refers only to the £5 and £10 rates depending on whether the worker has been away from home for more than five hours or more than ten hours. The guide states that the one meal rate (£5) will be claimed automatically without the individual doing anything. However, if they want to claim the £10 rate they need to log into the online portal to change the default option from £5 to £10. As before, the guide confirms that there is no need to upload or post any receipts as they are not required to process the subsistence allowance. The FAQs are the same as the previous version except for the reference to £5 or £10 rather than £13.

59. We should mention that there was conflicting evidence as to when the rate for subsistence expenses was changed from £13 for a day to £5 or £10 (depending on whether the individual worked for more than five hours or more than ten hours). Mr Hugo's evidence in cross-examination was that he thought that this was at some point during the 2012/13 tax year. However, it seems clear from the expense claim guides we have seen that the change was made at some point during the 2010/11 tax year. The point is not however material to our decision.

60. The expense claim guide was amended again at some point during the 2013/14 tax year. As before, the guide confirms that the £5 rate would be claimed automatically without the worker having to do anything and that there was no need to provide receipts. However, the guide did now say that workers should retain the original receipts for six years in case they were requested by HMRC.

61. It is clear from Mr Hugo's evidence and from the documentary evidence that the online portal by default included a claim for subsistence expenses of, initially, £13 a day and, after the change, £5 per day. If a worker did not incur any subsistence expenses and therefore did not want to make a claim, it would be necessary for them to log into the online portal, access the section for submitting expenses and amend the default amount. HMRC's evidence (which

was not challenged) is that subsistence expenses were claimed in approximately 90% of cases. It is therefore apparent that some workers did therefore remove the default expense claim.

62. Mainpay took advice in relation to tax issues concerning expenses from Dr M J O'Brien. In December 2008, Dr O'Brien noted that HMRC did not publish any agreed subsistence rates but drew attention to some figures published in Taxation Magazine in November 2001 and in Accounting Web in 2008. It appears that it is the article in Taxation (which related specifically to subsistence expenses in the television and film industry) which provided the basis for the £13 daily allowance. The article asserted that "the Revenue accepts these figures without question".

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***

65. Although the 2013 Contract (in contrast to the 2010 Contract) contained a requirement for Mainpay to consent before a worker undertook work or employment for somebody else, our conclusion is that, as a matter of practice, there was no expectation that such consent in fact had to be obtained. The 2010/11 FAQs for example suggested only that the worker should inform Mainpay if they were working for more than one employer so that Mainpay could ensure that their payments were taxed correctly. There is no suggestion that consent should be obtained. Of course, there was nothing in the 2010 Contract requiring consent. However, the 2013/14 FAQs contained a similar provision simply saying that, if the worker is offered other opportunities, they should notify Mainpay to ensure they continue to receive the benefits of engaging with Mainpay.

66. In fact, the FAQs no longer contained a specific question about working for more than one employer. It could perhaps be inferred from this that Mainpay expected that a worker would only work for Mainpay and not for anybody else. However, Mr Hugo's own explanation in cross-examination for the removal of the question about working for more than one employer was that this was only relevant to ensuring that the right tax code was applied and that, following the introduction of real time information, the correct tax code would be applied automatically and so there was no need for Mainpay to know if a worker had another employment. This, of course supports the conclusion that Mainpay did not expect to be told if a worker had another employment.

67. Some additional support for this can be inferred from the interviews with one of the workers conducted by HMRC. The worker in question had a full-time job with the NHS but did locum shifts in his spare time in respect of which he was engaged by Mainpay. There is no suggestion that the worker in question considered that they had any obligation to obtain consent from Mainpay in relation to that other employment.

68. In addition, there is no evidence of any worker actually seeking and being given consent to take on any other work or employment. On balance therefore, our conclusion is that, 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.

***Statutory benefits***

69. It is clear that, whether or not there was a continuing or overarching contract of employment between Mainpay and its workers, Mainpay considered itself to be under an obligation to pay statutory benefits such as sick pay, maternity pay and paternity pay. Mainpay has provided evidence that it did in fact make such payments.

***Length and number of assignments***

70. Mainpay has put together a summary of the assignments undertaken by each worker during the four tax years which are relevant to this appeal. On the face of it, this shows that most workers only undertook one assignment in a year and that the average length of an assignment was between 8-13 weeks. The methodology used to put together the table was to assume that one assignment came to an end and another one started either if there was a break between assignments or if there was a change in agent or end user/client.

71. It is however of course perfectly possible that a new assignment could be started without a break and with the involvement of the same agency and the same end client. In the event, these statistics have little relevance to the issues we have to determine other than possibly the question as to whether, if each assignment is a separate employment, the workplace in question is a permanent workplace (which we discuss below). We do not however make any specific finding as to the accuracy of the figures provided as it is not necessary for us to do so in order to reach our conclusion on this point.

**THE ISSUES**

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 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.

73. We will therefore now consider each of these issues in turn.

**CONTRACTS OF EMPLOYMENT – PRINCIPLES AND INTERPRETATION**

74. Although the principles are well known, it is not always easy to determine whether a contract is a contract of employment. The starting point for a contract of employment (often referred to as a contract of service) is the three principles set out by MacKenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497 [515].

75. The first requirement is that the worker, in return for payment, agrees to do some work for another person. This requirement is often referred to as "mutuality of obligation". The second requirement is that the other person has a sufficient degree of control over the worker in the performance of the service to be provided. The final requirement is that the other provisions of the contract are consistent with it being an employment contract.

76. The first two requirements have sometimes been described as the irreducible minimum for the existence of a contract of employment (often by reference to the comments of Stephenson LJ in *Nethermere (St. Neots) Limited v Gardiner* [1984] ICR 612 at [623 F-G] (see for example *Montgomery v Johnson Underwood Limited* [2001] ICR 819 at [21 and 23] per Buckley J). However, when read in context, it is clear that Stephenson LJ was only referring to mutuality of obligation (and not control) as the irreducible minimum.

