Neutral Citation Number: [2025] EWCA Civ 1290

Case No: CA-2024-002400

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Mr Justice Adam Johnson and Upper Tribunal Judge Thomas Scott
[2024] UKUT 00233 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 October 2025

Before:

LADY JUSTICE KING
LORD JUSTICE ARNOLD
and
LADY JUSTICE ELISABETH LAING

- -

Between:

MAINPAY LTD	**Appellant**
- and -	
THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS	**Respondents**

- -
- -

Michael Firth KC (instructed by direct access) for the **Appellant**
Sadiya Choudhury KC and Ronan Magee (instructed by **HMRC Legal Group**) for the **Respondents**

Hearing dates: 22 and 23 July 2025

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Approved Judgment

This judgment was handed down remotely at 11.00 am on 10 October 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. This is an appeal from a decision of the Upper Tribunal (Tax and Chancery Chamber) ('the UT'). The UT upheld a decision of the First-tier Tribunal (Tax and Chancery Chamber) ('the F-tT'). The F-tT had dismissed the appeal of the taxpayer ('Mainpay') from determinations and notices issued by the Commissioners of His Majesty's Revenue and Customs ('HMRC').

2. On this appeal, Mainpay was represented by Mr Firth KC, who appeared in the tribunals below. Ms Choudhury KC represented HMRC. She also appeared in both tribunals below. Junior counsel for HMRC, Mr Magee, did not appear below. He argued ground 2. I thank counsel for their written and oral submissions.

3. As I will explain, there were three broad issues in the appeal in the UT, which are reflected in the issues on this appeal. I list the grounds of appeal in paragraph 92, below. The first is the nature of the relationship between Mainpay and its temporary workers ('the workers'). HMRC contended that that relationship was not an overarching contract of employment, and that if there was no overarching contract of employment, there could not be a 'single employment'. The second only arises if HMRC is wrong about that. It concerns the amounts of expenditure which might be deductible for tax purposes. The third only arises if HMRC are right on the first issue. It concerns assessments for two tax years only and whether time for making those assessments should be extended. The question is whether any loss of tax in those years was 'brought about carelessly'. For the reason given below, I would dismiss the appeal on ground 1, on which I have reached a clear view. That means that ground 2 does not arise, and I prefer to express no view about it. I would also dismiss ground 3. In short, the F-tT directed itself correctly on this issue. It was entitled to hold that the relevant loss of tax was brought about carelessly.

The statutory provisions

4. It is convenient to start with the statutory provisions, as these may make it easier for the reader to follow the reasoning of the F-tT and of the UT, which I summarise below.

5. Section 29 of the Taxes Management Act 1970 ('the TMA') provides, so far as is material (with my emphases):

> '29. Assessment where *loss of tax* discovered
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment -
>
> > (a) that any income…which ought to have been assessed to income tax…[has] not been assessed…
>
> the officer or, as the case may be, the Board may, subject to subsection (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown *the loss of tax*.
> (2) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) the situation mentioned in subsection (1), above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,
>
> the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in in accordance with the practice generally prevailing at the time when it was made.
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above –
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that *the situation mentioned in subsection (1) above was brought about carelessly* or *deliberately* by the taxpayer or a person acting on his behalf.'
>
> The second condition, briefly, is that an officer of the Board could not reasonably have been expected, at the relevant time, on the basis of information made available to him at that time, to be aware of the situation mentioned in section 29(1) (section 29(5)). Section 29(6) makes further provision about the second condition.

6. Section 34(1) of the TMA enacts an 'ordinary time limit of four years' for an assessment of income tax. That limit is subject to other provisions in tax legislation which set longer periods. The four-year period runs until four years after the end of the year of assessment to which it relates. An objection to such an assessment may only be raised on an appeal (section 34(2)).

7. Section 36(1) of the TMA provides (with my emphases):

> 36. 'Loss of tax *brought about carelessly or deliberately* etc
>
> (1) An assessment on a person in a case involving a *loss of income tax…brought about carelessly* by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates.'
>
> Section 36(1A) provides a time limit of 20 years in four other cases, one of which is involves 'a loss of income tax…(a) brought about *deliberately* by the person'.

8. Section 118 of the TMA is headed 'Interpretation'. Section 118(1) lists various definitions which apply 'unless the context otherwise requires'.

