Neutral Citation Number: [2015] EWCA Civ 805

Case No: A3/2014/1817

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
FTC342012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2015

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE LEWISON
and
LORD JUSTICE FLOYD

- -

Between :

REED EMPLOYMENT PLC & ORS	**Appellants**
- and -	
HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

MR IAN GLICK QC, MR ANDREW CLARKE QC, MR DAVID EWART QC & MR ADAM RUSHWORTH (instructed by **Slaughter & May)** for the **Appellants**
MR MALCOLM GAMMIE QC, MR ADAM TOLLEY QC & MS KATE BALMER (instructed by **The Solicitors Office, HMRC**) for the **Respondents**

Hearing dates : 21 and 22 July 2015

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Approved Judgment

Lord Justice Lewison:

Introduction

1. Reed Employment plc ("Reed") appeals from the decision of the Upper Tribunal (Tax and Chancery Chamber) (Proudman J and Judge Herrington) dismissing its appeal against the decision of the First Tier Tribunal (Judge Bishopp and Judge Avery-Jones) that payments made pursuant to two sets of arrangements with employees relating to travel expenses were taxable earnings in the hands of the employees and hence liable for PAYE and National Insurance Contributions ("NICs"). The Upper Tribunal also refused permission to apply for judicial review of a decision by HMRC to issue determinations and charge tax on those arrangements despite having granted a "dispensation" stating that no additional tax would be payable. The decision of the Upper Tribunal is at [2014] UKUT 160 (TCC), [2014] STC 1882. The decision of the First Tier Tribunal is at [2012] UKFTT 28 (TC), [2012] SFTD 394. The appeal is brought with the permission of the Upper Tribunal. There is approximately £158 million in dispute, although issues of quantum remain to be determined.

Factual background

2. I take the essential facts from the decision of the Upper Tribunal.

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

4. The appeal relates to two successive sets of arrangements operated by Reed which were intended to make use of changes to the law relating to travel expenses paid to employees. Travel expenses also include subsistence expenses but it not necessary to distinguish between them.

5. Those changes in the law were originally made in 1998 and the relevant provisions were at that time contained in the Income and Corporation Taxes Act 1988. These provisions are now contained in Parts 3 and 5 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). For the purposes of this appeal, there is no material difference between the two statutes in this regard and consequently like counsel and both Tribunals I refer only to the relevant provisions of ITEPA.

6. Before 1998, employees could not deduct any travel expenses for travel from home to work from their taxable earnings, and so Reed remunerated employed temps on the basis that they would have to pay such expenses out of their salaries: that is out of their net (after tax) earnings. Since 1998, payments to an employee in respect of travel expenses for travel to a temporary workplace falling within Chapter 3 of Part 3 and Chapter 2 of Part 5 of ITEPA have been deductible by that employee from his taxable earnings provided they constitute the reimbursement of expenses actually incurred. This system operates by bringing the payment into charge under Chapter 3 of Part 3, but then permitting a deduction to be made. The additional charge and the deduction

will in many cases be self-cancelling. Chapter 3 of Part 3 is part of what ITEPA calls the "benefits code".

7. In addition there is a mechanism under section 65 of ITEPA by which HMRC can issue a "dispensation." This is a notice issued by HMRC stating that in relation to particular payments, benefits or facilities no additional tax is payable by virtue of the benefits code. While such a dispensation remains in force the specified payments or benefits need not be brought into account for tax purposes. Thus the employer need not account for PAYE on such payments or benefits; and they do not count for NIC purposes.

8. Following the changes in the law and having received advice from its accountants, Robson Rhodes, Reed tried to make arrangements that would enable it to make non-taxable payments to its employed temps in respect of their travel expenses. The intention was that these arrangements would (if effective) produce a saving both of income tax and employer's NICs part of which would be shared with the employed temps. Reed instructed Robson Rhodes to negotiate a dispensation with HMRC to cover the proposed arrangements, which Robson Rhodes proceeded to do. Between 6 January 2001 and 5 April 2006 there were many meetings and other contacts between Robson Rhodes and HMRC relating to how the arrangements operated, or would operate, and to permitted levels of expenses.

9. The first set of arrangements, the Reed Travel Allowance ("RTA"), operated from 1998 until April 2002. The second set of arrangements, the Reed Travel Benefit ("RTB"), operated from April 2002 to April 2006.

