Neutral Citation **[2026] UKUT 00348 (TCC)**

Case Number: UT/2024/000139

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

NATIONAL INSURANCE CONTRIBUTIONS – secondary Class 1 contributions – host employer provision – meaning of "made available" – appeal dismissed

Heard on: 10 and 11 June 2026
Release date: 09 September 2026

Before

MR JUSTICE RICHARDS
JUDGE NICHOLAS ALEKSANDER

Between

ARAMARK LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Sam Grodzinski KC, instructed by Fieldfisher LLP

For the Respondents: Adam Tolley KC and Bayo Randle, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against a decision of the First-tier Tribunal ("the FTT"), released on 12 September 2024 [2024] UKFTT 832 (TC), about an arrangement intended to avoid a liability of the Appellant ("Aramark") to secondary Class 1 national insurance contributions ("secondary Class 1 NICs"). The FTT decided that the arrangement did not achieve that objective. Aramark appeals against that decision with the permission of the FTT. References in this decision to paragraphs of the FTT's decision take the form "FTT [XXX]".

2. Aramark is a member of a group of companies, of which the parent is Aramark Corporation, a US corporation. Members of the group supply food services, facilities and uniform services to its clients. Aramark's business includes the provision of catering and hospitality services to operators of offshore installations in the North Sea on the UK continental shelf ("Offshore Installations").

3. Aramark was represented by Sam Grodzinski KC, and HMRC by Adam Tolley KC and Bayo Randle. Although greatly assisted by their detailed and helpful submissions, both written and oral, we have not found it necessary to refer to each and every argument advanced or all of the authorities cited in reaching our decision.

4. We take the following description from the FTT's decision as the background to this appeal:

> [3] Pursuant to contracts entered between [Aramark] and the operators (**Operators**) of the Offshore Installations, [Aramark] was required to provide skilled personnel, tangible goods, and equipment, including food, cleaning and housekeeping materials together representing the services necessary to provide hotel and catering services to the Operators' staff working on the Offshore Installations
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> [4] In the period from 8 October 2004 until 11 March 2017 [Aramark] met its contractual commitments to some of the Operators utilising resources supplied to [Aramark] by Aramark US Offshore Services LLC (formerly Aramark US Offshore Services Inc) (**OSI**) pursuant to an agreement between Aramark and OSI dated 1 June 2005 (**Intercompany Agreement**). The detailed terms of the Intercompany Agreement are discussed below; however, pursuant to the Intercompany Agreement, the employees of [Aramark] which had previously been used by [Aramark] to service the Operator contracts were transferred to OSI and [Aramark] agreed to provide certain defined services to OSI to facilitate the provision of services from OSI back to [Aramark].
>
> [5] The Intercompany Agreement was entered into as part of arrangements intended to ensure that [Aramark] remained competitive in the market for the services it provided to the Operators by seeking to eliminate the cost of [secondary class 1 NICs]. [Aramark] believed (and continues to maintain) that the arrangements were successful in doing so because OSI (an entity not being relevantly resident or having a presence in the UK) employed the personnel through whom the hotel and catering services were provided but did not cause the personal service of those employees to be made available to [Aramark] within the terms of the [relevant legislation].

5. It is common ground that, as OSI lacked the necessary residence or presence in Great Britain, it was not liable to pay secondary Class 1 NICs while the arrangements had effect.

6. However, HMRC contended that, as the personal services of the employees of OSI were "made available" to Aramark, paragraph 9, Schedule 3, Social Security (Categorisation of

Earners) Regulations 1978 ("the 1978 Regulations") applied with the result that Aramark was liable to secondary Class 1 NICs in the amount of £6,830,899 (plus statutory interest) in respect of the period from 6 August 2011 to 5 April 2014. The arrangements were implemented with effect from 8 October 2004 and in place until 11 March 2017. Statutory time limits precluded HMRC from issuing decisions for any date prior to 6 August 2011. Legislative changes resulted in Aramark accepting that they were required to pay secondary Class 1 NICs from 6 April 2014. HMRC's decision therefore relates to a shorter period than the whole period for which the arrangements were in place.

7. The issue in this appeal is whether the assessment of Aramark in those terms was correct and, in particular, concerns the meaning of "made available" in the 1978 Regulations.

8. The same issue has also arisen in other cases progressing through the tribunals and courts. In the case of *Odfjell Technology (UK) Limited v HMRC* [2025] UKFTT 28 (TC) and *Wood Group Engineering (North Sea) Limited v HMRC* [2026] UKFTT 1607 (TC) the FTT held that the 1978 Regulations applied, imposing a charge to secondary Class 1 NICs on the UK company. Permission to appeal to this Tribunal has separately been granted in both *Odfjell Technology* and *Wood Group*[1]. The case of *Bilfinger Salamis UK Limited v HMRC* [2026] UKUT 143 (TCC) ("*Bilfinger"*) was appealed to this Tribunal earlier this year, and the Upper Tribunal upheld the decision of the FTT that the 1978 Regulations applied[2]. Judge Aleksander was a member of the Upper Tribunal panel in that appeal. We asked the parties whether they had any objection to Judge Aleksander sitting in this appeal, and neither objected. We also considered the matter for ourselves and saw no reason for Judge Aleksander to recuse himself.

9. It is, in our view, unfortunate that, despite the fact that all of these appeals concern the interpretation and application of the same provisions in the 1978 Regulations, they were not heard together.

RELEVANT LAW

10. The system for national insurance contributions is contained in Part 1 of the Social Security (Contributions and Benefits) Act 1992 ("SSCBA"). Among other things, it provides, in the case of employed earners, for liabilities to pay Class 1 contributions, which consist of primary and secondary contributions.

11. Secondary Class 1 NICs are, under s7(1)(a) SSCBA, the liability of the secondary contributor, which, in the case of an employed earner employed under a contract of service, means the employer.

12. Under s6(1) SSCBA, secondary Class 1 NICs are paid in respect of the earnings of an employed earner. The expression "earnings" is defined by s3(1) SSCBA to include "any remuneration or profit derived from employment". An "employed earner" is defined by s2(1)(a) SSCBA as "a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with earnings". Individuals working on the Continental Shelf are, as a result of regulation 114, Social Security (Contributions) Regulations 2001 ("the 2001 Regulations"), treated as gainfully employed in Great Britain.

13. We note that the legislation distinguishes between "employed earners" and "self-employed earners" (defined as persons gainfully employed otherwise than as an employed earner). For the purposes of the legislation "employment" can therefore include self-

[1] At the date of the release of this decision, *Odfjell Technology* had been heard by a different panel of the Upper Tribunal, but the decision in that appeal had not been released.

[2] The Upper Tribunal refused permission to appeal to the Inner House of the Court of Session. The Appellant has renewed its application with the Court of Session. At the date of release of this decision, the Court of Session has not determined that application.

employment. We also note that the SSCBA does not apply to individuals employed in Northern Ireland.

14. Section 1(6) SSCBA imposes a territorial limitation on the liability to pay secondary Class 1 NICs: the putative secondary contributor must fulfil "prescribed conditions as to residence or presence in Great Britain". At the relevant time, regulation 145 of the 2001 Regulations set out those conditions as residence or presence, or having a place of business, in Great Britain when the secondary Class 1 NICs became payable.

15. The above tests for identifying the secondary contributor are supplemented by other provisions. In particular, s7(2) SSCBA provides that:

> (2) In relation to employed earners who—
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> (a) are paid earnings in a tax week by more than one person in respect of different employments; or
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> (b) work under the general control or management of a person other than their immediate employer,
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> and in relation to any other case for which it appears to the Secretary of State that such provision is needed, regulations may provide that the prescribed person is to be treated as the secondary contributor in respect of earnings paid to or for the benefit of an earner.

16. The 1978 Regulations were originally made under the Social Security Act 1975 (the predecessor to the SSCBA). Regulation 5 made provision for the person specified in column (B) of Schedule 3 to the 1978 Regulations to be the secondary contributor in relation to an employed earner in an employment described in column (A) of that Schedule. In the period relevant to this appeal, paragraph 9 of Schedule 3 to the 1978 Regulations was as follows:

Column (A)	Column (B)
9. Employment by a foreign employer where— (a) in pursuance of that employment the personal service of the person employed is made available to a host employer; and (b) the personal service is rendered for the purposes of the business of that host employer; and (c) that personal service for the host employer begins on or after 6th April 1994. Where the employment is as a mariner, this paragraph only applies where the duties of the employment are performed wholly or mainly in category A, B, C or D waters.	9. The host employer to whom the personal service of the person employed is made available.

17. Regulation 1, 1978 Regulations included the following definitions:

> "foreign employer" in paragraph 9 of Schedule 3 to these regulations means a person-

> (a) who does not fulfil the conditions as to residence or presence in Great Britain prescribed under section 1(6)(a) of the Social Security Contributions and Benefits Act 1992; and
>
> (b) who, if he did fulfil those conditions as to residence or presence in Great Britain referred to in (a) above, would be the secondary contributor in relation to any payment of earnings to or for the benefit of the person employed;
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> "host employer" in paragraph 9 of Schedule 3 to these regulations means a person having a place of business in Great Britain

18. It is common ground that the words "personal service" in paragraph 9 refer to the obligation of the employee to provide his own work and skill – in other words, to paraphrase, the first of the three conditions established in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497. It is also common ground that in order for a person to be employed by a foreign employer (namely under a contract of service), the "ultimate authority" or a "sufficient framework of control" must reside with the foreign employer. Without that ingredient being present, there would be no contract of employment in the first place, and there could be no foreign employer.

19. Paragraph 9 of Schedule 3 was inserted into the 1978 Regulations by regulation 4 of the amending regulations made in 1994 (the "1994 Regulations"). The Explanatory Note to the 1994 Regulations said this about the insertion made by regulation 4:

> Regulation 4 amends Schedule 3 to the [1978] Regulations by extending the description of employments in respect of which persons are treated as secondary Class 1 contributors to workers seconded, on or after 6th April 1994, by foreign employers to employers in Great Britain.

20. In the remainder of this decision, a reference to the "host employer provision" is a reference to paragraph 9 of Schedule 3 to the 1978 Regulations.