77. In *James v Greenwich LBC* [2007] ICR 577, Elias J explained at [16-17] that the "irreducible minimum" of some mutual obligation relating to work located the contract in the employment field. The existence of a sufficient level of control would then determine whether the contract is one of employment. (This must of course be understood in the light of the third stage of the enquiry in *Ready Mixed Concrete* which is to consider whether there are any other terms of the contract which are inconsistent with it being a contract of employment).

78. Somewhat confusingly, the term "irreducible minimum" has therefore been held to refer in some cases just to mutuality of obligation and in others to both mutuality of obligation and to the existence of a sufficient degree of control. In a sense of course this does not really matter given that it is clear that both must be present in order for a contract to be a contract of employment, a point recently reinforced by the Court of Appeal (Sir David Richards) in *HMRC v Atholl House Productions Limited* [2022] EWCA Civ 501 at [75 and 122].

79. Sir David Richards also made it clear in *Atholl House* at [122-123] that, when coming to the third stage of the enquiry, it is necessary to look at all relevant factors in determining whether the contract is a contract of employment. This includes not only the terms of the contract but also the circumstances in which it was made and which were known to both parties.

80. As far as the identification of the terms of the contract itself are concerned, there is a question as to what approach should be taken if there are provisions in the contract which may not reflect the true agreement between the parties. In *Autoclenz Limited v Belcher* [2011] UKSC 41, the Supreme Court indicated [at 28-35] that in certain circumstances in the context of an employment relationship a Court or Tribunal could consider what was actually agreed between the parties even if this differs from the written terms of the contract.

81. However, in *Uber BV v Aslam* [2021] UKSC 5, Lord Leggatt explained at [69-70] that this approach was only permissible in the context of the interpretation of statutory provisions (in that case relating to workers' rights) and was not a principle of contractual interpretation. On this basis, Sir David Richards in *Atholl House* concluded at [156] that, when determining whether, for tax purposes, a contract was a contract of employment, it is not legitimate to apply the *Autoclenz* approach given that, in the context of ITEPA, there is no special meaning given to the term "employee".

82. Both parties therefore accepted that the Tribunal should apply the approach to interpretation of contracts set out by the Supreme Court in *Arnold v Britton* [2015] UKSC 36 at [14-23]. In summary, the approach is to determine (objectively) what the parties intended in using the particular words contained in the contract in the light of the facts and circumstances known or assumed by the parties at the time the contract was entered into but disregarding the subjective intention of the parties. As Mr Firth noted, the Supreme Court warned that the surrounding circumstances and commercial common sense should not be invoked to undervalue the importance of the language of the contract. The clearer the natural meaning of the words, the more difficult it is to justify departing from it.

**THE NATURE OF THE 2010 CONTRACT**

83. With these principles in mind, we turn to the question whether the 2010 Contract is a contract of employment.

84. As we have said, it is clear from the advice given by Mishcon and from the terms of the contract itself that it was not intended to be a contract of employment. However, the subjective intention of the parties is irrelevant, as is the label which the parties give to the contract. We must look at the respective rights and obligations of the parties in relation to each assignment (it no longer being contended by Mainpay that the contract gives rise to an employment relationship in the gaps between assignments).

85. There is no doubt that, in relation to the assignments, the workers agree to provide their own services in return for payment. There is therefore no doubt in our minds that there is the necessary mutuality of obligation.

86. The next question is whether Mainpay had a sufficient degree of control over the workers in order for the contract to be one of employment.

87. Ms Choudhury, appearing on behalf of HMRC, submits that there is insufficient control on the part of Mainpay on the basis that clause 8(1) of the 2010 Contract requires the workers to accept the direction, supervision and control of the end client. As Mainpay has passed the right of control to the client, she argues that it follows that Mainpay cannot have a sufficient degree of control in order for the workers to be employees of Mainpay.

88. Mr Firth, on the other hand, analyses this provision rather differently. He notes that, what is important, is a right of control as opposed to actually exercising control (see *Atholl House* at [71]) and that Mainpay must have a right of control over the workers as this is the only basis on which it could require the workers to accept supervision, direction and control from the client.

89. In support of this, Mr Firth refers to the decision of the Court of Appeal in *Adecco v HMRC* [2018] EWCA Civ 1794. That case in fact related to VAT and, in particular, whether Adecco (being an employment agency) was, in relation to self-employed temps, making a supply of the services of those individuals or whether it was just making a supply of introduction services. In deciding this question, the Court of Appeal considered the extent to which Adecco had control over the relevant individuals. The contract confirmed that the temp

was to be under the end client's direction, supervision, management and control. Newey LJ concluded in relation to this point at [49(iii)] that:

> "While temps were to be subject to the control of clients, that was something that the temps agreed with Adecco, not the clients. Further, the fact that the contract between Adecco and the temp barred any third party from having rights under the Contracts (Rights of Third Parties) Act 1999 confirms that the relevant provisions were to be enforceable only by Adecco, which, on the strength of them, was able to agree with its clients that the temps should be under their control. Adecco can fairly be described as conferring control on its clients"

90. The question of course is not whether Mainpay had sole control over its workers but whether it had sufficient control for the contract to be one of employment. In the circumstances of this particular contract, our view is that it did.

91. The contract in this case required the workers to carry out an assignment identified by an end client and at the premises of that client. In these circumstances, irrespective of the terms of the contract, it is almost inevitable that Mainpay would not have day-to-day control or supervision over the way in which the worker carried out their duties. However, there is in our view no reason why an employer should not delegate control over an employee to a third party.

92. We agree with Mr Firth that such delegation is, itself, an exercise of control over the worker. In this particular case, there is nothing in the contract which excludes the provisions of the Contract (Rights of Third Parties) Act 1999 and so it is possible that (unlike in *Adecco*) the end client might be able to enforce the obligation placed on the worker by the 2010 Contract to co-operate with the client's reasonable instructions and to accept the client's direction, supervision and control. However, there is no doubt that these are obligations which Mainpay would itself be able to enforce directly under the terms of the contract. This is a further indication that Mainpay had a right to control the workers in the performance of their duties.

93. The obligation on the worker not to engage in conduct detrimental to the interests of Mainpay or the client is another element of control exercisable by Mainpay, as is the obligation to refrain from divulging confidential information relating either to the client or to Mainpay.