10. Under both the RTA and the RTB, Reed's case is that it paid employed temps less by way of salary than would otherwise have been the case, together with (contractually separate) payments in respect of travel expenses. This type of structure is colloquially (but inaccurately) known as a "salary sacrifice". Under the RTA, the payment reimbursing expenses did not appear expressly on an employed temp's payslip but Reed contends that it was calculable from the figures shown. Following concerns expressed by HMRC over the payslips, Reed replaced RTA with RTB under which the amount of the payment of travel benefit was expressly shown on the payslip.

11. If these arrangements were effective, Reed would leave the employed temp with at least the same net after tax pay as he or she would have had before the arrangements were implemented with Reed having to account for less tax and employer's NICs to HMRC in respect of that pay.

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

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

14. By 2004 HMRC were beginning to have concerns about the arrangements and after a series of meetings and extensive correspondence in 2006, HMRC revoked the last of the dispensations with effect from 5 April 2006. In February 2007, HMRC made determinations under the Income Tax (Pay As You Earn) Regulations 2003 and issued notices of decision under the Social Security (Contributions) Regulations 2001 assessing Reed for sums in respect of income tax and employee NICs that HMRC claims Reed should have deducted from employed temps' salaries and paid over to it, and for sums in respect of employer's NICs for which HMRC claims Reed should have accounted during the periods covered by the dispensations.

The proceedings and issues

15. Reed appealed to the FTT against the determinations and notices of decision. It also applied for judicial review to quash them on the ground that HMRC's actions breached its substantive legitimate expectation, based on the dispensations, that income tax and NICs would not be due on the allowances covered by the dispensations. In due course the judicial review application was transferred to the Upper Tribunal and was stayed pending the hearing of the tax appeals by the FTT (although the FTT also found facts that might be relevant only to the judicial review application). Before the transfer Henriques J, sitting in the Administrative Court, ordered that the application for permission should be treated as the substantive hearing. Although the Upper Tribunal dealt with the application on that basis its formal decision was a refusal of permission to apply for judicial review.

16. The Upper Tribunal dealt with a number of issues, not all of which were raised on this appeal. Those that were raised are the following (which I have renumbered):

    i) **Issue 1.** Under the employed temps' contracts of employment did Reed (a) make payments reimbursing the employed temps' travel expenses in addition to paying their wages or (b) make a single global payment in which the payment on account of travel expenses was simply part of the employed temps' overall wages. Reed contends for (a). HMRC contend for (b); and both the FTT and the Upper Tribunal agreed with HMRC. If (but only if) Reed succeed on issue 1:

    ii) **Issue 2.** Did the employed temps travel to temporary or permanent workplaces? Reed contends that they travelled to temporary workplaces. HMRC contend that they travelled to permanent workplaces and both the FTT and the Upper Tribunal agreed with HMRC. If (but only if) Reed succeed on issue 1 but fail on issue 2:

    iii) **Issue 3.** Which of the sums in question are "sums paid in respect of expenses" and which are "earnings"? Reed contends that the test is whether the expenses are actually incurred by reason of the employment. HMRC contend that the test is whether the expenses are actually incurred in performance of the duties of the employment. Both the FTT and the Upper Tribunal agreed with HMRC.

iv) **Issue 4.** As mentioned Reed secured a series of dispensations from HMRC which were later withdrawn. Reed challenged by judicial review HMRC's decision to charge PAYE and NICs despite the earlier grant of the dispensation. The Upper Tribunal held that Reed should not be permitted to amend its grounds for judicial review and also decided that Reed had no legitimate expectation which would support the claim for judicial review, essentially because Reed had failed to make full disclosure in persuading HMRC to grant the dispensations. Thus the Upper Tribunal refused permission to apply for judicial review. Reed challenges both the refusal of permission to amend and also the finding that it made inadequate disclosure to HMRC.

17. In order to succeed in the tax appeal, Reed must succeed both on Issue 1 and also on either Issue 2 or 3. At the conclusion of the argument on Issue 1 we informed the parties that we would dismiss the appeal on Issue 1. In consequence all the other issues, including Issue 4, fell away. These are my reasons for joining in that decision.

