[2014] UKUT 0160 (TCC)

Reference numbers: TCC-JR/01/2009
TCC-JR/02/2009
FTC/34/2012

INCOME TAX and NATIONAL INSURANCE CONTRIBUTIONS – allowances for travel and subsistence costs- character of allowances – whether earnings under ITEPA Part 3 Chapter 1 – Yes – or sums treated as earnings under ITEPA Part 3 Chapter 3 – No – whether recipients had permanent or temporary workplaces – permanent – travel costs ordinary commuting expenses and not deductible – whether allowances within dispensations granted pursuant to ITEPA s65 –No – whether dispensations could lawfully be granted – No

JUDICIAL REVIEW – whether appellants had legitimate expectation that allowances would not be subject to income tax and NICs and that dispensations would not be revoked and HMRC would not seek income tax and NICs from employees retrospectively – No

Whether appellants under obligation as employers to make PAYE deductions in respect of allowances paid – Yes – appeal and judicial review application dismissed

IN THE MATTER OF JUDICIAL REVIEW PROCEEDINGS
AND ON APPEAL FROM THE FIRST-TIER TRIBUNAL (TAX CHAMBER)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

REED EMPLOYMENT PLC AND 11 OTHERS **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: Mrs Justice Proudman DBE
Judge Timothy Herrington

Sitting in public in London on 23, 24, 25, 28, 29, 30, 31 October and 1 November 2013

Mr Ian Glick QC, Mr Andrew Clarke QC, Mr David Ewart QC and Mr Adam Rushworth, Counsel, instructed by Slaughter and May, for the Appellants

Mr Malcolm Gammie QC, Mr Adam Tolley and Miss Kate Balmer, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

GLOSSARY

Decision	The decision of the FTT dated 6 January 2012 (Judges Bishopp and Avery Jones)
Dispensations	First dispensation granted on 30 November 1998; Second dispensation (replacing the first) granted on 9 January 2001; Third Dispensation (replacing the second) granted on 7 February 2002; Fourth Dispensation (replacing the third) granted on 7 March 2003; and Fifth Dispensation (replacing the fourth) granted on 3 February 2004.
Disputed Allowances	The sums paid to Employed Temps in respect of travel expenses which Reed contends were contractually separate payments to payments of salary.
Employed Temps	Employees of Reed placed on assignment with clients.
ERA	Employment Rights Act 1996.
FTT	First-tier Tribunal (Tax Chamber).
HMRC	Used as a shorthand term to include not only Her Majesty's commissioners for Revenue and Customs but also their predecessor bodies, the Inland Revenue, HM Customs & Excise and the Contributions Agency.
ITEPA	Income Tax (Earnings and Pensions) Act 2003.
NICs	National Insurance Contributions.
Reed	The appellants collectively.
Relevant Period	6 January 2001 to 5 April 2006.
RR	Robson Rhodes.
RTA	Reed Travel Allowance, the scheme introduced in 1998.
RTB	Reed Travel Benefit, the amended scheme which succeeded RTA in 2002.

The Rules	The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended).
Schemes	The RTA and RTB schemes.
TCEA	The Tribunals Courts and Enforcement Act 2007.
Travel-to-work payment	The supplement to temporary employees' pay Reed paid (subject to the deduction of tax and NICs) while the RTA scheme was in operation.
UT	Upper Tribunal (Tax and Chancery Chamber).

DECISION

Introduction

1. Reed appeals against the decision of the FTT dated 6 January 2012 which dismissed appeals by Reed against determinations and notices of decision assessing Reed as liable for approximately £158 million on unpaid income tax and NICs for the Relevant Period. Issues of quantum remain to be determined and are not the subject of these appeals.

2. In the alternative, Reed applies for judicial review of those determinations and notices of decision.

3. Paragraphs 4 to 14 below are taken largely from the helpful summary of the dispute between the parties contained in Reed's skeleton argument.

4. Reed is a well-known employment agency. It operates both an employment agency (properly so called) and an employment business: that is, a business that supplies temporary workers to clients of Reed. Reed sends these workers to clients on assignment. The workers do not become employees of the clients, but are employees of Reed, and are usually known as Employed Temps.

5. The appeal relates to two successive sets of arrangements operated by Reed which were intended to make use of changes to the law relating to travel expenses paid to employees. Travel expenses also include subsistence expenses and we use the term to cover both types of expense.

6. Those changes in law were originally made in 1998 and the relevant provisions were at that time contained in the Income and Corporation Taxes Act 1988. These provisions are now contained in Parts 3 and 5 of ITEPA. For the purposes of this appeal, there is no material difference between the two statutes in this regard and consequently we refer only to the relevant provisions of ITEPA in this decision.

7. Prior to 1998, employees could not deduct any travel expenses for travel from home to work from their taxable earnings, and so Reed remunerated Employed Temps on the basis that they would have to pay such expenses out of their salaries: that is out of their net (after tax) earnings. Since 1998, payments to an employee in respect of travel expenses for travel to a *temporary* workplace falling within Chapter 3 of Part 3 and Chapter 2 of Part 5 of ITEPA, provided they constitute the reimbursement of expenses actually incurred, have been deductible by that employee from his taxable earnings; and if such payments are covered by a dispensation under section 65 of ITEPA, they are not taxable at all, nor do they count for NIC purposes. In these circumstances, the payments do not come within the PAYE Scheme and are exempt from NICs. In these new circumstances, having received advice from its accountants, RR, Reed sought to make arrangements that would enable it to make non-taxable payments to its Employed Temps in respect of their travel expenses. The intention was that these arrangements would (if effective) produce a saving part of which would be shared with the Employed Temps. Reed instructed RR to negotiate a

dispensation with HMRC to cover the proposed arrangements, which RR proceeded to do. Further, throughout the Relevant Period, there were many meetings and other contacts between RR and HMRC relating to how the arrangements operated, or would operate, and to permitted levels of expenses.

8. The first set of arrangements, the RTA, operated from 1998 until April 2002, and therefore was in place for the first part of the Relevant Period (January 2001 to April 2002). The second set of arrangements, the RTB, was in operation for the remainder of the Relevant Period (April 2002 to April 2006). Where appropriate we refer to the RTA and RTB collectively as the "Schemes".

9. Under both of the Schemes, Reed's case is that it paid Employed Temps less by way of salary than would otherwise have been the case, together with (contractually separate) payments in respect of travel expenses. Under the RTA, the payment reimbursing expenses did not appear expressly on an Employed Temp's payslip but Reed contends that it was calculable from the figures shown. Following concerns expressed by HMRC over the payslips, Reed replaced RTA with RTB under which the amount of the payment of travel expenses was expressly shown on the payslip.

10. If the Schemes were effective, Reed could leave the Employed Temp with the same net after tax pay as he or she would have had before the arrangements were implemented with Reed having to account for less tax and employer's NICs to HMRC in respect of that pay.

11. Under both of the Schemes, Reed paid part of the income tax and employee NICs it believed it had saved to its Employed Temps. Under the RTA (but not the RTB) this was done by means of what were called "travel-to-work payments" or "travel allowances" added to the Employed Temps' remuneration. It is not in dispute that these payments or allowances were taxable and income tax and NICs were duly paid in respect of them. Reed kept the majority of the savings for itself (the proportions of which changed in the Employed Temps' favour when the RTB replaced the RTA) and also kept all the benefit of the reduced employer's NICs saved.

12. In order to distinguish between the sums paid to Employed Temps in respect of travel expenses which Reed contends were not liable to income tax or NICs, and those sums paid to the Employed Temps as their share of the income tax and NICs saved, which were taxable, we refer to the former using the term "Disputed Allowances".

13. As a result of the discussions with HMRC, the relevant payments were covered by the five successive dispensations which HMRC gave to Reed and which, Reed believed, had the effect that the payments could be made free of PAYE and NICs.

14. By 2004 HMRC were beginning to have concerns about the arrangements and after a series of meeting and extensive correspondence in 2006, HMRC revoked the last of the dispensations with effect from 5 April 2006; and, in February 2007, HMRC made determinations under the PAYE Regulations, and issued notices of decision under the Social Security (Contributions) Regulations, assessing Reed for sums in respect of income tax and employee NICs that HMRC claims Reed should have

deducted from Employed Temps' salaries and paid over to it, and for sums in respect of employer's NICs for which HMRC claims Reed should have accounted during the periods covered by the dispensations.

15. Reed appealed to the FTT against the determinations and notices of decision: it also applied for judicial review to, amongst other things, quash them on the ground that, it says, HMRC's actions breached its substantive legitimate expectation, based on the dispensations, that income tax and NICs would not be due in respect of the Disputed Allowances. In due course the judicial review application was transferred to the UT and was stayed pending the hearing of the tax appeals by the FTT (although the FTT was invited by the UT to find facts that might be relevant only to the judicial review application and did so). Prior to the transfer Henriques J, sitting in the Administrative Court, ordered that the application should be treated as the substantive hearing and we have dealt with the application on that basis.

Relevant legislation

16. It is helpful at this stage to set out the relevant legislation with some commentary on its application to the issues we have to consider in determining this appeal and judicial review application. We only refer to the relevant legislation concerning income tax, because, as regards NICs, employment earnings on which NICs are payable are, as the FTT found, in general calculated on the same basis as those earnings are calculated for income tax purposes and HMRC's position has been that no NICs are payable in respect of a benefit in respect of which a dispensation has been granted even though there is no statutory basis for HMRC to issue dispensations in relation to NICs.

17. As we indicated in paragraph 6 above, we refer only to the relevant provisions of ITEPA which are not materially different from the corresponding provisions of the Income and Corporation Taxes Act 1988 which the relevant provision of ITEPA replaced.

18. Section 3 of ITEPA sets out the structure of the Parts of that Act dealing with employment income and in so far as relevant provides as follows:

> "(1) The structure of the employment income Parts is as follows:
>
> This Part imposes the charge to tax on employment income, and sets out –
>
> (a) how the amount charged to tax for a tax year is to be calculated, and
>
> (b) who is liable for the tax charged;
>
> Part 3 sets out what are earnings and provides for amounts to be treated as earnings;
>
> Part 4 deals with exemptions from the charge to tax under this Part (and, in some cases, from other charges to tax);
>
> Part 5 deals with deductions from taxable earnings.
>
> (2) In this Act "the employment income Parts" means this Part and Parts 3 to 7."

19. Section 4 deals with the meaning of "employment" for the purposes of the "employment income Parts" of ITEPA and in so far as relevant provides as follows:

"(1) In the employment income Parts "employment" includes in particular -

(a) any employment under a contract of service"

…

It is common ground that the Employed Temps fell within the scope of this provision.

20. Section 6(1) sets out the nature of the charge to tax on employment income as follows:

"(1) The charge to tax on employment income under this Part is a charge to tax on -

(a) general earnings, and

(b) specific employment income.

The meaning of "employment income", "general earnings" and "specific employment income" is given in section 7.

(2) The amount of general earnings or specific employment income which is charged to tax in a particular tax year is set out in section 9."

We are not concerned here with "specific employment income".

21. Section 7 expands on this provision, and so far as relevant provides as follows:

"(1) This section gives the meaning for the purposes of the Tax Acts of "employment income", "general earnings" and "Specific employment income".

(2) "Employment income" means –

(a) earnings within Chapter 1 of Part 3,

(b) any amount treated as earnings (see subsection (5)), or

…

(3) "General earnings" means –

(c) earnings within Chapter 1 of Part 3, or

(d) any amount treated as earnings (see subsection (5)),

excluding in each case any exempt income.

(4)…

(5) Subsection (2)(b) or 3(b) refers to any amount treated as earnings under –

…

(b) Chapters 2 to 11 of Part 3 (the benefits code)."

Thus the key concept to bear in mind is "general earnings" which is comprised of two streams: earnings falling within Chapter 1 of Part 3 of ITEPA and amounts treated as earnings under the remaining Chapters of Part 3 of ITEPA, and specifically in this case, Chapter 3 of Part 3.

22. Section 9(2) and (3) deals with the amount of employment income which is charged to tax in respect of general earnings as follows:

"(2) In the case of general earnings, the amount charged is the net taxable earnings from an employment in the year.

(3) The amount is calculated under Section 11 by reference to any taxable earnings from the employment in the year."

23. The concept of "net taxable earnings" is dealt with in sections 11 and 15 of ITEPA. It is helpful to deal with section 15 first, which sets out the concept of "taxable earnings" as follows:

"(1) This section applies to general earnings for a tax year in which the employee is resident, ordinarily resident and domiciled in the United Kingdom.

(2) The full amount of any general earnings within subsection (1) which are received in a tax year is an amount of "taxable earnings" from the employment in that year.

(3) Subsection (2) applies –

(a) whether the earnings are for that year or for some other tax year, and

(b) whether or not the employment is held at the time when the earnings are received."

24. Section 11(1) deals with the calculation of "net taxable earnings" as follows:

"(1) For the purposes of this Part the "net taxable earnings" from an employment in a tax year are given by the formula:

TE – DE

where -

TE means the total amount of any taxable earnings from the employment in the tax year, and

DE means the total amount of any deductions allowed from those earnings under provisions listed in section 327(3) to (5) (deductions from earnings: general)."

Thus it can be seen that the amount of taxable earnings is reduced by the amount of allowable deductions to arrive at "net taxable earnings".

25. As referred to in section 7, Part 3 of ITEPA deals in detail with the concepts of "earnings" and any "amount treated as earnings". Chapter 1 of Part 3 consists solely of section 62 which deals with the concept of "earnings" as follows:

> "(1) This section explains what is meant by "earnings" in the employment income Parts.
>
> (2) In those Parts "earnings", in relation to an employment, means –
>
> (a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
>
> (c) anything else that constitutes an emolument of the employment.
>
> (3) For the purposes of subsection (2) "money's worth" means something that is –
>
> (a) of direct monetary value to the employee, or
>
> (b) capable of being converted into money or something of direct monetary value to the employee.
>
> (4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7)."

26. Chapter 2 of Part 3 introduces the concept of taxable benefits in the form of what is known as the "benefits code". This code seeks to bring potentially within the scope of income tax payments in cash or in kind which would not otherwise fall under the concept of "earnings" as set out in section 62. The benefits code is set out in detail in Chapters 3 to 11 of Part 3: we are concerned with those benefits set out in Chapter 3 namely sums in respect of expenses, which are specifically included by section 63(1), and in that context we also need to refer to Chapter 11 which deals with the exclusion of lower paid employments from the benefits code.

27. Section 70 provides the detail of what expenses are caught by the benefits code as follows:

> "(1) This Chapter applies to a sum paid to an employee in a tax year if the sum –
>
> (a) is paid to the employee in respect of expenses, and
>
> (b) is so paid by reason of the employment.
>
> (2) This Chapter applies to a sum paid away by an employee in a tax year if the sum-
>
> (a) was put at the employee's disposal in respect of expenses,
>
> (b) was so put by reason of the employment, and
>
> (c) is paid away by the employee in respect of expenses.

(3) For the purposes of this Chapter it does not matter whether the employment is held at the time when the sum is paid or paid away so long as it is held at some point in the tax year in which the sum is paid or paid away.

(4) References in this chapter to an employee accordingly include a prospective or former employee.

(5) This Chapter does not apply to the extent that the sum constitutes earnings from the employment by virtue of any other provision."

It can therefore be seen that another key concept is whether the expenses concerned are paid "by reason of the employment". The term "expenses" is not defined; its interpretation being left to case law which we will consider later. It is also clear from section 70(5) that payments which constitute earnings by virtue of any other provision are not caught by the benefits code, so that if the payments concerned amount for instance to earnings within section 62(2) and not expenses (as also interpreted by extensive case law) then they will not be caught by section 70.

28. Section 71 gives further clarification as to the concepts introduced by section 70 as follows:

"(1) If an employer pays a sum in respect of expenses to an employee it is to be treated as paid by reason of the employment unless –

(a) the employer is an individual, and

(b) the payment is made in the normal course of the employer's domestic, family or personal relationship.

(2) If an employer puts a sum at an employee's disposal in respect of expenses it is to be treated as put at the employee's disposal by reason of the employment unless –

(a) the employer is an individual, and

(b) the sum is put at the employee's disposal in the normal course of the employer's domestic, family or personal relationships."

It is clear from the width of sections 70 and 71 that where, as is the case with Reed, the employer is not an individual all sums which can be characterised as "expenses" will be treated as paid by reason of the employment and therefore within the scope of section 70. We were given the example of a payment made by a solicitor's firm to reimburse a trainee's travel costs for travelling to his mother's funeral to illustrate the extent of the provision.

29. Section 72 makes it clear that sums falling within the scope of section 70, that is sums paid to or put at the disposal of an employee by reason of employment, are to be treated as earnings from the employment, and thus as general earnings within section 7(3)(b), and taxable earnings within section 15(2). Nevertheless, because they are taxable earnings deductions can be made from them under the provisions referred to below in arriving at "net taxable earnings" under section 11(1) in the same way as

deductions can be made against other general earnings that is salaries etc. which are earnings under section 62. The relevant provisions of section 72 are as follows:

> "(1) If this Chapter applies to a sum, the sum is to be treated as earnings from the employment for the tax year in which it is paid or paid away.
>
> (2) Subsection (1) does not prevent the making of a deduction allowed under any of the provisions listed in subsection (3).
>
> (3) The provisions are –
>
> section 336 (deductions for expenses: the general rule);
>
> section 337 (travel in performance of duties);
>
> section 338 (travel for necessary attendance);
>
> …"

30. Turning therefore to the expenses that can be deducted in arriving at net earnings, this is provided for in Part 5 of ITEPA. Section 327 in Chapter 1 of that Part introduces the subject, subsection (1) and the relevant part of subsection (3) of that section provide:

> "(1) This Part provides for deductions that are allowed from the taxable earnings from an employment in a tax year in calculating the net taxable earnings from the employment in the tax year for the purpose of Part 2 (see section 11(1))."
>
> (3) The deductions for which this Part provides are those allowed under –
>
> Chapter 2 (deductions for employee's expenses) …"

31. The general rule for deduction of expenses uses time hallowed language familiar to tax practitioners over many generations, now in Chapter 2 of Part 5 of ITEPA in section 336 as follows:

> "(1) The general rule is that a deduction from earnings is allowed for an amount if –
>
> (a) the employee is obliged to incur and pay it as holder of the employment, and
>
> (b) the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment.
>
> (2) The following provisions of this Chapter contain additional rules allowing deductions for particular kinds of expenses and rules preventing particular kinds of deductions.
>
> (3) No deduction is allowed under this section for an amount that is deductible under sections 337 to 342 (travel expenses)."

However section 335(3) makes it clear that deductions for travel expenses are governed by specific provisions rather than the general rule. These are set out in sections 337 to 339 the relevant provisions of which are as follows:

"**337 Travel in performance of duties**

(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 necessarily incurred on travelling in the performance of the duties of the employment.

(2) This section needs to be read with section 359 (disallowance of travel expenses: mileage allowances and reliefs).

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.

(4) Subsection (1) does not apply to the expenses of private travel or travel between any two places that is for practical purposes substantially private travel.

(5) In subsection (4) "private travel" means travel between –

(a) the employee's home and a place that is not a workplace, or

(b) two places neither of which is a workplace.

(6) This section needs to be read with section 359 (disallowance of travel expenses: mileage allowances and reliefs).

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."

32. Prior to 1998, when provisions substantially the same as sections 337 to 339 were introduced, expenses incurred in travelling from home to work were not deductible unless exceptionally the home could be regarded as a second place of work. It can be seen from the provisions set out above that such expenses are now deductible in carefully defined circumstances.

33. We were shown HMRC guidance which illustrates the different scenarios that sections 337 and 338 are intended to cover. We think the difference between the two sections amounts to this. Section 337 covers the costs of a journey made in the performance of an employee's duties, such as where a solicitor travels from his office to meet a client at the client's home, or an engineer servicing gas boilers travels from customer to customer during a course of a day. Such employees are travelling in the course of performing their duties of employment. By contrast, section 338 covers the cost of the employee travelling to a place where he is required to perform his duties, such as a judge who is based in London but as part of his duties is listed to hear cases in Winchester for a week. His travel expenses would be covered by section 338.

34. We are concerned in this case with expenses that may or may not fall within section 338. If it can be said that when each time an Employed Temp undertakes a short term assignment to a client, that is an assignment not lasting more than 24 months (see section 339(5)), the Employed Temp is travelling to a temporary

workplace then his expenses in travelling to that workplace from home, or from that workplace to home, will be deductible under section 338, but if the correct position is that when the Employed Temp makes those journeys he is travelling to and from a permanent workplace then the expenses will be regarded as the expenses of "ordinary commuting" and thus not deductible by virtue of sections 338(2) and (3).

35. We now turn to the provisions regarding dispensations. These are contained in section 65 of ITEPA which we set out in full as follows:

> "(1) This section applies for the purposes of the listed provisions where a person ("P) supplies the Inland Revenue 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 section 216(4) (provisions of the benefits code which do not apply to lower-paid employments).
>
> (3) If the Inland Revenue are 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, they must give P a dispensation under this section.
>
> (4) A "dispensation" is a notice stating that the Inland Revenue agree 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, the Inland Revenue 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."

As we were told, obtaining a dispensation can be convenient for the employer, the employee and HMRC in relation to the administration of claims for expenses. In order to obtain a dispensation the employer would need to satisfy HMRC that, in relation to sums it paid its employees as an allowance for travel expenses, the sums concerned amount to no more than the employees concerned would themselves be able to deduct from their taxable earnings under (in the circumstances we are considering) section 338 of ITEPA. This follows from the wording of section 65(3) which requires HMRC to be satisfied that no additional tax is payable in respect of the expenses concerned, which would of course not be the case if the payments made exceeded sums properly deductible under section 338.

36. The effect of a dispensation, and we believe this to be common ground, is that the sums covered by it can be paid without deductions for tax or employees' NICs under the PAYE system. Consequently the sums are not taxable in the hands of the employee. However the employee cannot make his own claim for a deduction for the expenses concerned when he completes his tax return because they will already have been deducted by his employer in computing the employee's taxable earnings and he will have received the sums as reimbursements of the expenses concerned. The employer is thus relieved of dealing with a multitude of expense claims from employees, when as in this case, it has calculated the payments made by reference to scale rates agreed with HMRC, and the employee is relieved of the burden of making individual claims on his tax return.

37. Mr Glick drew our attention to HMRC's guidance on travel expenses contained in booklet 490. The following extracts suitably describe the effect of a dispensation and the consequences if HMRC discover that reimbursed expenses were not covered by a dispensation and PAYE was not accounted for as follows:

> "10.1 A dispensation can save employers and employees time and effort reporting details of travel expenses and benefits on which no tax is ultimately payable.
>
> 10.2 A dispensation is in effect a notice of nil liability. A dispensation should never cover an item for which there would not be a matching income tax deduction. Where a dispensation is in force, it applies both for tax and national insurance purposes. It means that the employer does not have to report to the Inland Revenue expenses/benefits that are covered by the dispensation and the employer does not have to provide employees with details of expenses/benefits they receive which are covered by the dispensation (although it may reduce queries if the employer tells employees about dispensations which apply to them). If employers are in doubt at any time, they should ask their PAYE tax office for advice.

10.3 Before a dispensation can be issued, the Inspector has to know the kind of expenses paid, how they're identified in the employer's accounting system and who is authorised to approve reimbursement. The Inspector will have to be satisfied that no tax is payable in respect of the expenses payments and benefits covered by the dispensation, and the employer operates control systems adequate to ensure that expenses payments and benefits remain within the terms of the dispensation.

11.14 Where the Inland Revenue discovers that reimbursed travel expenses or benefits were not covered by dispensation and PAYE and NIC were not accounted for or the travel expenses were not included on forms P11D where appropriate, the employer will normally be regarded as having failed to correctly operate PAYE and/or correctly complete forms P11D with the result that PAYE tax, NICs, interest and penalties may be sought as appropriate from the employer.

11.15 Where the Inland Revenue find out that tax may be payable on items which were previously covered by a dispensation, for instance if the basis on which the dispensation was given has changed, the Revenue may revoke the dispensation by giving notice to the employer. Except in exceptional circumstances, the dispensation will be revoked from the date of the notice. Where it is revoked from the date of the notice, the Inland Revenue will not take any action against employers or employees in respect of payments made under the terms of the dispensation before that date."

38. We note that a dispensation can only apply for the purposes of "listed provisions". These are described in section 216(4) of ITEPA and they include expenses payments falling within Chapter 3 of the benefits code, which as we have seen, covers expense payments.

39. Section 216 in fact contains a longstanding provision that the provisions that treat expenses of certain kinds as earnings do not apply to "lower paid employments" which are defined by section 217 as employments where the earnings rate is less than £8,500. This is a sum which has not been adjusted for many years, so these days it is relevant only to a small minority of employees. Nevertheless, the effect of this provision is that expenses received by such employees will escape tax unless they fall within the definition of earnings within Chapter 1 of Part 3 of ITEPA.

The material facts

40. The Decision contains a lengthy description of the facts, the material documentation and the evidence. It is clear that there was extensive documentary evidence before the FTT supplemented by witness statements and oral evidence of several witnesses, and unsurprisingly, not all of the evidence which was before the FTT, and which was made available to us, is referred to in the Decision.

41. Reed make extensive criticisms discussed below of the FTT's findings of fact which form a considerable part of their grounds of appeal. Reed contends that the findings of fact amount to errors in law. We deal with these contentions below but at this stage we set out what we see as the principal findings of fact on which the FTT based its decision including those which are subject to Reed's grounds of appeal. References to numbered paragraphs are the paragraphs in the Decision where the relevant findings are made.

42. The FTT relied on the evidence of Simon Baddeley, a senior employee of a Reed group company for its findings as to the manner in which Reed conducted its day to day business of placing Employed Temps with clients. Reed's policy was to endeavour to fill a vacancy for an Employed Temp very quickly to minimise the risk of the business going to a competitor. Employed Temps were commonly engaged for a week or two, to provide holiday cover, but they might sometimes remain at the client's premises for as little as a day, or sometimes for months and occasionally even years (paragraph 22).

43. The vast majority of Employed Temps were during the Relevant Period employed under contracts of employment. The minority who were not are not relevant to this appeal (paragraph 30).

44. The contracts of employment at all times during the relevant period contained a provision that the employment would come to an end at the same time as the worker's current assignment. It was accepted by Mr Derek Beal, a director of Reed, that the purpose of this provision was to give Reed the opportunity of arguing that it was under no continuing obligation to the Employed Temp once the assignment had ended, but Mr Beal recognised that the trend in employment law was such that the Employed Temps should probably gain employment rights whatever the contracts provided (paragraph 31).

45. Mr John Rayer, a Partner at RR, considered that the relaxation of the hitherto strict treatment of travel expenses paid to employees represented an opportunity that might be used to Reed's advantage. As the Employed Temps had successive assignments to Reed's clients at different locations, and some were likely to experience gaps between their assignments, he took the view that, under the new rules, expenses incurred by such workers in travelling between their homes and their various workplaces, that is the client's premises, would no longer be non-deductible ordinary commuting expenses but would become deductible for tax purposes, though initially in the worker's hands. He therefore approached Mr Beal with a view to Reed's introducing an appropriate scheme (paragraph 46).

46. Mr Beal's evidence was that he was anxious to secure the protection of a dispensation, incorporating agreed scale rates for the allowances Reed was to pay. However, the FTT also found:

> "Though he did not go quite so far as to say that Reed would not have proceeded without a dispensation – the scheme was, we think, sufficiently attractive to Reed to make that a possibility – it was clear that Mr Beal was willing to do everything reasonably possible to secure one." (Paragraph 50)

47. Mr Rayer recognised that Reed would need to agree with HMRC scale rates for the amounts to be paid to Employed Temps, and he understood that a significant amount of work was undertaken by Reed in calculating appropriate rates (paragraph 58).