94. There is in our mind also the question as to who has the right to require the worker to turn up on a particular day at a particular time and at a particular place to carry out the assignment. This is not dealt with specifically in the contract which, in relation to such matters states only that this information will be given by Mainpay to the worker at the time the assignment is offered.

95. As a practical matter, we have found that the terms of the assignment will have been agreed between the worker and the agency before Mainpay is involved. However, there is no doubt that the only contractual relationship which the worker has is with Mainpay. It can therefore only be as part of this contract that the worker has the obligation to undertake the assignment. It follows from this that Mainpay does have control (as the contracting party) over when and where the assignment is carried out which again indicates a certain measure of control.

96. Finally, it is in our view relevant that Mainpay has the right to terminate an assignment at any time without prior notice. In effect, Mainpay can prevent the worker from carrying out any further duties in relation to a particular assignment even if the assignment is incomplete. Although this might be said not to be control in relation to the performance by the worker of their duties, the right to stop the worker from performing any further duties does, we consider, represent the sort of control which would be expected of an employer.

97. Taken together, we consider that, based on all of these factors, Mainpay does have a sufficient level of control over the workers for the contract to be a contract of employment in relation to each of the assignments.

98. Moving onto the third stage of the enquiry, there is nothing in our view in the contract itself or in the surrounding circumstances which would lead to the conclusion that the contract is anything other than a contract of employment.

99. Ms Choudhury draws attention to the fact that the contract is clearly drafted on the basis that it is an agency contract, for example referring to the relevant sections in ITEPA which deal with agency contracts. However, for the reasons we have explained, this sort of labelling is not relevant as it does not shed light on anything other than the subjective intentions of the parties.

100. We note that the contract contains provisions relating to sick pay and pay for annual leave. However, these provisions are equally consistent with the worker being an employee or a self-employed worker. This is recognised by the contract itself which mentions that the provisions relating to annual leave should not affect the worker's status as a self-employed worker (which would not be necessary if the provisions were not also consistent with the individual being an employee).

101. In our view, the 2010 Contract is therefore a contract of employment in relation to each individual assignment. We will need to consider whether all the assignments form part of a single (but not continuous) employment. However, as this is also relevant to the 2013 Contract, we will do so after we have analysed the nature of that contract.

102. Based on our conclusion, we do not strictly need to consider whether, if the 2010 Contract were not a contract of employment but were instead an agency contract, each assignment is part of a single deemed employment. However, in case we are wrong in our conclusion as to the nature of the 2010 Contract, we will consider that point briefly.

**AGENCY CONTRACT – SINGLE OR MULTIPLE EMPLOYMENTS**

103. Sections 44-47 ITEPA deal with situations where an individual secures assignments with an end client through an agency. In broad terms, the effect is that if the contract with the agency is not an employment contract, the worker is deemed to hold an employment with the agency and any remuneration is treated as earnings from that employment. To the extent relevant, the key provisions are as follows:

> "**44 Treatment of workers supplied by agencies**
>
> (1) This section applies if-
>
> (a) an individual ('the worker') personally provides, or is under an obligation personally to provide, services … to another person ('the client'),
>
> (b) the services are supplied by or through a third person ('the agency') under the terms of an agency contract,
>
> (c) the worker is subject to (or to the right of) supervision, direction or control as to the manner in which the services are provided, and
>
> (d) remuneration receivable under or in consequence of the agency contract does not constitute employment income of the worker apart from this Chapter.
>
> (2) If this section applies-
>
> (a) the services which the worker provides, or is obliged to provide, to the client under the agency contract are to be treated for income tax purposes as duties of an employment held by the worker with the agency, and

(b) all remuneration receivable under or in consequence of the agency contract (including remuneration which the client pays or provides in relation to the services) is to be treated for income tax purposes as earnings from that employment.

**45 Arrangements with agencies**

If-

(a) an individual ('the worker'), with a view to personally providing services … to another person ('the client'), enters into arrangements with a third person ('the agency'), and

(b) the arrangements are such that the services (if and when they are provided) will be treated for income tax purposes under s 44 as duties of an employment held by the worker with the agency,

any remuneration receivable under or in consequence of the arrangements is to be treated for income tax purposes as earnings from that employment.

**47 Interpretation of this Chapter**

(1) In this Chapter 'agency contract' means a contract made between the worker and the agency under the terms of which the worker is obliged to personally provide services to the client."

104. Section 44 ITEPA was considered by the First-tier Tribunal in *Thoene v HMRC* [2016] UKFTT 454 (TC), a case involving an individual who worked as a self-employed nurse through agency contracts with two separate agencies. Whilst Mr Thoene was unrepresented and it does not appear that either party made specific submissions on the point, it was necessary for the First-tier Tribunal to decide whether each assignment carried out by Mr Thoene under the agency contracts was a separate employment or whether all of the assignments constituted a single employment.

105. The Tribunal concluded at [133] that each assignment was a separate deemed employment except in circumstances where an individual carried on doing the same job for the same client but the period had just been extended. The reason given by the Tribunal is that s 44(2)(a) ITEPA treats "the services which the worker provides … to the client" as being "duties of an employment held by the worker with the agency". In their view, the inference from this is that the work done for each client under a particular assignment is a separate employment.

106. In principle, we agree that, based on the wording of s 44, this is a reasonable inference given the link between specific services provided to a particular person. As the First-tier Tribunal noted in *Thoene*, the requirement for the worker to be subject to supervision, direction or control as to the manner in which the services are provided supports this interpretation given that it is perfectly possible for a worker to be subject to supervision, direction or control in respect of one assignment but not to be subject to such supervision, direction or control in respect of another assignment. Whether or not this is the case will depend on the terms of the particular assignment. If supervision, direction or control is lacking, that assignment is not deemed to be an employment. This therefore points towards each assignment being considered individually and either treated as a deemed employment or not as the case may be.

107. Mr Firth however points out that this interpretation sits uneasily with s 45 ITEPA. As can be seen, s 45 applies where an individual enters into arrangements with an agency with a view to providing services to a client in circumstances where, if the services are in fact provided, s 44 ITEPA would treat those services as duties of an employment held by the worker with the agency. In those circumstances any remuneration received by the worker as a result of those arrangements is treated as earnings from "that employment".