9. Subsections (2), (4) and (5) all begin with the phrase 'For the purposes of this Act…' Section 118(2) and (4) contain the phrase 'shall not be deemed to be' or 'shall be deemed to be', as the case may be. Section 118(6) contains the phrase 'shall be treated for the purposes of this Act as…' Section 118(5)-(7) were inserted by paragraph 15 of Schedule 39 to the Finance Act 2008, with effect from 1 April 2010 (or in some cases, 1 April 2012).

10. Section 118(5) provides (with my emphases):

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

11. Section 118(6) applies, in short, where a person provides information to HMRC, later discovers that it was inaccurate, and then fails to take reasonable steps to tell HMRC. If that is so, 'any loss of tax or situation brought about by the inaccuracy shall be treated for the purposes of this Act as having been *brought about carelessly* by that person'. So section 118(6) expands the scope of section 118(5) (with my emphasis).

12. Section 118(7) provides:

> 'In this Act, references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or situation that arises as a result of deliberate inaccuracy in a document given to [HMRC] by or on behalf of that person'.

13. Section 4 of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA') provides

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

14. Section 338 of ITEPA provides:

> '338 Travel for necessary attendance
> (1) A deduction from earnings is allowed for travel expenses if-
> (a) the employee is obliged to incur and pay for them as a holder of the employment, and
> (b) the expenses are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment.
>
> (2) Subsection (1) does not apply to the expenses of ordinary commuting or travel between any two places that is for practical purposes substantially ordinary commuting.
> (3) In this section 'ordinary commuting' means travel between-
> (a) the employee's home and a permanent workplace, or
> (b) a place that is not a workplace and a permanent workplace.'

15. Section 339 of ITEPA provides (with my emphases):

> '339 Meaning of 'workplace' and 'permanent workplace'
> (1) In this Part 'workplace', in relation to *an employment*, means a place at which the employee's attendance is necessary in the performance of the duties of *the employment*.
> (2) In this part 'permanent workplace' in relation to *an employment*, means a place which

> (a) the employee regularly attends in the performance of the duties *of the employment*, and
> (b) is not a temporary workplace.
>
> This is subject to subsections (4) and (8).
> (3) In subsection (2) 'temporary workplace' in relation to *an employment*, means a place which the employee attends in the performance of the duties *of the employment*-
>
> (a) for the purposes of performing a task of limited duration, or
> (b) for some other temporary purpose.
>
> This is subject to subsections (4) and (5).
> (4) A place which the employee regularly attends in the performance of the duties *of the employment* is treated as a permanent workplace and not a temporary workplace if-
>
> (a) it forms the base from which those duties are performed, or
> (b) the tasks to be carried out in the performance of those duties are allocated there.
>
> (5) A place is not regarded as a temporary workplace if the employee's attendance is
>
> (a) in the course of a period of continuous work at that place-
>
> (i) lasting more than 24 months, or
> (ii) comprising all or almost all of the period for which the employee is likely to hold *the employment*, or
>
> (b) at a time when it is reasonable to assume that it will be in the course of such a period'.

The decision of the First-tier Tribunal

16. The F-tT ('decision 1') is a lucid introduction to the facts and the legal issues. If the F-tT did not err in law, the decision of the UT to uphold the F-tT's decision is of little legal significance. The decision of the F-tT is, therefore, the primary focus of this appeal, and of this judgment.

17. Mainpay describes itself as 'an employment business or umbrella company which supports temporary workers with all of their contracting needs, providing a fully compliant and tax efficient salary service'. The people whom Mainpay engages work mainly in education, health, and social care. Mainpay has contracts with employment agencies, which, in turn, have contracts with organisations such as schools and hospitals. Mainpay's case was that as it has a continuing contract with its workers, each of the places at which a worker works on an assignment is a temporary workplace (or, if it is not a temporary, is not a permanent, workplace).

18. If that was right, Mainpay was entitled to reimburse the workers' travel and subsistence expenses and to deduct those amounts from their income for the purposes of income tax and National Insurance Contributions ('NICs'). Mainpay was also, it argued, entitled to reimburse subsistence expenses using a round sum or benchmark scales rather than requiring the workers to provide evidence of their expenses, despite not having applied for (or having been granted) a dispensation in accordance with section 65 of ITEPA which would have confirmed that those payments would incur no liability to tax.