BACKGROUND FACTS

21. The FTT made the following findings of fact so far as relevant to this appeal:

(1) The purpose of Aramark's business, so far as relevant in this appeal at least, is the provision of catering and hotel services to Offshore Installations (FTT [161(1)]);

(2) Pursuant to contracts ("Operator Contracts") entered between Aramark and the operators ("Operators") of the Offshore Installations, Aramark agreed to provide skilled personnel, tangible goods, and equipment, including food, cleaning and housekeeping materials together representing the services necessary to provide hotel and catering services to the Operators' staff working on the Offshore Installations (FTT [3]);

(3) Pursuant to the "Intercompany Agreement" with "OSI" referred to at FTT [4], Aramark subcontracted to OSI its obligations to the Operators for each Operator Contract where the Operator permitted it to do so (FTT [87(2)]). Under the Intercompany Agreement, OSI agreed to provide services to Aramark to enable Aramark to meet its obligations under the Operator Contracts and Aramark agreed to provide a broad range of services to OSI to facilitate the provision of services by OSI to Aramark (FTT [87(6)] and [161(7)]).

(4) OSI is not resident in the UK (and so not in Great Britain) and is not present and does not have a place of business in the UK (and so not in Great Britain) for the purposes of NICs (FTT [87(1)]);

(5) Operator Contracts were substantially similar but not identical in terms of Aramark's ability to subcontract. However, the arrangements in place with OSI under the Intercompany Agreement were the same irrespective of the terms of the Operator Contracts. The effect of the Intercompany Agreement was to subcontract some, but not all, of Aramark's obligations. The services supplied pursuant to the Intercompany Agreement were "catering and similar supplies, provision of support and specialist services; control and management of manning levels" and, to the extent not covered under "catering and similar supplies": housekeeping, helipad, handyman and other services (FTT [161(4)]);

(6) There was an initial transfer of employees from Aramark to OSI for each Offshore Installation for which the Intercompany Agreement was relevant (FTT [87(7)]). Following the initial transfer of employees from Aramark to OSI there were two additional ways in which OSI employed employees working on Offshore Installations: (a) where Aramark won a new contract for an existing Offshore Installation and the Intercompany Agreement was engaged, individuals working on the relevant Offshore Installation would usually transfer their employment to OSI from the previous provider of services under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006; and (b) to the extent required, further employees were engaged directly by OSI, with human resource services needed to engage the employees provided by Aramark (FTT [87(8)]);

(7) Not all Offshore Installations in respect of which Aramark was contracted to provide services to Operators were subject to the subcontracting arrangements with OSI. In some instances, the Operator objected to the subcontracting arrangements (FTT [88(1)]);

(8) Each Offshore Installation is staffed by two groups of workers: those dedicated to working on the particular installation ("Core Crew") and itinerant workers who may be asked to work on different installations ("Ad Hoc Crew") (together "Crew") (FTT [88(2)]);

(9) The offshore hotel and catering industry is unionised. The terms and conditions of employment contracts for employees of OSI working on Offshore Installations in the UK continental shelf were standardised and incorporated terms and conditions from the joint memorandum of agreement between the Caterers Offshore Trade Association, Unite the Union and the Rail, Maritime and Transport Workers Union (the "COTA Agreement") Under the terms of the COTA Agreement, any worker who works continuously on a particular installation for six months or more becomes contractually entitled to be treated as Core Crew. Where an installation is closed, or the contract is transferred to an alternative supplier, Core Crew have rights not otherwise available to Ad Hoc Crew (FTT [88(2)] and [87(9)]);

(10) The practical operation of the relationship between OSI and Aramark as contained in the Intercompany Agreement was set out in an "Operations Manual". (FTT [161(8)]). The Operations Manual sets out the limited role of OSI as:

(a) although OSI is contractually responsible for the employment relationship with its workers, much of the administration of such relationship was delegated to Aramark; and

(b) the role of OSI management was limited to reviewing, approving, or ratifying proposals and decisions made by Aramark regarding HR, health and safety, finance, and accounting etc. (FTT [161(9)]);

(11) Neither the Intercompany Agreement nor the Operations Manual provides guidance as to how the physical delivery of the subcontracted services was to be carried out. On the face of matters, Aramark therefore had rendered itself unable to meet its obligations to the Operators to provide all management, supervision, personnel materials equipment, plant consumables and facilities required under the contract whether through or by a subcontractor (FTT [161(12)]);

(12) The most senior member of OSI staff on any Offshore Installation was the Chef or Unit Manager who had responsibility for leading the hotel and catering services on Offshore Installations, including the direct line management of the Crew (FTT [87(10)]);

(13) In order to meet its obligations under the Intercompany Agreement the services of each individual Crew member employed by OSI were caused or arranged (and even compelled) to be ready and able to be used by Aramark in performance of its contractual obligations to Operators upon the decision (required to be undertaken in accordance with the COTA Agreement) of Aramark through its logistics team. Neither OSI management nor the Unit Manager had any involvement in the allocation of Crew to specific Offshore Installations (FTT [161(5)]);

(14) The OSI management board did not have the skills and knowledge to direct day-to-day activities, and OSI management did not interact with or provide any substantive direction to its employed staff (FTT [161(10)]). Aramark exercised substantive and day-to-day control over the effective performance of duties through individuals employed by OSI. The principal means by which that control was exercised was through the Aramark Offshore Operations Manual ("the Offshore Manual", a different manual from the "Operations Manual described in paragraph (10) above) and Aramark Safe Systems Active Monitoring Protocols. These were documents drafted and owned by Aramark. They were never considered or reviewed by OSI management, and they are not referred to in the Operations Manual. The Offshore Manual expressly states that it "explains the policies, procedures and systems by which Aramark run our offshore business" and in this context "Aramark" included OSI. It also set out the procedures, controls, and standards for delivery (FTT [161(13)]);

(15) The Offshore Manual was the "bible" by which Unit Managers operated when working to meet the scope of services provided under the relevant Operator Contract. The understanding of the Unit Manager of these documents formed the foundation on which he led the Crew and orchestrated and supervised the delivery of the hotel services on the Offshore Installation. It was his experience of operating in accordance with the Offshore Manual that facilitated and enabled him to act autonomously whilst remaining accountable to the operations team (FTT [161(14)]);

(16) A Unit Manager would autonomously determine what needed to be done on a day-to-day basis on the Offshore Installation in conjunction with the Operator's Offshore Installation Manager ("OIM"). However, the FTT found that given that ultimate accountability was through the Unit Manager to the Operations Manager (an "onshore" role undertaken by an employee of Aramark) or operations team in terms of performance of the contractual services any superficial appearance that OSI directed day-to-day operations was an illusion (FTT [120] and [161(15)]). It was only because of such direction/day-to-day control that Aramark could comply with the terms of its contract with the Operators (FTT [161(16)]);

(17) OSI purchased food and other consumables in order that it could provide the catering, housekeeping and other services. But this was done through the Unit Manager using procedures and by reference to policies imposed through the Offshore Manual by

Aramark. The FTT found that, in consequence, Aramark exercised the same day-to-day control over the purchasing of food and consumables as it did in respect of the personal service of the OSI employees (FTT [161(18)]);

(18) Key decisions associated with the employment of staff (i.e. in connection with recruitment, promotion, pay levels, discipline and dismissal) were taken either directly, and in advance, by OSI management, or through the delegated authority granted to Aramark and subsequently ratified by OSI management through quarterly reporting (FTT [161(11)]);

(19) The Intercompany Agreement provides for the fee payable to OSI to be at a daily rate or as agreed in respect of each Operator Contract. However, in practice OSI did not charge on a daily rate and did not invoice on a contract-by-contract basis. Instead, the line-item cost of each individual (salary, overtime, travel etc.) and food and consumables were charged to Aramark at cost plus a markup (FTT [161(6)]);

(20) Whilst the arrangements under the Intercompany Agreement were not a sham, OSI was little more than a contractual shell: there was a management team in place which was sufficient to take the decisions required of OSI under the Intercompany Agreement as specified in the Operations Manual, but those decisions were limited to formal HR/contractual and certain financial decisions taken on the basis of recommendations made by Aramark. The FTT found that the Intercompany Agreement did not constitute a commercial subcontracting relationship between OSI and Aramark, rather OSI's employees were "seconded" to Aramark. The FTT found that the fact that OSI also supplied food and consumables did not convert the secondment into a commercially subcontracted service (FTT [163] and [166]);

(21) OSI did not exercise any effective or substantive day-to-day control over the Crew. In particular OSI did not direct or supervise how the personal service of the individual Crew members was performed. Whilst the Crew reported to the Unit Manager, the FTT found that the Unit Manager directed them precisely in the performance of their duties by reference to the step-by-step procedures, controls and basic standards in the Offshore Manual (FTT [167]). In reaching these findings, the FTT did not consider that the sections of the Offshore Manual concerning the management of people were particularly relevant to the issues before them. Rather, the FTT found that the sections of the Offshore Manual which addressed the services contracted by the Operator are performed were of critical importance (FTT [161(17)]);

(22) It was Aramark that exercised the substantive day-to-day control of the Crew with the consequence that the personal service of the Crew including the Unit Manager was made available to Aramark and rendered for the purposes of its business. In other words, there was a supply of staff and that the personal service of such staff was made available to Aramark and rendered for the purposes of Aramark's business (FTT [161(19)]) and [168]);

(23) These arrangements were implemented with effect from 8 October 2004 and remained in place until 11 March 2017. Although HMRC's decision to assess secondary Class 1 NICs relates to a shorter period than the whole period for which the arrangements were in place, the arrangements operated on a broadly consistent basis throughout the period in which the Intercompany Agreement was in place and the workers were employed by OSI (FTT [161(2)]);

(24) These arrangements were implemented with the sole objective of eliminating the UK secondary Class 1 NICs charge to allow Aramark to remain competitive in the market for the provision of services to Offshore Installations where the Operators of those

Offshore Installations consented to the subcontracting arrangements (FTT [161(3)] and FTT [87(3)]); and

(25) The FTT stated that it had reached its conclusions without particular reference to the FTT's analysis in *Bilfinger,* although it had essentially reached the same conclusion (FTT [164]).

THE FTT'S CONCLUSION IN THE LIGHT OF ITS FACTUAL FINDINGS

22. The host employer provision asked, among other matters (i) whether personal service of an individual is "made available" to the host employer, and (ii) whether that personal service was "rendered for the purposes of the host employer's business"? A good proportion of the FTT's decision was devoted to the question whether these concepts required the host employer to have some measure of "control" over the individual, or the way that individual performed his or her duties.

23. The FTT had to consider that issue without the benefit of any binding authority from the Upper Tribunal or a higher court, although it did have available to it the first-instance decision of the differently constituted FTT in *Bilfinger*. The FTT concluded that, as a matter of construction, personal service of an individual could be "made available" to a host employer even if that host employer had no control over the individual or the way in which services were performed (FTT [72]). However, at FTT [76], the FTT concluded that personal service could not be "rendered" for the purposes of the host employer's business unless that host employer exercised "control as to the day-to-day granular activities to be undertaken by the worker such that the host can realistically be considered to represent or stand in the shoes of the employer vis a vis the worker's performance of their own work and skills".