48. Reed recognised that any scheme would need to meet three essential requirements:

(1) that the Employed Temps agreed to work for a lower wage or salary in order to benefit from the scheme;

(2) that the expenses Reed was to reimburse were deductible expenses; and

(3) that the amounts paid, taken overall (since round sum payments were to be made) did not carry with them an element of profit in the Employed Temps' hands. (Paragraph 59).

49. The dialogue with HMRC began when, on 15 September 1998, Robson Rhodes wrote to HMRC applying for a dispensation. Robson Rhodes' letter described the category of expenses that were to be covered by the requested dispensation as:

> "travel and subsistence expenses when [Employed Temps] –
>
> - have no permanent workplace; and
> - are required to attend at various locations for the purpose of performing tasks of limited duration or for some other temporary purpose."

The letter went on to make it clear that "limited duration" meant not more than 24 months. In order to anticipate what RR thought would be an inevitable question, it also stated that "our client wishes to have the option to pay … round sum allowances, which do no more than meet the actual costs incurred." (Paragraphs 60 and 61)

50. In relation to this letter, the FTT made the following findings:

> "We are not entirely convinced the letter was wholly frank. The evidence showed that the analysis which Reed claimed to have undertaken of its employed temps' travelling habits and costs was by no means as extensive or detailed as Mr Rayer had been led to believe, and that the calculation of the subsistence payments for which approval was sought was somewhat "back of an envelope". An internal RR email, sent on 17 September 1998 (two days after the letter was sent) included the comment that Helen Riley, a tax partner at RR, "does have some qualms about the issue, in terms of lack of disclosure of the Revenue". (Paragraph 62)

The FTT recorded what it considered to be the issues arising out of the correspondence and meetings with HMRC leading up to the grant of the dispensation. It found at paragraph 65 of the Decision:

> "It is plain from the contemporary correspondence and notes of meetings that the employment status of the workers who were intended to participate in the scheme was the matter of greatest concern on both sides. The HMRC officers took some convincing that they were truly employed by Reed; but rather surprisingly did not ask for sample contracts of employment (which were not volunteered by Reed or by RR on is behalf). Mr Rayer told us that he was of the clear view, after perusing HMRC's own published guidance and the contrasting examples it provided, that the relevant workers were indeed employed. It emerged that Reed told Mr Rayer that it proposed to take legal advice about the terms of its contracts of employment once a dispensation had been granted; we were told that such advice was taken, but did not discover its result."

51. An Employee Guide prepared to explain the scheme was produced and a draft sent to HMRC. In paragraph 69 of the Decision the FTT found:

> "The need for an Employee Guide had been one of the topics of discussion at the meeting on 9 October, both sides evidently taking the view that the operation of the intended scheme must be clearly spelt out to those affected by it. It described the expenses covered what had by then been named the Reed Travel Allowance, or RTA, scheme as those incurred for "travelling from home to a site (temporary place of work)" The same guide described those who were eligible to participate as
>
> > "all temporaries employed by Reed Staffing Services … unless they have a permanent place of work defined as:
> >
> > - two years actually worked in one location as a principal place of work, or
> >
> > - an expectation that two years will be spent in one location as a principal place of work."

52. The FTT also made findings as to what was said to HMRC about the employees who would fall within the scope of the exemption in paragraphs 70 and 71 of the Decision as follows:

> "70. In the two letters, of 23 October and 18 November 1998, written by RR to HMRC, appear respectively the following statements:
>
> > "We confirm that the dispensation will apply only to employees of Reed Staffing Services Limited who have no permanent workplace, and who are required to attend various locations for a limited period only."
> >
> > "We confirm that the temporary workplace of the employee will vary from one assignment to the other … The only time similar journeys will be an issue is when the assignment is not for a limited duration or temporary purpose, in which case the employee will not be entitled to any expense allowance for travel and subsistence."
>
> 71. HMRC say that it is apparent from these statements that, by the time the first dispensation was granted, Reed and RR had concluded for themselves (though whether rightly or wrongly is a matter of dispute) that the employed temps who were to participate in the scheme, if a dispensation were granted, had no permanent workplaces, because the clients' premises were to be regarded as temporary workplaces. In our view that must be right; these passages have no other possible interpretation."

The passages referred to in paragraph 70 of the Decision were incorporated into the terms of the dispensation (paragraph 73) and the letter made it clear that the dispensations only applied in the circumstances described in paragraph 70 of the Decision (paragraph 74):

> "I would stress that this dispensation applies only to such expenses incurred in the circumstances detailed in your letters".

53. The first dispensation, issued on 30 November 1998 by Mr Downes of HMRC contained the following statement which was also contained in all subsequent dispensations:

> "I am giving you this dispensation because I am satisfied, on the basis of what you have told me, that no additional tax would be payable by the employees concerned on these expenses payments and benefits. I am authorised to do this by [s65 of ITEPA]."

54. The first dispensation was revoked and replaced by a second dispensation on 5 December 2000, some of the scale rates being increased at Reed's request (paragraph 80).

55. During correspondence leading up to the issue of the third dispensation, Miss Sue Ollerenshaw of RR, who became Reed's main contact at the firm when Mr Rayer left in 2001, sent a fax to Mr Read at HMRC on 24 January 2001 which stated:

> "You are correct in your understanding that "employed temps" are engaged under contracts of employment but they are not full time contracts and only apply when the employed temps are carrying out assignments on behalf of Reed. At these times they have all of the benefits and rights afforded by their contracts (paragraph 82)."

56. The Decision records in, paragraph 84, that HMRC placed considerable reliance on this statement, but that Miss Ollerenshaw's evidence was that it was made without giving the matter a great deal of thought, she (and she thought HMRC) considered that only two conditions, employment and an expectation that an employee would work on more than one assignment at different locations, needed to be satisfied if the travel and subsistence expenses were to be allowable.

57. The FTT observed in paragraph 87 of the Decision that the relevant contracts of employment "quite surprisingly in view of the importance both sides attached to the matter, had hitherto been neither requested nor volunteered" when recording that Mr Read of HMRC requested these contracts in March 2001 and that Miss Ollerenshaw only considered this request to have been made in the context of Reed's proposal that the (then) second dispensation be extended to agency workers (that is self-employed workers engaged by Reed under contracts for services and placed on assignments). The FTT then found in paragraph 88 of the Decision:

> "She did, however, provide copies of the contracts (one example each of Reed's contracts with its permanent employees, its temporary employees and its agency workers) under cover of a letter of 23 March 2001 to Mr Read, in which she also offered an answer – if we may say so somewhat disjointed and uninformative – to Mr Read's question about the criteria which dictated whether temporary employees were taken on as employed temps or agency workers."

58. The FTT regarded Reed's reaction to Mr Read's request as material to the Decision, recording Mr Rayer's observation in his evidence on what took place at a meeting on 9 May 2001 which discussed the request, that the contracts relating to the Employed Temps did not appear to be relevant to the application to extend the dispensation to agency workers and that:

> "The Dispensations relating to 'employed temps' had been granted after two detailed reviews by HMRC and I was alive to the possibility that if all the contracts were to be reviewed this could result in an unnecessary review being carried out with all the attendant cost and inconvenience to Reed."

The FTT records Mr Rayer's evidence to the effect that this issue and the VAT implications of including agency workers led to Mr Beal deciding that the application to extend the dispensation should be withdrawn.

59. In paragraph 93 of the Decision the FTT found that:

> "One immediate consequence of the withdrawal of the application for the extension was that the request for copies of the contracts was not pursued, and none were supplied at that time."

The FTT also found that the request was not renewed until July 2004.

60. The third dispensation was granted on 7 February 2002, which provided for further increase in the scale rates (paragraph 96).

61. The FTT recorded in paragraph 95 that during the discussion that had led to the issue of the third dispensation HMRC had concerns "that the payslips were poorly laid out leading to confusion in the mind of the employed temps and a continuing large volume of enquiries to HMRC's helpline." These were improved and the FTT recorded in paragraph 96 the following passage from Miss Ollerenshaw's letter to Mr Beal informing him of the grant of the third dispensation:

> "I also enclose a copy of my letter to the Inland Revenue dated 29 January 2002 and the attached pay-slip which clearly shows a 'reward adjustment' of £14.75 for the week which I explained to the Inland Revenue could cover salary sacrifices in respect of pension contributions, other benefits under the Reed Benefits Scheme and effectively sharing the benefit of the travel arrangement. I made it clear that the level of the salary sacrifice would be agreed in advance with the employees so that:
>
> > it would be effective for tax purposes; and
> >
> > the employees would understand their pay-slips and would not therefore need to contact the Inland Revenue at Bradford Valley View.
>
> The above is excellent news for the Group from several points of view. Firstly, it would now be very difficult for the Inland Revenue to seek any tax and NIC from the company retrospectively. This is on the basis that our recent meetings and my letter clearly demonstrate to the Inland Revenue that, under the current arrangement, salary sacrifices are calculated individually based upon the grossed up equivalent of the expenses payable per the P11D Dispensation. Whilst the Inland Revenue indicated that they were not happy for this practice to continue, they have not tried to recover any tax or NIC for the past.
>
> Secondly the Inland Revenue are aware that for the future the arrangement is being operated on quite an 'aggressive' basis as the company is sharing the benefits by way of salary sacrifices …"

62. The FTT records that the grant of the fourth and (final) fifth dispensations on 7 March 2003 and 3 February 2004 respectively were uncontroversial (paragraphs 97 to 99).

63. The FTT made detailed findings as to the mechanics of the RTA and RTB schemes, recording Mr Beal's description of the essence of the Schemes in paragraph 100, namely that in return for the scale rate allowance the Employed Temps "sacrificed" an amount of pay "based on the benefits that would be paid free of tax under the Dispensations and adjusted so that the Temporary Employee shared in the tax saving".

64. The FTT observed in paragraph 101 that Mr Beal's description was "somewhat opaque" and that the Staff Handbook was the principal means by which the workings of the scheme were communicated to participants and prospective participants (paragraph 102).

65. The FTT observed in paragraph 103 that the Employee Guide (referred to in paragraph 59 above) provided only an outline of the scheme, and in paragraph 104, quoted that part of the Employee Guide that travel expenses were paid, based on daily rates agreed with HMRC as a non-taxable allowance "so your gross pay will be reduced accordingly. SMP, pension or any other benefit derived from gross pay, taxable pay will all be reduced."

66. The FTT made the following further finding in paragraph 105 as to how the Schemes were explained:

> "Mr Baddeley told us that it was indeed part of a temps consultant's function to explain the workings of the RTA and RTB scheme to new recruits and, when the scheme was introduced, to existing employed temps who were to be included within it. It was, however, clear that the explanation was of the impact of the scheme for the time being in effect on the individual employed temp; there was no evidence that the terms of the dispensation were explained, or even that the temps consultants knew the details of the dispensations themselves."

67. In paragraph 107 the FTT observed that the description of the RTA scheme in the Staff Handbook which replaced the Employee Guide made no reference to a salary sacrifice (other than an "obscure" reference to the adjustment to gross pay "to allow for the reduction of Income Tax and National Insurance due under the scheme" (that is the "Exp Adj" figure referred to below) and that:

> "Rather to the contrary is the statement in the opening paragraph that "you can benefit from an amount additional to your normal hourly rate", which does not seem to us to be consistent with the notion that the employed temps were required to give anything up."

68. In paragraph 110 the FTT set out its findings as to how the remuneration of the Employed Temp who participated in the RTA was calculated as follows:

> "The starting point for the operation of the RTA scheme remained the hourly rate multiplied by the hours worked. The total so determined was then adjusted, as the scheme was explained to us, first by the deduction of an amount which was equal to the

allowance (for travel expenses, subsistence or both) permitted in the case of that temporary employee by the application of the scale rates set out in the then current dispensation. The tax and NICs for which the employed temp was liable were then calculated by reference to the net amount. The amount previously deducted was then added back, as a non-taxable payment. The taxable pay was then reduced again, by such an amount (the "Exp. Adj." figure) that the net sum the employed temp received was the same as he or she would have received in the absence of the RTA scheme. The "Exp Adj. figure was simply the difference between the tax and NICs the employed temp would have paid had he or she not participated in the scheme, and the reduced tax and NICs which resulted from that participation. Finally, the taxable pay was increased (taking the figures applying from 2001) by £1.50 or 75p per day, depending on the number of hours worked, a sum which on the payslips was misleadingly called "travel-to-work payment" (the term we use in this decision). The benefit to the employee of being in the scheme was the after-tax and –NICs amount of this payment."

69. The FTT expanded upon this finding by reference to a worked example that was produced to explain the scheme to Reed's finance director in paragraphs 112 to 114 of the Decision as follows:

"112. Miss Ollerenshaw had a meeting with Reed's finance director, Malcolm Paget on 31 January 2001 (shortly after the grant of the second dispensation, and when the earlier version of the RTA scheme was still in use). She produced a "worked example" in order that she could explain the mechanics of the scheme and the benefit to Reed of operating it; it was as follows:

	No Scheme	With Scheme	Payslip
Gross Pay	100	100	100
Less Travel Allowance		(47.25)	
Taxable & NICable		52.75	
Tax @ 22%	(22.00)	(11.61)	(11.61)
Employee NIC @ 10%	(10.00)	(5.28)	(5.28)
Net pay		35.86	
Plus Travel Allowance		47.26	
		83.11	
Less Travel adjustment		(15.11)	(15.11)
Total net	68.00	68.00	68.00
Employer NIC @ 12.2%	12.20	6.43	
Cost to Reed	112.20	91.32	

Saving to Reed	
i.e. £47.25 x 44.2% (tax plus NIC)	20.88

113. The "Travel adjustment" (on the payslips described as "exp adj") is the same as the difference between the total of the tax and NICs figures in the "No scheme" column, that is £32, and the total of the tax and NICs in the "With scheme" column, £16.89. As we have explained, its purpose was to reduce the net pay to the amount it would have been if the employed temp did not participate in the scheme. Although described in the handbook as an adjustment to gross pay it is more accurately an adjustment to net pay, because the adjustment to gross pay (and with it the tax and NICs liability) had already been made before this adjustment was applied.

114. The example shows that Reed reaped the entire benefit of the tax and NICs saving. It was in order to ensure that the employed temp saw some advantage from participation in the scheme that the travel-to-work payment was added to his or her pay. It amounted, when the RTA scheme was first introduced, to £1 per day. As Mr Beal's description rather obliquely indicates, that sum was at first accrued until it reached £50, when it was paid, after deduction of tax and NICs. From April 2001 the travel-to-work payment was altered to £1.50 per day if the employed tempt worked for more than 5 hours, or 75p if less than 5 hours were worked. The resulting amount was no longer accrued, but paid weekly, again after deduction of tax and NICs."

70. As indicated in paragraph 61 above, the FTT found that there were concerns about the clarity of the payslips provided to Employed Temps who participated in the RTA scheme. It analysed what it described as a sample payslip in paragraph 116 of the Decision as follows:

> "There were several sample payslips within the documents produced to us. One typical of the pre-April 2001 system was described in some detail by Mr Beal. It shows on the left hand side that the employed temp, who appears to have had several assignments during the week, earned total gross pay of £523.26. From that sum was deducted an item identified as "PRP/EXP ADJ" of £50.60. At this time (March 1999) Reed was still operating its PRP scheme. Although the PRP and RTA schemes were distinct, no attempt was made, at least on the payslip, to segregate the portion of the £50.60 which were attributable to each of them. The purpose of the deduction, as Mr Beal also explained, was to bring the net pay back to what it would have been without participation in the scheme. In this case, the gross pay after the adjustment was £472.66. On the right hand side of the payslip appeared the income tax (£55.47) and employee's NICs (£36.48) deductions, leaving net pay of £380.71. In a box at the foot of the payslip appear the words "This is what your payslip would have shown if you were not included in the PRP and expenses scheme this period", followed by other figures leading to a final net sum of £380.71, the same as the amount actually paid. However, in another box was shown the aggregate of the travel-to-work payments accrued to date, in this case £9. There was no explanation on the payslip of the calculation of that amount or even a statement of the amount which had accrued during the current week."

The reference to "PRP" is profit related pay, which is of no relevance to these appeals. In paragraph 117 of the Decision, the FTT recorded that Mr Beal's view was that the payslip enabled the Employed Temp to see that he was better off by participating in the Scheme through the disclosure of the £1 a day "travel allowance" which was the mechanism for passing on part of the benefit of the dispensation.

71. The FTT observed in relation to the sample payslip in paragraph 118 of the Decision as follows:

> "118 We observe at this point that, while the employed temp might have been able to see that participation in the scheme led to some increase in his or her net pay, it was not possible to discover from examination of the payslip how the adjustment had been determined, nor was any information provided to him or her, in the payslip, the handbook or otherwise, which would have revealed the amount set out in the dispensation current at the time. When the payslips discussed above were produced, the first dispensation was in effect. It allowed Reed to pay travel expenses to those employed temps using public transport of £5.00 per day in central London, and £1.75 elsewhere, plus a daily subsistence allowance of £3.15 in London and £2.35 per day for the travel-to-work payment at this time, regardless of area or distance, and nothing for subsistence."

72. The FTT in referring to the fact that later payslips may have shown incorrect figures due to a computer problem, made findings as to the extent of the benefits Employed Temps derived from participating in the RTA in paragraph 120 of the Decision as follows:

> "However, even those later payslips which showed that participation in the scheme conferred some benefit on the employed temp also showed that the benefit was very modest. A payslip from late 2001, after implementation of the revised RTA scheme (in which the payments were made immediately, rather than accrued), and when, it seems, the computer problem had been resolved, showed that the worker earned total gross pay of £455 which, after adjustments and deductions, resulted in net pay of £342.67. The comparative calculation indicated that the net pay without participation in the schedule would have been £341.58, a difference of £1.09."

73. The FTT, in paragraphs 121 to 125 of the Decision, made findings as to the many enquiries HMRC received from Employed Temps who could not understand their payslips which resulted after much correspondence and other communications in a meeting with Mr Read and Mrs Kirkham of HMRC. The FTT made the following findings in relation to this meeting in paragraphs 126 to 128 of the Decision as follows:

> "126. Mr Read and Mrs Kirkham arranged a meeting with RR (Miss Ollerenshaw) which took place on 30 November 2001. They were offered the explanation that the travel and subsistence payments were included in the hourly rate paid to the employed temp, and accordingly reflected in the gross pay for the week. The allowances were then deducted from the salary, in order to reduce the amount subject to income tax and NICs, and then added back as an amount which was payable without deduction of tax and NICs.The further adjustment, designed to reduce the amount actually paid (disregarding the £1.50 or 75p per day) to the amount which would have been received if the employed temp had not

participated in the scheme, was mentioned. In fact, as we have said, it represented the aggregate saving in tax and employee NICs which resulted from the employed temp's participation in the scheme.

127. It is apparent from contemporaneous records, as well as their evidence, that Mr Read and Mrs Kirkham found the explanation they were given to be both surprising and somewhat baffling; our view is that they probably did not understand it. However, Reed emphasises the fact that, then and for some time thereafter, and despite their bafflement, HMRC did not say to Reed that the manner in which it was operating the scheme, or perhaps more accurately applying the dispensations, was incorrect or otherwise unacceptable. Instead, on this occasion, Mr Read asked that the payslips be laid out in a clearer fashion, in order to reduce the number of calls by employed temps to HMRC. The contemporaneous note of the meeting indicates that part of the blame for the lack of clarity was placed upon a computer programme which Reed had purchased but which did not do quite what was intended.

128. We cannot say we are altogether satisfied by that explanation. Miss Ollerenshaw's note of the meeting at which she had explained the calculations to Mr Paget in January 2001 (see para.115 above) includes what are in our view two telling passages. The first is that "SO showed MP a worked example of the current calculation … and explained which calculations are transparent and which are calculated by the computer and not shown on the payslip." The second is a comment about "The lack of clarity of the calculations on the payslip and whether therefore Reed was complying with its obligations to the temps in respect or the format of payslips …"

74. The FTT made findings as to the manner in which the RTB, which replaced the RTA in April 2002, operated.

75. In particular, the FTT found (in paragraph 131) that "the major effect of the change was that there was now to be a single adjustment to an Employed Temp's pay, which (it was claimed) he or she would know in advance". It found, in paragraph 132 that a leaflet was produced for use by temp consultants to explain the new scheme to Employed Temps, which made reference to a matrix which had been drawn up, which was explained to be a table which:

> "shows the daily amount by which the Temporary/Contractor is agreeing for their gross pay to be reduced in order that they can receive the net benefit of participating in the RTB".

76. The Employee Handbook was also revised and the FTT found in paragraph 135 that it included the following statement:

> "To allow Reed to apply the RTB, you will need to make a salary sacrifice reduction to your gross pay. The amount of this reduction will depend on your Tax and National Insurance position."

77. In paragraph 136 of the Decision the FTT found that this information was expanded upon in internal guidance given to Reed's payroll department as follows:

"(1) The Temporary Employee's gross weekly pay is calculated on the basis of the number of hours worked and their agreed hourly rate as if they were not in the scheme. This figure is used to determine which tax/national insurance rate they would pay, and therefore determine their tax bracket on the RTB matrix.

(2) Using the tax bracket, and information from the timesheet to ascertain

(a) whether the Temporary Employee travelled by public or private transport, and

(b) whether the booking branch was in 'inner London' or elsewhere, the daily 'sacrifice' is worked out from the RTB matrix. This is then multiplied by the number of days worked, and is the 'RTB Adj figure' (i.e. the salary sacrifice);

(3) The RTB Adj is deducted from the gross pay. This gives the Total payments;

(4) The subsistence and travel expenses which Reed are 'reimbursing' the Temporary Employees for the week is calculated from the information on the payslip. Subsistence is payable where a Temporary Employee has worked at least 4 hours in one day. For each working day public transport is a flat rate expense (either London or elsewhere): private mileage expenses are calculated on the number of miles recorded by the Temporary Employee on their timesheet. The total figure is the 'RTB Expenses TP';

(5) The RTB Expenses TP is deducted from the Total Payments to give the taxable pay. The tax and NIC due on the taxable pay is calculated."

78. The FTT made findings as to how the matrix operated to determine the amount the Employed Temp would benefit by participating in the RTB scheme and how this was shown on a sample payslip in paragraphs 137 to 139 of the Decision as follows:

"137. The matrix was provided to the participants, as an annex to a circular letter of 22 March 2002, announcing the replacement of the RTA by the RTB scheme. It was divided into lettered columns and numbered rows, the columns reflected various possible combinations of tax and NICs liability, the rows the different travel bands – for those working in Inner London, for those using public transport outside London, and for those using their cars. It became possible for an employed temp to determine the gross deduction from his or her pay which would be made. An example was given of an employed temp paying standard rate tax of 22% and standard NICs of 10%, travelling by public transport outside London, who would fall in box E2 of the matrix and suffer a daily gross deduction of £1.49. An employed temp earning at a steady rate would be able to see in advance by this means what the deductions would be; another, earning at a fluctuating rate, or returning to work after an interval without work, would almost certainly not be able to do so. It is clear from an examination of the matrix (and would have been clear to any employed temp who took the trouble to examine it) that the deductions were entirely driven by the employed temp's tax and NICs liability. Indeed, the fact that those who did not pay tax or NICs were excluded should have made it clear that the scheme was primarily a device for saving tax and NICs, and not one whose essential purpose was the payment of expenses in a tax-efficient manner.

138. We did not have a "worked example" of the RTB scheme in the form set out at para.112 above, but did have some sample payslips. One was for a worker who fell

within box E2, and it showed gross pay for the week of £225, from which a deduction, described as "RTB ADJ", of £7.45 (5 days at £1.49) was made, leaving "Total payments" of £217.55. That figure was also recorded as " Gross pay to date" – the payslip assumed for simplicity that it was the first week of the tax year. The tax and NICs deductions were shown as £13.48 and £8.13 respectively. They were deducted from the "Total payment" to arrive at net pay of £195.94. As before, there was a box in which was shown what the net payment would have been without participation in the scheme: £225 less tax of £25.58 and NICs of £13.60, leaving £185.82. If this sample was typical, the employed temp derived significantly more from the RTB scheme than from its predecessor. Mr Beal's evidence was that, overall, Reed would take 40% and the employed temp 60% of the benefit. We did not discover whether this ratio was achieved in practice. It appeared that Reed took all of the benefit of the reduction in employer's NICs.

139. The sample payslip also shows that the "Taxable pay to date" was £170.30, and that the RTB NON TAXABLE EXP TP" was £47.25. That was explained in the circular letter in this way:

> "The net value of the RTB plan depends on which travel and subsistence rates apply to you and on your individual tax position.
>
> The benefit to you comes from the Tax and National Insurance savings that are made because your taxable income is reduced by these tax free amounts.
>
> This will be shown on your payslip as RTB NON TAXABLE EXP TP. Reed can confirm categorically that you will not become liable for these Tax and National Insurance savings. If you do not pay Tax and National Insurance, there will be no benefit."

79. The FTT observed in paragraph 140 of the Decision that how Reed arrived at taxable earnings of £170.30 from gross pay of £225 would not be apparent to the recipient of the payslip, but that it was clear that once the scheme was understood it was £225 less the "RTB NON TAXABLE EXP TP" (which was calculated by reference to the scale rates agreed with HMRC which, the FTT found, were not disclosed) and the RTB ADJ of £7.45. The FTT's view was that the circular letter gave the clear impression that the amounts set out in the dispensation were the amounts set out in the matrix. It also observed, in paragraph 141 that:

> "the amount of part of the sacrifice, if that is what it was, was not a fixed daily or weekly sum, but one which varied according to the temporary employee's tax and NICs liability."

80. The FTT found, in paragraph 143, following HMRC's decision to look into the RTB for the first time (on 19 July 2004) it requested copies of Reed's current contracts of employment, which were in due course provided.

81. The FTT found, in paragraph 145 of the Decision, that HMRC, during its investigation of the RTB scheme, expressed the view that Reed had a duty of care to consider the potential effect of a reduction in pay, *inter alia*, on pensions and other state benefits.

82. In relation to this issue, the FTT found, at paragraph 147:

> "We should also add that although a comment about the loss of certain contributory benefits appeared in the draft guidance supplied to HMRC (see para.104 above) we were unable to find any equivalent information in the material actually provided to the temporary employees."

The reference to the draft guidance is the draft Employee Guide referred to in paragraph 51 above.

83. The FTT found that amongst the reasons that influenced HMRC's decision to revoke the fifth dispensation on 5 April 2006 was the view that Reed's contracts with the Employed Temps did not provide for continuity between assignments but only for employment for the duration of each assignment (thus the workplaces were not "temporary") (paragraph 148).

84. The FTT made reference in paragraph 153 of the Decision to an internal HMRC email of 20 October 2006 which made observations on the employment issue as follows:

> "It looks to me like we have cocked-up here. Reed applied for a dispensation and contended that there was an overriding contract of employment. We met with Reed's tax advisers to discuss the position and raised our concerns as to the employment status of the workers concerned. Inexplicably, we did not ask to see the written contract.
>
> It seems to me that there is at the very least an arguable case to be made by Reed that we gave representations (a ruling) to the effect that we too considered that the workers were employees: (what other construction can be put on our agreement to grant the dispensation?!). Under administrative law Reed could have a viable claim against us if, having put all their cards face upwards on the table, they acted on our ruling.
>
> NB. Employment status is one of the 5 categories covered by COP 10 in which we will give guidance and will be bound by it (even if it turns out later to have been wrong) where all the relevant facts were provided in the sense that the taxpayer put his cards face upwards on the table.
>
> We may think it necessary to consult lawyers but I think that Reed may well have a strong case under administrative law that they were entitled to rely on our representation (ruling) that the workers were employees under an overriding contract of employment."

85. As regards the FTT's findings of fact concerning Reed's contracts with the Employed Temps, it set out in paragraph 157 the following key provisions in the example in use before 1999 as follows:

> "1. The Temporary Employee's employment and continuous employment begins on the date of the commencement of the current assignment.
>
> 2. Reed will endeavour to find the Temporary Employee the opportunity to work in the capacity specified on the Temporary Employee's copy of the time sheet where there is a suitable assignment with a Client for the supply of such work. Reed reserves the

right to offer any assignment to such temporary employees as it may elect where that assignment is suitable for several workers.