Legal framework

18. Section 6 of ITEPA imposes a charge to income tax on (a) general earnings and (b) specific employment income. This appeal concerns general earnings only. Section 7 (3) provides that "general earnings" means (a) earnings within Chapter 1 of Part 3 and (b) any amount treated as earnings under Chapters 2 to 11 of Part 3 (the benefits code). "Earnings" are in turn defined by section 62 as follows:

> "(2) … "earnings", in relation to an employment, means—
>
> (a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
>
> (c) anything else that constitutes an emolument of the employment.
>
> (3) For the purposes of subsection (2) "money's worth" means something that is—
>
> (a) of direct monetary value to the employee, or
>
> (b) capable of being converted into money or something of direct monetary value to the employee."

19. The benefits code referred to in section 7 (3) (b) brings within the charge to tax payments in cash or kind which would not otherwise be within the scope of section 62. One such benefit is a sum (a) paid to the employee in respect of expenses, and (b) so paid by reason of the employment: section 70 (1).

20. However, certain deductions may be made from "earnings" in order to arrive at "net taxable earnings". These include travel expenses if they fall within section 337 or 338. But if the payments made in relation to travel expenses are "earnings" as defined by

section 62 then Chapter 3 does not apply, and we need not be concerned with the benefits code: section 70 (5).

21. Accordingly, Issue 1 turns on whether payments in relation to travel expenses under RTA and RTB were part of the earnings of employed temps as defined.

Contract terms

22. The FTT found that the RTA as described in the Staff Handbook was incorporated into the employed temps' contracts: (FTT [214]), even though the employees did not understand it and Reed concealed from them the amounts of the allowances and the manner in which it was operating the arrangements: (FTT [210] and [212]). They reached similar conclusions in relation to the RTB, although the RTB was "rather less opaque" than the RTA: (FTT [212], [214], [222]). The Upper Tribunal upheld that finding: (UT [253]).

23. In their skeleton argument counsel for Reed argued that once the Upper Tribunal had reached that conclusion it should have accepted that Reed reduced the amount that it paid an employed temp (unless he or she had opted out) by the amount of his or her travel expenses and made a separate payment reimbursing such expenses. Accordingly it was argued that the Upper Tribunal should have found in Reed's favour on Issue 1 without having to go any further. I regard that as an impossible submission. Given that the FTT found that both the RTA and the RTB were incorporated into the employed temps' contracts, the next question that must be asked and answered is: what was the substance of the contractual terms? Subject to one qualification that I will mention, that is the way in which both the FTT (FTT [209]) and the Upper Tribunal (UT [195]) approached the issue; and in my judgment they were correct to do so. In the course of his oral submissions Mr Glick QC for Reed concentrated on what the contract terms were and what they meant; and I will do likewise.

24. The only relevant authority to which we were referred on this issue was the decision of the House of Lords in *Heaton v Bell* [1970] AC 728. Mr Bell's employers introduced a voluntary car loan scheme for certain employees. The employer bought the cars, insured them and paid the road fund tax, and lent them to employees who joined the scheme. There was then subtracted from the weekly wage of those employees a sum of money which varied according to the type of car on loan. Mr Bell applied to join the scheme in 1961, and £2 10s. 0d. was subtracted from his wages each week. In 1963 Mr Bell exchanged the car for a new one, and the weekly subtraction from that time was £2 18s. 0d. That sum was reduced as the car became older. Mr Bell's weekly pay slip set out eight items included in the computation of his taxable gross wage. One of those items was a sum to be subtracted from the sum of the other items, in respect of the loan of the car. Under the scheme, Mr Bell could on 14 days' notice cancel the car loan agreement. On such cancellation becoming effective, the subtraction from his weekly wage would cease. The question was whether Mr Bell's emoluments included the "headline amount" on his weekly pay slip, or whether the charge for the car was to be excluded. The House of Lords held by a majority that Mr Bell's emoluments were the gross amount shown on his pay slip, and that he had merely agreed that his employers might deduct part of his emoluments in order to pay for the car. They also held, by a different majority, that in any event the car was a perquisite of Mr Bell's employment which he could at any

time have converted into money by opting out of the scheme. On either basis the quantified value of the car formed part of his emoluments.