19. HMRC's case was that each assignment was a separate employment. That meant that the worker was working, in respect of that assignment, at what, for the purposes of that assignment, was a permanent workplace. If that was right, travel and subsistence expenses were not deductible at all. If that was wrong, Mainpay was not entitled to use benchmark rates, as, without a dispensation, an expense is not deductible without evidence that it has been incurred. HMRC therefore issued determinations under regulation 80 of the Income Tax (Pay as You Earn) Regulations 2003 for the years ending 5 April 2010 - 5 April 2014, relating to income tax under the Pay as You Earn scheme ('PAYE') and notices of decision under section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 in respect of NICs for the year ending 5 April 2010. Those were based on a denial of a deduction for subsistence expenses for Mainpay's workers.

20. The first two of the determinations under regulation 80, and the notices of decision for the tax year ending 5 April 2011, were issued more than four years after the end of the relevant tax year. They were not valid unless HMRC showed that any loss of tax was brought about carelessly by Mainpay, so that the six-year time limit for assessment under section 36 of the TMA applied.

21. The F-tT was not concerned with travel expenses, but only with subsistence expenses (paragraph 9). The position for the first three tax years was different from the position for the fourth year, because on 6 April 2013, Mainpay changed its contract with its workers. That meant that some of the issues for the decision of the F-tT also differed as between those tax years.

22. The F-tT quoted the relevant parts of sections 338 and 339 (see paragraphs 14 and 15, above). The F-tT commented that no deduction was available for expenses of an employee's attendance at a permanent workplace '(as this is ordinary commuting within section 338(2) and (3)'. The 'key question', therefore was whether the workplaces to which Mainpay's workers went in the course of their assignments were permanent workplaces.

23. HMRC argued that each assignment was a separate employment so that each workplace was a permanent workplace, and the employee's attendance was for 'all of the period for which they hold the employment'. Mainpay's argument was that all of the assignments were done under the terms of a single employment, so that each workplace was a temporary workplace. Their alternative argument was that each assignment is relatively short, with the result that workers did not attend a workplace 'regularly' within the meaning of section 339(2)(a). The result was that there could be a workplace which was neither temporary nor permanent. The expenses of attending such a workplace are deductible as section 338 only denies deduction if the workplace is a permanent workplace.

24. The F-tT summarised the nature of the evidence in paragraphs 20-31. Mr Andre Hugo was Mainpay's main witness. He was a consultant who advised Mainpay about accounting and finance, including PAYE. He was responsible for advising Mainpay whether its business complied with tax law, and for liaison with external advisers. While

the F-tT considered that he was truthful, they considered that 'there was more he could have told us'.

25. The F-tT explained why (paragraphs 21-24 of decision 1). He was 'the key person tasked with advising Mainpay on whether its operations complied with the relevant tax provisions, and, to that end, was the liaison between external advisers and Mainpay. As the ability to deduct expenses depended on ensuring that the business followed the correct procedures, we have little doubt that he knew more than he was letting on'. The F-tT expressed its surprise that he said he did not know much about the day-to-day operation of Mainpay's business, and that he did not know how assignments were given to workers. That was an important point for Mainpay's case, and the F-tT concluded that he did not answer the question because 'the true answer, confirmed by Mr Harker…was unhelpful to Mainpay's case' (paragraph 24). In paragraphs 52-54 the F-tT explained why it rejected Mr Hugo's speculation about how assignments were given to workers.

26. HMRC relied on witness statements from two officers who were involved in the HMRC investigation. One of them had retired by the date of the F-tT hearing.

27. The contracts between Mainpay and the workers were 'central to the dispute' (paragraph 30). The 2010 contract was adopted 'with the assistance of the law firm Mishcon de Reya towards the end of 2007 and in early 2008'. It was 'clear from Mishcon de Reya's advice that it was not intended to be a contract of employment'. That was reflected in the terms of the 2010 contract (paragraph 32).

28. The 2013 contract was 'again drafted with the assistance of external lawyers…Brebners'. The F-tT did not have any extracts from correspondence with them and had 'little evidence of what prompted the change'. There was a suggestion that it was triggered by an HMRC investigation into Mainpay's business which started in December 2011. 'Mr Hugo's evidence was that the sector was constantly evolving and that they were therefore taking advice on an ongoing basis' (paragraph 41).

29. There was no dispute that the 2013 contract was a contract of employment and 'it was clearly intended to be one'. The 'key question… was whether it was an overarching contract of employment (covering not only the assignments but also gaps between assignments) or whether each assignment constitutes a separate employment' (paragraph 42). The F-tT summarised the terms of the contract in paragraphs 43-50.