3. The duration of the Temporary Employee's employment will be for so long as Reed offers work to the Temporary Employee. It is anticipated that this will be for the duration of the assignment with the Client provided that the Temporary Employee satisfies the Client's requirements. Reed may instruct the Temporary Employee to end the assignment at any time without specifying reasons."

86. In paragraph 158 it summarised a number of other provisions in the example as follows:

"The conditions went on to provide that wages, "a proportion of which may be Profit Related Pay and Travel Expenses", were payable only in respect of the hours worked. Reed was obliged to endeavour to find the employed temp work, but it could elect to which of its employed temps it offered any particular assignment. The employed temp was under no obligation to accept any particular assignment Reed offered. Reed and the employed temp were each obliged to give the other notice "in accordance with statutory requirements". The relevant statutory minimum notice periods applicable to all employees therefore applied, but the contract provided in addition that there was no obligation on Reed to provide work (or, since the employed temp was entitled to wages only for hours worked, any pay) during such notice periods. There was at this time no entitlement to holiday pay, but statutory sick pay was provided for."

87. The FTT found that a new contract was introduced in October 1998 to effect the changes required by the Working Time Regulations 1998, and in particular the fact that Employed Temps now had a right to paid holidays (paragraph 160). It found in paragraph 161:

"Reed could not make a payment in lieu of holiday to the employed temp when any particular assignment ended since, unless a contract of employment is terminated altogether, it is unlawful to replace a right to paid holidays with a payment in lieu (reg 13(9)(b) of the 1998 Regulations). Employed temps were required to give 2 weeks' notice of an intended period of leave. In all other respects the contract was materially the same as its predecessor."

88. The FTT set out in paragraphs 163 to 165 of the Decision other changes made to the employment contracts between 1998 and 2004 as follows:

"163. As we understood the evidence, there was little significant change to Reed's contracts with its employed temps between the introduction of the RTA scheme in 1998 and 2004, save for the variation dictated by the move from the RTA to the replacement RTB scheme, which we described in para.131 above. We had, and should record, some evidence about Reed's own perception of their character. On 24 January 2001 Miss Ollerenshaw wrote to Mr Read, responding to his concern about the employment status of those participating in the scheme as it then was. "You are correct in your understanding that 'employed temps' are engaged under contracts of employment but they are not full time contracts and only apply when the employed temps are carrying out assignments on behalf of Reed." That was not merely Miss Ollerenshaw's understanding: as we have mentioned, the minutes of a meeting between Mr Beal and various RR employees, including Miss Ollerenshaw, on 8 October 2001

record that Mr Beal "advised that the permanent contracts [that is, those with its employed temps] are from assignment to assignment. There is no umbrella contract and no mutuality of interest."

164. There was a significant change to Reed's conditions of employment in April 2004, it appears as a result, in part, of the coming into force of the Conduct to Employment Agencies and Employment Businesses Regulations 2003. It introduced two forms of engagement, on assignment and on secondment. Relevant conditions include the following:

> "3. The Temporary Employee's employment and continuous employment begins on the date of the commencement of the current assignment or secondment.
>
> 4. Reed will endeavour to find the Temporary Employee the opportunity to work in the capacity as agreed at registration and specified on the Temporary Employee's copy of the time sheet where suitable work with a Client is available. Where the Temporary Employee is offered work with a Client, his/her copy of the time sheet will indicate whether this will be on an ASSIGNMENT or a SECONDMENT basis.
>
> 5. If the assignment basis applies, the Temporary Employee's services will be supplied to the Client for the duration of the assignment and the common terms of this agreement (paragraphs 1 to 22 inclusive) will apply together with the assignment only terms (paragraphs 23 and 24). If the secondment basis applies Reed will second the Temporary Employee to work under the Client's direction and control for the duration of the secondment and the common terms of this agreement will apply together with the secondment only terms (paragraphs 25 and 26) …
>
> 7. The duration of the Temporary Employee's employment will be for the duration or likely duration of the assignment or secondment with the Client as notified prior to the commencement of the assignment or secondment provided that the Temporary Employee satisfies the Client's requirements. Reed may instruct the Temporary Employee to end the assignment or secondment at any time without specifying reasons …"

165. The essential difference between the assignment terms in paras 23 and 24 and the secondment terms in paras 25 and 26 was that in the former case, it was Reed which was responsible for paying the employed temp's salary, whereas in the latter it was the client's responsibility, albeit Reed itself which undertook the calculations. The contract was changed again in October 2004. The only amendment of significance on that occasion was that the contract was expressed to begin at the start of the temporary employee's first (rather than, as hitherto, current) assignment or secondment. Despite the different arrangements for the payment of salary to those on secondment and those on assignment, it was not suggested to us that there was any material difference relevant to the RTB scheme then being used."

89. Finally, the FTT referred in paragraph 169 to the new form of agreement introduced in July 2006, which introduced the guarantee of a minimum of 336 hours paid work per complete 12 month period but, it found, left materially unchanged many of the remaining provisions of the earlier contracts. The Employed Temp was

now required to accept offers of suitable assignments (as the *quid pro quo* for the guarantee of the minimum amount of pay).

90. As regards HMRC's understanding of the operation of the Schemes, the FTT found in paragraph 170 that HMRC did not appreciate the significance of the "critical issue" as to whether the contracts extended over multiple assignments, or there was a separate engagement for each assignment until about 2004. The FTT found it surprising (in paragraph 171) that HMRC did not fully understand until quite a late stage precisely how it was that Reed was applying the dispensations, referring to Mr Read's comment in his evidence that he could "not understand how a salary sacrifice could be geared to an employee's tax and NIC rates rather than to the salary itself".

91. The FTT's conclusions on the disclosures made by Reed on which the dispensations were based and HMRC's understanding of what they were being told were set out in paragraphs 172 to 176 of the Decision as follows:

> "172. What we think it appropriate to observe at this stage is that the evidence made it clear to us that Reed, and RR on its behalf, were throughout at pains to say as little as they could to HMRC of the manner in which Reed was applying the dispensations. It was apparent from the correspondence, notes of meetings and their evidence before us that Miss Ollerenshaw, in particular, and to a lesser extent Mr Beal and Mr Rayer all seemed to find it difficult to speak of the schemes in a way which treated them candidly for what they were: a device by which Reed exploited the potential for its employed temps to obtain tax relief for their travelling and subsistence expenses, not in order to enhance their earnings, but for its own benefit. As we have said, the uplift to the employed temps' earnings achieved by the RTA scheme was, at best, modest; and, even leaving aside the possibility that (if Reed is right) the employed temps could have claimed the relief themselves, receiving in some cases significantly more than the travel allowance Reed in fact paid, while others were potentially worse off. We should, however, repeat the observation we have already made that the RTB scheme appeared to confer rather more of the benefit on the employed temps.
>
> 173. Before coming to the law and the issues we need to record some further findings of fact. Despite the preceding comments, we are satisfied that Reed's statement of the cases and circumstances (including the information given in the course of meetings and in the Employee Guide) which led to the grant of the first dispensation was given in good faith and contained all the facts that it and RR considered relevant at the time. In particular, Reed informed the inspector that 16,000 persons were employed at any time, and they were all employees and not agency workers, and that (factually) they had no permanent workplace but were required to attend various locations for a limited period (not exceeding 24 months). We do not consider that this is to be read as a representation that the workplaces were temporary workplaces in law. That is not a matter to be included in a statement of the cases and circumstances in which payments are made for benefits provided, namely the facts, but an application of the law to the facts which is for the inspector to make in order to be satisfied that a dispensation must be granted.
>
> 174. We have concluded that neither Reed nor any of the inspectors concerned appreciated, at least until 2004, that the distinction between a job-by-job employment and a continuing employment was relevant. Accordingly, neither considered that the terms of the contracts with the employed temps were relevant so long as the contracts

were employment contracts and not contracts with agency workers, which they both understood (correctly) that they were. Although, as we have said, it is surprising that HMRC did not ask for copies of the contracts sooner than they did, we accept it is unlikely that before 2004 they would have considered them in order to determine the duration of the engagement.

175. The inspectors who granted the dispensations must accordingly be taken to have understood that the applications were made in respect of a large number of employees, that they were all employees, and that the nature of their duties was that (factually) they had no permanent workplace but attended various locations for a limited period (not exceeding 24 months). In relation to each of the dispensations the inspectors were satisfied that no additional tax was payable, though "on the basis of what you have told me". These facts included the information given during the application for the first dispensation as well as in correspondence and meetings relating to later applications.

176. It is a necessary inference from the fact that the dispensations were granted that the inspectors decided (or assumed without considering the matter) that the facts stated resulted in a potential liability to tax under the listed provisions (chapter 3) but that the employed temps had temporary workplaces as a matter of law with the result that the disputed payments were deductible, and thus no additional tax was payable in respect of them."

92. In dealing with the legitimate expectation issue, the FTT made further short findings of fact in paragraphs 294 to 299 of the Decision. In paragraph 295 it stated:

"Although there is inevitably an element of hindsight in this conclusion, it seems to us that HMRC could have been rather more vigorous in seeking information, and more searching in their enquiries before granting the first dispensation, or before replacing it with its successors. HMRC themselves recognised this – see para.153 above. Mr Read told us, too, that he would not have accepted that the employed temps were truly making a salary sacrifice had he realised that Reed was basing the supposed sacrifice on the employed temp's tax and NICs position, rather than on either the expense actually incurred or the amounts set out in the current dispensation. We merely comment that we found it surprising that HMRC did not discover how Reed was utilising the dispensations much sooner than they did."

93. Having observed in paragraph 296 that an applicant for a dispensation bears the burden of determining the relevant facts and conveying them to HMRC and the consequences of any error he makes the FTT concluded in paragraphs 297 to 299:

"297. We have already indicated (see para.173 above) that the statement which led to the grant of the first dispensation, and was effectively repeated in relation to its successors, reflecting what Reed and RR believed to be relevant and correct at the time, namely that those to whom the dispensation would be applied were employees, and that they had temporary workplaces. We have concluded that the latter belief was wrong, as a matter of law, but we can accept that at the time Reed believed the contrary. We repeat, however, the point we have already made that it was not only Reed and RR, but HMRC too, who had not appreciated the significance of this point at that time, both sides thinking that what mattered in this context was only that the participants should be Reed's employees, and not agency workers.

298. The evidence showed quite clearly that Reed and RR knew that the schemes were risky and, as Miss Ollerenshaw put it, "aggressive". It will also be apparent from our narrative of events that we have set out above that they were not forthcoming about the manner in which the dispensations were being applied, and in particular that the employed temps were not themselves reaping more than a very modest part of the benefit, although it is true that it and RR did not actively conceal what was being done, and did disclose to HMRC that Reed was taking part of the benefit for itself. It also seems to us that, had they enquired rather more deeply, in particular in connection with the queries about the layout of the payslips, HMRC might have discovered sooner than they did that Reed was only nominally paying the allowances to its employed temps. Miss Ollerenshaw, as we have said, was uncomfortable about the operation of the RTA scheme (though less so about the RTB scheme); Reed itself shared some at least of her concerns (see, for example, para.115 above) and, as we have recorded (see para.117 above), Mr Beal fully recognised that Reed was not paying the dispensation allowances to its employed temps.

299. HMRC's position is that Reed could have no legitimate expectation because it did not fully disclose all relevant matters. We are satisfied, and find as a fact, that Reed did not volunteer to HMRC all of the details of the schemes. We have identified the more significant of those details already, and we have commented on Reed's own recognition that the schemes were innovative. However, we do not find that there was any deliberate concealment. We also repeat the observation we made earlier that neither Reed nor HMRC recognised the relevance of some matters until a late stage."

Further evidence: preliminary

94. The appellants have an outstanding application for permission to adduce a further witness statement of Mr Derek Beal for the purposes of this appeal. Mr Beal gave oral evidence to the FTT and provided three previous witness statements in support of the tax appeal and Reed's judicial reviews. We propose to deal with this application as a preliminary matter. This witness statement exhibits an actual payslip, Reed submitting that in paragraph 120 of the Decision the FTT relied on a payslip showing a benefit of £1.09 to the Employed Temp in question to support its findings of only a modest benefit to Employed Temps who participated in the Scheme on which no evidence had been given and no submissions had been made.

95. The Rules make specific provision for directions as to evidence in Rule 15. Of particular note in the present case is Rule 15 (2), which provides,

> "(2) The Upper Tribunal may—
>
> (a) admit evidence whether or not—
>
> (i) the evidence would be admissible in a civil trial in the United Kingdom; or

(ii) the evidence was available to a previous decision maker; or

(b) exclude evidence that would otherwise be admissible where—

(i) the evidence was not provided within the time allowed by a direction or a practice direction;

(ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or

(iii) it would otherwise be unfair to admit the evidence."

96. There is no specific guidance other than that. However, fairness, substantive and procedural, is the overriding criterion, and in any exercise of discretion the UT needs to have regard to the overriding objective, which is contained in Rule 2, in order to put itself in a position to exercise its functions properly,

"(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Upper Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Upper Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Upper Tribunal to further the overriding objective; and

(b) co-operate with the Upper Tribunal generally"

97. The express terms of rule 15 (2) mean that *Ladd v Marshall* [1954] 1 WLR 1489, pressed upon us by Mr Gammie, does not apply in the same way that it does to the CPR. Generally the UT can and does consider that all relevant evidence should be admitted unless there is a compelling reason to the contrary. However fairness between the parties is plainly such a compelling reason. Although *Ladd v Marshall* does not strictly apply, it is of persuasive authority as to how to give effect to the overriding objective of doing justice.

98. The principles in that case are that three conditions must be fulfilled to justify the reception of fresh evidence. As we have said, we do not consider that any such justification is required as there is no presumption against the admission of fresh evidence. However, consideration of those conditions goes to the issue of fairness. They are:

> "…first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

99. The impact of the CPR on the approach adopted in *Ladd v. Marshall* has been considered in a number of cases which were reviewed by the Court of Appeal in *Terluk v Berezovsky* [2011] EWCA Civ 1534. In paragraph 32 of his judgment Laws LJ said:

> "The learning shows, in my judgment, that the *Ladd v Marshall* criteria are no longer primary rules, effectively constitutive of the court's power to admit fresh evidence; the primary rule is given by the discretion expressed in CPR 52.11(2)(b) coupled with the duty to exercise it in accordance with the overriding objective. However the old criteria effectively occupy the whole field of relevant considerations to which the court must have regard in deciding whether in any given case the discretion should be exercised to admit the proffered evidence. It seems to me with respect that so much was indicated by my Lord the Chancellor (then Vice-Chancellor) in *Banks v Cox* (17 July 2000, paragraphs 40-41):
>
> > "In my view, the principles reflected in the rules in *Ladd v Marshall* remain relevant to any application for permission to rely on further evidence, not as rules, but as matters which must necessarily be considered in an exercise of

> discretion whether or not to permit an appellant to rely on evidence not before the Court below."

100. The approach of having regard to the *Ladd v. Marshall* criteria when applying the overriding objective should therefore be borne in mind when exercising our discretion under Rule 15 (2) (a). Mr Gammie pointed out that this approach is consistent with that taken in the Employment Tribunal.

101. The appellants seek to rely on the evidence which adduces a real payslip, saying that the FTT relied on a payslip which it did not realise was not a real payslip but a sample payslip. HMRC however say that the payslip could with reasonable diligence have been provided earlier since Reed was aware of all the facts and matters now relied on at an early stage. Reed had ample opportunity to put forward its case on the facts before the FTT. Secondly, HMRC say that the evidence would have no important influence on the outcome. The payslip to which the FTT referred was one of a number of payslips considered by the FTT and was not determinative of any matter. The FTT's observation that the employees received "very modest" benefits from the RTA was not the reason why the FTT found against Reed on the first issue. Even Mr Brown of the appellants' solicitors concedes that:

> "Reed does not consider the contents of the statement to be central to the arguments before the Upper Tribunal."

102. Thirdly, and importantly, we accept HMRC's submission that if the fresh evidence is admitted there will be prejudice to HMRC because it will have to deal with the new evidence several years after the event in circumstances in which all its own witnesses have completed their evidence.

103. In these circumstances, and particularly where before the FTT the appellants were represented by two silks and experienced junior counsel, it would in our view be unfair to HMRC for the appellants to be able to adduce further evidence for the purposes of an appeal. The application smacks of a desire to have yet another bite at the cherry simply because the appellants lost before the FTT.

104. Accordingly we refuse the application to admit fresh evidence.

The Issues

105. Nine issues emerged before the FTT for determination of the appeals and the judicial review application. We set them out here with a brief summary of the FTT's decision on each of them.

Issue 1: Did those of the Employed Temps who received payments under the RTA or the RTB:

(a) enter into an effective salary sacrifice, with the consequence that Reed paid them a reduced salary plus the relevant payments; or

(b) receive only a salary?

106. The FTT held that the RTA, and subsequently the RTB, were incorporated into the contracts of employment of the Employed Temps. However, it held that this alone was insufficient to characterise the disputed allowances as expense payments potentially falling within the scope of a dispensation under Section 65 of ITEPA and that to come within the scope of this provision the Employed Temps had to have made "an effective salary sacrifice" equal to the amount of the disputed allowance, not the "Exp Adj" figure which represented the aggregate of the income tax and NICs on the amount of the allowance. The FTT decided that there had not been an effective salary sacrifice in relation to RTA as at no time had the Employed Temps been told that they were to be paid anything other than a salary derived from multiplying the agreed hourly rate by the hours worked. It also decided that any sacrifice would be ineffective because of the possibility of the Employed Temp opting out of the scheme at any time. In relation to RTB, it decided that notwithstanding that the amount sacrificed was not the amount gained but was in some cases higher and in other cases lower, the position was no different because Reed provided no benefit in return for a salary sacrifice; it merely applied the dispensation in order to enable it to attribute part of the pay, entirely notionally, to the reimbursement of expenses, so that the tax and NICs burden could be reduced. The relevant findings on Issue 1 are in paragraphs 201 to 226 of the Decision.

Issue 2: If the answer to question (1) is (a), were the relevant payments:

(a) nevertheless earnings under ITEPA Part 3, Chapter 1 (and in particular section 62); or

(b) sums to be treated as earnings under ITEPA Part 3, Chapter 3 (and in particular section 72) as reimbursement of expenses?

107. The FTT held (on the hypothetical basis that it was wrong on Issue 1) that the answer to this question depended on whether the disputed allowances represented reimbursement of ordinary commuting expenses or of expenses incurred in the course of the Employed Temp's employment, and in turn this depended on whether the relevant workplace the Employed Temp was travelling to was a temporary or permanent workplace. As the FTT decided (under Issue 3) that the workplaces were permanent, Reed failed on Issue 2. The relevant findings on Issue 2 are in paragraphs 245 to 250 of the Decision.

Issue 3: Did the Employed Temps travel from their homes to:

(a) temporary; or

(b) permanent workplaces

for the purposes of sections 338 and 339 of ITEPA?

108. The FTT held that there was no *"over-arching"* employment contract between Reed and an Employed Temp in place throughout the time that the latter was being placed on assignments by Reed. There was a continuing contract, but it only constituted a contract of employment whilst the Employed Temp was working on an assignment with a client of Reed. Accordingly, the place of work for each assignment was in each case a *"a permanent workplace"*. The relevant findings on Issue 3 are in paragraphs 273 to 280 of the Decision.

Issue 4: Can an inspector lawfully grant a dispensation in relation to payments which are chargeable to tax and, if so, what conditions, if any, must be satisfied in order for him to do so?

109. This issue only arose if the payments were Chapter 3 earnings so was considered on a hypothetical basis. The FTT held that a dispensation merely requires that HMRC are satisfied that no additional tax is payable, regardless of whether they are right or wrong and that a dispensation can lawfully be issued on being so satisfied even if they are wrong and in those circumstances the dispensation is validly given and removes the liability to tax. The relevant findings on Issue 4 are in paragraphs 284 to 288 of the Decision.

Issue 5: If the answer to question 4 above is yes, did the dispensations cover the relevant payment? That is to say, were HMRC "satisfied", in the manner required by section 65, in respect of the relevant payments that no additional tax was payable by virtue of the "listed provisions" of the benefits code (as defined in ITEPA section 63)?

110. Again, this issue only arose if the payments were Chapter 3 earnings so was considered on a hypothetical basis. The FTT held that if HMRC were wrong in considering the listed provisions applied then the dispensation had no effect but if they were wrong for any other reason the dispensations had effect, subject to its right of revocation. The relevant findings on Issue 5 are in paragraphs 289 to 290 of the Decision.

Issue 6: If the answer to both questions 4 and 5 is yes, what is the effect of a dispensation as a matter of law? In particular:

(a) Does a dispensation relieve the employer of any obligation to deduct tax under PAYE that might otherwise arise (and if so in what circumstances)? or

(b) *Does a dispensation remove only any obligation that would otherwise arise under the PAYE regime to return details on form P11D of certain expenses and benefits paid to employees (and if so in what circumstances)? or*

(c) *Does a dispensation remove any income tax charge (including any liability to deduct under PAYE) that would otherwise arise under the listed provisions (and if so in what circumstances)?*

111. Again, this issue only arose if the payments were Chapter 3 earnings so was considered on a hypothetical basis. The FTT decided that a dispensation relieves the employer of the obligation to deduct tax under PAYE provided only the listed provisions are applicable, and in those circumstances removes the payments in question from tax altogether. This was so even if HMRC were wrong in agreeing that the disputed payments were deductible on the basis that the Employed Temps had temporary workplaces. The relevant findings on Issue 6 are in paragraphs 291 to 293 of the Decision.

Issue 7: Did Reed have a substantive legitimate expectation that:

(a) *the relevant payments would not be subject to income tax or NICs under any provisions;*

(b) *the dispensations would not be revoked retrospectively in the absence of serious and material misrepresentations; and*

(c) *if the dispensations were not revoked retrospectively, HMRC would not seek tax or NICs retrospectively (from Reed or its employees);*

and

(d) *if so, to what extent?*

(e) *If and to the extent that Reed had any substantive legitimate expectation, what are the consequences for the statutory appeals before this tribunal?*

112. The FTT decided that it did not have to consider this issue in the light of the fact that the judicial review proceedings were stayed until after the determination of the appeals and the scope of the FTT's own jurisdiction was before the UT in other appeals. The FTT therefore confined itself to making findings of fact as we have referred to above, leaving it to us to decide to what extent we are willing to adopt those findings and to what extent we are willing to make findings of our own in relation to the judicial review application which is also the subject of this decision.

Issue 8: In the light of the answers to the preceding issues, were Reed, as employers, under an obligation to make a PAYE deduction in respect of the relevant payments during the relevant period?

113. The FTT decided that there was only one possible answer to this question; whether or not they were Chapter 1 or Chapter 3 earnings the disputed allowances did not meet expenditure for which the Employed Temps could properly claim relief and they were therefore subject to deduction of tax. The FTT's findings are in paragraph 300 of the Decision.

Issue 9: Does the outcome of NICs in these appeals follow the outcome for tax?

114. The FTT decided that once it is accepted that a section 65 dispensation applies (in practice) to NICs as it applies to tax, it inevitably follows that the outcome is the same as it is for income tax. The FTT's findings are in paragraph 301 of the Decision.

115. It will be apparent from the description of the issues that they are inter-related and strictly speaking some issues do not need to be considered at all depending on the outcome of our decision on earlier issues. Nevertheless, we have taken the course of reaching a decision on all of the issues even though for the purposes of determining the tax appeals it was not strictly necessary to do so.

Reed's factual appeals

116. As indicated above, Reed appeals a large number of findings of fact made by the FTT. Reed accepts that an appeal to the UT only lies on a point of law (see section 11 of TCEA)) and therefore it may only succeed on those appeals if it satisfies us that the findings in question amount to errors of law on the basis that they were inconsistent with the evidence and contradictory to it: see *Edwards v Bairstow* [1956] AC 14 which we refer to in more detail below. Mr Glick addressed us on what he described as the key errors which he conveniently grouped under the following categories:

(1) How RTA and RTB operated;

(2) The benefit that the Employed Temps received from RTA and RTB;

(3) The explanation of RTA and RTB given to the Employed Temps;

(4) The nature of the relationship between Reed and the Employed Temps;

(5) Whether Reed would have gone ahead with the Schemes without a dispensation;

(6) Reed's understanding of the Schemes;

(7) Reed's disclosure to HMRC; and

(8) HMRC's understanding of the Schemes.

Whilst there is some overlap, it appears to us that the first four categories relate to the FTT's findings of Issues 1 to 6 and the last four categories to Issue 7.

Role of the UT and relevant law

117. When considering the criticisms of the Decision put forward by Reed, we should bear clearly in mind the limited circumstances in which it is appropriate for the UT to interfere with factual and evaluative decisions.

118. Section 12 TCEA sets out the powers of the UT when deciding an appeal as follows:

> (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal -
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either -
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.
>
> (3) In acting under subsection (2)(b)(i), the Upper Tribunal may also –
>
> (a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;
>
> (b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.
>
> (4) In acting under subsection (2)(b)(ii), the Upper Tribunal –
>
> (a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and
>
> (b) may make such findings of fact as it considers appropriate.

119. Mr Glick submits that in the present case, the errors of law in the Decision are such that we ought to set aside that decision and remake it under section 12(2) TCEA. He submits that if we were to do so, it would be open to us to make or substitute our own findings of fact where the FTT has failed to make a relevant finding or has made a finding which is plainly wrong using the powers contained in section 12(4)(b). If Mr Glick is right, it would appear that the effect of his submission is as follows. Suppose we were to decide that a particular finding of the FTT was contrary to the evidence so that no reasonable tribunal could have reached it. In those circumstances, section 12(2) would apply because we would have found that the decision concerned

involved the making of an error of law. If we then proceeded to remake the decision pursuant to section 12(2)(b)(ii) TCEA we would be able not only to correct the factual error which amounted to an error of law but also any other findings made by the FTT which we found to be plainly wrong, even if those errors in themselves were not sufficient to amount to an error of law.

120. We were taken to a comprehensive summary of the grounds on which factual findings can be challenged on appeal given by Arnold J in *Okolo v HMRC* [2012] UKUT 416 (TCC) where he dealt with the relevant authorities in paragraphs 25 to 28 as follows:

> "25. In *Edwards (Inspector of Taxes) v Bairstow* (1955) 36 TC 207 at 224, [1956] AC 14 at 29 Viscount Simonds said:
>
> > '… though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained.'
>
> Lord Radcliffe said (1955) 36 TC 207 at 229, [1956] AC 14 at 36:
>
> > 'If the Case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene.'
>
> 26. In *Georgiou (t/a Marios Chippery) v Customs and Excise Comrs* [1996] STC 463 at 476 Evans LJ, with whom Saville and Morritt LJJ (as they then were) agreed, said:
>
> > 'There is a well-recognised need for caution in permitting challenges to findings of fact on the grounds that they raise this kind of question of law … It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be misused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that on a question of law to arise in the circumstances, the appellant must first identify the finding which is

challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding, and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong.'

27. In *Proctor and Gamble UK V Revenue and Customers Comrs* [2009] EWCA Civ 407, [2009] STC 1990 Jacob LJ, with whom Mummery and Toulson LJJ agreed, said:

"9. Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that is so, an appeal court (whether first or second) should be slow to interfere with that overall assessment – what is commonly called a value-judgment.

10. I gather together the authorities about this in *Rockwater v Technip* [2004] EWCA (Civ) 381, [2005] IP & T 304:

71. … In *Biogen v Medeva* [1997] RPC 1 at 45 Lord Hoffmann said when discussing the issue of obviousness:

'The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans la nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* as authorising or requiring an appellate court to undertake a *de novo* evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. When the application of a legal standard such negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.'