25. Lord Morris said at 750:

> "In my view, there can be no doubt that the respondent obtained from his employers the right to use a car on terms which involved that he should pay to them whatever was from time to time an appropriate hire charge. As a matter of convenience he agreed that his payment was to be set off or deducted week by week from the amount which by his labour he had earned and which his employers therefore owed him. To dress that up as a wage reduction seems to me to be fanciful. The terms and conditions relating to the method of computing the respondent's earnings were in no way changed. If two craftsmen worked under precisely the same conditions so that they earned precisely the same amount and if one joined the car loan scheme while the other did not it would, in my view, be a mere delusion to treat the former as having agreed to a wage reduction (being a wage reduction which was to vary from time to time according as to how the cost of hiring the car varied). In truth there would have been an arranged and agreed deduction from wages. A deduction by any other name would be a payment just the same."

26. He also noted that Mr Bell's pay slips all began with the gross amount of Mr Bell's wages, from which deductions were then made.

27. Lord Hodson said at 757:

> "During the operation of the scheme there was an allocation for the purposes of the scheme of wages already earned and not, in my opinion, a fresh contract of employment at a reduced wage. This is no less true although the alteration is made through the employer by returning the money to him. The allocation is for the specific purpose of the scheme made at the request of the employee and is to be treated as a deduction from his gross wage."

28. Lord Upjohn said at 759:

> "It is quite clear that the exercise of this option to have the personal use of a motor-car in lieu of full wages had no effect upon the employment of the respondent in the sense that whether he had full wages or the use of a motor-car he performed precisely the same duties during precisely the same hours for a recompense at precisely the same rates as before and that his gross wages, taking this example with all its complex features, amounted to £33 9*s.* 2*d.* From this, though for a reason unspecified in the slip, the amount of £2 13*s.* 6*d.*

> due in respect of the operation of the car loan service was deducted."

29. Lord Diplock said at 763:

> "The weekly payslips issued by the company to Mr. Bell thereafter and receipted by him, disclose that he continued to be credited with flat rate wages, overtime and shift premiums and bonuses for the hours he worked at precisely the same rates as previously. These were, no doubt, those applicable to craftsmen of his grade under national or shop agreements. But he was debited with a weekly sum for the hire of the car, though no description of what it was appeared upon the payslip. When he was absent sick no deduction was made.
>
> In my view, the overwhelming inference is that the true agreement between him and the company was that the wages constituting the consideration for his services under his contract of employment should remain unchanged but that the company should be entitled each week to recoup themselves out of his wages, but not from any other source, the amount of his liability to them under his collateral agreement for the hire of the car."

30. Mr Glick submitted (and I agree) that the House of Lords was not laying down some principle of interpretation of contracts peculiar to tax. The same general principles apply as they do in any other context. There is no requirement of "enhanced clarity" where the question arises in the context of taxation. The document or documents in question must be interpreted in the ordinary way: *IRC v Wesleyan and General Assurance Society* [1946] 2 All ER 749 (Lord Greene MR). That said, the court must look at the reality of the situation, and not be taken in by camouflage: see Lord Upjohn in *Heaton v Bell* at 760E.

31. The starting point, in my judgment, is the contractual terms on which the employed temps were engaged. It is unfortunate that the contractual terms relating to pay received only a passing mention in the decision of the FTT ([158]) and the Upper Tribunal ([86]) and played little part in their analysis (FTT [217] and Upper Tribunal [226]). That is the qualification to which I referred earlier.

RTA

32. Before the introduction of the RTA employed temps were paid an amount calculated as the product of an agreed hourly rate and the number of hours worked: (FTT [109]). The first set of relevant contract terms (applicable from the introduction of RTA to the expiry of the first two years of RTB) provided so far as relevant:

> "5. The hourly rate for the assignment is as stated on the Temporary Employee's application form held at the branch where the Temporary Employee is registered.

> 7. Reed shall pay wages to the Temporary Employee only in respect of hours worked as certified by the Client and calculated at the hourly rates (a proportion of which may be Profit Related Pay and Travel Expenses) agreed at the commencement of the assignment."