30. In paragraphs 51-54, the F-tT made findings about how workers got assignments. A worker would agree an assignment with an agency. The agency would then give details of the assignment to Mainpay. Mainpay then put an assignment schedule on in its on-line portal ('the portal'). Workers were then able to log onto the portal. The F-tT did not accept that, in practice, an agency approached Mainpay with a particular assignment and left it to Mainpay to decide who should carry out the assignment (paragraph 52). Such documentary evidence as there was supported the view that the agencies agreed assignments with the workers (paragraphs 53 and 54).

31. Mainpay produced a guide to expenses claims and a list of frequently asked questions ('FAQs'). The guide for the first tax year said that expenses could be claimed at a flat rate without the need to keep supporting documents. The rate was said to be £13 subject to some reduction at the option of the worker. The guide said, of the 'standard Daily subsistence Allowance', that workers were 'not required to do anything as Mainpay claims this for you automatically on your behalf based on how many days you have worked for each particular week' (paragraph 56).

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

33. The amounts which could be claimed were amended during the first tax year, as a further guide referred only to rates of £5 and £10, depending on whether the worker had been away from home for more than five, or ten, hours. The guide said that the one-meal rate (£5) would be claimed automatically and that the worker did not have to do anything. If the worker wanted to claim £10, he had to log onto the portal, and change the default from £5 to £10. The guide said that there was no need to post or to upload receipts because they were not required to process the subsistence allowance.

34. There was conflicting evidence about when the rate changed from £13 to £5/£10. The F-tT thought that it was during the first tax year, not during the third tax year, but it did not matter when the rate changed (paragraph 59). The guide changed again during the fourth tax year. The guide continued to say that the £5 rate would be paid automatically, and that the worker did not have to provide receipts. But the guide added that workers should keep receipts for six years in case HMRC wanted to see them (paragraph 60).

35. It was clear from the evidence, the F-tT said, that the portal 'by default' included a claim for subsistence expenses of £13 a day to begin with, and after the change, £5 a day. If a worker did not claim any expenses, and therefore did not want to make a claim, he would have to log onto the portal and amend the default amount in the expenses section. HMRC's unchallenged evidence was that subsistence expenses were claimed in about 90% of cases.

36. Mainpay took advice about tax issues relating to expenses from Dr O'Brien. In December 2008, he noted that HMRC did not publish any agreed subsistence rates. He drew attention to some figures in Taxation Magazine published in 2001 and in Accounting Web in 2008. The article in Taxation Magazine related to the television and film industry seemed to have been the basis for the rate of £13. The article suggested that HMRC 'accepts these figures without question' (paragraph 62).

37. The F-tT explained the origin of the rates of £5 and £10 in paragraph 63. The relevant HMRC brief (24/09), issued on 2 April 2009, also made clear that the benchmark scale rates could only be used on two conditions: the employee had actually incurred the cost of a meal and the employer had applied to HMRC for a dispensation. It was common

ground that Mainpay had not applied for a dispensation before 'reimbursing' workers for subsistence expenses 'using round sum or benchmark scale rates'. There was some discussion between Mainpay and HMRC about this in 2013-2014. In February 2014, HMRC said that Mainpay had to adopt 'further procedures' before a dispensation could be granted (paragraph 64).

38. The 2013 contract required a worker to get Mainpay's consent before he worked for somebody else. The F-tT's conclusion, nevertheless, was that, in practice, there was no expectation that a worker would ask for such consent. The F-tT explained why (see paragraphs 65, 66, 67 and 68).

39. The F-tT found that whether or not there was an overarching contract of employment, Mainpay considered that it was obliged to, and did, pay statutory benefits to the workers (paragraph 69).

40. Mainpay produced some statistics about the length of the workers' assignments. The F-tT found that that evidence did not help it to decide the issues (paragraphs 70 and 71).

41. The F-tT listed the issues in paragraph 71. Two related to the 2010 contract and are not now relevant. HMRC accepted that the 2013 contract was a contract of employment.

42. The first of the four issues about the 2013 contract was whether it was an overarching contract of employment which continued during the gaps between assignments, and, if not, whether all of the assignments were part of a single employment despite any breaks. The second issue was whether the places where the workers worked were permanent workplaces or not. If they were not, subsistence expenses would be deductible. The statutory question was whether the workers attended the workplaces regularly. The third issue was if such expenses were in principle deductible, Mainpay could rely on benchmark scales when it did not have a dispensation from HMRC. The fourth, if subsistence expenses were not deductible, was whether losses of tax in the first two tax years had 'been brought about carelessly by Mainpay'.