72. Similar expressions have been used in relation to similar issues. The principle has been applied in *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605 at 613-614 (per Robert Walker LJ) in the context of a decision about 'fair dealing' with a copyright work; by Hoffmann LJ in *Re Grayan Building Services Ltd (in liquidation)* [1995] 1 BCLC 276 at 285, [1995] CH 241 at 254] in the context of unfitness to be a company director; in *Designer Guild v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, [2000] 1 WLR 2416 in the context of a substantial reproduction of a

> copyright work and, most recently in *Buchanan v Alba Diagnostics Ltd* [2004] UKHL 5, [2004] RPC 681 in the context of whether a particular invention was an 'improvement' over an earlier one. Doubtless there are other examples of the approach.
>
> 73. It is important here to appreciate the kind of issue to which the principle applies. It was expressed this way by Lord Hoffmann in *Designer Guild:*
>
> > 'Secondly, because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle."
>
> 11. It is also important to bear in mind that this case is concerned with an appeal from a specialist tribunal. Particular deference is to be given to such tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker: see per Baroness Hale in *AH (Sudan) v Secretary of State for the Home Dept* [2007] UKHL 49 at [30], [2008] 4 All ER 190 at [30], [2008] 1 AC 678 …
>
> 28. What Baroness Hale said in *AH (Sudan)*, which has since been approved by Sir John Dyson SCJ giving the judgment of the Supreme Court in *MA (Somalia) v Secretary of State for the Home Dept* [2010] UKSC 49 at [43], [2011] 2 All ER 65 at [43], was this:
>
> '[30] … This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734 at [16], [2002] 3 All ER 279 at [16]. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decision should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

121. More recently, the Court of Appeal in *Pendragon Plc and others v HMRC* [2013] EWCA Civ 868 emphasised strongly the limited scope of an *Edwards v Bairstow* type challenge in the UT. In that case, involving the question as to whether Pendragon's arrangements involved conduct falling with the European law principle of abuse of right, the UT had reversed the decision of the FTT holding it to be "plainly wrong and … only consistent with its having committed an error of law in its approach". The UT based that conclusion on its finding that the FTT did not provide

in its decision a comprehensive description of the arrangements in question nor a detailed analysis of them and that the FTT did not "understand the task before it as involving an objective assessment of [the] essential aim [of the transaction]".

122. In responding to these findings Lloyd LJ said in paragraph 144 of the judgment:

> "But it is one thing to say that a court or tribunal could have expressed its judgment more clearly; it is quite another to say that this shows an error of law or misdirection. The Upper Tribunal relied on this feature to say that the First-tier Tribunal "in consequence focused on the fact that finance was obtained, rather than on the fact that the obtaining of finance was subordinate to the essential aim of obtaining a tax advantage". With respect, it seems to me that here the Upper Tribunal fell into an error which it had already identified on the part of the First-tier Tribunal. It was a fact that to obtain finance was subordinate to the essential aim of obtaining a tax advantage. What was the essential aim is also not a question of "fact" but of an evaluative determination on the basis of the objective facts."

123. Lloyd LJ also cautioned against the UT deciding the matters on the basis of its own view of the facts in paragraph 160 of the judgment as follows:

> "For my part, looking at the facts of the present case, I can imagine the possibility that, if the members of the Upper Tribunal had been sitting as the First-tier Tribunal hearing Pendragon's appeal at first instance, they may well have decided the case differently from the actual decision of the First-tier Tribunal, and may have been able to do so in a way which involved no misdirection of law. It does not follow from this that the actual decision of the actual First-tier Tribunal was one which it was not entitled to reach. It is in the nature of an evaluative exercise that, on given facts, two different tribunals, properly directed as to the law, may each be able to come, entirely properly, to different conclusions. That is not a situation in which the appellate tribunal is entitled to say that the first instance tribunal has erred in law, and has reached a conclusion which it was not entitled to come to."

124. He therefore concluded in paragraph 165 of the judgement as follows:

> "Accordingly, it seems to me that no error of law has been shown on the part of the First-tier Tribunal, whether by the Upper Tribunal's reasoning or by Mr Pleming's submissions to us on this appeal. The First-tier Tribunal was entitled to come to the conclusion that it expressed. A differently constituted tribunal may have come to a different result on the same material. But that is not enough. The conclusion reached was open to the First-tier Tribunal on a proper understanding of the law, and was not reached as a result of any misdirection."

125. On the other hand, comments made by Lord Carnwath in the recent Supreme Court decision in *R (Jones) v First-tier Tribunal* [2013] UKSC 19 suggest that where the appellate tribunal is also a specialist tribunal then there should be a more flexible approach to what amounts to a "point of law". Lord Carnwath referred to the role of such a tribunal, quoting from an article he had written, in paragraph 46 of his judgment as follows:

> "… an expert appellate tribunal, such as the Security Commissioners, is peculiarly fitted to determine, or provide guidance, on categorisation issues within the social

> security scheme. Accordingly, such a tribunal, even though its jurisdiction is limited to 'errors of law', should be permitted to venture more freely into the 'grey area' separating fact from law, than an ordinary court. Arguably, 'issues of law' in this context should be interpreted as extending to any issues of general principle affecting the specialist jurisdiction. In other words expediency requires that, where Parliament has established such a specialist appellate tribunal in a particular field, its expertise should be used to best effect, to shape and direct the development of law and practice in that field."

In the same case Lord Hope, at paragraph 16 of his judgment, observed that "[a] pragmatic approach should be taken to the dividing line between law and fact, so that the expertise of Tribunals at the First-tier and that of the Upper Tribunal can be used to best effect."

126. Whilst we note these comments, we think they are dealing primarily with the "grey area" between fact and law and do not affect the *Edwards v Bairstow* principle that pure findings of fact should not be interfered with unless there is no evidence to support them or they were made upon a view of the facts that could not reasonably be entertained. The authorities show that is a very high hurdle to mount, as emphasised again recently in *Pendragon.*

127. In considering Reed's factual appeals we need to pay regard to Arnold J's comments that it was not open to a tribunal to disbelieve unchallenged evidence. This was expressed in paragraph 34 of the decision as follows:

> "Finally, I would add that, in the absence of any challenge to Mr Okolo's evidence to the tribunal that he had not developed, refurbished or redecorated any properties other than his own residence, it was not open to the tribunal to disbelieve that evidence: see *Phipson on Evidence* (17th end, 2009) para 12-12 and the authorities cited in footnote 32, in particular *Markem Corp v Zipher Ltd; Markem Technologies Ltd v Buckley* [2005] EWCA Civ 267 at [50]-[61], [2006] IP & T 102 at [50]-[61]. Counsel for HMRC submitted that this rule of evidence did not apply in the First-Tier Tribunal. I do not accept that submission. This rule of evidence is simply an application of the principles of natural justice which apply in all courts and tribunals."

128. We do not believe that this principle goes so far as to suggest that a tribunal is bound to accept every word in a witness statement unless the passage in question was put to the witness specifically in cross-examination and challenged. In a case such as this, with a vast amount of documentary evidence submitted as well as lengthy witness statements and extensive oral evidence, that would be impracticable and indeed is not encouraged. In *Markem Corporation,* relied on by Arnold J in *Okolo,* in the passage quoted above, the principle being enunciated was that it was not open to challenge the evidence of a witness upon a matter which he has not had the opportunity of giving an explanation by reason of there having been no suggestion whatsoever in the course of the case that his story is not accepted: see paragraph 59 of Jacob LJ's judgment. It must be open to the Tribunal to consider all the evidence put before it in the round when considering whether to accept a particular unchallenged passage in a witness statement, as opposed to considering the credibility of a witness's story as a whole.

129. In short, we approach the whole question of factual appeals on the basis that they are of limited scope.

130. We now turn to the substance of Reed's factual appeals, dealing with them under the eight categories identified in paragraph 116 above.

(1) How RTA and RTB operated

131. There are three findings that Reed contends are erroneous which fall into this category.

132. First, Reed contends that the FTT's finding that under the RTA "Exp Adj" was a deduction from the Employed Temps' net pay is erroneous. This finding is in paragraphs 112 and 113 of the Decision as set out in paragraph 69 above. Reed submits that the FTT relied on the worked example shown in paragraph 112, which was never given to HMRC, but which shows the "travel adjustment" as being a deduction from net pay. Mr Glick submitted that Miss Ollerenshaw was never asked why it showed a deduction from net pay rather than gross pay, nor was she asked why the calculation was in this respect different from every other calculation shown in the evidence, notably the Employee Handbook which stated that the "Exp Adj" deduction was to gross pay, an example that was used to explain the RTA to HMRC at the meeting of 30 November 2001, and a letter that Miss Ollerenshaw wrote to Mr Beal 12 February 2002 referring to "Exp Adj" being a deduction from "taxable pay". On this basis, Reed submits that applying the *Edwards v Bairstow* test, that the finding that Exp Adj was a deduction from net pay was one that no reasonable tribunal could have reached.

133. In our view there is nothing of substance in this point. It may be that the FTT was a little loose in its language by using the term "net pay" which is often equated with pay after deduction of tax, in contrast to "gross pay" or "net taxable pay". We accept that "Exp Adj" was a deduction to "gross pay" when that term is used in relation to income before deductions, such as for tax or national insurance and that the Employee Handbooks were correct in describing it in those terms. Nevertheless it is clear to us, as submitted by Mr Gammie, that when the FTT used the term "net pay" what it is referring to is the gross pay reduced by the Disputed Allowances, which might have been given the label "net pre-tax pay" to avoid potential confusion perhaps caused by the use of the simple term "net pay". Miss Ollerenshaw's example showed "Exp Adj" (described in her example as the "Travel Adjustment" in the sum of £15.11) as a deduction from a sum of two figures which are net of tax (namely the net pay calculated by applying the applicable tax and NIC rates to the Employed Temp's gross income after deduction of the Disputed Allowance and the Disputed Allowance itself, which on Reed's case was not subject to tax. However, it is clear that the purpose of this example was to show the benefit to Reed of operating the RTA Scheme, notably the £15.11 shown as "Travel Adjustment" which represented the difference between the income tax and NICs borne by the Employed Temp if he was not in the Scheme (£32) and that which would be borne if he was (£16.89), which figure was increased to £20.88 by the addition of the Employer NICs saved by Reed in respect of the Disputed Allowances.

134. The example achieves this by illustrating that the Employed Temp's net pay is the same whether he or she is in the scheme or not (£68), a point that the FTT makes in paragraph 114 of the Decision, as quoted in paragraph 69 above, and it does not include the sum added to the Employed Temp's gross pay (at this stage referred to as the Travel Allowance) as his or her share of the saving to Reed effected as a result of the Scheme. As the FTT correctly identifies in paragraph 113 of the Decision, the purpose of Exp Adj was to reduce the net pay to the amount it would have been had the Employed Temp not participated in the Scheme before account is taken of the benefit shared with the Employed Temp at this stage through the Travel Allowance.

135. Therefore in our view Mr Gammie is right when he says that Miss Ollerenshaw's example was demonstrating an alternative method of arriving at a particular result; she did so on a net travel adjustment basis rather than a gross expense adjustment basis. Miss Ollerenshaw's example served to emphasise the neutral effect on net pay and the extent of the benefit to Reed of operating the RTA which, as we shall see, is how matters were presented on the Employed Temp's payslips. In our view the FTT fully understood how the RTA scheme operated and how the deductions were made at the various stages in the calculation.

136. That the FTT understood how the scheme operated is illustrated by the FTT's description in paragraph 110 of the Decision, quoted in paragraph 68 above. In the fourth sentence of this paragraph the FTT refers to the fact that the *taxable pay* was reduced by "Exp Adj", to arrive at the same net figure as would be the case if the Employed Temp did not participate in the Scheme, and then correctly finds that the taxable pay was increased by the Travel Allowance, the after tax amount of which was the benefit to the Employed Temp of being in the Scheme. In addition, in paragraph 116 of the Decision, when reviewing a sample payslip the FTT clearly refers to "Exp Adj" being deducted from gross pay, in the context of the FTT recording Mr Beal's explanation that the purpose of the deduction was to bring the net pay back to what it would have been without participation in the scheme.

137. Mr Glick also relied on the fact that during Mr Beal's oral evidence Judge Bishopp put to Mr Beal an explanation of the way the travel allowance operated which suggested "Exp Adj" was a deduction to the gross pay and observed that this was at odds with what was said in the Decision. The exchange was recorded in transcript of the FTT's proceedings as follows:

> "Mr Bishopp: The way it was done, Mr Beal, was to calculate a salary sacrifice, which reduced the gross amount …
>
> A: Right
>
> Mr Bishopp: … and then add on this £1.50 or 75p a day. Wouldn't it have been easier simply to reduce the amount of the salary sacrifice to arrive at the same result?
>
> A: Yes, and in fact the RTB, in a sense, that's the way that that worked. But for the average temp, it was very difficult for them to understand the tax behind this situation, and for them to have a

figure that they could concentrate on which said, "This is what you're getting out of it", it was decided by the –

Mr Bishopp: Yes, but you still get the same bottom line. That's what you were inviting people to compare, wasn't it? Bottom line to bottom line?

A: Yes, they would still get their comparison with the bottom line. That probably would have been a better way of doing it and in a sense that's what we went on to with RTB."

In our view this exchange shows clearly that Judge Bishopp understood that "Exp Adj" (described here as a salary sacrifice) was a deduction from gross pay and that the Employed Temp could see the benefit of being in the RTA scheme by comparing the effect on his net pay or the "bottom line" as it is described in this exchange. This is fully consistent with the FTT's findings in paragraph 110 of the Decision and for the reasons we set out above we do not believe that it is at odds with the elaboration made in paragraph 113 of the Decision.

138. In any event Mr Glick was unable to explain how, if the FTT made an error in paragraph 113 of the Decision, it is significant in relation to any of the FTT's conclusions, which as the passage from *Georgiou* quoted in paragraph 120 above indicates is necessary for a successful challenge. The best Mr Glick could do was to say that the FTT clearly regarded it as an important finding and "it may be that it is." We note that the description of "Exp Adj" as a deduction from net pay is repeated in paragraph 216 of the Decision as part of the FTT's discussion on Issue 1, where the FTT said that the item could not constitute a salary sacrifice for that reason, but in that paragraph the FTT clearly finds that the sum did not reduce taxable salary, which in this context must mean that it did not affect what payments were liable to tax, which would clearly include the "Exp Adj" to the extent that the benefit was passed on to the Employed Temp.

139. We therefore find that it was open to the FTT to make the finding it did in paragraph 113 of the Decision. At its highest, the FTT might be criticised for a loose use of language, but as is clear from *Pendragon* the fact that we might have expressed the point in clearer language is insufficient to make a successful challenge to the finding.

140. Second, Reed questions the finding of the FTT in paragraph 118 of the Decision, quoted in paragraph 71 above, that Reed offered £1 per day for the travel-to-work payment at the time in question, regardless of area or distance and nothing for subsistence. Reed submits that in the context of the rest of the paragraph this statement confuses the travel to work payment (that is the Employed Temp's share of the benefit of the tax saving) with the Disputed Allowances.

141. Again, the most that the FTT can be criticised here for is not emphasising as clearly as it might that the travel to work payment was the means by which Employed Temps shared in the benefit of the arrangements. It is clear from paragraph 110 of the Decision where the FTT describes the travel to work payment as being misleadingly called a "travel allowance" that the FTT fully understood the difference between the

two payments and in paragraph 118 the FTT was making the point, perhaps not as clearly as it might have done, that the Employed Temps received a small part of the benefit from the scheme which had no correlation to the scale rates set out in the Dispensations. We therefore find no error of law on the FTT's part in respect of this finding and the FTT was entitled to make it.

142. Third, Reed submits that in relation to the RTB, the FTT confused the payment of the Disputed Allowances which, as the FTT found in paragraph 139 of its Decision quoted in paragraph 77 above, was shown on the Employed Temp's payslip as "RTB NON TAXABLE EXP TP", with "RTB ADJ" which was the benefit the Employed Temp received by participating in the RTB Scheme. Reed criticises the following finding in paragraph 223 of the Decision:

> "That the RTB ADJ might vary for reasons related to the participant's tax and NIC's position rather than to the expense actually incurred is, we think, of no consequence in itself, though it does highlight the fact that the scheme had, in truth, only a tenuous connection with travel and subsistence costs."

Reed says that the sum shown on payslips as "RTB NON TAXABLE EXP TP" does not bear a tenuous connection to travel and subsistence costs, so it was erroneous of the FTT to say that the "Scheme" bore a tenuous connection to travel and subsistence costs.

143. Again, the worst that can be levelled at the FTT in this regard is that its language was not perhaps as clear as it might have been. It is clear to us, however, particularly when bearing in mind the FTT's clear explanation in paragraph 137 of the Decision (set out in paragraph 78 above) as to how the matrix operated to determine the amount of "RTB ADJ", and its observation that the amounts deducted for it "were entirely driven by the Employed Temp's tax and NICs liability", that in paragraph 223 the FTT was in fact finding that the deduction for "RTB ADJ" did not correlate with, or in any way relate to, the scale rates agreed with HMRC or the sums actually incurred on travel or subsistence, so that its use of the word "Scheme" was intended to refer to the tax saving scheme rather than the payment of travel expenses. This is also clear from the last sentence of paragraph 137 of the Decision and is reinforced in paragraph 224 of the Decision where the FTT observes:

> "Similarly two employed temps with identical expenses but different tax and NIC liabilities were treated differently: as we have said, the scheme had only a tenuous link with actual travel and subsistence costs."

144. Therefore on this basis the FTT was in our view entitled to make the finding it did in paragraph 223 of the Decision.

(2) The benefit that the Employed Temps received from RTA and RTB

145. Reed submits that the FTT made a number of erroneous findings concerning the size of the benefit allocated to the Employed Temps under the Schemes, in particular that the Employed Temps enjoyed no meaningful benefit or an unfairly small portion of it.

146. Reed itself does not appear to be able to articulate how these findings impact on the reasoning behind the Decision. It refers to the observation by the FTT in paragraph 213 of the Decision that they are relevant to the question whether there was an effective salary sacrifice (the determination of which in the FTT's view was determinative of Issue 1), but comments in its skeleton argument that it is not entirely clear what relevance the FTT thought that the size of the benefit enjoyed by the Employed Temps had.

147. It seems clear to us that when Reed introduced the RTB scheme, it felt, on RR's advice, that it was important that there was shown to be a clear salary sacrifice. This appears from the FTT's findings on the explanatory material relating to the RTB Scheme in paragraphs 131 and 136 of the Decision, as quoted in paragraphs 75 and 77 above, where the references to salary sacrifice contemplate that what is being given up is the amount represented by "RTB ADJ".

148. Were the FTT's Decision on Issue 1 based on findings that a salary sacrifice of an amount represented by "RTB ADJ" could be effective to turn the Disputed Allowances into non-taxable expenses, but that the amount was so modest that it was not an effective salary sacrifice, then Reed's submissions on the FTT's findings as to the extent of the benefits received by the Employed Temps would clearly be relevant. However, we are not convinced that was the basis of the FTT's Decision on Issue 1.

149. In Paragraph 216 of the Decision, in relation to the RTA, the FTT considered whether the "Exp Adj" could amount to a salary sacrifice. Having decided that to be effective a salary sacrifice had to reduce taxable salary it said:

> "It is also the wrong amount as the sacrifice should be the amount of the allowance, calculated in accordance with the current dispensation, whereas "Exp Adj" equals the aggregate of the tax and NICs on the amount of the allowance."

150. In relation to the RTB, the FTT did focus on whether the deduction for "RTB ADJ" amounted to a salary sacrifice in paragraphs 223 to 225 of the Decision, finding at paragraph 223 that "at first sight it did". The FTT's reasoning for its conclusion that there was no sacrifice "in the true sense of the word" in paragraph 225 of the Decision was that the "supposed sacrifice, however it was presented, was no more than an arithmetical adjustment whose purpose was to ensure that Reed secured the intended share of the benefit".

151. It is therefore clear to us that the FTT based its decision on Issue 1 in relation to the RTB on the character of the deduction, and not its amount, whether modest or otherwise. The fact that in paragraph 225 of the Decision the FTT referred to Reed appropriating a significant share of the benefit to itself does not in our view alter the position and indeed the larger the amount of the benefit allocated to the Employed Temp the smaller the salary sacrifice would be, if it were correctly described as such.

152. We shall have to determine in relation to Issue 1 whether the FTT was correct to base its determination on the question as to whether there was a "salary sacrifice". If we find that they were not then Reed's criticisms on the amount of the benefit will be irrelevant. If we find that the FTT was correct in its approach for the reasons given above we do not believe that the question as to the amount of the benefit appropriated to the Employed Temp formed any part of the basis on which the FTT came to its conclusions on Issue 1. Consequently, Reed's submissions on this point fail the test established in *Georgiou* that the findings that are challenged are significant in relation to the conclusion. Reed impliedly recognises this in its statement in its skeleton argument that it appeals the FTT's findings of fact on the point "in case the Upper Tribunal considers them to be relevant." For the reasons given in our consideration of Issue 1 we do not find them to be relevant and accordingly dismiss Reed's factual appeal on this point without the need to consider the findings themselves in any detail.

153. In the context of its factual appeal on this point, Reed made the application for the admission of fresh evidence in the form of the witness statement from Mr Beal. As we have decided that the issue as to the amount of the benefit that the Employed Temps received was not material to the Decision, the application was of marginal relevance in any event.

(3) The explanation of RTA and RTB given to the Employed Temps

154. Reed criticises a number of findings of the FTT concerning the Employed Temps' knowledge of the underlying structure of the Schemes. There are three particular findings that fall into this category on which Reed made submissions.

155. First, Reed contends that a number of findings on the part of the FTT that Reed concealed the details of the dispensations and how they were being operated were erroneous. In particular Reed criticises the following findings of the FTT:

(1) Reed concealed not merely the detail of the current dispensation, in particular the amounts of the allowances set out in it, but also the manner in which Reed was operating it, from the Employed Temps (paragraph 210);

(2) An Employed Temp could not have worked out from his or her payslip the amount of the Disputed Allowance in his case under the RTA and although the working of the RTB was rather less opaque an understanding of the underlying structure of that scheme was beyond their reach (paragraph 211); and

(3) The make-up of "RTB NON TAXABLE EXP TP" was not revealed nor was there anything on the payslip from which it might be worked out as, to do that it was necessary to know the amounts set out in the current dispensation which were not revealed (paragraph 224).

156. Reed submits that the finding that Reed concealed something from the Employed Temps implies that Reed was obliged to reveal the information concerned;

and as this is not the case, the finding is unsupportable. Reed submits that all that the Employed Temps needed to know was how the Schemes affected them and as the FTT found at paragraph 105 of the Decision, set out in paragraph 66 above, this was explained by the temp consultant. Mr Glick referred to the passages in HMRC Notice 490 set out in paragraph 37 above to the effect that employees do not need to be given details of the expenses covered by the dispensation.

157. Although Mr Glick submitted that the term "concealed" is pejorative and indicates the failure to disclose something that there is an obligation to disclose, reading the relevant passages in the Decision as a whole it does not appear to us that the FTT was using the term in that sense. At no point do they suggest that there was a legal obligation to disclose the relevant amounts but their findings that the amounts concerned were not revealed are germane to their conclusions as to whether there was an effective salary sacrifice. We accept that this question may also be relevant to the question of legitimate expectation that may arise under Issue 7, but as we discuss in relation to that issue, the key question there is whether Reed "put all its cards on the table" and a finding on that issue does not require any failure to do so to be deliberate.

158. In our view the FTT made no specific finding that Reed was under an obligation to make disclosure of the details of the dispensations and what were covered by them, but it was entitled to find, as it did, that the details concerned were not revealed by Reed to the Employed Temps.

159. Secondly, Reed submits that the FTT's finding that "it would be difficult to imagine" had the Employed Temps understood the underlying structure of the arrangements, that they would not have made an informed decision to participate in that because of the potential loss of certain contributory benefits (for example statutory sick pay and statutory maternity pay) was erroneous. This finding was made in paragraph 212 of the Decision which also contained the comment that:

> "we have little doubt that, if they had been provided with clear information, many would have been put off by the potential of participation in the scheme to diminish their entitlement to various contributory benefits, and that they would have been surprised, to put it at its lowest, to see that under the RTA scheme Reed could achieve a saving of as much as £20.88 (see the worked example at paragraph 112 above) on a weekly salary of £100, while the employed temp gained only to the extent of (at that time) £5 less tax and NICs."

160. Reed refers to the fact that in paragraph 147 of the Decision, (set out in paragraph 82 above) the FTT stated that it was unable to find any information about the loss of contributory benefits having been given to the Employed Temps, yet the Employee Handbooks, at least from 2002, contained references to the effect of the Schemes being to reduce NIC-able pay and thus potentially to affect certain contributory benefits.

161. We accept that the Employee Handbooks do refer to the potential effect on contributory benefits. However, in paragraph 147 of the Decision, the FTT was merely recording the position with regard what was available to employees at the time of the original submission to HMRC, when the statement was in the draft Employee

Guide provided to HMRC but not in the material provided to Employed Temps at that time.

The FTT's findings in paragraph 212 are more expressions of opinion than definitive findings that no Employed Temps would have participated in the Scheme if they had been provided with clearer information: hence the use of the phrase "difficult to imagine" in paragraph 212. This comment was made in the context of the other findings in that paragraph as to the relative amounts by which the Employed Temp on the one hand and Reed on the other benefited from the Scheme, and it was apparent from this paragraph that the FTT did not regard the information in the Employee Handbook as clear enough to enable the Employed Temp to weigh up the downside of potential loss of contributory benefits against the upside of the cash benefit obtained by the participation in the Scheme. On this basis in our view it was open to the FTT to make the comments it did in paragraph 212 by drawing inferences from the evidence before it. We therefore see no basis on which we should interfere with those findings.

(4) The nature of the relationship between Employed Temps and Reed

162. We deal with this under Issue 3 below.

(5) Whether Reed would have gone ahead with the Schemes without a dispensation

163. Reed submits that the FTT's finding in the last sentence of paragraph 50, quoted in paragraph 46 above, that it was a possibility that Reed would have gone ahead with the RTA without a dispensation is flatly contradicted by the evidence and one that no reasonable tribunal would have made. This finding is relevant to Issue 7; we accept that if it could be shown that Reed would have gone ahead with the arrangements without a dispensation, it weakens its case on legitimate expectation.

164. Mr Glick referred us to Mr Beal's witness statement where he stated clearly that Reed could not and would not take the risk of operating RTB or RTA without the comfort of a dispensation, and his oral evidence where he repeated that Reed would not have gone ahead without the certainty of the dispensation. Mr Glick also observed that Reed ceased to operate the RTB on 5 April 2006 when revocation took effect, which is another indication that Reed was not prepared to operate the arrangements without a dispensation.

165. It is not clear from the Decision why, notwithstanding Mr Beal's clear statement the FTT came to the conclusion that it was possible (no higher than that) that Reed would have proceeded without a dispensation. Mr Beal's evidence was not challenged in cross examination and we have not been shown any other evidence which suggests that any doubt should be cast on the categoric nature of Mr Beal's statement. In those circumstances we accept Mr Glick's submission that the only finding on the evidence before it that was open to the FTT was that Reed would not

have proceeded with the Schemes without a dispensation. We therefore make that finding of fact for the purpose of our consideration of Issue 7.

(6) Reed's understanding of the Schemes

166. There are four findings that Reed contends are erroneous which fall into this category.

167. The first finding in this category that Reed contends is erroneous is the FTT's finding in the last sentence of paragraph 298 of the Decision, where after referring to Mr Beal's evidence (recorded in paragraph 117 of the Decision) which emphasised the distinction between the Disputed Allowances and the £1 a day travel allowance (which was the mechanism for passing part of the benefit of the Dispensations to the Employed Temps) the FTT stated:

> "Mr Beal fully recognised that Reed was not paying the dispensation allowances to its employed temps"

168. Mr Glick submitted that it may be that the FTT was confusing two separate issues: the payment of the expenses and the payment of the tax savings thus demonstrating a fundamental misunderstanding of the arrangements.