33. The FTT quoted what the Staff Handbook said about RTA at [106]:

> "REED'S TRAVEL ALLOWANCE SCHEME
>
> Participation in this scheme means that for each day that you work in a booking for Reed you can benefit from an amount additional to your normal hourly rate.
>
> HOW DOES THE SCHEME WORK?
>
> If you are eligible (see below) you will receive a Travel Allowance for each day that you work as a Reed Temporary: The value of your Travel Allowance will show on your payslip that week. The scheme is designed to be a tax efficient benefit agreed with the Inland Revenue.
>
> HOW MUCH WILL I RECEIVE?
>
> The current rate is an extra £1.50 a day for each day you work over 5 hours with the same client or, if you work less than 5 hours, the rate is 75p per day. These rates may be revised from time to time. So, if you have worked more than 5 hours a day for us every weekday for a year you will receive £378 over the course of the year. Tax and National Insurance is taken off the Travel Allowance Scheme amount at your normal rate.
>
> WHO IS ELIGIBLE?
>
> All temporaries working for Reed Staffing Services Limited are eligible except those who submit a claim for travel expenses. Unfortunately, if you trade with Reed as a Limited Company, you will not be able to be included in the scheme. Also, if you work for Reed Agency Services, then you will not be able to participate. Your Reed branch will be able to inform you if you are working in a Reed Agency Services booking.
>
> DO I NEED TO DO ANYTHING TO BE INCLUDED IN THE SCHEME?
>
> No, if you are eligible, you need do nothing. Please note that if you are in the scheme, you must not include your actual travel and subsistence costs incurred whilst working through Reed as an expense on your tax return. If for any reason you wish to opt out of the scheme, you may do so by letting us know in writing.
>
> HOW IS THE SCHEME SHOWN ON MY PAY SLIP?

> • Your total travel and subsistence allowance is shown as "Travel Allowance" beneath your timesheet pay on the left of your payslip. This value is a gross value, ie, Tax and National Insurance will be deducted from it.
>
> • Beneath this a figure appears next to the phrase "Exp Adj". This represents the adjustment to your gross pay to allow for the reduction in the total amount of Income Tax and National Insurance due under the scheme.
>
> • The agreement with the Inland Revenue means that the Tax and National Insurance deductions on your total pay (shown on the right of your payslip) are lower than they would have been without the scheme.
>
> • The end result is that you get more pay in your pocket than you would have without the scheme.
>
> • You can work out approximately how much more you get by taking your normal rate of tax off the Travel Allowance sum.
>
> WHAT DO I DO NOW?
>
> All you need do, as an Inland Revenue requirement of the scheme, is to tell us your daily mileage and if you use public transport to travel to work. You can do this by filling in the boxes on your timesheet each week. Please make sure that you do this, if appropriate, as failure to do so may result in your exclusion from this benefit."

34. The FTT found that following the introduction of the RTA the starting point remained the product of the agreed weekly rate and the hours worked: (FTT [110]). However, that sum was adjusted as the FTT described at [110]:

> "The total so determined was then adjusted, as the scheme was explained to us, first by the deduction of an amount which was equal to the allowance (for travel expenses, subsistence or both) permitted in the case of that temporary employee by the application of the scale rates set out in the then current dispensation. The tax and NICs for which the employed temp was liable were then calculated by reference to the net amount. The amount previously deducted was then added back, as a non-taxable payment. The taxable pay was then reduced again, by such an amount (the 'Exp Adj' figure) that the net sum the employed temp received was the same as he or she would have received in the absence of the RTA scheme. The 'Exp Adj' figure was simply the difference between the tax and NICs the employed temp would have paid had he or she not participated in the scheme, and the reduced tax and NICs which resulted from that participation. Finally, the taxable pay was increased

> (taking the figures applying from 2001) by £1.50 or 75p per day, depending on the number of hours worked, a sum which on the payslips was misleadingly called 'travel allowance', though elsewhere it was described as a 'travel-to-work payment' (the term we use in this decision). The benefit to the employee of being in the scheme was the after-tax/NICs amount of this payment."

35. The FTT commented as follows at [215]:

> "The description of the RTA scheme set out in the handbook issued to employed temps in the latter part of 2001 (which is set out at para [106] above) makes no mention whatever of any salary sacrifice, not merely in the sense that the phrase does not appear (the words used are, of course, not in themselves of any significance provided the meaning is clear) but in that there is nothing anywhere to suggest that the employed temps were giving up anything at all. They were offered an additional benefit, what in that description was referred to as the 'Travel Allowance' (for which we have used the term travel-to-work payment), but one searches in vain for any indication that part of the salary had to be given up, even if it was nevertheless paid in a different guise."