24. Since the FTT's decision in this case, the Upper Tribunal has released its decision in *Bilfinger* holding that neither the concept of "made available" or "rendered" carries with it any requirement for the host employer to have any measure of control. However, since the FTT did not have this decision available to it, it considered the question of control holding that, on the facts it had found that (i) OSI did not exercise the requisite control over the offshore Crew whether individually or collectively, but that (ii) Aramark did. The FTT therefore held that all necessary requirements for Aramark to be made liable for secondary Class 1 NICs under the host employer provision were satisfied.

GROUNDS OF APPEAL

25. Aramark appeals against the decision of the FTT on the following three grounds:

(1) *Ground 1*: The FTT having rightly accepted that granular, day-to-day, control of the employees by the host was required by paragraph 9(b) of the host employer provision, it should also have found that such control was necessary for paragraph 9(a) to be satisfied.

(2) *Ground 2*: The FTT having rightly accepted that, on a proper interpretation of the host employer provision, it did not apply to situations where a subcontractor "enters an engagement for a 'complete' or 'composite service'", it then failed to apply that interpretation to the primary facts it found, since, on those primary facts, Aramark did enter a contract for the provision of a complete/composite catering and housekeeping service with OSI.

(3) *Ground 3*: The FTT erred in law, on an *Edwards v Bairstow* basis, in concluding that Aramark exercised the necessary degree of control over the OSI employees and in finding that the employees had been seconded to Aramark. This was a conclusion that no reasonable Tribunal could have reached on the evidence and primary facts as found.

26. HMRC in their respondents' notice stated that they agreed with the result reached by the FTT and invited us to dismiss the appeal. However, their primary position was that, in the light of the Upper Tribunal's decision in *Bilfinger*, we should dismiss the appeal for reasons different from those on which the FTT relied:

> The appeal was rightly dismissed on the basis that the personal service of employees was made available to [Aramark] and rendered for the purposes of [Aramark's] business. However, HMRC's primary position is that the FTT erred in concluding, at FTT [75 to 79], that in order for the personal service to be "rendered" for the purposes of the host employer's business there is a requirement for direction or control by the host employer.
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> If, contrary to HMRC's primary position, the host employer provision does contain a requirement for direction or control, the FTT was correct to conclude that [Aramark] exercised the requisite direction or control.

27. Those competing positions mean that there are essentially two issues before us:

(1) Issue 1 – whether we should depart from the Upper Tribunal's decision in *Bilfinger*. If we do not do so, it is common ground that Aramark's appeal must fail.

(2) Issue 2 – if we do depart from *Bilfinger,* and so conclude that Aramark needed to obtain some level of control over the Crew, or the Crew's performance of their duties, whether the FTT's factual conclusion, that Aramark had that level of control, was available to it. Aramark's position (which represents an amalgamation of its Grounds 2 and 3) is that the FTT's factual conclusion on this issue was not available to it.

ISSUE 1 - *BILFINGER*

Decision of Upper Tribunal in *Bilfinger*

28. As mentioned above, on 7 April 2026 the Upper Tribunal released its decision in an appeal from the FTT in *Bilfinger*. The fact pattern in this appeal, whilst not identical, has substantial similarities with the fact pattern in *Bilfinger*. In summary:

(1) In *Bilfinger,* there was an initial transfer of existing employees of Bilfinger UK to Bilfinger Guernsey. In this appeal, existing employees of Aramark were transferred to OSI. In both cases individuals recruited subsequent to that initial transfer were employed directly by Bilfinger Guernsey and OSI respectively;

(2) In *Bilfinger,* Bilfinger UK entered into a contract with the operator of an Offshore Installation for the provision of various services, and the contract obliged Bilfinger UK to provide personnel and resources to perform the functions set out in the contract. In the case of this appeal, Aramark entered into contracts with Operators of Offshore Installations for the provision of various services, and the contracts oblige Aramark to provide skilled personnel and resources to perform the functions set out in the Operator Contracts;

(3) In *Bilfinger*, Bilfinger Guernsey entered into a separate contract with Bilfinger UK for the provision of labour and resources. In this appeal, Aramark entered into a separate contract (the Intercompany Agreement) with OSI for the provision of services (which implicitly included the provision of labour) and other resources to Aramark to enable Aramark to meet its obligations under the Operator Contracts;

(4) In *Bilfinger*, Bilfinger Guernsey entered into contracts with Bilfinger UK and Voyonic Crewing Ltd (an unconnected company) for the provision to it of HR, payroll and administration services. In this appeal, Aramark agreed under the Intercompany Agreement to provide OSI with a broad range of services to facilitate the provision of services by OSI to Aramark. Although Bilfinger Guernsey contracted with an

independent entity for the provision of some administrative services, and in the circumstances of this appeal, OSI only contracted with its affiliate, Aramark, we find that this makes no difference to the legal analysis for the purposes of the host employer provision; and

(5) In *Bilfinger*, there was no contract between Bilfinger Guernsey and the operator of the Offshore Installation. In this appeal there was no contract between OSI and the Operator.

29. In this decision, references to paragraphs of the Upper Tribunal's decision in *Bilfinger* take the form Bilfinger [XXX].

30. In its decision, at Bilfinger [65] to [72], the Upper Tribunal agreed with HMRC that the host employer provision did not require that direction or control over the employees of any kind be exercised by the host. Since Aramark subjects *Bilfinger* to detailed criticism, we will quote the relevant parts of the decision in full:

> [64] It is at this stage that we consider it pertinent to remind ourselves of the warning given in *Cozens* about the dangers of a court in seeking to define everyday words:
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> > "No doubt the Court could act as a dictionary. It could direct the tribunal to take some word or phrase other than the word in the statute and consider whether that word or phrase applied to or covered the facts proved. But we have been warned time and again not to substitute other words for the words of a statute. And there is very good reason for that. Few words have exact synonyms. The overtones are almost always different.
> >
> > Or the Court could frame a definition. But then again the tribunal would be left with words to consider."
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> [65] It seems to us that we were being invited to do just that by the appellant. In our view, and to adapt the conclusion of Lord Reid in *Cozens*, the Secretary of State in making the amending 1994 regulations inserting para. 9 into Sch. 3 to the 1978 Regulations has given no indication that the words "made available" are to be given any unusual meaning: "made available" means made available and nothing else.
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> [66] Understood in their ordinary, everyday meaning, those words do not, despite the submissions made by Mr Simpson, carry any connotation of "direction" in the manner submitted by him. Mr Simpson submitted that, if something is made available to someone to use, that "necessarily involves that that someone has power to decide how to use it (and indeed whether to use it at all)". However, that seems to us to be nothing more than an assertion of the intended result of the appeal rather than an exposition of the ordinary meaning of the expression "made available". As Mr Tolley noted in his oral submissions, it is perfectly normal English usage to talk of making something available to a person subject to particular terms or conditions. Nor can the requirement for some kind of direction be gleaned from the use of "rendered" in para 9 of Sch. 3 to the 1978 Regulations. The mere fact that the personal service is "made available" is not enough: the service also has actually to be "rendered" for the purposes of the business of the person to whom the personal service is being made available. That seems to us to be the self-evident purpose of that part of the host employer provision.
>
> [67] Mr Simpson also submitted that the host employer provision is "aimed at situations that approximate" a contract of employment. This was said to broadly correspond "to the (somewhat amorphous) idea of 'secondment'." We consider that at least some cases commonly regarded as constituting

secondments will be covered by the host employer provision. We would not, however, be prepared to say more than that. Substituting proxies for the language used by the law-maker, particularly "amorphous" ones like "secondment", is not the judicial task before us. The statutory question is not to be re-formulated into a question as to whether a case is one of secondment, whatever that expression might mean. That is even more the case in relation to the notion of "secondment-like-arrangements", a word chosen by the FTT at [207] of its decision to describe the purpose of the host employer provision. As the House of Lords wisely noted in *Cozens*, embarking on an exercise like this would mean that "the tribunal would be left with words to consider": but they would be our words and not the words deliberately chosen by the law-maker.

[68] Nor do we think that it helps at all to say (as Mr Simpson submitted) that the host employer provision was aimed at situations that "approximate" a contract of employment. There is nothing in the context or, more importantly, the language of the provision that bears that out. The intention, as we have noted above, of the 1978 Regulations was simply to describe particular cases and then provide who was to be the secondary contributor in relation to those cases: nothing more and nothing less. In any event, the notion of an arrangement "approximating" to a contract of employment simply begs the question as to the level of approximation required. Again, that would be to substitute a different test from the one actually used by the Secretary of State in the amending 1994 regulations.

[69] We consider that the real issue troubling the FTT in leading it to its conclusion that "some" level of direction was required was the notion that there must be some fact distinguishing cases to which the host employer provision applies from those involving contracts <u>for</u> services (referred to by the FTT (see [207] of its decision) and the appellant as "ordinary sub-contracting"). Mr Simpson submitted that such arrangements were not intended to be caught by the host employer provision as "otherwise, the application of the provision would be extended far beyond its proper scope".

[70] We are unable to accept that is the case. Indeed, we consider that this represents an inverse of the true position: the proper scope or intention of the host employer provision is to be inferred from the everyday language used in the provision.

[71] What we suspect has caused the confusion in this case are the unusual arrangements devised by the appellant to meet Marathon's desire to avoid bearing the economic cost of the secondary Class 1 contributions. As the FTT found, the scheme adopted was intended for no other purpose than to avoid a liability to secondary Class 1 NICs. For Marathon and the appellant, the world would, as a matter of substantive reality, continue as it did before the scheme was put into effect. The scheme adopted was not an ordinary secondment. Nor can it reasonably be regarded as an ordinary case of sub-contracting. In this connection, it needs to be recalled that the host employer provision was engaged only if the "personal service" of the person (in the employment law sense of the obligation of the employee to work "by one's own hands" and not "by another") was made available to another and that service was then "rendered for the purposes of the business" of that other. Both elements need to be satisfied.

[72] As we do not consider that some level of direction is intended to lie with the host employer in the host employer provision, it is not necessary to address Mr Simpson's further submissions about what that level might be. However, we would not want our decision to be read as suggesting that matters such as

> the direction that the host employer has in relation to any person will be irrelevant to the statutory question. In any given set of facts, such matters might indicate that the host employer provision is engaged. But that is, in our view, as far as it goes.