169. Again, in our view this is at its highest some loose language by the FTT. As Mr Beal's evidence that the FTT were referring to made clear, Reed never passed on the full benefit of being able (as it contended) to pay the Dispensation Allowances free of tax and NICs to the Employed Temps, and in our view it is this point that the FTT was trying to put across in paragraph 298 of the Decision. As we have already said, in our view the FTT clearly did understand the difference between the Disputed Allowances and the mechanisms used to pass part of the benefit of the Schemes to the Employed Temps. On this basis, even if there was an error of expression, it is insufficient to constitute an error of law and in our view had no effect on the Decision.

170. Second, Reed contends that the FTT's findings in paragraph 298 of the Decision that Reed and RR knew that the schemes were "risky" and "as Miss Ollerenshaw put it "aggressive" were erroneous.

171. Reed seeks to interpret this finding as a finding that Reed and RR believed that the Dispensations did not work. If that was the case then we would accept that the finding was not open to the FTT on the evidence. We were taken to evidence concerning Miss Ollerenshaw's use of the word "aggressive" namely:

(1) a letter she wrote to Reed after a meeting with HMRC on 29 January 2002 where she referred to the "arrangement being operated on a quite aggressive basis as the company is sharing the benefits by way of salary sacrifice";

(2) an internal file note dated 24 August 2001 where she says the arrangements were "very aggressive" and could result in HMRC revoking the dispensation retrospectively; and

(3) the transcript of her oral evidence where she answered a question from Mr Gammie as to whether the tax planning involved was "aggressive" by stating that the way in which it worked was not straightforward.

172. In our view this evidence justifies a finding that certain aspects of the schemes were aggressive, and certainly that they were "risky", a statement which is justified in the light of our finding that Reed would not have proceeded with them without a dispensation. In our view the FTT must be taken to have used the terms with that intent rather than a finding that Reed knew that the arrangements would not work. Indeed, Mr Glick was not going so far as to say the FTT found the latter, and he volunteered that he was in difficulty as to whether the finding played any great role in the ultimate conclusion.

173. On that basis we regard the findings in paragraph 298 as being neutral in the context of Issue 7 and we approach that issue on the basis that it was not the case that Reed believed that the schemes would not work.

174. Third, Reed contends that the FTT's finding in paragraph 69 of the Decision, quoted in paragraph 51 above, that both sides took the view that the operation of the intended scheme (at that point the RTA) must be clearly spelt out to those affected by it was erroneous.

175. Reed contends that this finding is at odds with the guidance in Notice 490 that the employer need not give details of what expenses are covered by a dispensation and the fact that when HMRC were sent the Employee's Guide which only gave an outline of the scheme they did not suggest that this was inappropriate.

176. We need not deal with this point in any detail. Mr Glick observed that although Reed contend the finding is wrong he found it very difficult to see quite how it feeds into the decision. We agree and on that basis it fails the test in *Georgiou* that the error, if there is one, has any significance in relation to the conclusions in the Decision.

177. Finally in this category, Reed contends that the FTT's finding in paragraph 65 of the Decision that Reed obtained legal advice about the terms of its contracts of employment once the first dispensation had been granted but the FTT did not discover its result was erroneous. Neither party was able to show us any evidence to support that finding so it appears that it was not open to the FTT to make it.

178. However, neither we nor Mr Glick were able to understand how the point has relevance, certainly in relation to Issue 7. It possibly has relevance to the interpretation of the contract of employment dealt with under Issue 3, but in the absence of anything more substantial on this point, we cannot see the finding has any significance in relation to the conclusions in the Decision.

(7) Reed's disclosure to HMRC

179. Reed contends that the FTT made a number of erroneous findings concerning Reed or RR's disclosure to HMRC with regard to the Schemes. In particular, Reed takes issue with the FTT's conclusions in paragraph 299 of the Decision that "Reed and RR were less forthcoming than they might have been." This question is obviously highly relevant to Issue 7 where we have to consider whether Reed can be said to have put "all its cards on the table" so as to benefit from a legitimate expectation that it would not be liable for PAYE in respect of the Disputed Allowances.

180. The only specific finding of fact that Reed challenges which may be relevant to the conclusion in paragraph 299 of the Decision is the FTT's finding in paragraph 62 of the Decision to the effect that the letter of 15 September 1998 to HMRC was not "wholly frank". As Mr Glick observed, a statement of that kind will raise alarm in the mind of counsel dealing with a claim of legitimate expectation and he therefore felt it was necessary to deal with the point.

181. We can allay Mr Glick's alarm with regard to this particular point. Although we need to consider the overall content of this letter in relation to the FTT's conclusion in paragraph 299 of the Decision that Reed and RR were less forthcoming than they should have been when we come to consider Issue 7, in our view paragraph 62 of the Decision was dealing solely with the question of the disclosure as to the extent of the scale rates for the purposes of the travel and subsistence expenses and the extent to which they would be regarded as accurate. This follows from paragraph 61 of the Decision which refers to the statement in the letter that Reed wished to pay round sum allowances which do no more than meet the actual costs incurred.

182. It therefore appears to us that in paragraph 62 of the Decision the FTT was questioning whether there had been adequate disclosure of the quality of the exercise carried out by Reed to establish the scale rates proposed in the letter rather than the issue of disclosure more generally. The question as to whether the scale rates were appropriately calculated is not an issue in this appeal and we are not aware of any challenge by HMRC at this stage of the appeals to their amount. Our view is therefore that the issue as to whether there was a wholly frank disclosure as to the calculation of the scale rates is irrelevant to the matters we have to decide under Issue 7 and we shall proceed to consider Issue 7 on that basis.

(8) HMRC's understanding of the Schemes

183. Reed contends that the FTT made two findings concerning HMRC's understanding of the Schemes which were not supported by the evidence and were therefore findings that no reasonable tribunal could have reached.

184. The first matter relates to findings made by the FTT in relation to a meeting held between Mr Read and Mrs Kirkham of HMRC and Miss Ollerenshaw on 30 November 2001. This meeting was prompted as a result of HMRC receiving a large

number of calls from Employed Temps regarding their payslips. After recording in paragraph 126 of the Decision that Miss Ollerenshaw explained the scheme then operating (the RTA scheme) in terms of the Disputed Allowances having been included in gross pay then deducted and added back as an amount payable without deduction of tax and NICs, with the further deduction to reduce the amount actually paid to the amount payable if the Employed Temp had not participated in the scheme (disregarding the travel allowance of £1.50 or 75p a day), the FTT finds in paragraph 127:

> "It is apparent from contemporaneous records, as well as their evidence, that Mr Read and Mrs Kirkham found the explanation they were given to be both surprising and somewhat baffling: our view is that they probably did not understand it."

185. Mr Glick submits that this was not a finding open to the FTT on the evidence. He referred us to the following evidence:

(1) Mrs Kirkham's note of the meeting which records the ways in which the payslips could be improved so that the Employed Temps and HMRC could understand them; this note records the following comment:

> "the travel and subsistence are included in the hourly rate, then shown as gross and deducted from salary, then the net figure added on."

Mr Glick submits that this shows that Mrs Kirkham understood that to calculate taxable pay the grossed up expenses were deducted from the headline amount and then added back net as tax free expenses and therefore understood how RTA worked and then went on to demonstrate that what was missing from the payslip was a figure showing the amount of the expenses (that is the Disputed Allowance) and suggests that a more straightforward way of showing the expenses would be to show them separately as a deduction from gross pay;

(2) A handwritten note that Miss Ollerenshaw handed to Mrs Kirkham and Mr Read at the meeting which shows a worked example of how the net pay of an Employed Temp who participated in the RTA was calculated and how this compared with the net pay of that which would have been received if the Employed Temp did not participate. This note shows the Employed Temp's gross weekly pay of £356.25 in the example (calculated on the basis of 37.5 hours worked at a rate of £9.50 per hour) to which was added the travel allowance of £7.50 (£1.50 for each of the five days worked) to arrive at the total gross pay. The example then shows a deduction described as "pay conversion" of £69.49 which is the grossed up amount of £47.25. The latter figure is shown as having been calculated by reference to the scale rates then in force, and the former figure being calculated by grossing this up by the combined income tax and national insurance rates then in force (32%). We observe that this figure of £69.49 is an aggregate of what the Employed Temp receives (£47.25) and what Reed receives (Exp Adj) without separating these figures out. This leaves what is described as "taxable and NIC-able" pay of £294.26 from which tax of £64.73 and national insurance of £20.73 are

deducted before the Disputed Allowance of £47.25 is added back to show total net pay of £256.06. Underneath that figure Miss Ollerenshaw has written a figure of £5.12 as the Employed Temp's benefit from being in the Scheme, the example showing that without the scheme the Employed Temp would have received net pay of £250.94. Finally, the example shows that for an Employed Temp participating in the scheme Reed would pay employer's national insurance contributions of £24.66 as compared with £32.04 in respect of an Employed Temp who did not participate in the scheme;

(3) Mrs Kirkham's evidence that she had no memory of the meeting and could not say whether her note was an accurate and complete record of the meeting;

(4) Mr Read's evidence that he had no recollection of the meeting independent of Mrs Kirkham's note, but he also stated the following:

> "I remember Susan Ollerenshaw trying to explain what was going on but I personally found her difficult to follow on this and other occasions. She spoke quickly and confidently but somehow her explanations were in my view never very clear. Often I had to ask her several times what she meant. At times I felt slightly embarrassed to have to ask the same question several times, and I suspect there may have been times when I stopped asking."

He also stated:

> "I did not come away from the meeting understanding exactly how Reed paid its employees in terms of expenses and scale rates … it does not appear that there was any discussion of salary sacrifice or of the fact that the employees had, it transpires, in the Revenue's view, fixed term contracts or of any other issues which might have alerted me or Diane Kirkham of the fact that the expenses were not allowable at all"

In relation to Miss Ollerenshaw's worked example Mr Read said in cross-examination

> "Well, I vaguely remember she did give some explanations and I also vaguely remember I didn't really know what she was talking about and neither did Diane. And I think we went away for a strong drink afterwards."

(5) Notes of a further meeting held on 24 January 2002 when a revised payslip was discussed.

186. Mr Glick submits that the evidence of Miss Ollerenshaw's worked example, and Mrs Kirkham's note of the meeting on 30 November 2001 showed clearly that Mrs Kirkham understood how the RTA scheme worked, and in particular that Reed was paying expenses in substitution for salary. Mr Glick submitted that Mr Read's evidence, when asked to read the note, to the effect that he would have understood it at the time it was written together with the evidence of the meeting held on 29 January 2002 and the fact that shortly thereafter he issued the third dispensation is only consistent with HMRC understanding how the RTA worked. He therefore submits

that it was not open to the FTT to find that Mr Read and Mrs Kirkham found the explanation given by Miss Ollerenshaw "surprising and somewhat baffling" and that they "probably did not understand it."

187. We reject Mr Glick's submissions on this point. It was clearly open to the FTT to weigh up Mr Read's witness statement and his oral evidence on his understanding of the Scheme against the documentary evidence of the explanation given at the meeting on 30 November 2001. In particular the FTT was entitled to take into account Mr Read's statement that he was at times embarrassed to have to keep on asking Miss Ollerenshaw questions, and his statement, notwithstanding that it was hearsay, that Mrs Kirkham did not know what Miss Ollerenshaw was talking about and they went for a "strong drink afterwards". We note that the explanation given did not specifically refer to Exp Adj as a separate figure and therefore clearly indicate the benefit Reed obtained from the Scheme, nor was there any explanation of the employment contracts or the concept of the "salary sacrifice" the example given referring to a "pay conversion" comprised both of the Disputed Allowance and Exp Adj. In those circumstances in our view it was clearly open to the FTT to come to the somewhat tentative "view" that Mr Read and Mrs Kirkham "probably" did not understand the Scheme in the light of the fact that some explanation was given but there was clear evidence, from Mr Read, that notwithstanding that, there was an incomplete understanding of how the Scheme worked. Mr Glick has therefore not been able to surmount the high hurdle that is necessary to show that no reasonable Tribunal could have made the finding that it did in paragraph 127 of the Decision. Indeed, we agree with the FTT's findings in this regard. It rings true that Mr Read and Mrs Kirkham felt the need for "a strong drink" after listening to Miss Ollerenshaw's attempts at explanation.

188. The second matter relates to the FTT's finding in paragraph 298 of the Decision that had HMRC enquired rather more deeply, in particular in connection with the queries about the layout of the payslips:

> "it might have discovered sooner … that Reed was only nominally paying the allowances to its employed temps."

Reed contends that if this was intended to amount to a factual finding that HMRC was not aware of how the Schemes operated during the Relevant Period then it was wrong.

189. We do not read the passage concerned as having the implication that Reed suggests. Rather we think it is, consistent with other passages in the Decision (for example in paragraphs 137 and 295) which explained that the benefit the Employed Temps received from the RTB were based not on the travel expenses actually incurred but on the Employed Temp's own tax and national insurance position and that both Schemes were primarily designed to save tax and NICs rather than as schemes to pay expenses in a tax-efficient manner. Again the worst that could be levelled at the FTT is that it did not express itself as clearly as it might on this point.

190. Our conclusion on the factual appeals that we have reviewed in detail is that none amount to an error of law which is significant in relation to the Decision. Part of

Mr Glick's approach was to attempt to instil in us a concern that a large number of relatively minor errors would have a cumulative effect in that if he was able to satisfy us that there are repeated mistakes then it does give strength to the more important mistakes which it is submitted were made.

191. The difficulty for Mr Glick is that we have not been able to identify any important mistakes, that is any findings of fact which are sufficiently erroneous to amount to errors of law, other than the matter referred to in paragraph 165 above where we have proceeded to remake the FTT's decision and take the revised findings into account in our consideration of Issue 7.

192. In our view Mr Gammie has correctly characterised a large number of Reed's factual appeals and in our view this also includes the considerable number, which although maintained we heard no oral submissions on, as a wide ranging and pernickety attack on the FTT's findings amounting to the deployment of a "fine toothcomb" with the intention of discovering detailed grounds of purported criticism. We have attempted to stand back from this and look at the Decision as a whole when considering and largely dismissing Reed's factual appeals.

193. We can now turn to deal with the nine issues which the parties have identified for determination in these proceedings.

Issue 1: Did the Employed Temps make an effective salary sacrifice?

194. Before analysing this issue in detail, it is helpful to state what we understand to be the essence of the dispute between the parties on Issue 1.

195. In our view the key to determining Issue 1 is to ascertain the true construction of the contractual arrangements between Reed and the Employed Temps as regards the payment of their remuneration. As Mr Glick put it, the key issue is what were the Employed Temps' taxable earnings which resolves itself into the question of what was the contractually agreed wage or salary?

196. HMRC's position is that the Employed Temp agreed to be paid a salary at the hourly rate specified in his or her contract of employment (which might vary from assignment to assignment), an agreement that was not varied by the arrangements put in place under each of the Schemes whereby (as HMRC put it) the Employed Temp's net pay increased as a result of participation in the relevant scheme to take account of the tax and NIC savings generated by Reed seeking to recharacterise part of what was included in the hourly rate.

197. The competing analyses of the contractual arrangements put forward can be summarised as follows.

198. HMRC's analysis is that part of the Employed Temps' earnings are paid as a sum described as non-taxable expenses, part of the benefit of the tax savings thereby generated being passed on to the Employed Temps, under the RTA by the two stage

process of deducting the tax saving and then adding back the sum described as the Travel Allowance, and under the RTB by a single adjustment of a deduction from taxable earnings of a sum calculated by reference to a matrix, with the benefit of the Employed Temp's income tax and NIC savings being included as part of the Employed Temp's taxable earnings. As a result of this analysis, HMRC contends, the Employed Temp's taxable earnings are never anything other than the agreed hourly rate the entirety of which falls to be taxed as earnings under Chapter 1 of ITEPA. In HMRC's view, in order to be able to characterise the payments received as amounting to two separate payments, namely a sum representing earnings under Chapter 1 of Part 3 of ITEPA on the one hand and a sum representing payment of expenses under Chapter 3 of ITEPA on the other hand, payment of which can be made without deduction of tax or NICs because of the existence of a dispensation under section 65 of ITEPA in respect of such payment, it is necessary that the Employed Temp has agreed to a reduction in his or her hourly rate to reflect the amount of the sum paid in respect of expenses.

199. HMRC contends that there was no such agreement in this case, either because the terms of the Schemes never became incorporated into the Employed Temps' contracts of employment, or if they did, they did not alter the agreed hourly rate stated clearly in the contractual terms.

200. Consequently, HMRC's answer to the questions posed by Mr Glick as set out in paragraph 195 above is that the taxable earnings were the sum calculated by the product of the agreed hourly rate and the number of hours worked, with the Employed Temp's net pay being adjusted to take account of the benefit which accrued by participation in the relevant Scheme, and consequently the contractually agreed wages or salary was the sum ascertained by application of the agreed hourly rate to the hours worked.

201. Reed's analysis of the contractual arrangements is that there were two separate contractual payments one of which was a payment of expenses falling into charge only under section 72 ITEPA and deductible under section 338 ITEPA and the other of which was a payment of earnings taxable under section 62 ITEPA so that Reed was obliged to pay a weekly salary plus a payment to reimburse travel expenses, not just a salary. Reed therefore contends that if the whole of the relevant Scheme is incorporated into the contract between the parties, then the Employed Temp is entitled to a salary and to a separate reimbursement of travel expenses, each computed in accordance with the relevant Scheme.

202. We should at this stage say something about the term "salary sacrifice". It is not a statutorily defined term and there is nothing in the legislation or any relevant case law that we were referred to which suggests that it is a concept with any legal significance as such. We were told that it is a term used by HMRC in some of its guidance materials and by tax practitioners in referring to a situation where an employee gives up or "sacrifices" taxable pay in return for something else which is not taxable. For example an employee paid £25,000 per year might agree to reduce his pay to £22,000 in return for the employer paying contributions on his behalf in an amount of £3,000 into a personal pension scheme, with the result that the employee's

taxable pay has been reduced to £22,000 and the employee receives a non-taxable benefit.

203. We have not used the term at all in our description of the competing analyses of the contractual position set out in paragraphs 195 to 198 above, but we think it can be regarded as a convenient way of describing what HMRC say is necessary to have reduced the Employed Temp's taxable pay, namely an agreement by the Employed Temp to reduce his contractual salary in return for payments which can properly be analysed as the reimbursement of tax deductible expenses. Reed contended that there is no autonomous concept of "salary sacrifice", but that the question to be determined is whether in the true analysis of the arrangements the Employed Temp agreed to be paid two contractually agreed sums, a sum representing salary, with the gross sum calculated by reference to the hourly rate being reduced by the amount of the expenses agreed to be paid (subject also to the adjustments made under the respective Schemes to share the benefits of the tax saving generated), and a separate sum representing the expenses. Mr Glick accepts that you could call the reduction in gross pay from what would be payable if the Employed Temp was not a participant in the Schemes a salary sacrifice but if that were done it would amount to no more than a description of the effect of the contractual arrangements. We are therefore of the view that we can safely use the term on a neutral basis but will express our conclusions on Issue 1 on the basis of whether we believe that the FTT erred in law in analysing the contractual arrangements in the way that they did in paragraphs 209 to 226 of the Decision.

204. We do, however, observe that Reed and RR themselves did appear to attach some importance to the existence of a "salary sacrifice". We were shown a paper prepared by Miss Ollerenshaw in August 2001 in the context of a review of the RTA which ultimately resulted in the replacement of the RTA with the RTB. This paper contains the following statement:

> "In the event that the Inland Revenue were to become aware of the fluctuating salary sacrifice, they could effectively defeat the scheme by saying the sacrifice is ineffective because it is made after the pay has been earned.
>
> In order to prevent this occurring, Reed needs to consider making a flat rate sacrifice which can, if necessary, be topped up with taxable pay. We would need to survey the current levels of expenses in order to calculate the proposed sacrifice but the costs of this should be justified by the greater security of the scheme afforded."

205. Hence Miss Ollerenshaw reveals her developing thinking on how to achieve this suggestion in a memorandum to Mr Beal on 6 December 2001:

> "My current thinking on the T & S is that a pre tax and NIC salary adjustment of say £1.50 per day may be acceptable to the Inland Revenue provided the temps are prepared to buy into it. This is on the basis that it would be an effective salary sacrifice as the employees would be agreeing to sacrifice the pay before it was earned. The Inland Revenue accepts that this is effective for tax purposes for pension contributions and formerly worked for PRP."

206. Miss Ollerenshaw also recognised that the question of whether the Schemes were effective was essentially an "employment issue", by which we take it to mean what the Employed Temp's contract provided for. In an email to Joan Edmunds of Reed on 24 August 2004 Miss Ollerenshaw wrote:

> "Whilst you are reviewing the current contracts and the Temp handbook, you should also bear in mind that the Inland Revenue could also attack the current arrangements by contending that the salary sacrifices are ineffective. This would be on the basis that the sacrifice is either ineffective or is not made before the earnings are "paid" for PAYE. Whether or not the sacrifice is effective is principally an employment law issue. However, for PAYE purposes any sacrifice must be made before a temporary worker becomes entitled to be paid so in the majority of cases this will be before an assignment or secondment commences. The Inland Revenue have, historically, accepted that salary sacrifices can be linked to the rate of tax and/or NIC that an employee pays. However, if the pay sacrifices are, fluctuating on a regular basis, the Inland Revenue could try to argue that a temporary worker does not know his or her rate of tax and NIC until the end of the week when the payroll is run. This would be too late to make an effective salary sacrifice for PAYE purposes."

We observe at no point did Miss Ollerenshaw advise that it was necessary that there had to be a "salary sacrifice" of the amount of the gross pay re-characterised as travel expenses; she appears to be of the view that it was sufficient that the Disputed Allowances were paid as a non-taxable expense but there was a deduction from gross pay of the relevant amount calculated by reference to the matrix, such sum to be described as the "salary sacrifice".

207. As we have observed, Reed does not seek to rely on there being a salary sacrifice either in the way described by Miss Ollerenshaw or as an autonomous concept separate from the question of the contractual arrangements between Reed and the Employed Temp.

208. We were referred to the House of Lords' judgment in *Heaton v Bell* [1970] AC 728 as an illustration of the effect of an employee's contractual arrangements on the measure of his taxable pay, and which we are told is commonly regarded as the origin of the concept of "salary sacrifice", although the term is not used in any of the speeches in that case.

209. *Heaton v Bell* concerned the effect of a car scheme on an employee's liability for income tax. Mr Bell's employers had introduced an optional scheme under which they loaned cars to employees, and the wages of those who took the cars were reduced by between £2. 10s. and £2.18s. per week. Mr Bell joined the scheme and the issue was whether the amount of the reduction was to be included in the computation of "the full amount of [Mr Bell's] emoluments".

210. Mr Bell submitted that they should not be included: his taxable income was the net amount paid to him. HMRC submitted that the sums should be included, on two alternative bases:

(1) On a true construction of the agreement, Mr Bell was entitled to his full wages, from which he authorised his employers to deduct a payment by him to them for the use of the car. In other words, Mr Bell was not really being paid less than before and, accordingly, the full (pre-reduction) amount should be taxed. HMRC relied on the fact that as the deduction in arriving at the net wage was variable and the net wage could not be arrived at until the gross wage had been determined. Mr Bell's emoluments were the gross wages before any deduction for the use of the car.

(2) Alternatively, even if the true construction of the agreement was that Mr Bell was paid reduced wages and provided with the use of a car, the use of the car could be converted into money and was therefore taxable as a perquisite under the legislation then in force which is in effect equivalent to the concept of something that is capable of being converted into money provided for in section 62(3) ITEPA. This was because Mr Bell could always opt out of the scheme and receive an additional amount of between £2.10s. and £2.18s. per week instead of the use of the car.

211. The House of Lords held, by a majority, that:

(1) The true construction of the agreement was that Mr Bell was entitled to his full wages from which his employers retained part in payment for the hire of the car. The consequence was that the full wages were taxable.

(2) In any event, the right to the use of the car was convertible into money because it could be surrendered in return for a money payment. It was therefore a perquisite liable to be assessed at that value.

212. It is important to note how Mr Bell's net pay was calculated, as shown by his weekly payslip which was reproduced in the House of Lords' judgment. After adding up the items constituting Mr Bell's gross pay, starting with the "flat rate" or, using the terminology employed in this case "headline rate", calculated by multiplying the hours worked by an agreed hourly rate, there appears a deduction for the amount of the benefit under the car loan scheme which purported to reduce Mr Bell's taxable gross wage.

213. Lord Morris in his speech at Page 747G to H identified the heart of the issue, being the interpretation of the agreement made between Mr Bell and his employer, as follows:

> "It is necessary, in the first place, to decide as to the true interpretation of the agreement subsisting at the relevant time between the respondent and his employers. When he joined the car loan scheme did he vary his terms of employment by agreeing to accept a reduced wage or did he agree that from his wage there would be deducted such sum as represented the sum payable to him in respect of his hiring of a car? That there would be less money to take home week by week would follow in either event. But there would be rather more to take home week by week if the amounts referable to the car are excluded from the taxable income."

214. Lord Morris's conclusions on the interpretation of the agreement were set out at 748B to D as follows:

> "I turn, therefore, to consider on the facts as found what the true position was as between the respondent and his employers. The quest must be to find the realities of the arrangements that were agreed. If (taking these figures merely to state the point) the respondent, before he joined the scheme, had been entitled to receive in a week the gross wage of £33. 9s. 2d. and if, when he hired a car, his employers wished to receive £2. 13s. 6d. a week because the car was loaned to him, was the position thereafter that, for the same labour as before, rendered on the same terms as before, the respondent was still entitled to receive a gross wage of £33. 9s. 2d. and that from his gross pay or from his take-home pay there was to be deducted the amount of £2. 13s. 6d., or was the position thereafter that he agreed that his gross wage was to be £30. 15s. 8d. and that he was to have the free use of a car? My Lords, I consider that the former position was the true one."

215. It should be noted that Mr Bell could at any time have opted out of the car loan scheme on 14 days notice in which case he would receive his wages entirely in cash. It was on this basis that the House of Lords (again by a majority) held that the right to use the car was convertible into money through the exercise of the right to opt out.

216. Mr Bell put some emphasis on one of the conditions attached to the offer to participate in the scheme which stated that "an amended wage basis will come into operation if the application is accepted". Indeed, Lord Reid, who dissented on the first issue, relied on this provision to reach his conclusion that the acceptance of the offer resulted in Mr Bell receiving a reduced wage: see his speech at Page 743F.

217. The majority were of the clear view that this condition made no difference. Lord Morris dealt with the point at 751B to D as follows:

> "Under condition 6 an amended wage basis was to come into operation if a craftsman loaned a car under the scheme. The words "wage basis" are somewhat ambiguous. They might denote the rate of pay which someone is to earn by his work. They might denote the way in which his pay is dealt with or adjusted before the amount is arrived at which the employed person is to receive to take away. One thing is quite clear. Rates of pay and terms affecting what was to be the financial reward for work done were in no way altered if a craftsman joined the scheme. They were the same, other circumstances being equal, for those within and for those without the scheme. The "simple agreement" which was signed did not even purport to alter the terms of employment relating to the wage which one who signed was to receive. It made no mention whatsoever of payment or of wages. So there was no agreement made which produced an "amended wage basis" in any sense which meant that gross earnings were to be less. Work done after joining the scheme was to earn the same reward as would have been earned by similar work done before joining the scheme."

218. Lord Hodson analysed the contractual arrangements as constituting an agreed allocation of wages already earned. He stated at Page 757D to F:

> "It is argued that the use of the phrase "an amended wage basis" in the conditions which the company put forward points to a reduction in wages during the operation of

the scheme in the case of each individual rather than a deduction from his wages applied at his request in a particular manner.