36. The FTT then considered the "adjustment to your gross pay" to which the Handbook referred and said at [216]:

> "This statement does not assist Reed because, as we have said, the 'Exp Adj' is, despite its description, a deduction from net pay and it is not claimed to reduce taxable salary, which is necessary to its constituting a salary sacrifice. It is also the wrong amount as the sacrifice should be the amount of the allowance, calculated in accordance with the current dispensation, whereas 'Exp Adj' equals the aggregate of the tax and NICs on the amount of the allowance. In any case it is, at best, doubtful whether any employed temp reading that passage would understand it to mean that he or she was giving up any salary; moreover, the numerous enquiries by concerned employed temps, to Reed and to HMRC, are in our view clear evidence that they did not. Although, as we have said, it may not be necessary for the validity of a contract that both parties fully understand it, it seems to us to be a bare minimum (in this context) that the employed temp should know he or she was required to give up x in order to receive y (even if x and y happen to have the same monetary value). We do not understand how anyone can be said to have agreed to sacrifice anything in complete ignorance. But even if we are wrong in that conclusion, it does not seem to us that the employed temps made a salary sacrifice as a matter of fact."

37. They added at [217] for good measure that there was no evidence that any participant in the RTA arrangement was "told that they were to be paid anything other than a salary derived from multiplying the agreed hourly rate by the number of hours worked." The Upper Tribunal decided that the FTT had been entitled to come to that conclusion (UT [235]). Mr Glick submitted that that was not the right question. The question was not whether the FTT was entitled to come to their conclusion, which would have been the appropriate question in dealing with a question of fact. The interpretation of the contractual documents remains classified in English law as a question of law, on which the Upper Tribunal should have made up their own minds. I agree with that submission; but it does not matter because the FTT were obviously right.

38. The contract terms are, in my judgment, clear. The employed temp is entitled to be paid the product of the agreed hourly rate and the number of hours worked. Far from contemplating an additional payment for travel expenses, clause 7 envisages that travel expenses form part of that product. Equally clause 7 does not contemplate two separate contractual payments; but only one calculated as the product of the hours worked and the hourly rate. Thus far it is plain that the whole of the product of the hours worked and the hourly rate would count as "earnings" for tax purposes. However, these contract terms do not stand alone. They are supplemented by the Staff Handbook. But it is equally important to have in mind that the contract terms remained in force throughout the operation of the RTA; so the two must be read together.

39. Did the Staff Handbook make any difference to the contract terms? The explanation of RTA does not purport to alter the calculation required by clauses 5 and 7 of the contract terms. Nor did it do so in fact. On the findings of the FTT, which are not susceptible to challenge, following the introduction of RTA the starting point for the calculation of the employed temps' wages remained the product of the agreed weekly rate and the hours worked. The Staff Handbook also says that the Travel Allowance is "additional to your normal hourly rate". It does not suggest that there is to be any change in the normal hourly rate itself, or that the normal hourly rate would be affected by participation in the arrangement. Nor does it suggest that the number of hours worked would be reduced for the purposes of calculating pay. The contract terms in the conditions of employment remained unaltered. What we are concerned with is the amount of an employed temp's "gross wages" (see Lord Upjohn in *Heaton v Bell* at 759) or "wages already earned" (see Lord Hodson at 757). We are therefore concerned with the headline rate and not with the bottom line. In the language of *Heaton v Bell* the terms and conditions relating to the method of computing the employed temps' earnings were in no way changed. The employed temps performed precisely the same duties during precisely the same hours for a recompense at precisely the same rates as before. Take an example analogous to that described by Lord Morris. Assume two employees, one of whom is covered by RTA and the other of whom opts out. It would be wholly unrealistic (even if one might not call it a delusion) to say that the former had agreed a wage reduction but the latter had not. Even the language of the handbook explaining RTA contradicts Reed's case. Far from saying that the employee's normal rate would be reduced, it says in terms that the employee will benefit "from an amount *additional* to your normal hourly rates". The deduction described as "Exp Adj" is said to be a deduction from "your gross pay" and the deductions for tax and NIC on "your total pay" are lower than they would

otherwise have been. It is gross pay or total pay that counts as earnings. Both the language and the reality militate against the conclusion that any employed temp agreed to a wage reduction, or that there were two separate contractual payments.