Judicial comity

31. The parties recognise that as a matter of judicial comity, the Upper Tribunal will generally follow its earlier decisions on points of law. However, it is not bound to do so as a matter of *stare decisis* and should not do so if it is satisfied that its earlier decision is wrong. Mr Grodzinski submits that the Upper Tribunal should find that *Bilfinger* was wrongly decided. He referred us to the decision of David Richards J (as he then was) and Judge Ghosh (as he then was) in this Tribunal in *Gilchrist v HMRC* [2014] UKUT 0169 (TCC) which at [85] and [86] usefully summarises the principles that apply when considering whether we should follow previous decisions of the High Court:

> [85] In summary, we consider the following principles to apply in relation to the question of whether the High Court binds the Upper Tribunal as a matter of *stare decisis*:
>
> (i) The question whether the Upper Tribunal is bound by High Court decisions as a matter of *stare decisis* is a matter of Parliamentary intention, in the light of the well-recognised need for predictability and consistency of outcome.
>
> (ii) The Upper Tribunal is not bound by decisions of the High Court, as:
>
> (a) the intention of Parliament, in enacting the Tribunals, Courts and Enforcement Act 2007 ('TCEA 2007') and constituting the Upper Tribunal as a court of superior record makes it clear that Parliament did not intend the Upper Tribunal to be bound by the High Court as a matter of *stare decisis*;
>
> (b) as a matter of principle, the need for predictability and consistency of outcome are not offended; and
>
> (c) there is a substantial line of authority that tribunals which are constituted as superior courts of record are free to depart from High Court decisions, which line of authority has not been disturbed.
>
> [86] None of the principles we have set out above is affected by the decision of the Supreme Court in *R (on the application of Cart) v Upper Tribunal*; *R (on the application of MR (Pakistan)) v Upper Tribunal (Immigration and Asylum Chamber)* [2011] UKSC 28, [2011] STC 1659, [2012] 1 AC 663 ('*Cart*'). The question whether the High Court binds the Upper Tribunal as a matter of stare decisis is conceptually distinct from the question whether the High Court has supervisory jurisdiction, as a matter of judicial review, over unappealable decisions of the Upper Tribunal.

32. The Upper Tribunal then went on to consider the decision of the Administrative Appeals Chamber of this Tribunal in *Secretary of State for Justice v RB* [2010] UKUT 454 (AAC) at [39] to [41]:

> 39. There is no doubt that, when applying the law of England and Wales, the Upper Tribunal is bound by decisions of the Court of Appeal on issues of law in accordance with the ordinary rules of precedent. This follows from its status as a higher court, to which the statute provides a direct right of appeal.
>
> 40. On the other hand, for the reasons given below, it seems to us equally clear that, where the Upper Tribunal is exercising a jurisdiction formerly exercised

> by the High Court, it need not regard itself as formally bound by decisions of the High Court. Subject to one qualification, we think the position should be the same as where the High Court is dealing with decisions of co-ordinate jurisdiction:
>
> > "that he will follow the decision of another judge of first instance, unless he is convinced that that judgment is wrong, as a matter of judicial comity; but he is not bound to follow the decision of a judge of equal jurisdiction" (see e.g. *Huddersfield Police Authority v. Watson* [1947] K.B. 842, 848, per Lord Goddard C.J.)
>
> 41. The one qualification that we would suggest to this formulation arises from the particular nature of the Upper Tribunal's jurisdiction, in line with the statement of Lady Hale in *AH (Sudan) v Secretary of State* [2007] UKHL 49 para [30] (repeating comments she had made in the Court of Appeal in *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All ER 279). She emphasised the highly specialised character of some legislation before the tribunals, and the need for the higher courts to respect their expertise. Consistently with that approach, where such specialised issues arise before the Upper Tribunal, it may in a proper case feel less inhibited in revisiting issues decided even at High Court level, if there is good reason to do so.

33. The Upper Tribunal in *Gilchrist* then concluded:

> [94] Leaving aside any effect of *Cart*, it follows that the Upper Tribunal may depart from a decision of the High Court, if the Upper Tribunal is "convinced" (using the language at para [40] of *RB*) or "satisfied" (using the language at para [47] of *RB*) "[…] that [the High Court decision] is wrong." We do not consider that there is any difference between "convinced" and "satisfied" in this context.

34. The circumstances in which an appellate tribunal can depart from a previous decision were also considered in the decision of Singh J (as he then was) in the Employment Appeal Tribunal in *British Gas Trading Ltd v Lock and another* [2016] ICR 503 at [75]:

> 75 In the light of the authorities to which I have referred it may be helpful if I summarise the applicable principles when this appeal tribunal is invited to depart from an earlier decision of its own. Although this appeal tribunal is not bound by its own previous decisions, they are of persuasive authority. It will accord them respect and will generally follow them. The established exceptions to this are as follows:
>
> > (1) where the earlier decision was *per incuriam*, in other words where a relevant legislative provision or binding decision of the courts was not considered;
> >
> > (2) where there are two or more inconsistent decisions of this appeal tribunal;
> >
> > (3) where there are inconsistent decisions of this appeal tribunal and another court or tribunal on the same point, at least where they are of co-ordinate jurisdiction, for example the High Court;
> >
> > (4) where the earlier decision is manifestly wrong;
> >
> > (5) where there are other exceptional circumstances.

35. The authorities differ in their description of the standard that should be adopted when departing from a previous decision. In *RB* the standard was described as "convinced" or "satisfied", whereas in *British Gas* the standard was expressed as the decision in question being

"manifestly wrong". In *Gilchrist* the Upper Tribunal decided that there was no difference between "convinced" or "satisfied", and we consider that "manifestly wrong" (as used in *British Gas*) captures the same concept.

36. Aramark relies on the statement of the Upper Tribunal at [41] of *RB* that the Upper Tribunal "may in a proper case feel less inhibited in revisiting issues decided even at High Court level, if there is good reason to do so". It submitted that in a specialist jurisdiction such as this, where the function is to give guidance on the appropriate interpretation of legislation that affects more than one party, the Upper Tribunal may feel it is important to take a more generous approach when considering whether to follow a previous decision.

37. We are not persuaded that in *RB* the Upper Tribunal was holding that it enjoys greater latitude to depart from other Upper Tribunal decisions. Rather, the Tribunal was addressing circumstances in which it might depart from a previous decision of the High Court. The Tribunal concluded, in the light of statements of Lady Hale in *AH (Sudan)* and other cases as to the specialist expertise of the Upper Tribunal, that the Upper Tribunal might have more latitude in departing from previous decisions of the High Court in areas where it could bring that specialist expertise to bear. Those circumstances do not apply in a case such as this, where the previous decision is one made by the same chamber of the Upper Tribunal, which has the same relevant specialist expertise.

38. We also note that "comity" does not just mean courtesy. There is an established hierarchy by which judgments of lower courts and tribunals can be determined to be wrong by higher courts and tribunals. It would not be right for this Tribunal to hear what is in effect an appeal against *Bilfinger*. Only the Inner House of the Court of Session can reverse *Bilfinger*. We will, therefore, apply with rigour the requirement that we be "convinced" or "satisfied" that the Upper Tribunal's decision in *Bilfinger* is wrong. To reach that threshold, Aramark must do more than make the kind of submissions that might be made on appeal to the Inner House of the Court of Session.

Should we depart from *Bilfinger*?

39. It is common ground that *Bilfinger* directed itself correctly on the principles of statutory construction at Bilfinger [40]-[47]. However, Aramark submits that the Upper Tribunal fell into error in applying those principles.

Meaning of "made available"

40. Mr Grodzinski submits that on the ordinary meaning of the words in the host employer provision, a foreign employer cannot "make available" the personal service of its employees to a GB host, and such service is not rendered for the purposes of the host's business, if the host cannot exercise day-to-day control over the working activities of the employees. He submits that for the employees' personal obligation of work and skill to be made available to the host, the foreign employer, albeit retaining ultimate authority, or what the case law sometimes calls "a sufficient framework of control", must give to the host the ability to control the employees' work on a day-to-day basis.

41. Mr Grodzinski criticises the conclusion reached by the Upper Tribunal in Bilfinger [64] to [66] quoted earlier. Mr Grodzinski submits that the Upper Tribunal erred by asking and answering the question whether, in ordinary English, "something" could be made available without a power of direction over it – yet the "personal service" of an employee is not a "thing". Even if it were normal English to speak of a person making a physical object available to another (regardless of whether the other has power of control over the object), the position is not the same in the context of an employer making the "personal service" of an employee available to another. If the other does not have power to control what the employee does on a

day-to-day basis, they cannot be said as a matter of ordinary English to have had the "personal service" of that employee "made available".

42. Mr Grodzinski argues that the conclusion reached by the Upper Tribunal in *Bilfinger* may have arisen from the manner in which the appellant in that case put its arguments: giving analogies by reference to things, rather than by reference to people. Mr Grodzinski illustrated the difference by reference to an example of someone who employs a cook and offers the services of that cook to a friend. The offer could take the form of instructing the cook to go to the friend's house and cook whatever the friend requests. Alternatively, the employer could provide the cook with a recipe and ingredients and specify the meal that is to be provided. Only in the former case, submits Mr Grodzinski, is the personal service of the cook being made available to the friend, because only in that case did the friend have day-to-day control over the cook. Mr Grodzinski submits that an employer cannot be said to be making available the personal service of an employee to the host, if the employer retains the power to tell the employee what to do from day-to-day, and if a host cannot exercise that power.

43. Mr Grodzinski further submits that even if control is not inherent in the phrase "made available", it arises, as the FTT found, from the requirement in the host employer provision that the personal service be "rendered" for the purposes of the host employer's business (see FTT [73]-[76]).

44. We are not persuaded by these submissions. We recognise that analogies can be useful in considering what statutory words mean. However, it is appropriate to treat the process of reasoning by analogy with caution as it is possible to produce many analogies some of which involve the phrase "made available" or "rendered" carrying with it a connotation of control and some of which do not. We are far from being "convinced" or "satisfied" that, as a purely linguistic matter, the concept of making available the personal service of an individual necessarily carries with it a concept of control. For our part, we see no great difficulty with a conclusion that, in Mr Grodzinski's example, the personal service of the cook is being "made available", even if he or she cooks a pre-determined meal. We do not consider that the threshold for departing from the decision of the Upper Tribunal on this issue has been met.

Inferences to be drawn from later amendments to legislation

45. The host employer provision was amended with effect from 6 April 2014 with the introduction of the anti-avoidance provisions in new Regulation 5A, which resulted in Aramark accepting that it was required to pay secondary Class 1 NICs from 6 April 2014. At the same time, paragraph 9(a) was amended to read as follows:

> 9. Employment -
>
> (a) by a foreign employer where the employed person, under an arrangement involving the foreign employer and the host employer, provides, or is personally involved in the provision of services, to a host employer.