In my opinion, there was no change in the terms of the employment of the respondent in any real sense at any time. During the operation of the scheme there was an allocation for the purposes of the scheme of wages already earned and not, in my opinion, a fresh contract of employment at a reduced wage. This is no less true although the alteration is made through the employer by returning the money to him. The allocation is for the specific purpose of the scheme made at the request of the employee and is to be treated as a deduction from his gross wage. I do not think any other conclusion is to be drawn from the ambiguous phrase "amended wage basis". The basis was not amended. It remained the same throughout. The variation which took place during the operation of the scheme was in the amount applied by the employee out of his wages."

219. Lord Upjohn came to the same conclusion at 760A to B as follows:

"… What does appear quite clearly is that it was a deduction from or reduction of (for there cannot be any real difference between the two phrases) the monetary wages which had already been plainly earned by the respondent. The phrase in condition 6 "amended wage basis" taken by itself may be ambiguous; but in this case I can have no doubt that it meant no more to the parties than that the monetary wage would have to be adjusted and each knew by how much, namely (taking the example) £2. 13s. 6d."

220. Both Mr Glick and Mr Gammie seek to gain support for their respective positions from *Heaton v Bell*. Mr Glick submits that the case simply emphasises the fact that how much an employee is entitled to be paid by way of wages or salary is a matter or construction of the contract of employment and that in this case the Disputed Allowances did not form part of the Employed Temps' salaries but constituted separate payments to reimburse expenses.

221. Mr Glick distinguishes the circumstances in *Heaton v Bell* from the arrangements under consideration in this case in the context of refuting the FTT's finding that the existence of the right to opt out destroyed any argument that there was a separate contractual right to be paid the Disputed Allowances. He sees the second issue in *Heaton v Bell* as being purely the question as to whether non-monetary benefits can be converted into money and was therefore capable of being taxed as a perquisite, and that the House of Lords' findings on that issue makes it clear that if an employee who receives a non-monetary benefit can opt to receive additional wages or salary instead, the non-monetary benefit will be treated as money's worth in the amount foregone, and taxed accordingly. He submits that this principle is irrelevant in the present case because there is no issue as to whether the Disputed Allowances would be converted into money: they were money, the only issue is whether these monetary payments were part of the Employed Temps' salaries or not.

222. Mr Gammie's answer to the opt out point is that *Heaton v Bell* establishes that the agreed wage rate was not affected regardless of the right to opt out, and that the FTT's finding was to that effect.

223. In relation to the first issue considered in *Heaton v Bell* Mr Gammie submits that the reasoning of Lord Upjohn cited in paragraph 219 above essentially applies to this case; there was never an amendment to the Employed Temp's contractual wages from the agreed hourly rate and any adjustments thereafter to the account of participation in the scheme were to wages that had already been earned. On that basis, there was no effective "salary sacrifice" and Reed must lose on Issue 1.

224. We observe that Miss Ollerenshaw was conscious of the need to avoid the Schemes failing in their objective because of the application of the principles identified in *Heaton v Bell*: see the documents we have referred to in paragraphs 204 and 205 above. We are clear that what emerges from *Heaton v Bell* is that a mere re-labelling of a part of an employee's salary is insufficient and what is required is an agreement that what was previously contractually paid as a salary is now clearly being paid as a reimbursement of expenses. The FTT decided that the evidence clearly pointed to there being a re-labelling exercise that was insufficient to change the character of the monies paid as the Disputed Allowances. We therefore now turn to the question as to whether the FTT were entitled on the evidence to come to that conclusion.

225. The evidence which was available to the FTT can be summarised as follows.

Contracts of employment

226. The sample contracts of employment we saw as in force from time to time until 2006 contain very little detail concerning remuneration. In broad terms, they provide for the Employed Temp to be remunerated for each hour worked on the basis of the hourly rate for the assignment concerned, as stated on the Employed Temp's application form (to which the contract of employment was annexed) or as notified to the Employed Temp. Nothing is said about any part of the employee's pay being reduced and an expenses payment made instead or indeed anything about the RTA or RTB scheme. Indeed in the earlier version of the contract the relevant provision concerning remuneration states that a proportion of the Employed Temp's pay calculated at the hourly rate may be travel expenses.

227. Some of the versions contain a statement to the effect that the conditions and the details of the assignment on the front contain full details of the terms and conditions applying to the assignment. Mr Tolley relied on this provision as an "entire agreement clause" precluding the terms of the relevant Scheme being incorporated into the Employed Temp's contract of employment. Later versions provide that the terms and conditions in the contract together with the details of the assignment and the Reed Temporary Workers Handbook contain the full terms and conditions of employment.

228. The application form or offer letter attached to the terms and conditions of employment state clearly the hourly rate. Nothing is said about any adjustments to the agreed hourly rate to take account of the relevant Scheme.

Employee Handbooks

229. These changed over the years to reflect RTA and RTB as those Schemes were introduced. As the FTT found in paragraph 215 of the Decision, when the RTA was introduced the Handbook stated that the Employed Temp participating in the scheme benefited from "an amount additional to your normal hourly rates". The handbook then describes that benefit as the Travel Allowance of £1.50 per day. The handbook also explained the "Exp Adj" figure appearing on the payslip as being an adjustment made to gross pay so the net pay the Employed Temp receives is the same as it would have been if the Employed Temps did not participate in the Scheme. A later version explained "Exp Adj" as "the adjustment to your gross pay to allow for the reduction in the total Income Tax and National Insurance due under the scheme" pointing out that "the agreement with the Inland Revenue means that the Tax and National Insurance deductions on your total pay (shown on the right of your payslip) are lower than they would have been without the scheme".

230. When the RTB was introduced an explanation of it was included in the handbook. Later versions of this after the Scheme's introduction were, as the FTT found in paragraph 223 of the Decision, more explicit in explaining the purpose of the Scheme, which it was stated "provides you with a tax and NI-free travel and subsistence allowance as part of your pay rate". The handbook also explained that the benefit came from the tax and national insurance savings made because of the reduction in taxable income and therefore that the value of the benefit depends on where the Employed Temp was positioned on the matrix and his individual tax and NI position. The handbook also explained the entries that would appear on the Employed Temp's payslip, in particular that "RTB Expenses TP" represented the tax free expenses "RTB ADJ" was a "salary sacrifice" being the "gross adjustment made to your pay as per your position on the matrix". The matrix was explained on the basis that "to allow Reed to apply the RTB, you will need to make a salary sacrifice reduction to your gross pay" and that the amount of that deduction depended on the Employed Temp's tax and national insurance position.

Other explanatory material

231. The FTT also had evidence from Mr Baddeley to the effect that a temp consultant would explain the workings of the RTA and the RTB to new recruits but found that no details of the terms of the Dispensations were given: see paragraph 105 of the Decision.

232. In addition, Employed Temps were referred to their payslips to demonstrate the effect of the relevant Scheme. We observe, as the FTT did in paragraph 118 of the Decision, as quoted in paragraph 71 above, in relation to the payslip in operation during the currency of the RTA that whilst the Employed Temp might have been able to see that participation in the scheme led to some increase in his or her net pay, it was

not possible to discover from the examination of the payslip how the adjustment had been determined nor was any information provided to him or her in the payslip, the handbook or otherwise which would have revealed the amounts set out in the dispensation current at the time.

233. The evidence also shows, as recorded in paragraphs 121 to 125 of the Decision, that many Employed Temps could not understand their payslips, resulting in many enquiries to HMRC.

234. With regard to the RTB, the sample payslips submitted in evidence, show the amount paid as non-taxable expenses under the heading "RTB Expenses TP", but gross pay is still shown as being calculated purely by reference to the agreed hourly rate, the only adjustment to that being the deduction for "RTB Adj", as determined according to the matrix. There is however a comparison included showing the reduced amount the Employed Temp would have received had he or she not participated in the scheme, so the Employed Temp can see the benefit obtained from participating in the Scheme.

235. In our view the FTT was entitled to conclude in relation to the RTA, on the basis of the evidence we have summarised above, that whilst they had agreed as a term of their contracts of employment to be paid in accordance with the current scheme, they had not agreed to be paid anything other than a salary derived from multiplying the agreed hourly rate by the number of hours worked: see paragraphs 214 and 217 of the Decision. The FTT concluded in effect that the process of "manipulation" by deducting an amount for travel expenses, as justified by entries on the timesheets and the Employed Temp's tax and NIC position, and adding the same sum back again, did not make any change to the Employed Temp's contractually agreed rate of pay and consequently the pay on which he or she falls to be taxed: see paragraphs 218 to 220 of the Decision.

236. In our view this conclusion is fully consistent with the principles that emerge from *Heaton v Bell*; what has happened in this case is the same as what the majority of the House of Lords held occurred in *Heaton v Bell;* there was no change to the Employed Temp's contractually agreed rate of pay when the RTA was implemented but merely an adjustment to salary which had already been earned with no amended contract of employment at a reduced salary. Consequently, it appears to us, as it did to the FTT, that the application of the relevant scheme resulted in a mere re-labelling of a part of an employee's contractually agreed salary and, as we identified in paragraph 219 above, this is insufficient to constitute an agreement that part of what was previously contractually paid as salary was now being paid as a reimbursement of expenses. It follows that we reject Mr Glick's submissions on this point.

237. We also reject Mr Glick's submission that *Heaton v Bell* does not help on the issue as to whether the existence of the opt out was fatal to the Schemes. We do not agree with Mr Glick that the second issue in *Heaton v Bell*, that is the right Mr Bell had to opt out of the car loan scheme and receive a monetary payment instead is not relevant here as there is no option to convert a non-monetary benefit to a monetary benefit. We agree with Mr Gammie that the principle goes wider than that, it

establishes that an agreed wage rate was not affected regardless of the right to opt out and the FTT's finding on the opt out issue was to the same effect.

238. In relation to the RTB, although the FTT found, as it was entitled to on the evidence, that the amount characterised as expenses was clearly identified and the amount sacrificed by the deductions made according to the matrix were not the same as the amount gained, it made the same essential finding as it did in relation to the RTA, namely that Reed "applied the dispensation in order to enable it to attribute part of the pay entirely notionally, to the reimbursement of expenses, so that the tax and NICs burden could be reduced": see paragraph 225 of the Decision.

239. For the reasons we have set out above, in our view the FTT was fully entitled to come to that conclusion, and on the basis of our previous analysis such an arrangement is insufficient to constitute an agreement by which the Employed Temp has effectively given up part of his salary in return for a payment of tax free expenses.

240. In essence, the arrangements that Miss Ollerenshaw devised in order to meet the concerns about whether the contractual arrangements did meet this requirement, which was a requirement that in our view she recognised was necessary, were ineffective to achieve the stated purpose and we observe that they failed for the simple reason that Reed did not, possibly for presentational reasons, make it clear to the Employed Temps that as a result of the Schemes their hourly rate had been reduced from £X to £Y, with the reduction being paid as tax free expenses.

241. We have reached this conclusion on the assumption that the terms of the Schemes, ineffective as they were to achieve Reed's objective, had been incorporated into the Employed Temps contracts of employment. Mr Tolley, as he did before the FTT, made strong submissions to the effect that the terms of the Schemes were not incorporated into the contracts of employment of the Employed Temps at all. It has not been necessary for us to deal with that issue in reaching our conclusions on Issue 1, but we shall deal briefly with Mr Tolley's submissions as they are relevant to Issue 7 .

242. The starting point for Mr Tolley's submissions is that it was HMRC's case that the Employed Temps' contractual terms did not at any material time include a provision as to salary sacrifice, that is there was at no stage a contractual term whereby the Employed Temp agreed to accept a reduction in his or her gross pay to which he or she would otherwise have been entitled. In support of that case, Mr Tolley observes that there is nothing in the written terms and conditions of employment at the relevant time about there being any reduction in gross pay. He also submits that the handbook and other communications about the Schemes were not a source of contractual terms.

243. Mr Tolley supports these submissions by two further points; First on Reed's case there would be a conflict between the express salary provisions in the printed terms and conditions and the allegedly incorporated handbook provisions, which is a reason against incorporation. Secondly, on the material before it the FTT should have concluded that there was no intention to incorporate the handbooks or other material,

and Mr Tolley submits that is the case because of the effect of the entire agreement clause and the fact that the provisions concerned were not apt for incorporation.

244. We were referred to a number of authorities which have had to consider the effect of provisions in staff handbooks and the like where it has been argued, on the one hand, that the effect of an entire agreement clause is to exclude such extra provisions as contractual terms and on the other hand, that the handbooks and other materials complement the written terms and conditions and the parties' intention was that the material as a whole should be read together in order to find the agreed contractual arrangements.

245. In particular, in the Court of Appeal case of *Briscoe v. Lubrizol Ltd* [2002] EWCA Civ 508 Potter LJ said at paragraph 14:

> "It is of course frequently the case that details of an employee's contract and the benefits to which he is entitled by virtue of his employment are largely to be found in a handbook of the kind supplied to the claimant in this case. For this purpose, and depending on the circumstances, incorporation by express reference in the statutory particulars of employment will not usually be required by the Court. Again, it is frequently the case that, in the employment context, the language of a handbook, while couched in terms of information and explanation, will be construed as giving rise to binding legal obligations as between employer and employee."

246. In *Keeley v Fosroc International Ltd* [2006] EWCA Civ 1277 the Court of Appeal approved the statement from *Briscoe v Lubrizol* quoted above, adding the proviso that the provisions sought to be incorporated should not be in conflict with other contractual provisions.

247. In *Carmichael v National Power PLC* [1999] AC 1226 the House of Lords held that it is not always appropriate to determine the contractual position solely from the written terms agreed at the outset of the relationship. Lord Irvine LC said at Page 1230H to 1231A:

> "In my judgment it would only be appropriate to determine the issue in these cases solely by reference to the documents in March 1989, if it appeared from their own terms and/or from what the parties said or did then, or subsequently, that they intended them to constitute an exclusive memorial of their relationship. The industrial tribunal must be taken to have decided that they were not so intended but constituted one, albeit important, relevant source of material from which they were entitled to infer the parties' true intention, along with the other objective inferences which could reasonably be drawn from what the parties said and did in March 1989, and subsequently."

248. It is also clear from this judgment that the ascertainment of the terms and conditions of a contract of employment should not be regarded entirely as a question of law. Lord Hoffmann said at Page 1233B and C:

> "But I think that the Court of Appeal pushed the rule about the construction of documents too far. It applies in cases in which the parties intend all the terms of their contract (apart from any implied by law) to be contained in a document or documents. On the other hand, it does not apply when the intention of the parties, objectively

> ascertained, has to be gathered partly from documents but also from oral exchanges and conduct. In the latter case, the terms of the contract are a question of fact. And of course the question of whether the parties intended a document or documents to be the exclusive record of the terms of their agreement is also a question of fact."

249. In relation to the effect of an entire agreement clause, in *Royal National Lifeboat Institution v Bushaway* [2005] IRLR 674 the Employment Appeal Tribunal said:

> "There may be cases where it is not permissible to look beyond the written terms of the written agreement, but this is not one of them. The existence of an entire contract clause is not conclusive."

250. *Keeley v Fosroc* dealt with the question as to whether certain provisions not contained in the written terms and conditions of employment were to have contractual effect. Auld LJ said at paragraph 31:

> "…it does not necessarily follow that all provisions are apt to be terms of the contract. For example, some provisions, read in their context, may be declarations of an aspiration or policy falling short of a contractual undertaking …. It is necessary to consider in their respective contexts the incorporating words and the provision in question incorporated from them."

251. In the light of those principles derived from the authorities we conclude on the incorporation issue as follows.

252. We accept Mr Tolley's submission that the Employed Temps' contractual terms did not at the material time include a provision by which an Employed Temp agreed to accept a reduction in her contractually agreed hourly rate. That is self evident from our conclusions in paragraphs 235 to 241 above.

253. We do not accept, however, that the FTT was not entitled on the evidence before it to conclude, as it did, that those Employed Temps who participated in the Schemes had agreed to being paid in accordance with the terms of the relevant Scheme. It was, in our view open to the FTT not to regard the entire agreement clause as being determinative; in any event that clause did not apply throughout the entire period that the Schemes were in force. The FTT had regard to *Keeley v Fosroc*, and the question as to whether arrangements were apt for inclusion in the contract. As the arrangements resulted in an adjustment to an Employed Temp's net pay our view is that, in all the circumstances it was open to the FTT to conclude that the provisions were apt to be included. In our view it was also open to the FTT, as indicated in paragraph 213 of the Decision, to take account of the fact that the Employed Temps received an extra benefit by agreeing to participate in the relevant Scheme and, contrary to Mr Tolley's submissions, we cannot see how such a benefit could in all the circumstances be characterised as anything other than a contractual payment. As *Carmichael v National Power* demonstrates, the exercise of ascertaining the terms of an employment contract should not be regarded entirely as a question of law. It is clear to us that the FTT applied the correct legal principles, there was evidence before it on which it was entitled to conclude as it did in paragraph 214 of the Decision that

in all the circumstances the Employed Temps had agreed to be paid in accordance with the terms of the relevant Scheme and we should therefore not interfere with those findings.

Issue 2: Were the disputed allowances within Chapter 1 or Chapter 3?

254. We take the same approach as we did with Issue 1 by stating what we understand to be the essence of the dispute between the parties. Mr Glick summarised the dispute as he saw it in his skeleton argument as follows:

(1) Reed's position is that payments reimbursing travel expenses actually incurred by *reason of the employment* are not earnings chargeable under Chapter 1 of ITEPA;

(2) HMRC's position is that only payments reimbursing travel expenses actually incurred *in the performance of the duties of the employment* are not earnings chargeable under Chapter 1.

255. By way of amplification of this succinct summary, as we understand it, HMRC's case was that if the expenses concerned were ordinary commuting expenses, which by virtue of s338(2) ITEPA were not deductible from earnings, then the expenses must be regarded as Chapter 1 earnings and cannot be Chapter 3 earnings, regardless of whether the payments sought to do no more than reimburse the employee for expenses actually incurred without any element of bounty. This is because the payments are paid to the employee in return for acting as an employee and amount to no more than a contribution to the employee's personal expenditure, as non-deductible travel expenses. Reed's position is that the authorities demonstrate that expense payments which do no more than reimburse an employee for expenses actually incurred (and for this purpose it is common ground that the scale rate allowances paid by Reed fall into this category) did not amount to emoluments (under the legislation that pre-dated ITEPA) and therefore do not amount to earnings under Chapter 1 of ITEPA.

256. The question as to whether the expenses were the expenses of ordinary commuting is determined by s338(3) ITEPA, so if under Issue 3, we determine that the expenses were incurred in travelling between an Employed Temp's home and a permanent workplace then they must be regarded as ordinary commuting expenses and on HMRC's analysis cannot be Chapter 3 expenses. On Reed's analysis they are still Chapter 3 expenses because the sums were paid "by reason of the employment" as provided for in section 70(1) of ITEPA and do not involve any element of bounty. It seems to us that Reed in effect maintain that "expenses" as that term is used in section 70 of ITEPA means expenses that do no more than reimburse an employee for expenses actually incurred, regardless of whether they are ordinary commuting expenses or not, if they are the latter they are charged to tax under Chapter 3 but not Chapter 1.

257. Reed therefore maintains that even if they are unsuccessful on Issue 3, if they are successful on Issues 4 to 6 (as they were in the FTT) they will succeed on the appeal because they will be able to rely on the Dispensations to nullify the tax charge, even if they were made on a mistaken basis.

258. Conversely, it is common ground that if Reed is successful on Issue 3 then the expenses concerned must be regarded as being within the scope of Chapter 3. The payments can be regarded as expenses in the normal sense in which that term is used as being a reimbursement of costs actually incurred by the employee concerned. These reimbursements are capable of being covered by a dispensation under section 65 of ITEPA, because the workplaces to which the employees were travelling were temporary workplaces so that the expenses were deductible under section 338 of ITEPA and consequently, as required by section 65(3) of ITEPA a dispensation can be given because no additional tax is payable in respect of the payments concerned.

259. Therefore, as a practical matter Issue 2 only becomes relevant if Reed does not succeed on Issue 3 and has succeeded on Issue 1. We have determined Issue 1 against Reed and, as discussed below, will determine Issue 3 against it so that we are proceeding to consider Issue 2 on the basis that our determinations on Issues 1 and 3 are both wrong. In these circumstances, like the FTT, despite the detailed arguments put to us based on the authorities, we decide the issue without going into any great detail.

260. The FTT in effect agreed with HMRC's analysis; in paragraph 246 of the Decision they held that if the expenses concerned were ordinary commuting expenses they remained earnings within section 62. Its reasoning for that conclusion was as follows:

> "It is not the fact that the expense is not deductible (true though it is) which leads to this conclusion, but that the payment defrays what has to be regarded as a personal (getting to work) rather than an employment (doing the work) expense."

The FTT therefore relied, as it went on to state in paragraph 246 of the Decision:

> "On the fundamental distinction … between expense incurred in putting oneself in a position to do the work, the expense incurred in doing the work itself."

261. Mr Glick submits that the FTT's reliance on this distinction is false and neither the expense of travelling from home to a permanent workplace nor the expense of travelling from home to a temporary workplace is incurred in the performance of the duties of employment. Accordingly, Mr Glick submits, if the proposition advanced by HMRC were right, all payments reimbursing expenses that are deductible only under section 338 of ITEPA would be earnings within Chapter 1 of ITEPA and so could not fall within Chapter 3. That, he submits, is inconsistent with the statutory scheme which contemplates that some payments reimbursing expenses deductible only under section 338 fall within Chapter 3 of ITEPA.

262. Mr Glick submits that the correct analysis is that payments reimbursing travel expenses actually incurred "by reason of the employment" are not earnings

chargeable under Chapter 1. He submits that expenses incurred in travelling from home to work (whether to a temporary or permanent workplace) are incurred by reason of the employment but not in the performance of the duties of the employment. Accordingly, as the relevant payments reimbursed expenses actually incurred by reason of the employment, they are not earnings chargeable under Chapter 1, but instead are sums paid in respect of expenses which are treated as earnings under Chapter 3 and are deductible if incurred in travelling for necessary attendance at a temporary workplace.

263. Mr Glick relies on a number of authorities to support his submissions. The first is the well-known case of *Pook v Owen* [1970] AC 244. The relevant facts in that case were that Dr Owen worked as a general practitioner from his home in Fishguard but also held part-time appointments as an obstetrician and anaesthetist at a hospital in Haverford West, 15 miles away which required him to be on call to attend the hospital when necessary. The hospital reimbursed travel expenses for the first 10 miles of the journey but not the remaining 5 miles. Dr Owen's duties in respect of these part-time appointments (and responsibility for the patient) began as soon as he received a telephone call from the hospital, when he gave initial instructions before setting off for the hospital in his car; occasionally he was able to deal with the matter by telephone alone. There were two issues before the House of Lords, first whether the payments for the first ten miles of the journey were an emolument ("the Earnings Issue") and secondly whether the expenditure incurred by Dr Owen for the last five miles was deductible (the "Deductibility Issue")

264. Mr Glick submits that the majority of the House of Lords (Lords Guest, Pearce and Donavan) based those parts of their speeches which found in favour of Dr Owen on the Earnings Issue on the basis that the travelling allowance paid by the hospital was a reimbursement for actual expenditure so it could not be an emolument. Lord Wilberforce, who found in favour of Dr Owen on the Deductibility Issue, proceeded on the basis that this meant that Dr Owen had also succeeded on the Earnings Issue. Lord Wilberforce found that the expenses were deductible because when Dr Owen made the journey between Fishguard and Haverfordwest he was travelling between two places of employment and therefore made the journey in the performance of his duties of employment. Lord Wilberforce did, however, state (at Page 263H) that he could not see how Dr Owen could have established that reimbursement of a non-deductible expense was something other than an emolument.

265. We do not accept that the ratio of *Pook v Owen* can be discerned purely by analysing the reasoning of the majority on the Earnings Issue. As Lord Wilberforce found in his speech, in our view the findings on the Deductibility Issue inform the basis of the decision as a whole. Lord Guest found for Dr Owen on this issue on the basis that Dr Own was making the journey when travelling from one place of work to another (his duties having commenced when he took the telephone call at home) so that the journey was made in the performance of his duties, Lord Pearce found for Dr Owen on this issue on the same basis, with Lord Donovan and Lord Pearson dissenting. We therefore see that the majority of the judges reached a conclusion that the circumstances in respect of which Dr Owen claimed a deduction must equally apply to the expenses in respect of which he was reimbursed, namely that the

expenses were incurred in the performance of his duties of employment because he was travelling between two places of work, or as Lord Wilberforce put it, he was travelling not to his work but on his work.

266. When the House of Lords came to consider *Pook v Owen* in *Taylor v Provan* [1974] STC 168 they appeared to have no doubt that *Pook v Owen* had been decided on this basis. That case considered the issue as to whether expenses incurred by Mr Taylor, who had been appointed a director of a company in the United Kingdom, in travelling from his base in Canada (where he performed some of his duties as a director) to the UK to attend to the UK company's business, although treated as emoluments because they were paid to him in his capacity as a director nevertheless escaped assessment to income tax on the grounds that they were deductible as expenses necessarily incurred in the performance of the duties of his office. The House of Lords held that in the special circumstances of his case Mr Taylor was to be regarded as having two places of work and applied *Pook v Owen* accordingly to allow the deductions.

267. Lord Reid, in analysing *Pook v Owen*, said at page 173H "the question whether he had two places of work was the main question at issue". Lord Morris clearly thought this to be the case as well, as he stated at page 177J:

> "The feature of there being in a real sense a dual location of the performance of the duties is more pronounced than it was in *Pook v Owen*."

268. Lord Wilberforce also relied on *Pook v Owen* (see page 182H), Lord Simon said that the ratio of the case, quoting with approval Lord Guest's findings on the Deductibility Issue, was that Dr Owen was travelling between two places of work (see page 186e) and Lord Salmon stated at page 190H:

> "In *Dr Owen v Pook* … the majority of this House held the taxpayer had two places of work between which he had to travel."

269. Mr Glick also relies on the alternative holding of Walton J in *Donnelly v Williamson* [1982] STC 88 to support his analysis that it is sufficient that a payment reimburses expenses actually incurred by reason of the employment for it not to be charged as Chapter 1 earnings.

270. In *Donnelly v Williamson*, Miss Williamson was employed as a teacher. The issue was whether payments by her employer in respect of travel expenses incurred in returning from home to school in order to attend parents' evenings were chargeable to tax as emoluments from her employment. Walton J held that the payments were not emoluments from her employment because it was not part of her contractual duties as an employee to attend parents' evenings. However, he also decided the case on the alternative basis that the payments were not emoluments in any event.

271. Walton J in considering whether *Pook v Owen* had been decided on the basis that Dr Owen had two places of work explained at page 97 b to c:

> "There is no trace that I can find in either of the speeches to suggest that on this aspect of the matter they relied upon the 'two places of work' point, and, indeed, Lord Donavan expressly rejects it, although Lord Wilberforce, another member of the majority, made this the cornerstone of his concurrency."

272. Having analysed the speeches in detail he then concludes at page 97 e to f:

> "Therefore, the question under this head of the case simply is, as I see it, whether the allowance here in question was intended as a genuine estimate of the cost to the taxpayer of undertaking the journeys she did in fact undertake, or whether, on the other hand, it included an element of bounty."

273. We observe, however, that *Taylor v Provan* was not cited to Walton J. We also observe that this part of his judgment was obiter and in any event he was not specifically considering as we are, the deductibility of expenses which are paid pursuant to an employee's contract of employment, but expenses which were paid by reason of the teacher's employment. As regards travel to work payments generally, as the FTT observed in paragraph 246 of the Decision, Walton J explained at page 94 that

> "… if an employer pays the expenses of the employee's travel to work … there cannot be any dubiety as to the status of the cost of such provisions as an emolument."

274. Therefore in our view the cases analysed above, taken as a whole, support the FTT's findings in paragraph 246 of the Decision that there is nothing in *Pook v Owen* or the other authorities which casts doubt on the fundamental distinction between expenses incurred in putting oneself in a position to work and expenses incurred in doing the work oneself, the expenses incurred in *Pook v Owen*, as Lord Wilberforce held, falling into the latter category and the expenses incurred by the Employed Temps in travelling to a permanent place of work falling into the former category and therefore consistent with well known authority such as *Ricketts v Colquhoun* [1926] AC 1, to be regarded as earnings falling within Chapter 1 of ITEPA.