RTB

40. The contract terms that I have quoted operated for the first two years of RTB. They were then replaced by fresh contract terms which stated so far as relevant:

> "8. The hours of work likely to be involved and the hourly rate for the assignment will be as notified to the Temporary Employee prior to the commencement of the assignment.
>
> 14. The Temporary Employee will be paid only in respect of hours worked which have been verified, at the hourly rates agreed at the commencement of the assignment or secondment.
>
> 15. Reed undertakes to pay the Temporary Employee in respect of work done, whether or not the Client has paid Reed in respect of such work.
>
> 23. When properly owing, Reed shall pay wages for hours worked, holiday pay and where appropriate other benefit such as travel allowance to which the Temporary Employee may be entitled…"

41. Once again in my judgment the terms of the contract are clear. The employed temp is entitled to be paid under clause 14 the product of the hours worked and the hourly rate. Travel allowance is regarded by clause 23 as something paid on top of the payments due under clause 14. There is no suggestion that a different hourly rate (or a different method of counting hours worked) applies if an employed temp receives a travel allowance.

42. Does the other material make any difference? The FTT quoted from a leaflet explaining the RTB at [132]:

> "How does the RTB differ from the Reed Travel Allowance Scheme?
>
> In short, participating in the Reed Travel Allowance Scheme meant that an individual would benefit by receiving an additional 75p or £1.50 per day, depending on the number of hours they worked. The RTB however works differently, in that the benefit to each Temporary/Contractor will depend on their individual Tax and NI circumstances.
>
> What do the Temporaries/Contractors need to do?
>
> As before, there will be a box on the timesheet for the Temporary/Contractor to indicate if they travel to work by Public Transport as well as a box to complete the number of miles they travel to work if they use their own transport.

> However an additional box will now be included on the timesheets. This box will need to be completed by the Temporary/Contractor with the number of days in which their day covers a meal break.
>
> What do the figures on the matrix mean?
>
> This table shows the daily amount by which the Temporary/Contractor is agreeing for their gross pay to be reduced by in order that they can receive the net benefit of participating in the RTB."

43. The handbook was also revised to cater for the RTB. The FTT quoted from the February 2006 version at [135]:

> "'As a Temporary Worker, Reed offers you the opportunity to increase your take-home pay through the Reed Travel Benefit ("RTB").
>
> The travel benefit has been negotiated with HM Revenue and Customs on your behalf and provides you with a tax- and NI-free travel and subsistence allowance as part of your pay rate. This reduces your taxable and NI-able income and therefore increases your take-home pay.
>
> Will I ever receive less pay by being in the RTB?
>
> No. On your payslip each week, the Tax, National Insurance and Net Pay that you would have received had you not participated in the RTB will be shown. This will demonstrate that you do not receive less net pay through the RTB and in the majority of cases you will receive more.
>
> How do I claim my Travel Benefit?
>
> We require you to complete your Timesheet with the information listed below, which enables Reed to calculate your Tax and National Insurance free expense value.
>
> To allow Reed to apply the RTB, you will need to make a salary sacrifice reduction to your gross pay. The amount of this reduction will depend on your Tax and National Insurance position."

44. The FTT commented that this time the paperwork did refer to a "salary sacrifice" (FTT [223]) but continued at [224]:

> "As before, the employed temps earned a sum calculated by multiplying the agreed hourly rate by the number of hours worked. There was no separate identification of the travel and subsistence allowance claimed to be included, and no differentiation in the calculation of the 'headline' pay between

> those who did and those who did not incur travelling and subsistence expenses—and one who used public transport one week and walked or cycled to work the next earned the same gross amount in each week (assuming the same hourly rate and the same number of hours). Similarly, two employed temps with identical expenses but different tax and NICs liabilities were treated differently: as we have said, the scheme had only a tenuous link with actual travel and subsistence costs. The revised RTB payslips identified a sum as 'RTB non-taxable exp TP' (or 'RTB Expenses TP'), a payment which one might deduce had been made in respect of expenses, but its make-up was not revealed, nor was there anything on the payslip from which it might be worked out: to do that it was necessary to know the amounts set out in the current dispensation, but they were not revealed. It is apparent that the aggregate of that sum and what is recorded as 'taxable pay TP' equals the 'total payments' (that is, the gross pay less RTB Adj).”