108. There seems little doubt, as suggested by Mr Firth, that the purpose of s 45 is to tax as employment income any remuneration received by the individual from the agency which is not linked to an assignment with any particular client. This is confirmed by the explanatory notes to s 45 ITEPA 2003 which state that:

> "The provision is aimed at remuneration paid by the agency while an agency worker is on their books, for a period in which the worker is not assigned to any particular client."

109. It is clear that the reference to "that employment" in s 45 ITEPA is to the deemed employment which arises as a result of s 44 ITEPA (see s 45(b)). However, given that the remuneration which is intended to be within s 45 ITEPA is remuneration which does not relate to a specific engagement with a particular client, this reference only makes sense if the deemed employment between the worker and the agency arising as a result of s 44 ITEPA is a single employment which covers not only the assignments which fall within s 44 ITEPA but also the gaps between those assignments.

110. Whilst we accept Ms Choudhury's submission that a more natural reading of s 44 ITEPA on its own is that each assignment for each client is a separate employment, when looked at in the context of s 45 ITEPA, we agree with Mr Firth that this interpretation cannot be right. Ms Choudhury's only comment in relation to s 45 ITEPA is that its purpose is just to fill in the gap. In a sense, this is of course correct but in our view it can only succeed in doing so if the arrangement between the agency and the worker is a single employment.

111. One possible objection to this interpretation which we have considered is that, on a literal interpretation, this could result in remuneration for an assignment which does not fall within s 44 ITEPA (for example because there is no supervision, direction or control) being treated as income from the single deemed employment. However, our view is that the reference in s 45 ITEPA to remuneration receivable in consequence of the arrangements must, in the context of s 44 ITEPA, be understood as excluding any remuneration relating to a specific assignment given that such remuneration is dealt with by s 44 ITEPA itself. Section 45 ITEPA therefore only deals with remuneration which does not relate to a specific assignment.

112. In conclusion, had the 2010 Contract been an agency contract rather than an employment contract, we accept that there would have been a single deemed employment between Mainpay and its workers which covered all of the assignments carried out by those workers. The result of this would be that each workplace would be a temporary workplace and that subsistence expenses would in principle be deductible subject to the point we will come on to in relation to the use of round sum or benchmark scale rates without a dispensation.

**THE NATURE OF THE 2013 CONTRACT**

113. As we have said, both parties agree that there is a contract of employment in place whilst an assignment is being carried out. The question is whether the 2013 Contract is a global or overarching contract of employment not just when an assignment is being carried out but also in the gaps between assignments.

114. Ms Choudhury accepts that there is some sort of contract in existence between assignments but submits that, during these gaps, it is not a contract of employment. It is therefore necessary to consider what features are required in the gaps between employments for the contract to be a continuing or overarching contract of employment.

115. Mr Firth accepts that mutuality of obligation must be present in the gaps between assignments but suggests that there is no need for any real element of control to exist, noting that in *Ready Mixed Concrete*, the requirement is for control in relation to the performance of the particular service. Given that no service is being provided in the gaps between assignments,

he argues that it would not make any sense for there to be a requirement for control during these periods in order for the contract to be an overarching contract of employment.

116. Ms Choudhury on the other hand submits that control is part of the irreducible minimum of obligations necessary for a contract of employment to exist and that, in this case, even if there were the necessary mutuality of obligation, there is insufficient control by Mainpay during the gaps between employments.

117. On this point, the parties were unable to find any authorities which discuss the requirement for control during the gaps between assignments in the context of an overarching contract of employment. It appears that those cases which have considered the possible existence of an overarching contract of employment have been decided on the basis as to whether or not there is the necessary mutuality of obligation. This might of course indicate that Mr Firth is right in his submission. However, this is not a point which we need to decide as, in our view, the necessary mutuality of obligation does not exist between assignments.

118. As far as mutuality obligation is concerned, Mr Firth's position is that it is sufficient that there is an obligation on the employer to provide work (or to provide pay or other benefits in the absence of work) and that there is an obligation on the employee to consider in good faith whether to accept any work which is offered to them. In support of this, he refers to the decision of the Upper Tribunal in *Reed Employment plc v HMRC* [2014] UKUT 160 (TCC). The question in that case was whether the contract between an employment agency, Reed and the workers which it engaged was an overarching contract of employment.

119. In *Reed*, the Upper Tribunal considered at [319-320] a decision of the Employment Appeal Tribunal in *ABC News Intercontinental Inc v Gizbert* [2006] All ER 98. In that case, ABC had entered into a contract with Mr Gizbert under which it guaranteed 100 days of work a year at $1,000 per day (the payment being made whether or not the work was offered). Mr Gizbert, for his part, could decide whether or not to accept assignments offered to him but was required to do so in good faith. The Employment Appeal Tribunal observed at [21] that this meant that ABC "did not have an unfettered right to offer no work or pay; [Mr Gizbert] did not have an unfettered right to refuse assignments; he was obliged to act in good faith." On this basis, it concluded that there was the necessary mutuality of obligation for there to be an overarching contract of employment.

120. The Upper Tribunal in *Reed* did not express a view as to whether the Employment Appeal Tribunal was correct as it found that, there was no real obligation on Reed which was "capable of founding mutuality" and no obligation on the workers to consider in good faith an offer to work. The Upper Tribunal did however observe at [320] that:

> "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"

121. Ms Choudhury, whilst accepting that there need not be an obligation on a worker to accept every assignment offered to them, submits that there must be an obligation to do some work, referring to the decision of the Employment Appeal Tribunal in *Cotswold Developments Construction Limited v Williams* [2006] IRLR 181 where the Tribunal explain at [55] that:

> "It does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work… the focus must be upon whether or not there is some obligation upon an individual to work, and some obligation on the other party to provide or pay for it."