275. In our view this conclusion is consistent with the structure of the legislation itself. Mr Gammie gave us a valuable history lesson as to the derivation of Chapter 3. Whilst the definition of "emoluments" as to be found in ITEPA's predecessor legislation has always been regarded as being widely drawn, in 1948 legislation was enacted to bring expenses within the scope of the charge to income tax in so far as such expenses were paid to "Directors and Others" the "Others" now being referred to as "higher paid employees" within the scope of what is now section 216(4) of ITEPA as referred to in paragraphs 37 and 38 above. The legislation was originally introduced to counter the mischief of the growing practice of expense accounts which enabled a number of businessmen to escape taxation in respect of monies paid to them in respect of what were characterised as expenses . The legislation has not materially changed since then so that section 70 of ITEPA is in substance the same in effect as the legislation introduced in 1948.

276. What has changed, however, is the number of taxpayers to whom the legislation applies. In 1948, the legislation applied to all company directors and all employees

earning £2,000 a year, a sum which at that time would be a number of times greater than average earnings. The current legislation applies to all directors and all other employees earning in excess of £8,500 a figure which is now well below the average wage and which has not increased for many years.

277. Regardless of that, if Mr Glick were right in his submissions, then all expenses paid to employees earning less than £8,500 a year to reimburse them for their costs of travelling to work would not be subject to income tax as, on his analysis they would not be earnings and would not be treated as earnings because the employee concerned would be earning an amount less than £8,500 threshold. We cannot believe that Parliament intended that result when it originally enacted the legislation at a time when the vast majority of taxpayers would not be subject to it, and nothing has changed in the structure of the legislation since.

278. In our view, the effect of the legislation is to impose a basis to charge income tax on payments made to employees which do not constitute Chapter 1 earnings and was not intended at the time it was enacted or since to make any change to what constituted an "emolument" under the predecessor legislation or Chapter 1 earnings under ITEPA. If it was an emolument before the legislation because it was a reimbursement of personal expenditure it remained an emolument afterwards.

279. This analysis is also consistent with the other feature of Chapter 3 which is that if a sum does constitute earnings by virtue of other provisions (for example Chapter 1) then it is not to be treated as earnings under Chapter 3: see section 70(5) of ITEPA. This is consistent with our analysis that the intention was to leave the scope of the charge under what is now Chapter 1 intact when the legislation was originally introduced.

280. We do not accept Mr Glick's submission that the effect of the FTT's decision on this issue would be to make the application of section 338 ITEPA to Chapter 3 earnings redundant. As Mr Gammie submitted, there may be circumstances in which an employer reimburses travel expenses and it can be said that they do not arise from the employment and are not therefore within the scope of Chapter 1 but (because they are reimbursed) they are deemed to be paid by reason of the employment by virtue of section 71 ITEPA and section 338 would not be redundant in that situation.

281. We therefore conclude on Issue 2 that the FTT was correct in its finding to the effect that if the Disputed Allowances were paid to Employed Temps to reimburse them for their travel to a permanent workplace, such payments were not made to reimburse them for expenses incurred in the performance of their duties but must be regarded as ordinary commuting expenses and such payments were therefore Chapter 1 earnings and taxable accordingly.

Issue 3: temporary or permanent workplace for the purposes of s. 338 and s. 339 ITEPA?

282. We were addressed separately on employment law issues by Mr Clarke QC for Reed and by Mr Tolley for HMRC. The FTT held that there was no overarching contract of employment throughout the time that an Employed Temp was being placed on assignments. It was held that there was a continuing contract but that it was only a contract of employment while the Employed Temp was working on an assignment. Accordingly, the place of work for each assignment was in each case a "permanent workplace".

283. The fundamental dispute on this issue is whether, as Reed submits, there is either one contract of employment covering successive assignments (Reed's primary case) or, alternatively, (Reed's secondary case) a single employment relationship that covers successive assignments or, as HMRC submits, there is a separate contract of employment for each assignment. It is not in dispute that the terms pursuant to which an Employed Temp is engaged during an assignment are sufficient to establish a contract of employment. The issue is whether that is the position in relation to each assignment individually or whether there is an overarching contract of employment which, to use Mr Clarke's expression, fills in the gaps between assignments.

284. It is common ground that the Employed Temps were provided on registration with the current Conditions of Employment for Temporary Workers and Employee Handbook. All the relevant versions of the handbook were headed: "This contract of service is made BETWEEN…the employer…AND the Temporary Employee…" The terms in force throughout the relevant period included the following:

- "The Temporary Employee's employment and continuous employment begins on the date of the commencement of the current [from October 2004, "first"] assignment"

- "Reed will endeavour to find the Temporary Employee the opportunity to work in the capacity specified on the Temporary Employee's copy of the time sheet [from October 2004, "in the capacity agreed at registration and specified on the Temporary Employee's copy of the timesheet"] where there is a suitable assignment with a Client for the supply of such work". "Reed reserves the right to offer any assignment ["or secondment" from April 2004] to such temporary employees as it may elect where that assignment [from April 2004 "the available work"] is suitable for several workers."

- Until October 2004, "the duration of the employment will be for the duration of the assignment or secondment with the Client". From October 2004 this was replaced with "Reed will inform the Temporary Employee of the likely duration of each assignment or secondment".

- Until October 2004 the terms stated, "The Temporary Employee is under no obligation to accept an offer of an assignment".

- "Reed will give to the Temporary Employee and the Temporary Employee will give to Reed notice in accordance with statutory requirements provided that Reed is under no greater obligation than at any other time to provide work during a period of statutory notice."

- "The Temporary Employee is entitled to be paid annual leave in accordance with the Regulations." "The Temporary Employee is required to give a minimum of two weeks' notice of his/her intention to take paid annual leave. Reed reserves the right to refuse the Temporary Employee permission to take such leave."

- Payment was to be for hours worked only."

285. Reed's primary case, that there is one contract of employment covering successive assignments, depends on three propositions. First, that there is a single contract of employment between Reed and each employee running from the Employed Temp's acceptance of the first assignment until terminated by notice or operation of law, meaning either an accepted repudiatory breach or frustration. Secondly, that this contract of employment will govern successive assignments as well as the first assignment. Thirdly, that a contract does not change its nature or status as a contract of employment throughout its lifetime just because there are intervals between assignments.

286. It is common ground that a contract of employment is a contract in which there is an irreducible minimum of mutual obligation that the employee will personally work for the employer in return for payment or retainer ("the wage/work" obligation), that the employee will be subject to the employer's control in a sufficient degree and that the other provisions of the contract are not inconsistent with it being a contract of employment: *Nethermere (St Neots) Limited v. Gardiner* [1984] ICR 612. There must also be mutuality of obligations in the two separate senses (see *Stephenson v. Delphi Diesel Systems Limited* [2003] ICR 471) of the wage/work obligation and in the sense that there has to be a bilateral obligation between the parties in order for there to be a contract at all. As Elias J said in the Employment Appeal Tribunal in *Stephenson* at [11]-[14],

> "The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract.
>
> The issue of whether there is a contract at all arises most frequently in situations where a person works for an employer, but only on a casual basis from time to time. It is often necessary then to show that the contract continues to exist in the gaps between the periods of employment. Cases frequently have had to decide whether there is an over-arching contract or what is sometimes called an "umbrella contract" which remains in existence even when the individual concerned is not working. It is in that context in particular that the courts have emphasised the need to demonstrate some mutuality of obligation between the parties but, as I have indicated, all that is being done is to say that there must be something from which a contract can properly be inferred. Without some mutuality, amounting to what is sometimes called the "irreducible minimum of obligation", no contract exists.
>
> The question of mutuality of obligation, however, poses no difficulties when the individual is actually working. For the period of such employment a contract must, in our view, clearly exist. For that duration the individual clearly

undertakes to work and the employer in turn undertakes to pay for the work done. This is so, even if the contract is terminable at will. Unless and until the power to terminate is exercised, these mutual obligations (to work on the one hand and to be paid on the other) will continue to exist and will provide the fundamental mutual obligations.

The issue whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work as available is irrelevant to the question whether a contract exists at all during the period when the work is actually being performed. The only question then is whether there is sufficient control to give rise to a conclusion that the contract which does exist is one of a contract of service or not."

287. HMRC say that there is no mutuality in either sense when the Employed Temp is not on assignment. They assert that the contract either terminates at the end of the assignment or it ceases to be a contract of employment (the First-tier Tribunal held that it remains in being) at the end of each assignment.

288. Reed asserts that the contract of employment does not terminate. First, Mr Clarke contended that this is because of the provisions of section 86 of the ERA. By this section there is a requirement for the employer to give a specified period of notice to terminate the employment, unless either party waives his right to notice or accepts a payment in lieu of notice or the conduct of either party entitles the other party to treat the employment as terminable without notice. By section 86 (3), that if the contract specifies a shorter period it has to be read subject to the provisions for the minimum period of notice.

289. Thus, says Reed, a contract of employment cannot be terminated without such notice. Reed relies upon *Brown v. Chief Adjudication Officer* [1997] ICR 266 in which Mrs Brown, although employed under a series of daily contracts, was held to be entitled to statutory sick pay on the ground that under the then operative statute she had the requisite continuous employment for three months. She was employed for over nine months although her contract of employment was expressed to be for a term certain of one day so that the contract had effect as if for an indefinite period. Because the employer did not give notice to terminate, the contract subsisted during the time when Mrs Brown was on sick leave. Thus, argues Mr Clarke, once a contract of employment always a contract of employment until terminated by notice. So it cannot, submitted Mr Clarke, make any difference that the employed temp accepted successive assignments.

290. Mr Clarke also relied on three other cases, *Welton v. Delux Retail Limited* [2013] ICR 428, *ABC News Intercontinental Inc v. Gizbert* (unrep) UKEAT/0160/06 (two unfair dismissal cases) and *Troutbeck SA v. White* [2013] EWCA Civ 1171 and the cases cited therein respectively to demonstrate that contracts with gaps in them took effect as contracts for an indefinite period which need to be terminated by notice. He says that the court in each case inferred an overarching contract filling in the gaps between a series of assignments.

291. He accepts that for an overarching contract to be found, rather than a series of separate contracts, there must be mutual obligations subsisting between each separate engagement. There must be subsisting mutual obligations continuing throughout the relevant period and between each separate engagement. The distinction between HMRC and Reed's arguments is that Reed says that the mutuality of obligation does not have to subsist over the entire duration of the contract rather than the need to have a wage/work obligation existing at some stage of the contract. Mr Clarke submitted that mutuality of obligation for a part of the relevant period is sufficient to establish mutuality for the entirety of the relationship.

292. He says that the fact that respective obligations on the employer and the employee to provide and accept work might vary does not mean that the contract was not one of employment. The focus instead should be upon whether under the contract as a whole, there was some obligation upon the Employed Temp to work and some obligation upon Reed to provide or pay for it. The relevant obligation was in respect of the first assignment and also in respect of subsequent assignments once accepted. As the contract could only be brought to an end on notice it cannot be right that there are no obligations applicable in the intervals between assignments. In any event, the obligations are consistent with a continuing contract of employment.

293. Mr Clarke cites the statement of Langstaff J (sitting in the Employment Appeal Tribunal on appeal from the employment tribunal) in *Cotswold Developments Construction Limited v. Williams* [2006] IRLR 181 at [54]-[55], where he said,

> "Since 'mutuality of obligation' may be used in either the Elias J or Recorder Underhill QC sense, or it may relate to those obligations which are of such a nature that they indicate that the contract might be one of service (although there are differences of definition in case law as to the nature of the employer's obligation) it is important to know precisely what is being considered under that label (to adopt the second general point made by Elias J in *Stephenson*) and for what purpose. Regard must be had to the nature of the obligations mutually entered into to determine whether a contract formed by the exchange of those obligations is one of employment or should be categorised differently. A contract under which there is no obligation to work could not be a contract of employment…However, the phrase 'mutuality of obligations' is most often used where the question is whether there is such a contract as will qualify a party to it for employment rights or holiday pay. In this situation a succession of contracts of short duration under each of which the person providing services is either an employee or a worker will give rise to no rights (for instance to pay unfair dismissal or holiday pay) unless (i) the individual instances of work are treated as part of the operation of an overriding contract, or (ii) s.212 (continuity of employment) or, arguably, a continuing employment relationship sufficient to satisfy the principle of effectiveness applies (for holiday pay). Such an overriding contract cannot exist separately from individual assignments as a contract of employment if there is no minimum obligation under it to work at least some of those assignments…
>
> We are concerned that tribunals generally, and this tribunal in particular, may, however, have misunderstood something further which characterises the application of 'mutuality of obligation' in the sense of the wage/work bargain. That is that it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to

withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it. Stevenson LJ in *Nethermere* put it as '…an irreducible minimum of obligation…' He did so in the context of a case in which home workers were held to be employees. Mrs Taverna refused work when she could not cope with any more…It is plain, therefore, that the existence and exercise of a right to refuse work on her part was not critical, providing that there was at least some obligation to do some….Although Kerr LJ dissented in the result, he too expressed the 'inescapable requirement' as being that the purported employees '…must be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer."

294. As to the statement that an overriding contract cannot exist separately from individual assignments if there is no minimum obligation under it to work at least some of those contracts, Mr Clarke says that the present case is different because there is, unlike in *Cotswold*, a written contract of employment, capable of encompassing all assignments during its lifetime. Once the first assignment has been agreed, it is sufficient of itself to produce the requisite wage/work obligation required for the overarching contract of employment. He takes two principles from *Cotswold*. First, that although the wage/work obligation has to be present at some time during the lifetime of the contract in order for it to be a contract of employment, it does not have to be present throughout the lifetime of the contract. Secondly, the fact that an employee may have a right to refuse work does not prevent the contract from being one of employment.

295. Mr Tolley says that Mr Clarke has done no more than pick "interesting bits of employment law and say they are imported into s. 4 of ITEPA". All Mr Clarke was doing, he said, was identifying examples where in the context of employment law it does not matter that there was no contract of employment. Further, he took cases about employees' rights, such as *Wiltshire v. National Association of Teachers* and *Brown v. The Chief Adjudication Officer*, and assumed that they applied to ITEPA in the same way that they applied to the ERA.

296. He submitted that there is a fundamental difference between the contractual position and the extensive statutory protection afforded to employees. He submitted that all the examples cited to us were cases relating to statutory employment rights and therefore distinguishable. S.4 of ITEPA poses the question, was there a contract of employment, and not, what rights does the employee have under statute? The question of what statutory rights the Employed Temps may or may not have had against Reed is of no assistance in determining the meaning of s.4 of ITEPA.

297. This is clear he says from the decision of the Supreme Court in *Gisda Cyf v. Barrett* [2010] UKSC 41; [2010] CR 1475. That case decided that the effective date of termination under the ERA for the purposes of an unfair dismissal claim was not the same as the date on which the contract terminated. Lord Kerr of Tonaghmore drew a distinction between rights under the statute and rights under the contract. He pointed out that it would be unfair for time to begin to run against an employee in relation to his unfair dismissal complaint until he knew, or has a reasonable chance to find out, that he had been dismissed. It is that consideration which provides the

rationale for not following the conventional contract law route in interpreting the employment law statute. He described it at [35] and [39] as,

> "…a statutory construct. It is designed to hold the balance between employer and employee but it does not require –nor should it- that both sides be placed on an equal footing. Employees as a class are in a more vulnerable position than employers. Protection of employees' rights has been the theme of legislation in this field for many years. The need for the protection and safeguarding of employees' rights provides the overarching backdrop to the proper construction of [the statute]…
>
> The need to segregate intellectually common law principles relating to contract law, even in the field of employment, from statutorily conferred rights is fundamental…"

298. Mr Tolley submitted that continuity of employment is another statutory construct for the purposes of the ERA. It serves the purpose of determining whether for example the employee can invoke the statutory remedy of unfair dismissal. In order to do so, the employee needs to have a stipulated minimum period of continuous employment under the statutory scheme. Thus, even if there are separate assignments and separate employment contracts, the statute fills in the gaps and says that the employee has been employed continuously. That explains *Brown v. Chief Adjudication Officer*, where the statute imposes a benevolent fiction on day by day contracts of employment, turning them into nine months continuous employment for the purposes of protecting the rights of the employee.

299. He relied on passages in *James v. Greenwich LBC* [2007] ICR 577 (affd [2008] ICR 545) to show that Mr Clarke is wrong and that the question of control does not depend on the work being carried out during an assignment. At [19], Elias J said,

> "Second, other cases, of which *Carmichael*, *Nethermere* and *Clark* are all examples, are situations where a worker does some casual work for an employer and for one reason or another it is necessary to show that there is a contract of employment in place, even when there is no work being performed. Plainly there is a contract of some kind in place while the work is being performed, but the question which frequently arises is whether there is also a contract governing the relationship, what is variously described as an overarching, umbrella or a global contract, in the period where there is no work being carried out. It is in that context that the courts have held that there must be this irreducible minimum of contractual obligation in order for a contract to be established."

300. Mr Tolley referred to *Airfix Footwear Limited v. Cope* [1978] ICR 1210, *O'Kelly v. Trust House Forte plc* [1983] ICR 728 and *Hellyer Brothers Limited v. McLeod* [1987] ICR 526. Again, he stressed the words used by Slade LJ in *Hellyer* at 541E, approved by Lord Irvine in *Carmichael v. National Power*) that there had to be (and he said that "any doubts as to this point were laid to rest by the decision of the court in *Nethermere*"),

"mutual obligations subsisting over the entire duration of the relevant period."

301. Again, in *Clark v. Oxfordshire Health Authority* [1998] IRLR 125 the Court of Appeal accepted the submissions of counsel (see [38] and [39]), that mutuality of obligation had to subsist in the continuing arrangements between the parties outside any single engagement.

302. Thirdly, in *Cornwall v. Prater*, Lewison LJ said at [48] and [52],

> "The cases to which we were referred about casual workers all concerned the question whether there was a single umbrella agreement, which itself amounted to a contract of employment covering the whole period from the beginning of the first engagement to the conclusion of the last. Thus, it was relevant to look at the whole period alleged to be covered by the umbrella to see whether there was mutuality of obligation throughout that period, including during gaps between individual engagements…
>
> The council's argument presupposes that it was necessary to find mutuality over the whole period from the beginning of the first engagement to the conclusion of the last. In a case where s. 212 does not apply, that may well be right, but in the case where gaps between individual engagements can be bridged by s.212, that necessity does not arise."

303. Accordingly Mr Tolley submitted that Mr Clarke is wrong in saying that mutuality of obligation needs merely to be established during the first assignment and that it was wrong of the FTT to focus on the gaps between assignments. If this were correct, the statements to the contrary in *Hellyer*, *Clark*, *Carmichael* and *Cornwall* (and also *James v. Redcats (Brands)*) would all have to be ignored.

304. We agree with the FTT that it would be wrong to read statutory concepts, such as that of continuity of employment, into the definition in s. 4 ITEPA, which is concerned with contractual rights. While there may be no employment contract in being in a gap period between assignments the time may nevertheless count for employment law purposes towards the employee's period of employment for statutory purposes. The provisions in the contracts were driven by the mandatory requirements of the Working Time Regulations and were confined to those statutory rights. No freestanding contractual rights were being created; instead the contracts were simply recording that the Employed Temps would be entitled to their statutory rights. Reed's obligations do not add anything to the statutory requirements. For the purposes of ITEPA, the question is the different one whether, when the Employed Temp is not on an assignment, he is employed under a contract of service.

305. In any event, the notice obligation was effectively meaningless. There was never intended to be a true contractual obligation at all because Reed retained the right to terminate an assignment at any time, there was no right to work or be provided with work during the notice period and for the reason given by the FTT the concept of notice was in practice a wholly notional one. This is perhaps emphasised

by the fact that none of the handbooks mentions notice, which was in practice largely ignored, as appears from Mr Baddeley's evidence.

306. There are two questions: first, whether there is a contract at all in the gaps and, if so, secondly, whether this is a contract of employment. The FTT decided that when there was no current assignment there was a contract of some sort in existence as there were various contractual terms that applied, such as the obligation to give notice of termination in accordance with the statutory requirements (although, as the Tribunal pointed out, this was of no practical benefit to the Employed Temp since Reed was expressly "under no greater obligation than at any other time to provide work during a period of statutory notice" so that the Employed Temp would suffer no loss if notice were not given) and the (as the FTT described it) weak obligation on Reed to endeavour to find the Employed Temp work opportunities.

307. Mr Tolley submitted that in this respect the FTT was wrong and there was no contract between the parties at all in the gap periods. The FTT relied on three matters. One, that the Employed Temp had to give notice to Reed to take paid holiday and that Reed had to meet the statutory requirements about holiday. Secondly, there was the requirement to give notice of termination. Thirdly, the obligation on Reed to endeavour to look for work. Mr Tolley also submitted that the handbooks were not incorporated as part of the contract but, even if they were, he relies on *Carmichael* for the proposition that if one is going beyond the terms of a strict contract and looking at conduct and documents expressed in non-contractual language then one falls into the territory of mixed fact and law with which the UT ought not to meddle.

308. We accept Mr Tolley's submissions on the first and second matters since the statutory requirements as to the contents of an employment contract do not add anything to the position. In any event, we agree with the FTT that in practice the obligation to give notice was a hollow one.

309. The third head, Reed's obligation under Clause 2 to "endeavour to find the temporary employee the opportunity to work in the capacity specified", is the one that gives us pause. However, Mr Tolley took us to the handbook which stated (in the version in force until 2005) under the heading "Your Contract",

> "If you are offered work by Reed, there being no obligation on Reed to look for work for you or to find you work and no obligation on you to accept any work that may be offered."

310. From 2005, the handbook changed. Under the heading "Your contract", it said,

> "If you are offered work by Reed, and please remember that Reed cannot guarantee to find you work, then that offer will be on the terms and conditions of work supplied with the handbook".

311. The 2006 version is again different, but in line with the 2005 version. Thus there is a significant difference between the older version of the handbook and the later versions, but neither involves a promise to offer work nor any obligation to accept work if offered.

312. It is hard to escape the conclusion that the FTT had to evaluate the evidence as a whole and the factual matrix at the time the contracts were entered into, to understand the nature of the obligation, if any, on Reed in the earlier period.

313. Again, the handbook contains phrases such as,

> "When you register with Reed, you are entering into a partnership. Not only do you work for us but we also work for you", and
>
> "It is very important that you keep us informed as to your availability. If you intend to take a short break or a holiday, please let us know the dates that you will be unavailable for work well in advance. This allows us to plan your future assignments accordingly."

314. We agree that such phrases are either merely aspirational or simply not apt for incorporation in a contract.

315. We add the fact that every time there was an assignment the terms would be repeated. On each occasion there was an assignment letter or a timesheet with the terms and conditions on the back. Further it is notable that there was no obligation on the Employed Temp to accept any offer of an assignment and clause 9 of the terms and conditions says "If the temporary employee accepts an assignment, he undertakes these duties". No duties arose until each assignment was accepted.

316. Thus it seems to us that there was a greater obligation from 2005 than there had been earlier to use endeavours to find a suitable opportunity for work, but in reality the obligation was a shadowy one. If pressed we would find that there was mutuality (in the sense of a contract, for which the agreement to work the first assignment would be relevant consideration) for the later period but not the earlier.

317. However in any event we agree with the FTT in its negative answer to the second question, namely whether there was a contract in the gap periods between assignments which satisfied the "irreducible minimum of obligation" necessary for an employment contract.

318. It is common ground that the test is the threefold one specified in *Nethermere* at 623, namely that,

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

319. Mr Clarke's three cases do not establish mutuality of the wage/work obligation in this case. In *Gizbert*, the employer did not have an unfettered right to offer no work or pay and the claimant did not have an unfettered right to refuse assignments. There was a commitment for the employer to offer 100 days work per annum and a commitment on the employee to consider assignments in good faith and the EAT

considered that this did amount to sufficient mutuality to found a contract of employment.

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

321. Reed's fallback case is that even if there was no continuing contract of employment, there was a continuing employment relationship which covered successive assignments.

322. Reed's argument under this head is that "employment" in sections 338 and 339 of ITEPA is not limited to employment under a contract of employment. Section 212 of the ERA creates the concept of deemed continuity of employment for the purposes only of statutory rights. The premise of the section is that there is no contract of employment in the periods in question: see *Fitzgerald v. Hall, Russell & Co Limited* [1970] AC 984 at 993 B and 1001 E-F per Lords Morris and Upjohn. It is thus irrelevant that employment has a wider meaning for the purposes of such statutory protection: see *Gisda Cyf v. Barrett* at [39].

323. Reed's best point under this head is that section 4 of ITEPA defines "Employment" as being inclusive of (in particular) (a) any employment under a contract of service, (b) any employment under a contract of apprenticeship, and (c) any employment in the service of the Crown. However in our view the employment must be under a contract of some description to satisfy the definition as otherwise it would be so wide as to have no principled boundaries.

324. Accordingly, we dismiss the appeal on Issue 3.

325. There were also several challenges to the FTT's factual findings as to the nature of the relationship between the Employed Temps and Reed. They were not fully developed in oral argument but only in Reed's written skeleton argument. They relate to control, contractual obligations between assignments and notice to take paid holiday.

326. As to control, it is said that Reed retained control over the Employed Temps when they were not on assignment in three respects. Reed could dictate when paid holiday could be taken, the Employed Temps might be required to participate in grievance procedures and the Employed Temps had to keep Reed informed of their availability for work. However, Reed could not direct Employed Temps what to do or

where to go, or whether to take or even to consider work. In the circumstances, it was open to the FTT to find that Reed had no material control over the Employed Temps. Again, it was open to the FTT to decide that the requirements to provide holiday pay, statutory sick pay and maternity pay were insufficient to amount to the irreducible minimum of obligation necessary to found an overarching contract.

327. The FTT may have been wrong in assuming that there was a 13 week qualifying period for holiday pay, but that is irrelevant to the point being made in paragraph 279 of the Decision. Again, the FTT may have misunderstood the evidence as to a practice growing up not to give notice of taking a holiday. However, neither of these points are central to the FTT's decision. Reed is here doing what we indicated in paragraph 192 above it is not permitted to do on an appeal on a point of law, namely deploying a fine toothcomb in order to discover some detail of criticism while failing to stand back and see the Decision as a whole.

Issue 4: Could the Inspector lawfully grant the dispensations?

328. The issue is an academic one on the position as we have found it, as, having decided that Reed's appeal fails on Issue 1, the dispensations do not apply and PAYE should have been operated. It is common ground that the dispensations could never apply to Chapter 1 emoluments.

329. If the appeal had succeeded on Issues 2 and 3, HMRC accept that the dispensations would apply to the payments because they would be Chapter 3 expenses in respect of temporary workplaces. If Reed had failed on Issue 2 but succeeded on Issue 3, HMRC have confirmed that no extra tax would be due. Thus the only area in which the issue could arise in practice is if the appeal had succeeded on Issue 2 but failed on Issue 3.

330. We therefore proceed on the basis that, contrary to our findings, the allowances were Chapter 3 earnings paid in respect of non-deductible expenses so that the dispensations purported to remove the allowances from the PAYE system.

331. The issue depends on the construction of section 65 ITEPA, set out above. Reed contends that the purpose of section 65 is to provide certainty for the employer (and incidentally for HMRC) that specified payments to employees will not give rise to a tax charge. It only requires that HMRC should be satisfied (see ss. (3)) that no additional tax is payable on the payments which are the subject of the dispensation. It does not require that there should be no liability or the dispensation would be pointless and the employer would have to investigate the application of the benefits code in every case. Instead, once granted, a dispensation will be excluded from the PAYE system and will prevent a tax charge even if HMRC were in fact mistaken. If HMRC were right, the employer would have no means of recovering tax from the employee which it would have to pay under the PAYE system.