45. They concluded at [225]:

> “The supposed sacrifice under the RTA scheme was matched by a corresponding gain, so that there was no true sacrifice. The RTB scheme was different; the sample payslips produced to us show that the amount sacrificed was not the same as the amount gained, but in some cases was higher and in others lower. But we do not think that matters. In our view a salary sacrifice implies reciprocity: the employee gives up a portion of his or her earnings, even if the portion is variable, in exchange for an identified benefit provided by the employer. Reed, however, did not provide any benefit at all; it merely applied the dispensation in order to enable it to attribute part of the pay, entirely notionally, to the reimbursement of expenses, so that the tax and NICs burden could be reduced. Far from providing a benefit to the employed temp, it appropriated a significant part of the saving to itself; and the supposed sacrifice, however it was presented, was no more than an arithmetical adjustment whose purpose was to ensure that Reed secured the intended share of the benefit. It was not, in our view, a sacrifice in the true sense of that word.”

46. Once again the Upper Tribunal held that the FTT was entitled to reach that conclusion: (UT [238], [239]). But for the reasons given by Mr Glick that, too, was not the right question. The question is what the contract terms mean.

47. Mr Glick relied on a different version of the Staff Handbook before us. That version (which was a 2002 version) said:

> “One of the most unique benefits, which you can receive by working for Reed, is the Reed Travel Benefit (RTB). This travel benefit works by offering you:

> • Higher net pay through a reduction in taxable and Niable income….
>
> To allow Reed to administer the RTB, we will need to make a small reduction to your gross pay. The amount is dependent on your Tax and National Insurance position and you can see which adjustment will apply to you by referring to the matrix on the following page….
>
> Will I ever receive less pay by being in the RTB?
>
> No. On your payslip each week the Tax and National Insurance and net pay which you would have received had you not participated in the RTB will be shown. This will demonstrate that you will not receive less net pay by being in the RTB and in the majority of cases you will receive more."

48. The FTT found that the employed temps earned a sum calculated by multiplying the agreed hourly rate by the number of hours worked. Again the contract terms (and in particular clauses 14 and 23) explicitly required Reed to pay the product of the hours worked and the hourly rate. Any travel allowance would be on top of that. Accordingly once again the employed temps performed precisely the same duties during precisely the same hours for a recompense at precisely the same rates as before. The headline rate, which represents "wages already earned" or "gross wages", remained the same both before and after the introduction of RTB; and would have been the same for an employed temp covered by RTB and an employed temp who opted out. The first reduction referred to in the Staff Handbook is a reduction in "taxable" pay. The headline rate or gross pay remains the same. The subsequent statement that there will be a small "reduction to your gross pay" is at best ambiguous and cannot, in my judgment, override the clarity of the contract terms. As Lord Upjohn observed in *Heaton v Bell* at 760A there is no difference between a reduction of and a deduction from gross wages which the employee had already earned. What the employee had already earned was the product of the hours worked and the hourly rate as provided by clause 14 of the contract terms. The answer to the question "will I receive less pay?" given by the Staff Handbook is an unequivocal "No". That is quite the opposite of saying that you will receive less pay, but you will receive an additional travel allowance to make up for it.

49. Mr Glick also showed us an example of an RTB payslip. He accepted that the payslip did not form part of the contractual documentation, but submitted that it was evidence of conduct which showed what the parties had in fact agreed. The payslip did indeed contain a comparative calculation of what the employee would have received if she had not been in the RTB, as the 2002 Staff Handbook had explained. However the payslip also showed very clearly that, for both the RTB and the non-RTB case, the employee was paid by reference to her hourly rate multiplied by the number of hours worked. The payslip comes nowhere near showing that the employee had agreed to a reduced wage plus a tax free travel allowance.

50. In my judgment both the FTT and the Upper Tribunal were correct in deciding Issue 1 against Reed.

51. On this basis, the remaining issues do not arise. It was for these reasons that I joined in the decision to dismiss the appeal.

Lord Justice Floyd:

52. I agree.

Lord Justice Longmore:

53. I agree also.