122. In the same paragraph, the Employment Appeal Tribunal in Cotswold Developments approved the comment of Kerr LJ in *Nethermere (St. Neots) Limited v Gardiner* [1984] ICR 612 at [629F] that:

> "The inescapable requirement concerning the alleged employees however…. is that they must be subject to an *obligation* to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer"

123. We were referred to a number of other cases by Mr Firth and Ms Choudhury in the context of mutuality of obligation. It would not in our view be helpful to review each of those cases in this decision. It is sufficient to note that each of them in one way or another indicated that, in order for the necessary mutuality of obligation to exist, the worker must be under an obligation to accept at least some work if it is offered. Against this background, we do not consider that either the Upper Tribunal in *Reed* or the Employment Appeal Tribunal in *Gizbert* intended to suggest that the necessary mutuality of obligation would exist if the worker had an unrestricted right to refuse all offers of work.

124. In *Reed*, the Upper Tribunal simply did not decide the point, having found that there was no obligation on Reed to provide work nor any obligation on the temps even to consider whether to accept work if it was offered. In *Gizbert*, what was important was that Mr Gizbert did not have an unfettered right to refuse assignments in that he was obliged to act in good faith. Although it is not spelt out in the decision of the Employment Appeal Tribunal, the inference from this is that he could not unreasonably refuse a suitable assignment given that he was going to be paid for 100 days work whether or not he in fact worked for that number of days.

125. In our judgment, the key principle which emerges from the authorities is that there will not be the necessary mutuality of obligation if the worker has an unfettered right to refuse an offer of work. At a minimum, what is needed is that there is some restriction on the ability to refuse a suitable offer of work which, in effect, results in there being an obligation to accept at least some work.

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* 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.

129. We should note that Ms Choudhury suggested that we should look at the reality of the situation (referring to the principle that legislation should be construed purposively based on a realistic view of the facts as explained by the Court of Final Appeal of Hong Kong in *Collector of Stamp Revenue v Arrowtown Assets Limited* 6 ITLR 454 at [35]. However, this sort of

argument was never part of HMRC's case prior to Ms Choudhury's oral submissions and we accept Mr Firth's submission that HMRC should not be allowed to introduce such an argument at such a late stage as it would require a rather different focus on the facts which Mainpay has had no opportunity to consider.

130. The question then is what obligations are placed on the workers. In terms of mutuality of obligation, the only relevant provision is the requirement in clause 3.1 for the worker to "consider any suitable Assignments obtained by the Company". 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.

131. It is in our view necessary to consider the obligation against the factual background known to the parties when they entered into the contract. As we have explained, the assignments are obtained by direct discussions between the worker and an employment agency. It is only once the worker had agreed to perform a particular assignment that the details of the assignment would be communicated to Mainpay. The reality is that this is where the work done by a worker through the relationship with Mainpay comes from.

132. Against this background, we do not consider that, in the unlikely event that Mainpay were itself to obtain an assignment which it then offered to a worker there would be any obligation implied or otherwise for the worker to accept any such assignment instead, the worker would have an unfettered right to refuse any assignment obtained by Mainpay.

133. This is in our view supported by the fact that, 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.

134. Although we do not place any reliance on the point, we note that such a conclusion is consistent with the fact (as we have found) that, as a matter of practice, there was no expectation that workers would seek permission from Mainpay before taking assignments with other employers, despite the apparent obligation to do so contained in clause 2.2 of the 2013 Contract.

135. 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.

136. Although it is not relevant to the interpretation of the 2013 Contract, we note that this is a point which may have been appreciated by Mainpay, as a further revised version of the contract was introduced in 2014 which requires workers to accept all suitable assignments offered by Mainpay and goes on to state that refusal of an offer of a suitable assignment without good cause may constitute gross misconduct resulting in termination of the employment.

137. Given our conclusion in relation to the lack of mutuality of obligation, we do not need to consider the extent to which control on the part of Mainpay over its workers during the periods between assignments is required in order for an overarching contract of employment to exist nor whether the 2013 Contract confers the required level of control (if any) on Mainpay. Given

the lack of authority on this point we think it is best left to be decided in a case where it is necessary to do so.

**SINGLE (BUT NOT CONTINUOUS) EMPLOYMENT**

138. Even if there is no overarching contract of employment (which Mainpay accept is not the case in relation to the 2010 Contract and which we have found not to be the case in relation to the 2013 Contract), Mr Firth submits that there is nonetheless a single employment relationship. If this is right, the workplaces where the workers carry out their assignments would not be permanent workplaces given that ss 338 and 339 ITEPA define permanent workplace and temporary workplace by reference to the duties of an "employment".

139. 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."

140. In essence, Mr Firth submits that where an individual provides services on a number of occasions under a single overarching contractual arrangement between the worker and their employer, this represents a single employment, even though the employment is not continuous (because there are gaps between assignments).

141. Mr Firth does not suggest that there is any authority supporting this proposition but argues that it is entirely natural to consider each assignment within the arrangements to be part of the same employment relationship and, conversely, that it would be artificial to consider each assignment as a separate employment. He points out for example that, if each assignment were a separate employment, a P45 should be provided by the employer each time an assignment comes to an end in accordance with the provisions of the Income Tax (Pay as you Earn) Regulations 2003 (employment for this purpose having the same definition as in s 4 ITEPA).

142. In further support of his submission, Mr Firth observes that it is difficult to see what legislative purpose there might be in treating workers who carry out a number of assignments for the same employer differently depending on whether or not the contract is an overarching contract of employment.

143. One additional point made by Mr Firth is that most of the cases dealing with the possible existence of overarching contracts of employment relate not to tax but to the question as to whether or not the employee qualifies for certain workers' rights which depend upon them being able to demonstrate a particular period of continuous employment. In order for the employment to be continuous, they need to be able to show that there is a contract of employment during the gaps between assignments. Mr Firth points out that this of course is not the case in relation to the tax legislation which does not require continuous employment but is based on whether there is a single employment (whether or not there may be gaps between the periods of work which are comprised in that employment).

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."

145. In addition, Ms Choudhury notes that each assignment will have different terms for example in relation to pay, duration, location and work to be done. She submits that, on this basis, 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. In response to this, Mr Firth makes the point that, even if there were an overarching contract of employment this would, in a sense, still be a framework agreement given that the specific terms of each assignment would need to be plugged in to the overarching employment contract.