332. HMRC on the other hand say that any dispensation is limited in effect as section 65 in terms applies only when the charge to tax is "under the listed provisions",

whereas here the charge is under Chapter 1. If HMRC were wrongly satisfied that there was no additional tax payable they would be acting beyond their powers in granting the dispensation. Section 65 applies under ss (1)) only "for the purposes of the listed provisions", defined by ss (2) to mean the provisions listed in s. 216 (4), including s. 70 payments provided that they are not Chapter 1 earnings. By ss (3) and (4), the requirement for a dispensation to be given is that HMRC should be satisfied that no additional tax is payable "by virtue of the listed provisions". By ss (5), "nothing in the listed provisions applies to the payments, or the provision of the benefits or facilities, covered by the dispensation", and then, importantly, "or otherwise has the effect of imposing any additional liability to tax in respect of them."

333. Section 65 (1) starts with the words: "This section applies for the purposes of the listed provisions". It is common ground that if the payments are Chapter 1 earnings the dispensation has no effect as it is no more than a statement that there is no liability to tax under the listed provisions.

334. If however, for the purposes of the issue it is assumed (contrary to our finding) that the listed provisions are applicable, a dispensation merely requires that HMRC be satisfied that no additional tax is payable, regardless of whether HMRC are correct in being so satisfied. In our judgment the dispensation would in those circumstances be validly granted and removes the liability to tax unless and until it is revoked.

Issue 5: Did the dispensations cover the allowances?

335. In our judgment the dispensations did not cover the allowances since the allowances fell within Chapter 1.

336. On the assumption however that we are wrong and the allowances fell within Chapter 3, but Reed is wrong on Issue 3, it follows from what we have said that the dispensations would have been fully effective according to their terms unless and until revoked.

Issue 6: What is the effect of the dispensations?

337. On the hypothesis, again, that we are wrong and the allowances fell within Chapter 3, it follows from what we have already said that the dispensations would relieve the employer of any liability to deduct tax under the PAYE system. This is not merely the obligation to return details for PAYE purposes of the travelling expenses paid to employees, but to remove those travelling expenses from charge to tax altogether. We agree with the Decision for the reasons given at paragraphs 291-293.

Issue 7: Did Reed have a legitimate expectation such as to entitle it to judicial review or to succeed on the tax appeals?

338. There are three matters: one, jurisdiction; two, amendments and three, the substantive application.

339. There has been a good deal of debate in the authorities as to whether the FTT has any jurisdiction to hear claims based on legitimate expectation. Reed's case depends on two possible sources of jurisdiction, first pursuant to section 50 (6) of the Taxes Management Act 1970 and, secondly, pursuant to section 8 of the Human Rights Act 1998. However as to the former we are, as Mr Glick accepted, bound by the decision of the Court of Appeal in *Aspin v. Estill* [1987] STC 723 that the FTT does not have jurisdiction under that section. Reed therefore reserves the right to argue the matter at a higher level but concedes it before us. Sir John Donaldson MR (with whom the other members of the Court of Appeal agreed) said at p.726, referring to Lord Templeman's speech in *Preston v. IRC* [1985] STC 282 at 291,

> "Based on that short passage counsel for the taxpayer submitted that the General Commissioners could have considered whether, if the advice had been given, it was an abuse of power –to use an unfortunate phrase, but one which is now hallowed by tradition- to raise this assessment at all. That is a somewhat surprising submission bearing in mind that judicial review is a remedy which is only available in the High Court, and then only subject to leave. Although that particular passage in Lord Templeman's speech did provide some foundation for counsel's argument, I am bound to say that for my part I greeted it with surprise bordering on horror, because I did not believe that it was the intention of Parliament that the General Commissioners, worthy body though they are, should exercise a judicial review jurisdiction."

340. Sir John Donaldson MR had also quoted (at p. 726) (and Nicholls LJ had referred to the passage at p. 727) from what Lord Scarman had said in *Preston* at 299,

> "…judicial review should in principle be available where the conduct of the commissioners in initiating such action would have been equivalent, had they not been a public authority, to a breach of contract or a breach of a representation giving rise to an estoppel. Such a decision could be an abuse of power: whether it was or not and whether in the circumstances the court would in its discretion intervene would of course be questions for the court [i.e. not for the General or Special Commissioners] to decide."

341. Mr Glick relies for present purposes on section 6 of the Human Rights Act 1998, the decision of Sales J in *Oxfam v. Revenue and Customs Commissioners* [2009] EWHC 3078 (Ch) (from which it seems that the FTT may have jurisdiction in relation to legitimate expectation) and the decision of Judge Hellier sitting in the FTT in *CGI Group (Europe) Limited v. Revenue and Customs Commissioners* [2010] UKFTT 224 (TC).

342. By section 6 it is unlawful for a public authority (including HMRC) to act in a way incompatible with a convention right. Under section 7, a convention right may be referred to in any legal proceedings where a person claims that a public authority

has acted unlawfully. However, by section 8, a court may only grant such relief or remedy or make such order within its powers as it considers just or appropriate. The 1998 Act does not create jurisdiction to hear judicial review applications; the jurisdiction has to be within the powers of the tribunal concerned.

343. Despite Mr Glick's persuasive and ingenious arguments to the contrary, we agree with the decisions of Warren J and Judge Bishopp, sitting in the UT in *Revenue and Customs Commissioners v. Hok Limited* [2012] UKUT 363 (TCC) and *Revenue and Customs Commissioners v. Noor* [2013] UKUT 71 (TCC) that the FTT did not have the relevant jurisdiction. The FTT's jurisdiction derives wholly from statute. It was created by section 3 (1) of TCEA to exercise functions conferred on it by statute. Parliament did not by any statute confer on the FTT a general supervisory or judicial review jurisdiction to enable it to hear cases about legitimate expectation. As the UT said in the latter case, the fact that the FTT does not have any judicial review jurisdiction was in our view made clear by the House of Lords in *Customs and Excise Commissioners v. JH Corbitt (Numismatists)* Limited [1980] STC 231. Further the fact that the TCEA 2007 conferred a judicial review jurisdiction on the UT shows that it was necessary to create such a jurisdiction by statute since both Tribunals are a creature of statute without an inherent jurisdiction.

344. The question of the FTT's jurisdiction is however irrelevant if we grant the permission sought by Mr Glick to amend his case, since in that event the amendments bring the judicial review application in line with the tax appeals.

345. If the amendments are not allowed, we find that we cannot go on to hear the legitimate expectation point in the tax appeals in any event. This Tribunal has no inherent jurisdiction; instead it is statutorily invested (see Part IV of the Rules) with a particular (restrictive) jurisdiction in relation to judicial review. The Human Rights Act 1998 confers no general jurisdiction on us to hear legitimate expectation claims. As we have said, the Convention can only be relied upon if it is within the powers of the tribunal to deal with the matter. Accordingly, the issue of amendment is crucial.

346. Reed has three categories of amendment. First, so-called Category A amendments, the amendments to paragraphs 15, 31, 36, 50 and 53.2, which are uncontroversial and which we allow. There are also other amendments within Category A which we similarly allow because they are cosmetic amendments, such as certain amendments to paragraphs 23, 29, 37 and 38.

347. Secondly, Category B amendments. These relate to the incorporation of the Schemes comprised in the handbooks. They are amendments to paragraph 2, 18(a), 19, 22 and the substantive amendments to paragraphs 23 and 29, 30(a), 31, 36(b), 37, 38 (again other than the cosmetic amendments), 43, 44 and 44(a), 50, 53.2 (a), 53.3 and 53.4.

348. The Category B amendments relate to HMRC's argument that there was no effective salary sacrifice. There are three grounds for this argument: (i) the arrangements were not incorporated into the Employed Temps' contracts (we have found against this argument), (ii) the Employed Temps could opt out of the

arrangements and (iii) because any reduction in salary was matched by a corresponding enhancement ("cash for cash"). Reed seeks to amend on the basis that if Reed fails because there was no effective salary sacrifice, either as a result of (ii) or (iii), HMRC should be held to their representation that these matters were irrelevant to whether tax was due.

349. There is a wrinkle to the application to amend in that Mr Glick accepted that, if cash-for-cash were only part of Issue 2 and not part of the Issue 1 salary sacrifice, then only opt-out would be relevant. Thus Mr Glick's contention is, in essence, that if Reed fails on Issue 1 because of opt-out, then HMRC should be held to their representation as to irrelevance to tax.

350. Paragraph 23 seeks to make the same substantive amendment that was sought in 2010, namely by adding the allegation that HMRC were content that an effective salary sacrifice would allow the expenses to be paid free of tax. There is at the heart of the application a disagreement as to whether or not at the hearing before the FTT HMRC disavowed any reliance on the opt-out and cash-for-cash arguments. Reed say that at a hearing by the UT on 29 and 30 November 2010 there was an understanding to that effect and that because HMRC have now gone back on that understanding Reed should be allowed to make the amendments which the UT refused on that occasion. In other words, Reed say that HMRC's position has changed. HMRC on the other hand says that they have always been consistent in their statements of case, judicial review pleadings, skeleton arguments and oral submissions.

351. HMRC object to the Category B amendments on the following bases. First, the more important amendments were considered and refused by the UT in December 2010. HMRC say that there is no good reason why we should on this occasion go behind the decision, made after detailed argument, on that occasion. The proposed amendments either extend the legitimate expectation allegations beyond the scope of the dispensations granted (in which case there was detailed argument about the matter on the previous occasion) or they do not, in which case they are unnecessary. Mr Gammie maintains that HMRC's argument was never whether the Schemes were incorporated or not, but what was the hourly rate at which the Employed Temps agreed to provide their services.

352. Normally we would allow amendments, even made at a late stage, on the basis that a party should be permitted to put its case as best it can, provided always that there is no prejudice to the other party. HMRC maintain that there is prejudice because it is no longer possible for them to challenge the witness evidence. However, it is plain (i) that the point was before the FTT and (ii) the relevant factual question was whether HMRC were aware of the arrangements when the dispensations were granted. They plainly were.

353. However it seems to us that, contrary to the submissions for Reed, the alleged change of position by HMRC should have been obvious at the hearing in November 2010. In those circumstances, an application to amend to include alleged legitimate expectation based on salary sacrifice cannot be maintained. It seems to us that, as Mr Gammie submitted at the hearing in November 2010, Reed is trying to build their

case "on the back of what they get in the First-tier Tribunal by way of evidence there."

354. We would accordingly refuse permission to amend in accordance with the Category B amendments.

355. However, in view of our findings as to the substantive point, the question of whether the amendments should be allowed or not may well fall away. We therefore turn to this third matter.

356. The relevant principles were enunciated by Bingham LJ in *R v. IRC ex p MFK Underwriting Agents* [1990] 1 WLR 1545 at 1569-70 (approved by the Supreme Court in *R (on the application of Gaines-Cooper) v. HMRC* [2011] UKSC 47 at [27]-[29]) where he said,

> "…I do not, I hope, diminish or emasculate the valuable developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed, it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting, a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen. The Revenue's discretion, while it exists, is limited. Fairness requires that its exercise should be on a basis of full disclosure. [Counsel] accepted that it would not be reasonable for a representer to rely on an unclear or equivocal representation. Nor, I think, on facts such as the present, would it be fair to hold the Revenue bound by anything less than a clear, unambiguous and unqualified representation."

357. Mr Glick summarises the applicable principles by saying that if (a) the taxpayer makes full disclosure of the information that HMRC considers material to exercise the discretion and (b) represents that the taxpayer will be treated in certain way, HMRC should, as a matter of fairness, be made to keep their word. He submits however that if neither party considers a fact to be relevant at the time, non-disclosure does not prevent a claim for judicial review even if the fact subsequently turns out to be relevant. In such circumstances, the argument runs, it would not be unfair to hold HMRC to their representation for, if they had known the true facts, it would have made no difference to their decision to grant the dispensation.

358. On the basis that, as we have found, Reed fails in their appeal because there was no effective salary sacrifice under Issue 1 and also fails on Issues 2, 3, 4 and 6, Mr Glick submits that Reed can rely on the dispensations as they involve the following representations:

- Neither Reed, nor the Employed Temps, would be liable to tax (under PAYE or otherwise) or NICs in relation to the relevant payments and

- It was irrelevant to this analysis whether the contracts with the Employed Temps were overarching or job-by-job contracts of employment.

359. Importantly, Mr Glick relies on Reed having provided disclosure of all matters that both Reed and HMRC considered relevant to the granting of the dispensations so that Reed is entitled to protection of their legitimate expectation. However we note that open dealing on both sides underpins the principle of legitimate expectation because the finding is one of abuse of power. In *MFK*, Bingham LJ at p. 1569 emphasised the need for the taxpayer to "put all his cards face upwards on the table." Thus although we see the force of Mr Glick's assertion we do not think it goes as far as he says since disclosure is relevant to the understanding that the taxpayer has of any statement made by HMRC. As Blake J said in *R (on the application of Lower Mill Estate Limited and Anor) v. HMRC* [2008] EWHC 2409 (admin) at [19] that

> "…whether legitimate expectation is ultimately to be decided in the claimant's favour would materially depend upon whether they put before the Revenue all information that was required for a full and frank disclosure to prompt the ruling. That again depends upon the material facts as to what was really going on, who knew what was really going on, who therefore knew, or ought to have known, what facts were material for the Revenue to give an authoritative ruling, and matters of that sort."

360. Indeed, there may be nothing between the parties if the relevant question is whether, if full disclosure had been made, the dispensations would still have been given. We repeat that non-disclosure does not have to be deliberate to engage the *MFK* principle.

A clear, unambiguous, unqualified promise, made with lawful authority

361. It is common ground that in order to create a legitimate expectation HMRC's representation or promise that tax will not be payable must be "clear, unambiguous and devoid of relevant qualification", see *MFK* at 1569G, *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453 at [60], [115] and [134] and *Paponette v. AG of Trinidad and Tobago* [2010] UKPC 32 at [28]. Further it is also common ground that the judge must have regard to "how on a fair reading of [the promise it] would have been reasonably understood by those to whom it was directed": see per Dyson LJ in *R (ABCIFER) v. Secretary of State for Defence* [2003] QB 1397 at [56].

362. The first question is whether HMRC is acting intra vires in making any promise. They cannot act ultra vires so that they cannot be held to any promise, however clear, to do that which they did not have power to do and there would be no question of legitimate expectation.

363. Mr Gammie submits that HMRC did not provide any clear representation that the disputed allowances would never be subject to tax, linking this to his submission that the dispensations can carry no greater representation than that which the statute

allows. He submits that a dispensation under section 65 can only be granted in respect of items which would fall to be charged by the listed provisions. As the items fell to be charged under Chapter 1 the inspector could not be satisfied (within section 65 (3)) that the listed provisions gave rise to no additional charge to tax. As the listed provisions do not give rise to a charge to tax on Chapter 1 earnings, but a charge by virtue of section 62, they cannot, he says, give rise to "an additional charge to tax". Thus he says that the inspector could not be satisfied within the section that no additional tax is payable by virtue of the listed provisions. There is, he says, no clear, unambiguous and unqualified representation to the effect that, even if the workplaces were permanent, no tax would be due. Further there was no representation that no overarching contract was required in order for the disputed allowances to fall within the dispensations.

364. However, as in *MFK* itself (see 1568-9), we do not believe that HMRC could not lawfully give the dispensations consonant with their statutory duty. Dispensations are given with the intention that they be acted upon or they become devoid of all effect. We prefer the line taken by Blake J in *Lower Mill Estate* (at [33]) to the effect that a claim for legitimate expectation cannot be defeated by the fact that, but for the representation, the tax would otherwise have been due.

365. However, again as in that case, as a separate question from breach of statutory duty, the Tribunal must assess the meaning, weight and effect reasonably to be given to the dispensations in the factual context which obtained at the time.

366. In the present case, as in *MFK*, the claimant is a sophisticated taxpayer. One starts from Bingham LJ's proposition (at 1569),

> "Every ordinarily sophisticated taxpayer knows that the revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayers' only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law…It is one thing to ask an official of the revenue whether he shares the taxpayer's view of a legislative provision, quite another to ask whether the revenue will forgo any claim to tax on any other basis. It means that the taxpayer must make plain that a fully considered ruling is sought. It means, I think, that the taxpayer should indicate the use he intends to make of any ruling."

367. In the present case a dispensation is a fully considered ruling. Indeed the statutory authority for it means that it is hard to think of one that is more fully considered. But the question arises whether the claimant in this case indicated in sufficient detail the use he intended to make of it.

368. We note, as did the FTT that the dispensations can only be read in the light of the statements made on which they were founded. Thus (see paragraphs,70, 73 and 74 of the Decision) the two letters of 23 October and 18 November 1998 confirm that the dispensation only applies to employees who have no permanent workplace and the first dispensation specifically refers to this.

369. Before going on to the issue of disclosure, we propose to deal with other submissions made by Mr Gammie. First, that even where a dispensation is granted, it is not inviolate, since ("with reason") HMRC remains entitled to revoke a dispensation retrospectively to the date of the original grant. Thus, the argument runs, the taxpayer is aware of the possibility of retrospective revocation and should conduct its business accordingly. Miss Ollerenshaw said in evidence "I was always alive to the fact that it was possible for a dispensation to be revoked" and acknowledged that this could be done retrospectively, leaving Reed liable to meet "the underpaid PAYE and NIC plus interest and penalties". Indeed the FTT held (at paragraph 46 of the Decision that "Mr Beal was conscious of the need to avoid the risk…that HMRC might seek to revisit retrospectively any scheme which was introduced".

370. Secondly, that Reed knew that the dispensations depended on the Employed Temps having to be working at temporary workplaces. Thirdly that Reed knew it was responsible for ensuring that it complied with the terms of the dispensation.

371. Mr Gammie relies on these matters to show that Reed could have had no expectation that the dispensations were a guarantee that no tax would be charged. On the contrary, Reed would have had every expectation that HMRC could revisit the dispensations retrospectively. Since the disputed allowances were not within the scope of the dispensations (being Chapter 1 earnings) there was no need to revoke them retrospectively since tax should always have been paid. Thus, Mr Gammie argues that Reed can have no greater expectation arising from HMRC's decision not to revoke the dispensations retrospectively than if HMRC had in fact done so.

372. To the extent that this is a reworking of the argument as to vires, we would merely repeat that legitimate expectation cannot be defeated by the fact that, but for the representation, the tax would otherwise have been due. To the extent that it is a new point that Reed could not have a legitimate expectation that the dispensations would not be revoked retrospectively, we would merely say that they were not in fact so revoked and Reed took pains to ensure that they were not. In those circumstances we do not accept the force of Mr Gammie's argument in so far as it is a free-standing one.

Disclosure

373. However, it is a different matter when it comes to disclosure.

374. The FTT made various findings of fact. If and so far as necessary, we would exercise our powers under Rule 15 of the Rules to direct that the evidence in the FTT should stand as evidence in the UT. The FTT had the advantage, which we have not, of hearing the relevant evidence and we gratefully adopt its findings. As we have not heard the evidence or seen the witnesses we do not propose to make any independent findings of our own.

375. Reed made a number of detailed submissions as to why it believes that a conclusion that "it was less than forthcoming" in dealing with HMRC than it should

have been is not justified on the evidence that was before the FTT, and we now deal with these.

376. The FTT found that HMRC could have been more searching in their inquiries before granting the first dispensation and that it is surprising that HMRC did not (a) recognise the relevance of the dispensations until too late and (b) discover, sooner than they did, how Reed was utilising the dispensations.

377. Reed challenges the finding (at paragraph 298) that "had [HMRC] enquired rather more deeply…[they] might have discovered sooner than they did that Reed was only nominally paying the allowances to its employed temps". First, Reed maintains that HMRC must have known this fact from the information provided to them. We do not think there is anything in this point since the documents provided were unclear. At all events, the FTT was entitled to draw the inference it did. Secondly it is said that the FTT did not make it clear what it meant by "nominally". We consider that the FTT made it abundantly clear that what was meant was that the payments were based on Reed's own tax and NIC position rather than the dispensation rates: see paragraphs 137 and 295 of the Decision.

378. The FTT also found that the HMRC Inspector framed the dispensation in reliance on what Reed told him. The FTT made the correct observation that section 65 requires a dispensation to be made if the Inspector is satisfied under section 65 (3) "by reference to the payments, benefits or facilities mentioned in the statement supplied" by the taxpayer, in other words, as the FTT said, "from the statement furnished". An applicant for a dispensation bears the burden of conveying the relevant facts to HMRC and generally bears the consequences of any error he makes.

379. The FTT was satisfied, and found as a fact, that Reed did not volunteer to HMRC all the details of the schemes. The FTT found that the evidence showed that Reed and RR knew that the schemes were risky and indeed, as Miss Ollerenshaw said, "aggressive". Although they did disclose that Reed was taking part of the benefit for itself, they did not explain in terms that the Employed Temps were not taking more than a small part of the allowances.

380. Thus the FTT found the following facts:

- At paragraph 62: An internal RR email sent on 17 September 1998, shortly before the first dispensation was granted on November 1998 and shortly after the letter was sent on 15 September 1998 setting out Reed's foundation for it, commented that Helen Riley, a RR tax partner, had qualms about the issue, "in terms of lack of disclosure to the Revenue".

- At paragraphs 172 and 299: Reed, and RR on its behalf, were throughout at pains to say as little as they could to HMRC of the manner in which Reed was applying the dispensations; and (at paragraph298) that Reed, and RR on its behalf, were not forthcoming about the manner in which the dispensations were being applied.

- At paragraph 212: Under Reed's own worked example, produced by Miss Ollerenshaw at the meeting, Reed could "achieve a saving of as much of £20.88 [under the RTA]…on a weekly salary of £100, while the Employed Temp gained only to the extent of (at that time) £5 less tax and NICs." In that paragraph the FTT said,

> "We find it difficult to imagine that any of the employed temps would have made an informed decision to participate in either the RTA or the RTB scheme had they understood the underlying structure. We accept that the actual benefit to the employed temps, even under the RTA scheme, was in many cases not much less than it would have been had they sought relief for their travelling and subsistence expenses in the conventional way, assuming such relief was available at all, and that in order to obtain relief they would have been required to keep records and make an annual return. But we have little doubt that, if they had been provided with clear information, many would have been put off by the potential of participation in the scheme to diminish their entitlement to various contributory benefits, and that they would have been surprised, to put it at its lowest, to see [the potential savings to Reed as compared to the gains to them]."

- At paragraph 298: Reed and RR knew that the schemes were, as Miss Ollerenshaw put it, "aggressive".

- At paragraph 298: "Mr Beal fully recognised that Reed was not paying the dispensation allowances to the employed temps".

381. Mr Glick challenges these factual findings in order to demonstrate that the FTT was wrong in finding that Reed was "less than forthcoming" in dealing with HMRC than it should have been.

382. Reed challenges Ms Riley's "qualms", complaining that there was no evidence on the subject or basis for these qualms. However, the email itself says that her concern arose because of "lack of disclosure to the Revenue", which, being only two days after the letter of 15 September 1998, had to relate to the content of that letter.

383. Reed challenges the finding that Reed and RR were at pains to say as little as possible about the manner in which Reed was applying the dispensations complaining again that there was no evidence to that effect. However there was in fact abundant evidence. For example, that Reed and RR repeatedly chose to have meetings rather than put anything down in writing to HMRC, that Reed chose not to send documents requested by HMRC such as the contracts and question and answer sheets, that Reed sought to limit the number of contracts provided and to send only contracts vetted by RR which were not, in its view "ambiguous", Miss Ollerenshaw talked through an example payslip rather than a real one and explained the scheme only in general terms, she explained the scheme clearly to Reed but did not do so to HMRC, Reed sought RR's advice on whether to refer to the travel schemes in the Employer

Compliance review and decided not to make specific reference to them, Reed sought to direct employee questions about payslips away from HMRC which can only have been so as to avoid HMRC discovering how the scheme actually worked. When the payslips were changed and RTB introduced, Reed did not tell HMRC about the historic concerns it had held about RTA. Lack of disclosure was put many times to Reed's witnesses in cross-examination. There was therefore ample evidence from which the FTT could make the findings it did.

384. It is plain that, while Reed did disclose to HMRC that it was sharing the benefit with the Employed Temps, it did not make clear the disparity in benefit. The payslips were confusing.

385. There is a challenge to the FTT's finding about Mr Beal's state of mind. Again, his witness statement as a whole demonstrates that Reed was not actually paying the dispensation allowances. While the payments under the RTB were more favourable to the Employed Temps, they were still driven by Reed's own tax and NIC position. The FTT's finding was factually correct.

386. Reed also takes issue with the FTT's finding that Miss Ollerenshaw did provide copies of the contracts to HMRC, saying that it is plain that the letter was in draft only and was never sent. However, it is clear that the FTT did not find that the letter was sent as it said that contracts were not in fact sent. It is plain from paragraph 88 of the Decision that the issue of the contracts was not pursued at the time but that a meeting was held instead.

387. Reed also contends that the FTT was wrong to find that Reed and RR knew that the schemes were aggressive. But that was a word used by Miss Ollerenshaw in cross-examination. It is not suggested that the schemes were illegitimate. In so far as the criticism is of the RTB as well as the RTA, even in February 2002 Miss Ollerenshaw, while "more comfortable" with RTB, was noting that "for the future the arrangement is being operated on quite an aggressive basis". In any event, as before, the FTT was entitled to draw the inference from the evidence as a whole that the arrangements were aggressive.

388. Reed similarly objects to the finding that the arrangements were "risky". Again, there is evidence that Reed was conscious that HMRC might seek to revisit any scheme retrospectively and that the Inspector could withdraw a dispensation.

389. We find that there was either ample direct evidence on which the FTT made its factual findings or that they were based on the inferences that the FTT properly drew from the evidence. In any event we do not see that, looking at the circumstances in the round, any doubt is cast on the FTT's conclusion that Reed was less than forthcoming with HMRC. This is merely an unsuccessful attempt to bring the appeal within the principle of *Edwards v. Bairstow.*

390. We move on to deal with Mr Glick's substantive submission that on the facts of this case the issue is solely whether HMRC represented that Reed could pay tax-free expenses to the Employed Temps and that how Reed and the Employed Temps agreed

to allocate the tax savings is irrelevant to whether the payment of the expenses themselves would be taxable.

391. We do not think that Bingham LJ's judgment in *MFK* can be read in this way. However, if knowledge of the full position would or might have affected the giving of the dispensations then Mr Glick's case must fail in any event. Whether this is right or wrong, the extent of disclosure was plainly relevant to the issue of legitimate expectation.

392. Reed told HMRC that they proposed to implement dispensations by way of a salary sacrifice and then constructed an arrangement which was ineffective to secure that aim. Reed has to a large extent rested their case on a manuscript example created by Miss Ollerenshaw. Her attempts to explain it at the hour-long meeting of 2001 had to be followed by a strong drink and there is no letter to HMRC at any stage between 1998 and 2006 clearly setting out what Reed was doing with the dispensations. On the contrary, the letters of 23 October and 18 November 1998 both made several references to Reed's paying the allowances to the Employed Temps.

393. If HMRC had known that Reed planned to make large monetary savings on its own account, the position might have been different. While it is true that HMRC took a long time for the penny to drop, section 65 puts the burden firmly on the taxpayer to make the relevant statements if it wishes to receive the dispensations. In our view this includes, per Bingham LJ in *MFK*, the necessity for the taxpayer to "put all his cards face upwards on the table".

Issue 8: Was Reed obliged to make PAYE deductions?

394. It follows that as the allowances were Chapter 1 earnings Reed was obliged to make PAYE deductions accordingly.

Issue 9: NICs.

395. It is accepted for present purposes that the outcome for NICs is the same as for tax.

Conclusion

396. Accordingly we dismiss Reed's appeals and refuse permission for judicial review.

397. We would merely add that a huge number of authorities were cited to us. We have not referred to them all, not because they were not relevant, but because we did not want to make an already long judgment even longer.

Mrs Justice Proudman DBE **Judge Timothy Herrington**

Upper Tribunal

Release Date: 9 April 2014

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