46. Mr Grodzinski submits that the approach taken by the Upper Tribunal in *Bilfinger* has the same effect as that adopted by the amended legislation. Mr Grodzinski submits that if there were any ambiguity in the meaning of paragraph 9(a) (in the form in force at the relevant times), we can consider the later legislation to see whether its amending effect would have been necessary if the meaning of the earlier legislation had been as wide as being contended for by HMRC. If the Upper Tribunal's interpretation of the host employer provision in the relevant period were right, Mr Grodzinski submits that the later amendments made in 2014 would not have been necessary and that this is a pointer against the Upper Tribunal's conclusion in *Bilfinger*. Mr Grodzinski referred us to the judgment of Lord Hamblen and Lord Burrows JJSC in *News Corp UK v HMRC* [2024] AC 89 at [59] (which related to the application of VAT to

digital newspapers) in support of his contention that subsequent legislation can be used as an aid to interpretation in these circumstances:

> *(4) Subsequent legislative treatment*
>
> 59 Although unnecessary to our decision, it is also noteworthy that, subsequent to the specified period, both the EU Commission and the UK Parliament have made reforms explicitly dealing with electronically supplied newspapers in 2018 and 2020 respectively (see para 23 above). Applying a wide-ranging approach so that digital editions were already covered by the zero-rating for VAT prior to 2020 would entail accepting that, e g, Parliament was acting unnecessarily and indeed on a mistaken basis (see as evidence for this the Explanatory Memorandum referred to in para 23 above) when it explicitly "extended" the items (albeit with some exceptions) as from May 2020. That one can refer to subsequent legislation to resolve an ambiguity in earlier legislation has been accepted in several cases: see, e g, *Cape Brandy Syndicate v Inland Revenue Comrs* [1921] 2 KB 403, 414; *Comr of Inland Revenue v Hang Seng Bank Ltd* [1991] 1 AC 306, 323—324; *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), section 24.19.

47. The decision of the Supreme Court in *News Corp* and the other cases cited apply only where there is an ambiguity in the legislation, and we note the statement of Lord Hodge JSC in *Project Blue v HMRC* [2018] UKSC 30 at [33] that "[…] subsequent amendments are not a legitimate tool in ascertaining prior parliamentary intention". The point is dealt with in detail in *Bennion* at section 24.19 (cited by Lords Hamblen and Burrows JJSC with approval in *News Corp*):

> **Section 24.19: Inferences from later Acts**
>
> Where the legal meaning of an enactment is doubtful, subsequent legislation on the same subject may be relied on as persuasive authority as to its meaning.
>
> **Comment**
>
> Where it appears that an enactment proceeds on a particular view of an earlier Act, the question may arise whether this may be relied on when construing the earlier Act.
>
> Later legislation will not lightly be taken to override the clear legislative intention expressed in the words of an earlier Act. Here it is necessary to remember that, except when legislating, the legislature generally has no power authoritatively to interpret the law. That function belongs to the judiciary alone. The legislature may, with binding effect, legislate to amend the law. Legislation may even declare what the law is considered to be or to have been. But a mere indication that the legislature has mistaken the nature or effect of some legal rule does not in itself amount to a declaration that the rule is other than what it is. As Lord Radcliffe said in *IRC v Dowdall O'Mahoney & Co Ltd*:
>
> > 'The beliefs or assumptions of those who frame Acts of Parliament cannot make the law."
>
> Where, however, the legal meaning of an enactment is doubtful, a later Act may be treated as of persuasive authority if it indicates that the legislature took a particular view of the existing law. Similarly, where an Act is passed which on one (but not the other) of two disputed views of the existing law is unnecessary, this may be taken to suggest that the other view is correct. A later Act may be relevant even if not yet in force.

> The point arose in *Cape Brandy Syndicate v. Inland Revenue Commissioners*, where Lord Sterndale MR said:
>
> > "I think it is clearly established in *Attorney-General v Clarkson* [1900] 1 QB 156 that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier."
>
> The courts have consistently repeated the need for ambiguity before reliance may be placed on later legislation. "Ambiguity" here is used to mean that the earlier provision must be "open to two perfectly clear and plain constructions" or "fairly and equally open to divers meanings". This test for ambiguity is a high one. It has been said that it is not enough to show simply that there is more than one arguable construction. It must be shown that they are both equally tenable.

48. This point was raised before the FTT in both *Bilfinger* and *Aramark* (although *News Corp* was not cited as authority in *Bilfinger*). As regards this appeal, the FTT declined to express a view:

> 80. Having reached these conclusions [on the meaning of the host employer provision], we do not feel it necessary to consider the 2014 amendments to the [host employer provision] or the introduction of the specific anti-avoidance provisions.

49. The argument was rejected in *Bilfinger* in the FTT at [60] and was not pursued on appeal. We see a real conceptual difficulty in being satisfied or convinced that the Upper Tribunal in *Bilfinger* was wrong not to determine, in the taxpayer's favour, an argument that was not before it.

50. In any event, it is only in cases of ambiguity that subsequent amendments to legislation can be used as an aid to interpretation. The tax statutes are full of examples of Parliament amending legislation in order to clarify its meaning without intending to change its effect. Even if the Upper Tribunal in *Bilfinger* had considered the argument that was not before it, and had concluded that there was no ambiguity in the legislation that would permit the subsequent amendments to be used as an aid to interpretation, we would not have been convinced or satisfied that this analysis was wrong.

Application of the Explanatory Note

51. Mr Grodzinski submits that the Upper Tribunal in *Bilfinger* erred in dismissing the interpretative relevance of the Explanatory Note to the 1994 Regulations. He submits that the Upper Tribunal erred at Bilfinger [58] in stating that the Explanatory Note to the host employer provision

> said nothing about the mischief to which the new para 9 of Sch 3 was addressed. Nor did it provide any further background. Rather it was limited to a simple description of the effect of the new provision.

and likewise erred at Bilfinger [60] in finding that the reference to workers being "seconded" was of no meaningful assistance in interpreting the words of the host employer provision.

52. In *R (oao Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, Lord Steyn said at [5]

> […] In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see Cros*s, Statutory Interpretation*, 3rd ed (1995), pp 160-161. If used for this purpose the recent reservations in dicta in the House of Lords about the use of Hansard materials in aid of construction are not engaged: see *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 407; *Robinson v Secretary of State for Northern Ireland* The Times, 26 July 2002, in particular per Lord Hoffmann, at para 40.

53. In the case of primary legislation, there is a constitutional constraint on the weight to be given to an Explanatory Note because it is prepared by the executive, and not written by Parliament (which, constitutionally, is the author of the legislation). However, Mr Grodzinski argues that these constraints do not apply in the case of secondary legislation (such as the 1994 Regulations in this case) where constitutionally the regulations and the associated Explanatory Notes are prepared by the same body - the Secretary of State for Social Security (and subsequently by the Treasury, when the functions of the Secretary of State were transferred in 1999).

54. Mr Grodzinski submitted that it would be surprising for an Explanatory Note, the whole purpose of which is to explain to the reader what the new provision is there to do, were to offer no real assistance on that very question. So, the starting point, he submits, is that the drafter of the Explanatory Note is trying to explain to the reader what the legislation is there to do. For that reason, the reference to "secondment" in the Explanatory Note should be taken into account as an aid to interpreting the legislation. Secondly, he submits that the term "secondment" is generally understood to refer to a situation in which the host is using the personal service of the relevant workers as if they were its own employees, and that is how the FTT in this appeal viewed the meaning of the term at FTT [64]. Mr Grodzinski submits that this approach is supported by the case law referring to secondment and also supported by the drafter using the words "host employer" which are words typically used in a secondment context. Mr Grodzinski referred us to the decision of the then President of the Employment Appeal Tribunal, Underhill J (as he then was), in *Pervez v Macquarie Bank Ltd (London Branch) and another* [2011] ICR 266, which concerned whether an individual seconded from Hong Kong branch to the London branch of a bank was working in Great Britain. Mr Grodzinski acknowledged that the question before the Employment Appeal Tribunal in that case was whether Mr Pervez was based in Great Britain within the meaning of the legislation and was not directly about the meaning of the word "secondment". Counsel acknowledged also that they were unable to find any cases in which the term "secondment" had been defined. Nonetheless, Mr Grodzinski argued that Underhill J, with all his expertise in that area, clearly recognised that the arrangements concerning Mr Pervez were properly referred to as a secondment where Mr Pervez was reporting to the directors of the London host and was integrated into its business.

55. Mr Grodzinski also referred us to HMRC's "Offshore Intermediaries Guidance" which states that HMRC accept that the host employer provision is not intended to apply to legitimate contracts for the provision of a complete service. Mr Grodzinski acknowledged that the guidance was not an admissible aid to statutory interpretation, but it reflected the dividing line

between secondments (intended to be within the scope of the host employer provision) and commercial subcontracting relationships which are outside the provision.

56. We find the decision in *Pervez* to be of little assistance to us. It is concerned not with the meaning of "secondment", but with whether Mr Pervez was "working in Great Britain", an entirely different question. Underhill J stated at [12] that his judgment was expressly limited to the circumstances of Mr Pervez's particular case and that, as secondments come in all shapes and sizes, a different conclusion might be appropriate in a different case.

57. We are not convinced or satisfied that the Upper Tribunal was wrong to say at Bilfinger [60] that the term "secondment" is not a term of art, and that the Explanatory Note was intended to give a short non-technical explanation of the legislation rather than an exhaustive explanation of its scope. The issue before us is not whether the arrangements put in place by Aramark constitute a "secondment" within the meaning of the Explanatory Note but whether the language used in the legislation applies to the arrangements.

58. The HMRC guidance was published after the amendments made in 2014, and so is not directed to the legislation in scope in this appeal, and so is of no assistance, even if it were admissible as an aid to interpretation.

59. Overall, we are not convinced or satisfied that the Upper Tribunal in *Bilfinger* was wrong to decline to give the reference to "secondment" in the Explanatory Note the weight for which Aramark argued, particularly given that it does not have a technical meaning.