146. The only authority referred to by the parties which addresses the single (but not continuous) employment question is *Reed*. The Upper Tribunal gave the argument fairly short shrift although it is not entirely clear why the point was dismissed. Having referred to the definition of employment in s 4 ITEPA, The Upper Tribunal states at [323] that:

> "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."

147. It might be inferred from this that the Upper Tribunal thought that there was no contract in existence at all in the gaps between assignments. However, it seems that they had earlier concluded at [316] that there probably was a contract of some sort in existence between assignments, at least in relation to part of the period under review.

148. We do however consider that the Upper Tribunal reached the right conclusion. Section 4 ITEPA clearly links the concept of "employment" to a particular type of contract. For present purposes, the only relevant type of contract is a "contract of service" (s 4(1)(a) ITEPA). Given that neither the 2010 Contract nor the 2013 Contract is an overarching contract of service, it must in our view follow from this that there is a separate contract of service for each assignment. The natural reading of s 4 ITEPA is that each assignment, governed by a separate contract of service is a separate employment. There is for example no suggestion in s 4 ITEPA that a single employment may encompass more than one contract of service.

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.

**PERMANENT WORKPLACE**

151. Taking stock of the position we have reached so far, our conclusion is that there is no overarching contract of employment and that each assignment is a separate employment. The result of this is that each workplace at which a worker carries out an assignment cannot be a temporary workplace as it is prevented from being so by s 339(5)(a)(ii) ITEPA 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.

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.

154. Ms Choudhury's response to this is that the requirement to attend the workplace regularly is simply the corollary of s 339(5) which prevents the workplace from being a temporary workplace if the employee is expected to attend that workplace for more than 24 months or for most of the period during which the employment subsists. In effect, what she is saying, is that this provides some explanation as to what might be seen as regular attendance.

155. In our view, s 339(2) must be interpreted, as is the case with all legislation, in the context in which it appears. Sections 338 and 339 ITEPA draw a clear distinction between a permanent workplace and a temporary workplace. Given the careful definition of these two terms, it would to us be surprising if Parliament had intended that there should be a third category of workplace (neither permanent nor temporary) which it had not taken the trouble to define and in respect of which it made no specific provision in relation to the deductibility or otherwise of expenses.

156. Taking this into account, the only sensible interpretation of s 339 is that if a workplace is prevented from being a temporary workplace by s 339(5)(a)(ii) as a result of the employee's attendance at that workplace comprising the whole or almost the whole of the period for which the employment is held, that must be taken to be regular attendance so that the workplace is a permanent workplace within s 339(2) ITEPA.

157. We appreciate that the result of this interpretation is that s 339(2)(a) ITEPA adds very little (if anything) and that we should not lightly interpret legislation in such a way that any part of it is, in effect, redundant. However, it is by no means unknown for this to be the result of the way in which legislation has been interpreted by the Courts.

158. Our conclusion therefore is that where a workplace is prevented from being a temporary workplace as a result of s 339(5), the employee is taken to attend that workplace regularly so that the workplace is a permanent workplace within s 339(2) ITEPA. The result of this is that Mainpay's workers are not entitled to deduct subsistence expenses due to the restriction in s 338(2) relating to the expenses of ordinary commuting which includes travel between an employee's home and a permanent workplace.

159. Even if we are wrong in this, our view is that if an employee attends a workplace every day during which the employment subsists, they must be taken to attend the workplace regularly.

160. Mr Firth disputes this based on the comments made by the Supreme Court in *Isle of Wight Council v Platt* [2017] UKSC 28. That case was dealing with the question as to whether a child's parents were guilty of an offence as a result of the child failing to attend school regularly. The Supreme Court suggested at [1] that:

> "There are at least three possible meanings of 'regularly' in that provision: (a) evenly spaced, as in 'he attends church regularly every Sunday'; (b) sufficiently often, as in 'he attends church regularly, almost every week'; or (c) in accordance with the rules, as in 'he attends church when he is required to do so'."

161. Mr Firth suggests that the first and third alternatives do not make any sense in the context of s 339 ITEPA and so the meaning must be the second alternative which is that the worker attends the workplace "sufficiently often". Assuming this is right, he submits that an employee cannot be said to attend a workplace sufficiently often if they are only there for say a day or for a week. He suggests that a month might be an appropriate time after which it could be said that the employee has attended the workplace "sufficiently often".

162. This interpretation leads to one odd result which Mr Firth acknowledges. This is that, even where an employee expects to attend the same workplace for a significant period of time, he will not have attended the workplace "sufficiently often" until he has been working for more than a month. This means that the employee could claim travel and subsistence expenses for the first month of their job but would no longer be able to claim once they had been working for more than a month.

163. In our view, this anomaly demonstrates why Mr Firth's suggested interpretation cannot be correct. It is very difficult to see why Parliament might intend that somebody should be able to claim travel and subsistence expenses for the first month of a permanent job but then no longer be able to claim such expenses once they had been working for more than a month.

164. The other obvious difficulty with Mr Firth's interpretation is that it requires an arbitrary line to be drawn in order to determine the point at which attendance qualifies as regular. Then it seems no particular reason why, say, attendance every day for a week rather than a month should not be regular.

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.

166. Mr Firth submits that this cannot be right if the assignment only lasts for one day on the basis that it cannot be said that an individual attends a workplace regularly if they only attend the workplace on one occasion. We do not however agree with this. As the Supreme Court noted in *Isle of Wight*, there are a number of possible meanings of the word "regularly". The context in which they were interpreting the term is very different to s 339 ITEPA. The Supreme Court did not suggest that the three examples they put forward were the only possible meanings of the word saying only that there were "at least three" possible meanings. In any event, attendance for one day as a result of the employment only lasting for one day would arguably fall within their third possible meaning which is attendance when required to do so.

167. Our conclusion on this point therefore is that, even if the requirement to attend the workplace regularly is a separate requirement for a permanent workplace, an individual does necessarily attend a workplace regularly if it is attended by them on every day the employment continues, even if that is only for one day.