43. The F-tT considered the law about contracts of employment in paragraphs 74-82. It concluded, for the reasons given in paragraphs 83-102, that the 2010 contract was a contract of employment in relation to each individual assignment.

44. In paragraphs 113-137 the F-tT considered the nature of the 2013 contract. Both parties agreed that there was a contract of employment while an assignment was being done. The question was whether the 2013 contract was a 'global or overarching contract' in the gaps between assignments. HMRC accepted that there was a contract of some kind between assignments. It did not accept, however, that the contract which existed between assignments was a contract of employment. That made it necessary for the F-tT to consider what features were required in the gaps for there to be a continuing or overarching contract. Mainpay accepted that there had to be mutual obligations during the gaps, but argued that there was no need for any element of control. The requirement of control in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] QB 497 ('*Ready Mixed Concrete*') related to the

performance of the particular service. As no service was provided during the gaps between assignments, it would make no sense for there to a requirement of control during the gaps. HMRC disagreed. Control was the 'irreducible minimum'.

45. The parties had not referred to any relevant authority. The focus of the cases about overarching contracts was mutuality of obligation, not control. Mainpay might have been right about that point, but it did not matter for the purposes of the F-tT's decision as 'the necessary mutuality of obligation does not exist between assignments' (paragraph 117). The F-tT discussed four authorities in paragraphs 118-124. They are *Reed Employment v HMRC* [2014] UKUT 160 (TCC) ('*Reed*'); *ABC New Intercontinental Inc v Gizbert* [2006] All ER 98 (Employment Appeal Tribunal); *Cotswold Developments Construction Limited v Williams* [2006] IRLR 181; and *Nethermere (St Neots) Limited v Gardiner* [1984] ICR 612. It held (paragraph 125) that 'the key principle' was that if the worker had an unfettered right to refuse work, the necessary mutuality of obligation was missing.

46. The F-tT then considered clauses 3.1 and 5.2 of the 2013 contract. Based on its findings of fact, the F-tT did not accept that those provisions reflected 'the true agreement between the parties'. The understanding of the parties when they made the agreements was that the workers would be offered their assignments directly by agencies and not by Mainpay, even though Mainpay was the only entity with which the workers had a contract (paragraph 127). The F-tT was nevertheless bound by *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 that the facts cannot override clear contractual language. The F-tT therefore accepted that Mainpay was obliged to obtain assignments and to provide a minimum number of hours of work. HMRC had not, until Ms Choudhury's oral submissions, suggested that the F-tT should look at the reality rather than at the terms of the contract. The F-tT accepted Mainpay's argument that HMRC should not be allowed to introduce that argument at such a late stage.

47. The question therefore was what obligations workers had. The only relevant obligation, in clause 3.1, was 'to consider' any suitable assignments. There was no express obligation to accept any assignment. There was no justification for implying any term of good faith (paragraph 130). It was necessary to consider the obligation against the factual background known to the parties (paragraphs 131 and 132). The F-tT considered that a worker would have an unfettered right to refuse any assignment offered by Mainpay (paragraph 132). That was supported by a difference between the facts of this case and the facts in one of the authorities (paragraph 133). The F-tT's conclusion on mutuality of obligation meant that it did not need to consider control (paragraph 137).

48. The F-tT next considered whether, even if there was no overarching contract of employment, there was, nevertheless, a single employment, as Mainpay contended. If that argument was right, the workplaces at which the workers did their assignments would not be permanent workplaces because sections 338 and 339 of ITEPA define permanent workplace and temporary workplace by reference to the duties of 'the employment'. The F-tT quoted section 4 of ITEPA (paragraph 139).

49. Mainpay's submission, in essence, was that if a person provides services on several occasions under a single overarching contract between the worker and his employer,

this is a 'single employment' even though, because of the gaps between the assignments, the employment is not continuous. Mainpay did not have any authority to support that approach. It argued, nevertheless, that it was 'entirely natural to consider each assignment within the arrangements to be part of the same employment relationship'. If it were otherwise, the employer would have to give the employee a P45 every time an assignment ended (paragraph 141).