Whether the personal service was "for the host employer"

60. Mr Grodzinski submits that it is relevant to consider the words in sub-paragraph 9(c) of the host employer provision: "that personal service for the host employer begins on or after 6th April 1994". These words, he submits, make it clear that the personal service referred to in sub-paragraphs 9(a) and (b) must be for the host employer. This, he argues, strongly supports the conclusion that the host employer must (in the words of the FTT) "stand in the shoes" of the foreign employer - or put another way, that the employee is seconded to the host employer - and that it is not sufficient for the personal service to be provided to the foreign employer, who then simply uses the output to meet its contractual obligations to the host, as in a sub-contract situation. The Upper Tribunal in *Bilfinger* thus erred in not attaching any significance to the express words of paragraph 9(c) in construing the host employer provision as a whole. Mr Grodzinski accepted that the primary function of paragraph 9(c) is to inform the reader when the provision as a whole commences in effect. However, he submits that this is not its only relevance and that the express words used in the legislation have to be taken into account when interpreting paragraph 9 as a whole: if paragraph 9(c) was nothing more than a commencement provision, it could have read, "that personal service [namely the personal service specified in (a) and (b) above] begins on or after 6 April 1994". It did not need to use the words "for the host employer".

61. Mr Grodzinski also notes that the legislation refers to "host employer", rather than just "host" or "host entity". While the term is defined in Regulation 1 as simply "a person having a place of business in Great Britain", he submits that the deliberate use of the word "employer" in the term "host employer" connotes the situation of a British host business standing in the shoes of the employer, as in a secondment.

62. It is not obvious to us that this argument was before the Upper Tribunal in *Bilfinger*. If paragraph 9(c) provided an obviously strong indication of the kind for which Aramark argues, we might have been prepared to conclude that Bilfinger was "manifestly wrong" in failing to deal with that indication. However, we see no such strong indication. We agree with HMRC that the opening words used in paragraph 9(c) are nothing more than a commencement

provision. We also agree with HMRC that the words “for the host employer” identify whose service is in question and when it must begin; they do not add any qualitative requirement about the nature of the relationship beyond what paragraphs 9(a) and (b) already provide.

63. In a similar vein, we do not accept Aramark’s arguments based on the use of the word “employer” in the defined term “host employer”. The meaning to be given to these words is as set out in regulation 1 of the 1978 Regulations: a “host employer” is conceptually any person having a place of business in the Great Britain. The use of this defined term provides little support for the inference that Aramark seeks.

Ejusdem generis

64. Mr Grodzinski acknowledges that in *Bilfinger*, the Upper Tribunal was right to say that in interpreting the host employer provision, it was necessary to have regard to the primary legislation conferring *vires* on the Secretary of State to make the 1978 Regulations, namely s7(2) SSCBA. However, the Upper Tribunal was wrong at Bilfinger [50] to find that s7(2) simply conferred a wide general discretion to make regulations identifying any person as a secondary NICs contributor. In his submission, s7(2) must be read as a whole, and applying the *ejusdem generis* principle. He argues that it is relevant that one of the two specific classes of case expressly identified by Parliament where regulations can be made, is where the employed earners “work under the general control or management of a person other than their immediate employer”: s7(2)(b). In *Bilfinger* the Upper Tribunal incorrectly focussed on what it regarded as the width of the residual words “any other case…” at the end of s7(2). However, as the Court of Appeal held in *Gregory v Fearn* [1953] 1 WLR 974 at 976 *per* Evershed MR:

> It has […] long been established that those words “other person whatsoever” are to be construed *ejusdem generis* with those which precede it.

65. Thus, submits Mr Grodzinski, the Upper Tribunal was wrong to find that no relevant statutory intention could be discerned from the words of s7(2)(b) indicating the kinds of cases that the regulations made under s7(2) were intended to cover.

66. Mr Grodzinski referred us to section 23.6 of *Bennion, Bailey and Norbury on Statutory Interpretation*:

> **Section 23.6: Ejusdem generis principle: general specific terms**
>
> Where a word of wider meaning is included in a string of particular words forming a genus, the *ejusdem generis* principle may operate to restrict the meaning of the wider word so as to keep it within the genus.
>
> **Comment**
>
> This section applies where, within a string of terms each of which is qualified in some way, there appears an unqualified word.
>
> **Example**
>
> The Dublin Carriage Act 1853, s 25 required a licence to be held before any person could lawfully 'use or let to hire any hackney carriage, job carriage, stage carriage, cart, or job horse' (emphasis added). In *Shaw v Ruddin* it was held that hackney carriage, job carriage, stage carriage and job horse were genus-describing words, the genus being conveyances used for hire. Accordingly, the unrestricted word cart, when found in their company, must be construed as limited to carts used for hire.
>
> **Example**
>
> *Scales v Pickering* concerned a local Act empowering a water company to 'break up the soil and pavement of roads, highways, footways, commons, streets, lanes, alleys, passages and public places'. There was thought to be an

urban flavour about this string. Accordingly, the word 'footways' was held not to apply to a path across a field.

67. We note that the application of the *ejusdem generis* principle to the interpretation of s7(2) was not before the Upper Tribunal in *Bilfinger*. If that principle provided an obviously strong indication in favour of Aramark's proposed in interpretation, it might have satisfied us that *Bilfinger* was wrong. However, in our judgment, there is no such strong indication. This is because for the *ejusdem generis* to apply, there must be a genus to which it can be applied. There is no genus in the case of the language in s7(2) – there is no list of things preceding the phrase "any other case" which could be described as a "genus".

68. Even if paragraphs 7(2)(a) and (b) could be described as a "genus", we find that the *ejusdem generis* principle is displaced because it is implicit in the legislation that there is a contrary intention for the reasons given by the Upper Tribunal at *Bilfinger* [49] and [50], namely that the intention of Parliament in enacting s7(2) was to confer a wide discretion on the Secretary of State to provide "where it appears to the Secretary of State that such provision is needed" special provision identifying a person prescribed in the regulations as the secondary contributor. Section 23.8 of *Bennion* states, correctly in our judgment, that the *ejusdem generis* principle does not apply where a contrary intention appears – whether expressly or implicitly. We agree with the Upper Tribunal in *Bilfinger* that the cases where the power might be exercised are many and varied, and no attempt was made by Parliament to delineate or limit them further.

Relevance of "control" in paragraph 9

69. Mr Grodzinski submits that the Upper Tribunal in *Bilfinger* was wrong to consider that its interpretation, rejecting the relevance of control in paragraph 9, was supported by the reference to control in paragraph 2 of Schedule 3.

70. Paragraph 2 provided as follows:

Column (A)	Column (B)
2. Employment, whether or not under a contract of service (not being employment described in paragraph 2 in column (B) of Schedule 1 to these regulations or an employment to which paragraph 1, 4, 5, 7 or 8 of this Schedule applies) in which the person employed renders, or is under an obligation to render, personal service and is subject to supervision, direction or control, or to the right of supervision, direction or control, as to the manner of the rendering of such service and where the person employed is supplied by or through some third person (including, in the case of a body of persons unincorporate, a body of which the person employed is a member) and— (a) where earnings for such service are paid by or through, or on the basis of accounts submitted by, that third person or in accordance with arrangements made with that third person; or	2. (a) In England and Wales where the person employed is supplied by or through the agency of a body of persons unincorporate and the person employed is a member of that body, the other members of that body, and, in any other case, the third person by whom or through whose agency the person employed is supplied; (b) in Scotland, the third person by whom or through whose agency the person employed is supplied; (c) where the other members of the body or the third person specified in sub-paragraph (a) or, as the case may be, the third person specified in sub-paragraph (b) of this paragraph do not fulfil the conditions as to residence or presence in Great Britain prescribed in regulation 119(1) (b) of the Social Security (Contributions) Regulations 1979, the person to whom the person employed is supplied (and in that case sub-paragraph

(b) where payments, other than to the person employed, are made by way of fees, commission or other payments of like nature which relate to the continued employment in that employment of the person employed.	(a) or, as the case may be, sub-paragraph (b) shall not apply).

The Upper Tribunal considered that paragraph 2 pointed against Aramark's interpretation: paragraph 2 expressly incorporates concepts of "supervision, direction or control" that are not expressly mentioned in paragraph 9 raising the inference that no such concepts are relevant to paragraph 9. However, Aramark submits that the Upper Tribunal overlooked important indications of meaning that came from the architecture of the provisions. Aramark argues that, having apparently cast the net wide in the opening words of paragraph 2, the drafter of the provisions then seeks to limit its scope to situations where the individual is subject to supervision, direction or control by someone, who may or may not be an employer. It would not, therefore, be enough, in paragraph 2, simply to refer to situations where a contract of service is involved. By contrast, paragraph 9 of Schedule 3 is only ever concerned with situations involving a contract of service with a foreign employer, where the same need to spell all of this out does not arise so far as the foreign employer is concerned. For that reason, Aramark submits that the language of paragraph 2 says nothing about the meaning of paragraph 9, because any requirement for a requirement for direction, supervision or control, was inherent in the contractual employment relationship that is the precondition to paragraph 9 applying, but is not a precondition to paragraph 2 applying.

71. The Upper Tribunal addressed this argument at Bilfinger [53] and [54]:

> [53] The simple point to observe here is that the Secretary of State, in making appropriate provision in the regulations, was well able to make provision by reference to whether a person was subject to "supervision, direction or control" or "to the right of supervision, direction or control" as to the manner in which a person rendered "personal service". It does not, of course, necessarily follow from this that, in inserting para. 9 into the same Schedule as para. 2, the Secretary of State rejected any concept of "supervision, direction or control" in the provision made by para. 9.
>
> [54] But, as Lord Hodge made clear in *R (O)*, it is the language used by the law-maker (in this case, the Secretary of State rather than Parliament) that is the primary source from which the purpose of the legislation is to be inferred and it does seem to us to be – to put it at its lowest – surprising that, having referred to the "rendering" of "personal service" in both paras. 2 and 9 of Sch.3, the Secretary of State then chose different words in the form of "made available" to indicate that, as the FTT found and as the appellant submits, some level of "direction" was required. The question which naturally arises is why, if that was indeed the Secretary of State's intention in inserting para. 9 into Sch.3 to the 1978 regulations, the Secretary of State chose not to refer in terms to "direction" (or "control") and, indeed, not to go on and provide in terms what the necessary level of direction was.