168. We have already noted that the spreadsheet produced by Mainpay appears to show that the average length of assignments over the period is at least eight weeks. On that basis, even if we had agreed with Mr Firth's interpretation, it seems there would be few instances where the workplace would not be attended regularly, although no doubt this would need to be investigated more thoroughly had it been relevant.

**USE OF BENCHMARK SCALE RATES**

169. Given the conclusion that we have reached, this is not a point which we need to address as the expenses are not deductible on any basis. However, as the point was fully argued and in case of any appeal, we will briefly set out our thoughts in relation to this issue.

170. Generally speaking, it is necessary to show that an expense has been incurred and the amount of that expense in order for it to deducted from earning in accordance with ss 333 and 334 ITEPA. However, s 65 ITEPA allows an employer to apply for a dispensation which is, in effect, an agreement by HMRC that certain categories of payment (including a reimbursement of expenses) is not subject to tax. To the extent relevant, s 65 ITEPA provides 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
>
> (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."

171. Based on this provision, HMRC, in 2009, introduced a system of benchmark scale rates which employers could use to make subsistence payments to employees who incur such expenses. The arrangements were set out in the 2009 HMRC Brief which we have already referred to.

172. The HMRC Brief explained that it was still important to ensure that an employee had in fact incurred subsistence expenses but that, subject to this, the benchmark scale rates could be reimbursed without a tax liability as long as the workplace was a temporary place of work and the employee was absent from home for a continuous period in excess of either five hours or ten hours. The benchmark scale rates were £5 if the worker was away from home for more than five hours and £10 if the worker was away from home for more than ten hours.

173. Under the heading "**What you have to do if you want to pay scale rates to your employees?**", the response was:

> "You should apply to HMRC for a dispensation. You need to complete a Form P11DX, which is the form used by employers to apply for a dispensation, and submit it to HMRC. On the form you need to indicate with a tick against the appropriate statement under "Travel and Subsistence" that you intend using HMRC's benchmark scale rates to reimburse your employees' subsistence payments. By ticking this box you would be merely notifying HMRC that you intend to pay HMRC's benchmark scale rates for day subsistence and that you have adequate management processes in place to ensure that payments are only made where all the qualifying conditions are met."

174. It is common ground that Mainpay did not apply for a dispensation and that no dispensation was granted by HMRC. Mr Firth however submits that it was nevertheless open to Mainpay to reimburse employees using benchmark scale rates as along they had in fact incurred some expense.

175. The basis for this submission is that, says Mr Firth, 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. In support of this, Mr Firth refers to the terms of s 65 ITEPA itself and also to the decision of the Court of Appeal in *Cheshire Employer and Skills Development Limited v HMRC* [2012] EWCA Civ 1429.

176. The question in *Cheshire* was whether lump sums payments made by an employer to cover motoring expenses of its employees were earnings for NIC purposes. The travel in question was not travel from home to a temporary workplace but was travel by the employees between different sites in the course of their duties. The Court of Appeal decided that, in these circumstances, a genuine reimbursement of the expenses was not earnings for NIC purposes. In reaching this conclusion, Etherton LJ set out at [55] the following principles:

> "… in a case where an employer establishes a general scheme for reimbursement of employees' travelling expenditure, then in determining whether the allowances are to be treated as the taxable earnings of the

> employees because they involve a profit element or they are to be ignored because they are reimbursement of expenditure: (1) a broad brush approach is necessary in view of the practical constraints of devising a scheme that can apply to a number of different employees and is administratively workable; (2) the test is not whether the allowance produces a mathematical equivalence with the expenditure; (3) rather, the question is whether the scheme was constructed in a genuine endeavour to produce an equivalence between the allowance and the expenditure and to apply with approximately equal justice to all within its scope."

177. Although Mr Firth accepts that *Cheshire* was dealing with a different point, he submits that it should apply by an analogy to a scheme put in place to reimburse subsistence expenses relating to the attendance of employees at a place of work which is not a permanent workplace in accordance with s 338 ITEPA.

178. In this case, he argues that Mainpay's decision to pay employees who had incurred subsistence expenses a flat figure of initially £13 a day, subsequently reduced to £5 or £10 per day, was clearly a genuine scheme to reimburse expenses, admittedly applying a broad-brush approach and should therefore be treated in accordance with the principles laid down by Etherton LJ in *Cheshire* as an approximation of the expenses in fact incurred and therefore deductible.

179. This approach, says Mr Firth, is supported by s 65 ITEPA itself. He notes that s 65(3) requires HMRC to grant the dispensation if the officer is satisfied that no tax is payable as a result of the reimbursement of the expenses. HMRC have themselves applied a broad-brush approach in agreeing that their benchmark scale rates can be used in order to reimburse expenses without any tax liability. If this was not permissible, Mr Firth argues that no dispensation could ever be granted as HMRC could not be satisfied that no tax was payable without knowing the precise amount of the expenses incurred by each employee.

180. In further support of his position, Mr Firth notes that both HMRC's employment income manual and the HMRC brief suggest that, where an employer reimburses expenses at a level in excess of the benchmark scale rates without agreeing this in advance with HMRC, it is only the excess over the benchmark rate which would be subject to tax and NIC's.

181. On this basis, Mr Firth submits that it is irrelevant whether an employer obtains a dispensation or not. A broad-brush approach is permitted and can therefore be operated without any liability to tax.

182. Ms Choudhury's position in relation to this point is that, as is made clear by the HMRC Brief, the benchmark scale rates can only be used if a dispensation has been applied for. If it has not, it must be shown that actual expenses have been incurred and it is only those expenses which can be reimbursed. She also notes that, in any event, there is no evidence that Mainpay had a proper system in place for monitoring expenses and that the documentation shows (borne out by the interviews which HMRC carried out with a sample of workers) that expenses were reimbursed whether or not any expenses had in fact been incurred.

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.

190. Even had we come to a different conclusion, there is in our view a serious question as to whether the arrangements operated by Mainpay were a genuine attempt to reimburse expenses which its employees had actually incurred. It is clear from the employment guides and the supporting FAQ's which we have referred to above that the subsistence allowance would be paid whether or not the employees had incurred any expenses and that no evidence was required to be provided as to whether any expenses had in fact been incurred.