50. Mainpay submitted that it was difficult to understand the legislative purpose of treating workers who do a number of different assignments for an employer differently depending on whether or not the contract is an overarching contract of employment. Most of the cases about overarching contracts of employment were not concerned with tax but with the question whether the employee had continuous employment for the purposes of acquiring statutory employment rights. The tax legislation has no such requirement. There could be a single employment for tax purposes even if there were gaps between the periods of work in that single employment (paragraph 143).

51. HMRC submitted that, in the absence of any authority, Mainpay's submission was a surprising one. An employee could be employed by an employer under successive contracts of employment for successive engagements: see paragraph 10 of the judgment of Elias LJ in *Quashie v Stringfellow Restaurants Limited* [2012] EWCA Civ 1735; [2013] IRLR 99, in which he referred, in support, to two authorities of this court. Each assignment will have different terms about pay, length, place, and duties. The contract between the agency and the worker is best understood as a 'framework agreement under… which separate contracts of employment are entered into'.

52. The F-tT said that the only authority which addressed the question of a single but discontinuous employment was *Reed*. The UT had given the argument 'short shrift' although it was not clear why it had done so (paragraph 146). In any event, that decision was right. Section 4 of ITEPA linked 'the concept of employment to a particular type of contract'. The relevant type of contract in this case was a contract of service. The 2013 contract was not an overarching contract of service. It must 'follow… that there is a separate contract of service for each assignment'. The 'natural reading' of section 4 was that 'each assignment, governed by a separate contract of service is a separate employment. There is no suggestion' in section 4 that 'a single employment may encompass more than one contract of service' (paragraph 148).

53. HMRC were right to analyse the contract as a 'framework agreement' under which 'consecutive contracts of service arise each time an assignment is entered into'. A contract existed throughout but it was different and separate from the contracts of employment for each assignment. The 'employment' was not under the framework agreement but 'instead comes into existence as a result of each separate contract of service as envisaged by' section 3 (paragraph 149). The F-tT therefore rejected the argument that 'the assignments collectively form part of a single employment because they are linked by a single agreement' (paragraph 149).

54. It is unnecessary for me to summarise the F-tT's reasoning on the question whether the workers were, when on an assignment, working at a temporary or at a permanent

workplace (paragraphs 151-168) or about the use of benchmark or scale rates for expenses (paragraphs 169-189). In paragraph 189, the F-tT concluded that there was 'no automatic entitlement to deduct the amounts reimbursed' by Mainpay to the workers unless there was a dispensation.

55. It added, in paragraph 190, that if it had reached a different view, there was, in 'our view, a serious question whether the arrangements…were a genuine attempt to reimburse expenses which its employees had actually incurred. It is clear from the employment guides and the supporting FAQS which we have referred to above that the subsistence allowance would be paid whether or not the employees had incurred any expenses and that no evidence was required to be provided as to whether any expenses had in fact been incurred'.

56. The default in the portal was that expenses would be paid unless the employee actively removed the claim. There was no guidance that workers should do that if they did not incur any expenses (paragraph 191). It seemed that about 10% of employees must have done that. It could not be inferred that remaining 90% had all incurred expenses. The notes of HMRC's interviews with the workers suggested that at least one was 'reimbursed expenses' even though he had incurred none. The F-tT did not therefore 'consider that the arrangements operated by Mainpay were a genuine attempt to reimburse subsistence expenses actually incurred' (paragraph 193).

57. The last topic which the F-tT considered was whether any 'loss of tax' had been 'brought about carelessly' in the first two tax years (paragraphs 194-216). HMRC accepted that if no loss had been brought about carelessly the notices of determination and section 8 decision notices for those years were out of time, because they were issued more than four years after the end of the relevant year (sections 34 and 35 of the TMA).

58. Mainpay submitted that it had not been careless. It had taken advice from Mischon De Reya about the 2010 contract, 'having explained the context and importance of obtaining a deduction for the relevant expenses'. It relied on *Bella Figura v HMRC* [2020] UKUT 120 (TCC). Even if advice does not deal with a specific point, it may give implicit reassurance about it. Mainpay criticised HMRC's approach to this issue in its statement of case. The pleading was vague and said nothing about causation. The F-tT agreed to some extent. The statement of case and HMRC's skeleton argument suggested that Mainpay failed to take reasonable care to ensure that the contract was an overarching contract of employment, that it should have taken steps to ensure that the contract was a 'reflection of what the workers would be doing and to confirm the correct treatment for travel and subsistence expenses with qualified personnel'. HMRC added that in the light of the advice from Mishcon de Reya, Mainpay should have asked for further clarification (paragraph 199).