72. Deciding precisely what inference to draw from the different wording in paragraphs 2 and 9 of Schedule 3 is not straightforward. Aramark's analysis, that paragraph 2 provides little if any guide to the meaning of paragraph 9 strikes us as realistically arguable. However, we are far from satisfied, or convinced, that the analysis of the Upper Tribunal in *Bilfinger* was wrong. It is, in our judgment, significant that paragraph 2 was originally enacted in the Social Security

(Categorisation of Earners) Regulations 1974 (SI 1974/1244), 20 years before the enactment of the host employer provision. If the drafter of the 1994 Regulations had wanted to qualify paragraph 9 by reference to control, there was a formula in paragraph 2 that could have been used. The failure to use that formula leads us to conclude that the Upper Tribunal in *Bilfinger* was not obviously wrong to conclude that the concept of "made available" in paragraph 9 does not import any requirement for control. We also consider that there is real force in HMRC's analysis that paragraph 9 is concerned with employment contracts that necessarily have two features: personal service and control. However, only the "personal service" element is called out by paragraph 9, leading to an inference that there was a deliberate decision not to refer to the "control" element. Overall, we are not convinced or satisfied that there was any error in the decision of the Upper Tribunal in *Bilfinger* in this respect.

Ordinary commercial subcontracting arrangements

73. Mr Grodzinski submits that the consequences of the Upper Tribunal's interpretation in *Bilfinger* demonstrate why it cannot be right. First, if it were right, it would logically have applied in the relevant period to what could be called "ordinary commercial subcontracting arrangements". Mr Grodzinski acknowledges that the underlying facts in *Bilfinger* were a long way from ordinary commercial subcontracting, but it is impossible, he submits, to discern what the differences are that would be relevant to the application of the provision as the Upper Tribunal interpreted it. The second and related point is that if the approach in *Bilfinger* were correct it could logically also have applied during the relevant period to make Operators liable for secondary Class 1 NICs as well.

74. By contrast, if Aramark's approach to the interpretation of the legislation is correct, Mr Grodzinski submits that it has the effect that there will only ever be one host who is liable because there will only ever be one host to whom one can say the employees will have been seconded and will only ever be one host who exercises day-to-day control over their activities. Overall, Aramark argues that interpretation adopted in *Bilfinger* is that it captures far too much. Although HMRC always disavowed any argument that ordinary commercial subcontracting arrangements are caught – possibly because the legislation contains no apportionment machinery and no provisions making more than one host jointly and severally liable for the NICs – there is no logical reason why, on HMRC's approach to the interpretation of the legislation, that result should follow.

75. The example presented to us by Mr Grodzinski as a paradigm of "ordinary commercial subcontracting" was the situation regularly found in the case of the construction of a building, where the main contractor subcontracts particular aspects of the construction (for example electrical work) to a specialist subcontractor. For example, a main contractor might instruct an electrician employed by the electrical subcontractor where to place an electrical socket, and Aramark questions why (on HMRC's interpretation) this does not amount to the personal service of the electrician being made available to the main contractor.

76. One difficulty with this argument is that it involves a false comparison. Aramark did not enter into an ordinary commercial subcontracting arrangement. It entered into an unusual arrangement under which, despite having signed contracts with Operators which required it to have access to individuals to perform those contracts, Aramark deliberately ensured that it had no contractual relationship with the necessary individuals. On the FTT's finding at FTT [161(3)], this arrangement was implemented with the sole objective of eliminating what would otherwise have been a secondary Class 1 NIC liability. In saying this, we should not be taken as expressing any moral judgment or evaluation. If Aramark's planning succeeds, it is entitled as a matter of law to the resulting saving in its NIC liability. However, we do not accept that an analysis of the theoretical tax treatment of a generic and hypothetical "ordinary commercial subcontracting arrangement", which Aramark did not implement, has much to say about the

correct analysis of the unusual arrangement which it did implement. We agree with the Upper Tribunal's conclusion to similar effect at Bilfinger [71].

77. That said, if HMRC's interpretation of the host employer provision means that it is incapable of being applied in any rational way to ordinary commercial subcontracting arrangements, we acknowledge that this would be a pointer against that interpretation. In our judgment, the application of the host employer provision will be acutely sensitive to the precise factual circumstances. However, there are at least two conceptual ways in which such subcontracting arrangements would not be caught by the host employer provision:

(1) In a straightforward case the requirement of paragraph 9(a) of Schedule 3 might not be met. Absent the unusual features that are present in this case, the electrician in the example set out in paragraph [75] might well be providing his or her personal service to the subcontractor rather than the main contractor.

(2) Similarly, or alternatively, the requirement of paragraph 9(b) of Schedule 3 might not be met. The electrician installing the socket might say with some justification that, while doing so in accordance with the main contractor's instructions, his or her services are rendered for the purposes of the subcontractor's business rather than for the purposes of the business of the main contractor. By contrast, in the unusual circumstances of this case, the FTT found that OSI was a "contractual shell" making it correspondingly difficult for OSI to establish that its employees were acting for the purposes of OSI's business.

78. We do not need to reach a definitive conclusion on how the host employer provision will apply in hypothetical circumstances in order to determine this appeal. However, we consider that the provision can be interpreted in a perfectly rational way so that it does not apply to ordinary commercial subcontracting arrangements. We are not satisfied or convinced that the Upper Tribunal's conclusion to that effect was wrong.

79. We appreciate that there may be difficult cases at the margin, but that is not unusual in relation to tax legislation. However, in our judgment the possibility of such difficult cases does not provide any sufficiently strong reason to depart from *Bilfinger*.

Conclusions on Issue 1

80. For the reasons we have given, we are not "convinced" or "satisfied" that *Bilfinger* was wrongly decided, or (in the words used in *British Gas*) that it was "manifestly wrong".

81. Accordingly, the FTT was wrong to hold that some degree of direction must necessarily lie with the host employer if the host employer provision was to apply, and, to that extent only, we consider that the FTT erred in law. It therefore follows that we accept HMRC's primary case and that, consequently, we find against Aramark on Issue 1. It is common ground that this conclusion means that Aramark's appeal must fail. It is therefore of academic interest only whether we set aside the FTT's decision and remake it with the same outcome, or if we simply decline to interfere with the FTT's overall conclusion. For completeness, however, we will proceed as set out below.

82. As we have found an error of law in the FTT's decision, we may (but need not) set aside its decision: see s12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. It is open to us to find that the FTT has made an error of law but reached the right result in any event.

83. The same issue arose in *Bilfinger* and for the same reasons as expressed by the Upper Tribunal in *Bilfinger*, we consider that there is no realistic possibility that the FTT in this case might have reached a different conclusion if it had correctly directed itself to the law. We find that the FTT's error of law was immaterial in the sense adopted by the Court of Appeal in *Degorce v HMRC* [2018] 4 WLR 79 at [95]. The decision of the FTT as to the outcome stands,

namely, that the host employer provision did apply throughout the relevant period with the result that Aramark was correctly assessed to secondary Class 1 NICs.

ISSUE 2 - *EDWARDS V BAIRSTOW* CHALLENGE

84. As we have found against Aramark on Issue 1, it follows that the appeal must be dismissed. However, we have been asked by the parties to consider Issue 2 in case this decision should be successfully appealed.

85. At the heart of Issue 2 is Aramark's submission that the FTT erred in law, in an *Edwards v Bairstow* sense, in concluding that it exercised the necessary degree of control over the OSI employees and in finding that the employees had been seconded to Aramark, and that this was a conclusion that no reasonable Tribunal could have reached on the evidence and primary facts as found. In addressing Issue 2, we have to assume that the FTT's findings at FTT [73] to [77] as to the need for control are correct.

86. There is no dispute between the parties as to the legal principles which should be applied, which are those set out in the decision of the Court of Appeal in *Re Sprintroom Ltd* [2019] EWCA Civ 932 at [76], as applied in the context of tax appeals in *JTI Acquisition Co v HMRC* [2024] EWCA Civ 652 at [71], namely whether the FTT's decision was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, lack of consistency, or a failure to take account of some material fact which undermines the cogency of the conclusion.

Aramark's submissions

87. Mr Grodzinski submits that the FTT's findings in relation to control were inconsistent with its primary findings of fact on the witness evidence and on the documents – in particular, but not limited to, the Offshore Manual. He submits that the FTT had found that all of the relevant OSI employees were line managed by OSI's Unit Manager on board the platforms, that they took their instructions only from that Unit Manager as to the work that they were to be doing, that the Unit Manager was the person responsible for managing their performance, and that neither they, nor the Unit Manager, had any regular contact with anyone from Aramark. Mr Grodzinski notes that this is not surprising given that Aramark operational staff, in particular Aramark's Operations Manager were all located physically onshore, hundreds of miles away from the Offshore Installations, at a time well before remote communications were as easy as they are today. Mr Grodzinski submits that these findings as to primary facts are inconsistent with the FTT's finding that day-to-day control over OSI's Crew was exercised by Aramark.

88. Mr Grodzinski took us through the evidence and factual findings of the FTT, in particular the findings that the Unit Manager was the most senior OSI employee on an Offshore Installation, and had responsibility for leading the hotel and catering services there – "including the direct line management of on-installation personnel" (FTT [87(10)]). He also referred us to the witness evidence relating to the role of the Unit Manager and the relationship between the Unit Manager and Aramark's onshore Operations Manager, which the FTT had found to be credible and consistent with the documentary evidence. In summary, Mr Grodzinski submits that the FTT found that the Unit Manager had a high degree of autonomy, was responsible for the line management of OSI's Crew and the first point of contact for any personnel issues whilst offshore. Experienced Unit Managers would have little contact with Aramark's onshore team, managing the vast majority of situations themselves. Their contact would be limited to contract performance reporting and the annual appraisal.

89. In more detail, Mr Grodzinski submits that the FTT erred in its findings relating to control for the following reasons:

(1) The FTT erred in finding at FTT [161(3)] that Aramark exercised

> "substantive and day-to-day control over the effective performance of duties through individuals employed by OSI. The principal means by which that control was exercised was through the [Offshore Manual] and ASSAMs"

Mr Grodzinski submits that the only reasonable conclusion open to the FTT on the basis of the evidence before it was that day-to-day granular control over the Crew was exercised by the Unit Manager (an employee of OSI), and therefore by OSI, and not Aramark. The fact that the Unit Manager exercised his authority consistently with the requirements of the Offshore Manual did not mean that it was Aramark, rather than OSI, that was exercising control. A manual cannot line manage or supervise the personal service of employees, let alone on a day-to-day or granular basis – the Offshore Manual could not control which individual chopped onions or washed-up dishes. That decision was in the hands of the Unit Manager.

(2) The FTT's findings are predicated on the Offshore Manual, in particular, being so important to the operation of OSI's services on Offshore Installations that it became a puppet master, with the Unit Manager ceding his authority and managerial discretion to the requirements of the Offshore Manual. Mr Grodzinski submits that the evidence does not support such a finding. Rather the evidence showed that the Offshore Manual was one of four sources from which a Unit Manager drew direction – but was not one of the two sources given particular emphasis. Mr Grodzinski referred us to the evidence of Mr Lowbridge (a Unit Manager) recorded at FTT [144], which he had identified as his engagement and discussions with the senior representative of the Operator on the Offshore Installation and his own experience, knowledge and skills.