191. As we have said, the default position in relation to the expenses section of the on-line portal is that subsistence expenses would be paid unless an employee went into the system to remove the claim. However, there is nothing in the guidance to employees which makes it clear that they should do this if they did not in fact incur any expenses.

192. Whilst it appears that approximately 10% of employees, must have done so (as Mainpay's records show that expense reimbursement payments were only made to about 90% of employees), it cannot be inferred from this that all of the remaining employees did in fact incur expenses. Indeed, the notes of the interviews with the employees suggest that there was at least one of those employees who was reimbursed expenses even though they did not in fact incur any.

193. On this basis, we do not consider that the arrangements operated by Mainpay during the relevant period were a genuine attempt to reimburse subsistence expenses actually incurred.

**LOSS OF TAX BROUGHT ABOUT CARELESSLY**

194. The final point we need to determine is whether any loss of tax relating to the tax years ended 5 April 2011 and 5 April 2012 was brought about carelessly. If it was not, HMRC accept that the notices of determination and the Section 8 decision notices for those years are out of time as they were only issued more than four years after the end of the relevant tax year (ss 34 and 36 Taxes Management Act 1970 ("TMA")).

195. Section 118 TMA provides that a loss of tax is brought about carelessly if the person in question fails to take reasonable care to avoid bringing about that loss.

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. In the same paragraph, it highlighted the need to show that any failure to take reasonable care caused the loss of tax. The Upper Tribunal also reminded itself at [85] that the burden of proof is on HMRC to show that there was a failure to take reasonable care and that the failure caused the loss of tax.

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. It is therefore this first aspect which we must focus on.

201. Mr Hugo, on behalf of Mainpay, got in touch with Mishcon in November 2007. The individuals at Mishcon with whom Mr Hugo was dealing were members of their employment group. He explained the background including that Mainpay was an umbrella company which employed temporary workers and paid them a salary. He also mentioned that certain allowable

expenses would be paid to the employees. The request to Mishcon was to provide a suitable contract. Mr Hugo enclosed with his email a "Terms of Engagement" used by an employment agency. He asked whether this could be used as the basis of Mainpay's contract with its workers or whether it should have a contract of employment.

202. Mishcon took the terms of engagement and made some proposed amendments. When he received this, Mr Hugo raised various queries. He noted that Mainpay would be paying the workers as employees (i.e. salaries and reimbursed expenditure) and asked whether the fact that the contract treated the workers as self-employed affected Mainpay's ability to reimburse them for "deductible business expenditure". Mishcon's response was that this was the correct contract and that it was right to treat the individuals as self-employed rather than employees. The advice was that "the fact that they are 'self-employed' … does not affect Mainpay's ability to reimburse them for deductible business expenditure".

203. In his evidence, Mr Hugo mentioned that he had a number of conversations with Mishcon as well as the correspondence which has been provided to the Tribunal. In a report to his colleagues of one of these conversations, Mr Hugo mentions that Mishcon had advised that Mainpay is required to retain an original hard copy of any supporting documentation in relation to business expenses. Mr Hugo's explanation for the fact that Mainpay did not do so in relation to subsistence expenses was that he interpreted this as relating to travel expenses. He also mentioned that employees were told to retain receipts (although, as we have explained, this was only from 2013/14).

204. Mr Firth submits that, on the basis of this correspondence, there was no failure to take reasonable care on the part of Mainpay. He draws attention to the fact that Mishcon were told that Mainpay was an umbrella company and that it was important that expenses could be reimbursed/deducted. On top of this, Mr Hugo specifically queried whether the form of contract affected the deductibility of expenses and Mishcon confirmed that it did not. There was therefore no reason for Mr Hugo or Mainpay to seek further clarification of this advice and no suggestion that he might get a different answer if he were to raise the point again.

205. As far as the advice from Mishcon is concerned, Ms Choudhury makes the point that Mr Hugo's brief to Mishcon does not give any information about the sort of expenses which would be reimbursed or the basis on which it might be suggested that those expenses could be deducted. She notes that, in his follow up to Mishcon after receiving the draft contract, Mr Hugo just refers to deductible business expenditure. Mishcon's response was simply to confirm that the form of contract did not affect Mainpay's ability to reimburse them for deductible business expenditure. This is the basis on which Ms Choudhury suggests that Mr Hugo should have sought further clarification of the position. Ms Choudhury also draws attention to the fact that Mishcon advised that Mainpay should retain records of expenses which it did not do.

206. Ms Choudhury also referred to the fact that Mainpay did not take any advice after the publication of the HMRC Brief in April 2009 and continued using the £13 a day rate for reimbursement of subsistence expenses rather than the £5 or £10 benchmark rates until around 2011 and did not apply for a dispensation. However, in our view, this is only relevant to the question of reimbursement of expenses using benchmark scale rates without a dispensation and not to the question as to whether the expenses were deductible at all as a result of the workplaces being permanent workplaces (in the absence of an overarching contract of employment). This is not therefore part of the case put forward by HMRC in relation to carelessness which, as we have said, related only to the latter point.

207. Having said this, our conclusion is that Mainpay did fail to take reasonable care and that, as a result of this, there was a loss of tax.

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.

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.

216. For the reasons we have explained, our conclusion is that there was a loss of tax brought about carelessly by Mainpay and so the determinations and decisions relating to the tax years ended 5 April 2011 and 5 April 2012 were made within the relevant statutory time limit contained in s 36 TMA.

**DECISION**

217. For the reasons we have explained, the workplaces attended by each worker in respect of each individual assignment were permanent workplaces. Any travel and subsistence expenses relating to the individual's attendance at such a workplace is not therefore deductible as a result of s 338(2) ITEPA.

218. There was a loss of tax brought about carelessly by Mainpay in respect of the tax years ended 5 April 2011 and 5 April 2012 and so the notices of determination and Section 8 Decisions relating to those years were made in time.

219. Mainpay's appeal is therefore dismissed and the regulation 80 Determinations and Section 8 Decision Notices for all years are upheld.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

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

**ROBIN VOS**
**TRIBUNAL JUDGE**

**Release date: 21st DECEMBER 2022**