59. It was clear, however, from HMRC's statement of case and from the skeleton argument that 'the carelessness relates to the question whether or not the subsistence expenses were deductible at all (on the basis that the contract was not an overarching contract of employment) and not the subsidiary question as to whether Mainpay was entitled to

reimburse expenses based on benchmark scale rates without a dispensation'. That was therefore the F-tT's focus (paragraph 200).

60. Mr Hugo got in touch with Mishcon de Reya in November 2007. He dealt with members of their employment group. He explained the background, 'including that Mainpay was an umbrella company which employed temporary workers and paid them a salary. He also mentioned that certain allowable expenses would be paid to employees. The request to Mishcon was to provide a suitable contract'. He asked whether the terms of engagement used by an employment agency could be used, or whether Mainpay should have a contract of employment (paragraph 201).

61. Mishcon de Reya suggested some amendments to the terms of engagement. Mr Hugo then asked various questions. He told them that Mainpay would be paying the workers as employees '(ie salaries and reimbursed expenditure)' and asked whether the fact that the contract treated the workers as self-employed affected Mainpay's ability to reimburse them for 'deductible business expenditure'. Mishcon's response was that this was the correct contract and that it was right to treat the individuals as self-employed rather than employees. The advice was that 'the fact that they are "self-employed"…does not affect Mainpay's ability to reimburse them for deductible business expenditure' (paragraph 203).

62. The F-tT referred to some of Mr Hugo's evidence. He had had further conversations with Mishcon de Reya and the F-tT had been provided with correspondence. In a later report of one such conversation to his colleagues, Mr Hugo said that Mishcon de Reya had advised that Mainpay was required to keep an original hard copy of any documents in support of business expenses. Mainpay did not do that for subsistence expenses, he said, because he interpreted that advice as relating to travel expenses. He added that employees were told to keep receipts. The F-tT's comment was that that was only from the fourth tax year (paragraph 203).

63. Mainpay submitted that the correspondence did not show a failure to take reasonable care. Mishcon de Reya were told that Mainpay was an umbrella company and that it was important that expenses could be reimbursed/deducted. He had asked specifically whether the type of contract affected whether expenses were deductible and was told that it did not. There was therefore no reason for Mainpay to ask for further advice and no suggestion that the answer would have been different if he had asked the question again.

64. HMRC submitted that Mishcon de Reya were given no information about the expenses which were at issue. Mr Hugo merely referred to 'deductible business expenditure' in his further contact. Mishcon de Reya just confirmed that the form of contract did not affect the reimbursement of deductible business expenditure. Mishcon de Reya also advised Mainpay to keep records and Mainpay had not done so. Nor had Mainpay taken advice after the publication of the HMRC brief in 2009. The F-tT said that that was only relevant to the question of using benchmark scales and not to the question whether expenses were deductible at all as a result of the workplaces being permanent workplaces (in the absence of an overarching contract of employment). It was not part

of HMRC's case on carelessness, which related only to 'the latter point' (paragraph 206).

65. The F-tT considered that 'Mainpay did fail to take reasonable care and that, *as a result*, there was a loss of tax' (paragraph 207) (my emphasis).

66. The F-tT accepted that Mainpay took advice from Mishcon de Reya about the appropriate form of contract between Mainpay and its workers, and that when instructing Mishcon de Reya, Mainpay referred to the reimbursement of expenses which would either be allowable or deductible. There was, however, no detailed explanation of what the expenses were or of the basis on which they might be deductible. Mr Hugo knew that he was dealing with employment lawyers, not tax advisers. He was an accountant with significant experience of umbrella companies. 'He was therefore well aware of the complexities of ensuring that expenses could be reimbursed on a tax free basis' (paragraph 208).

67. It was not reasonable for Mr Hugo to rely on a 'vague assurance' that the form of contract would not affect Mainpay's ability to reimburse workers for 'deductible business expenditure'. This is very far from either an explicit or implicit reassurance that the reimbursement of subsistence expenses to the relevant individuals would, based on a particular contract produced by Mishcon, be deductible for tax purposes. He could not 'realistically have expected Mishcon to give such an assurance as they clearly did not have the [relevant] information… in order for them to provide definitive advice in relation to this' (paragraph 209).