Mr Grodzinski noted that the Operator Contract between Aramark and the Operator was itself highly prescriptive, and that to the extent that the functions of a Unit Manager were set out in a document, it was not just the Offshore Manual that was relevant – by way of an example, one of the Operator Contracts included provisions relating to menu choices, themed meals, how often particular areas are to be cleaned, and even the materials to be used for quilt covers. Mr Grodzinski submits that the Offshore Manual could not provide the only or primary direction over how the day-to-day activities of the Unit Manager and the rest of the Crew were carried out.

(3) The FTT erred at FTT [161(15)-(16)] by stating that:

> (15) We accept that a [Unit Manager], particularly one who had worked up through the ranks would autonomously determine what needed to be done on a day-to-day basis on the Offshore Installation in conjunction with the [Operator's manager]. However, given that ultimate accountability was through the [Unit Manager] to [Aramark's onshore Operations Manager] or operations team in terms of performance of the contractual services any superficial appearance that OSI directed day-to-day operations was an illusion.
>
> (16) Only through such direction/day-to-day control could the [Aramark] comply with the terms of its contract with the Operators.

Mr Grodzinski submits that the FTT failed to take account of the undisputed fact that the Unit Manager was an employee of OSI, and as such legally represented OSI. It was never, and is not, alleged that the employment of the Unit Manager by OSI (rather than Aramark) was a sham. As it was found that the Unit Manager would autonomously determine what needed to be done on a day-to-day basis, it was OSI (through its employee, the Unit Manager) which directed the day-to-day operations of the Crew.

(4) The FTT erred in finding at FTT [161(17)] that sections 1-6 of the Offshore Manual (dealing with the performance of the services contracted by the Operator) were critical to its decision, and that section 9 (concerning the management of the Crew) was not particularly relevant. Mr Grodzinski submits that to the extent that the Offshore Manual is taken into account in addressing whether Aramark exercised day-to-day control over the Crew, section 9 (dealing with management of people) is more relevant than sections 1-6. Mr Grodzinski referred to the provisions of the section 9 which, he submits, confirms that the Unit Manager autonomously exercised day-to-day control over the rest of the Crew.

(5) The FTT erred in finding that the Intercompany Agreement "did not constitute a commercial subcontracting relationship" between OSI and Aramark (see FTT [163]). Aramark would need to know whether the Operator Contract was being correctly performed, and so the mere fact that the Unit Manager reported to Aramark's onshore Operations Manager does not mean that the Intercompany Agreement is something other than a commercial subcontract. It was neither alleged nor found that the Intercompany Agreement was a sham, and the fact that it did not have the same kind of detailed provisions as the Operator Contract did not mean that it was uncommercial.

(6) The FTT erred in finding at FTT [163] that

> OSI also supplied food and consumables but that did not convert the secondment into a commercially subcontracted service.

Mr Grodzinski submitted that the FTT were correct to find that the host employer provision does not apply in circumstances where a subcontractor enters into an engagement for a "complete" or "composite" service (see FTT [65] and [78] and HMRC's "Offshore Intermediaries Guidance" discussed above). Mr Grodzinski noted that the FTT had found that the services supplied by OSI to Aramark included catering, housekeeping, and other services (see FTT [161(4) and (18)]). On the basis of these findings of fact, Mr Grodzinski submits that Aramark had contracted with OSI for a complete or composite service, and in consequence the FTT should have found that the host employer provision could not apply. In other words, Aramark was not contracting with OSI for the supply of a chef, but for a complete catering and housekeeping service.

Discussion

90. There is no dispute in relation to the primary facts found by the FTT. Rather, Aramark's appeal on Issue 2 concerns the evaluative findings made by the FTT in relation to those primary facts. Before addressing the detail of the criticisms set out in paragraph [89], we draw the following threads from the FTT's primary factual findings:

(1) The Operator Contracts concluded between Aramark and Operators are highly prescriptive – we noted in one example that it even extends to how duvets should be folded. The Operator Contracts specify in exacting detail how the "day-to-day" execution of the services provided by Aramark should be performed;

(2) The Operator Contracts need the work of individuals to fulfil them;

(3) By Clause 2.1 of the Intercompany Agreement, OSI undertook generally to use its best endeavours to ensure that Aramark's obligations under the Operator Contract were discharged (see FTT [115]);

(4) Aramark put in place systems to ensure that OSI was able to comply with that best endeavours obligation so that the "day-to-day" execution of the Operator Contracts was correctly performed;

(5) The Unit Manager is the senior person on the Offshore Installation responsible for the performance of the Operator Contract. The Unit Manager is employed by OSI and supervises the Crew and their work in executing the requirements of the Operator Contract;

(6) Mr Lowbridge, a Unit Manager, gave oral evidence before the FTT. He was "openly agnostic" (see FTT [142]) about whom he worked for. Whilst he has a high degree of autonomy and is not supervised by Aramark's onshore team on a day-to-day basis, he is ultimately accountable to Aramark's onshore team, for example, through an annual appraisal by Aramark's onshore Operations Manager. He follows the Offshore Manual. The Offshore Manual is highly prescriptive in order to ensure that the Unit Manager follows procedures that will ensure that Aramark complies with its obligations under the Operator Contracts;

(7) OSI was a contractual shell. It had a management team that was sufficient to take the decisions required of OSI under the Intercompany Agreement as specified in the Operations Manual. However, those decisions were limited to formal HR and contractual decisions and certain decisions taken on the basis of Aramark's recommendations; and

(8) It is Aramark that has drafted the Offshore Manual.

91. There were two options open to the FTT in evaluating the primary facts (including, but not limited to, the threads we have drawn out above):

(a) OSI retained "day-to-day control" of the Crew but ensured that the Crew would act in accordance with the Offshore Manual so that Aramark would meet its own contractual obligations to the Operator; or

(b) In substance and looking at the facts realistically, the combination of Clause 2.1 of the Intercompany Agreement and the processes that Aramark had put in place resulted in Aramark having day-to-day control of the Crew.

92. Choosing between those two options was ultimately an evaluative question for the FTT. We can identify no flaw in the FTT's decision to prefer option (b), such as a gap in logic, lack of consistency, or a failure to take account of some material fact which undermines the cogency of the conclusion.

93. We also find that, for similar reasons, there was no flaw in the FTT's finding (such as a gap in logic, lack of consistency, or failure to take account of a material fact) that the Intercompany Agreement was not a contract for a "complete" or "composite" service.

94. The overall conclusion expressed by the FTT is well within the range of reasonable conclusions. It is consistent with commercial common-sense and Aramark's need to have reassurance that it would be able to meet the exacting and prescriptive requirements set out in the Operator Contracts.

95. Accordingly, the detailed criticisms set out in paragraph [89] strike us as either "island hopping" or as quibbles with the phrasing of individual conclusions that do not address the FTT's decision as a whole. More specifically:

(1) Aramark is critical of the FTT's conclusions as to the significance of the Offshore Manual, arguing that the Offshore Manual "cannot control anyone". However, that does not engage with the totality of the FTT's reasoning. The FTT was not saying that a

document conferred control. Rather, its point was that Aramark had put in place a framework under which Crew would act in accordance with the Offshore Manual that Aramark had prepared with that framework meaning that, viewed realistically, it was Aramark rather than OSI that had day-to-day control over the Crew.

(2) It was a matter for the FTT to consider the significance of the Offshore Manual. It had in mind Mr Lowbridge's evidence at FTT [144] that he was guided and directed by sources other than the Offshore Manual. Aramark engages in "island-hopping" when it argues that this compelled the FTT to downgrade the significance of the Offshore Manual. There is nothing obviously wrong with the FTT's factual and evaluative conclusion at FTT [161(14)] that the Offshore Manual was the "foundation" on which Mr Lowbridge (and so other Unit Managers) led the Crew.

(3) There is no force in the suggestion that the FTT lost sight of the fact that the Unit Manager was an employee of OSI. The FTT recorded that fact in the Decision (see FTT [87(10)]). The FTT also noted the autonomy that the Unit Manager enjoyed. However, Aramark engages in island-hopping when it argues that these factors compelled a conclusion that OSI exercised control over Crew through the Unit Manager. There were other relevant factors for the FTT to evaluate as well, such as the fact that the Unit Manager, notwithstanding his or her autonomy, was acting within a framework devised by Aramark, and OSI's own lack of substance given that it was a "contractual shell".

(4) Aramark's arguments based on the relative significance of section 9 of the Offshore Manual as compared with sections 1 to 6 involve a simple disagreement with the FTT's factual and evaluative conclusions. The FTT had a multitude of evidence to consider, not all pointing in the same direction. It was for the FTT to decide how much weight to give to competing inferences that could be drawn from different sections of the Offshore Manual.

(5) Aramark's submission that the FTT should have concluded that the Intercompany Agreement was a "commercial subcontracting relationship" is an exercise in island-hopping that fails to address the totality of the FTT's conclusion. The descriptive label that the FTT chose to give to the Intercompany Agreement was simply an element in its overall conclusion. No doubt the Intercompany Agreement could be described in a variety of ways, but the FTT's chosen descriptors are incapable of vitiating its overall conclusion on the question of control.

(6) The same goes for the argument that the FTT should have concluded that OSI was providing a "complete or composite service" to Aramark. Aramark singles out some factors that it considers support that description at FTT [161(4)] and FTT [161(18)]. However, the FTT found that there were some matters in which OSI had no involvement at all such as the allocation of Crew to specific Offshore Installations (see FTT [161(5)]). Moreover, the FTT had to evaluate the significance of the point that OSI was a "contractual shell" and whether its freedom of action was constrained by the framework that Aramark had put in place. Aramark is in effect arguing that the FTT should have characterised OSI's role differently. However, that represents a simple disagreement with an evaluative conclusion expressed by the FTT after a careful consideration of competing evidence.

Issue 2 conclusions

96. For the reasons we have given, we are not persuaded that the FTT erred in finding that Aramark had not entered into a contract for the provision of a complete/composite catering and housekeeping service with OSI, or that it erred in finding that Aramark exercised the necessary degree of control over the OSI employees such that the host employer provision was engaged.

97. Accordingly, even if we were wrong in finding against Aramark on Issue 1, we would have found against Aramark in respect of Issue 2.

DISPOSITION

98. For the reasons given above, the appeal is dismissed.

MR JUSTICE RICHARDS
JUDGE NICHOLAS ALEKSANDER

Release date: 09 September 2026