68. Mainpay were, in any event, taking separate tax advice from Dr O'Brien of UK and International Tax Consultants about the reimbursement of expenses. In cross-examination, Mr Hugo's evidence was that umbrella companies were a 'relatively new sector which was constantly evolving as learning developed and that Mainpay was, throughout the relevant period, taking separate tax advice about the reimbursement of expenses from Dr O'Brien on an ongoing basis'. The F-tT considered that that 'no doubt' was why Mainpay asked him for such advice in December 2008 (paragraph 201).

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

70. The F-tT acknowledged that while HMRC had not separately pleaded that that failure '*caused* the loss of tax, *it is in our view implicit in the suggestion that there was a failure to take reasonable care to ensure that the contract was an overarching contract of employment, that this was what caused the loss of tax given HMRC's case that the reimbursement of expenses was not deductible if the contract was not an overarching contract of employment'* (paragraph 212) (my emphasis).

71. It was clear to the F-tT that 'the failure to take reasonable care to ensure that the contract in question was an overarching contract of employment *led directly* to the loss of tax as a result of Mainpay treating the reimbursement of expenses as deductible when, in the absence of an overarching contract, they were not' (paragraph 213) (my emphasis). The F-tT added that if Mainpay had asked Dr O'Brien for advice about the terms of the contract and the and on the deduction of expenses 'on a tax-free basis', there seemed 'little doubt' that he would 'at the very least have raised alerted Mainpay to a potential problem'. The F-tT referred to a letter he sent in December 2008 which assumed that the workers were employees (contrary to the terms of the 2010 contract) and to Mainpay's acceptance that, 'even though the 2010 contract, properly interpreted, is a contract of employment, there is no basis on which it could be said to be an overarching contract of employment' (paragraph 215). The F-tT recorded Mainpay's submission that the concept of overarching contract of employment might not have been understood in 2007 in the way in which it is now. That, in the F-tT's view was another reason for getting specialist advice. The F-tT noted, nevertheless, that many of the cases on this topic to which it was referred had been decided before 2007 (paragraph 215).

The decision of the UT

72. There were five grounds of appeal from the F-tT to the UT. The UT listed them in paragraph 26 of its decision ('decision 2'). They challenged the F-tT's views
    i. that the 2013 contract was not an overarching contract of employment because there was insufficient mutuality of obligation;
    ii. that successive assignments under the same contract did not amount to a single employment;
    iii. on the interpretation of 'temporary workplace' and 'regularly attends';
    iv. that Mainpay was not allowed to estimate expenditure in order to calculate deductions; and
    v. that the loss of tax for the first two years was brought about carelessly by Mainpay.

73. The UT considered ground i. in paragraphs 33-66 and dismissed it. There is no appeal against that decision. The UT considered and dismissed ground iii. in paragraphs 85-105. Mr Firth, apparently recognising that the fate of this ground of appeal was inextricably linked with the fate of ground ii., advanced no separate oral argument on this ground. He was right to do so. I do not, therefore, consider it further.

74. The UT considered and dismissed ground ii. in paragraphs 67-84. It recorded Mr Firth's argument in paragraph 71, in five steps. It said, in paragraph 72, that 'While Mr Firth deserves credit for his ingenuity and tenacity in devising and pursuing this argument, to a large extent his submissions were made to and properly dealt with by the F-tT'. The UT did not accept that it was surprising or illogical that an umbrella contract might, depending on its terms, be an overarching contract of employment, or an agency contract, or neither. It followed that it was not surprising or illogical that the classification of the contract could have different consequences for tax and employment law (paragraph 74).

75. The lack of authority was not decisive, but it would be surprising if the argument were correct, or arguably so, and had not been raised in any of the authorities 'up to and including *PGMOL*'. That is a reference to *HMRC v Professional Game Match Officials*

Limited [2021] EWCA Civ 1370; [2022] 1 All ER 971. The Supreme Court upheld the decision of this court in that case ([2024] UKSC 29; [2024] ICR 1480), after the judgment of the UT in this case. The UT said that the only authority in which the argument was considered, even elliptically, was *Reed*. The UT gave seven reasons for rejecting Mr Firth's argument. It concluded that the F-tT was entitled to hold, for the reasons which it gave, that each contract was properly construed as 'a framework agreement which provided the basis on which consecutive contracts of service for individual assignments could arise' (paragraph 80).

76. The UT considered ground v. in paragraphs 118-164. The UT noted that this issue related only to the assessments for the first two tax years, which were out of time, and only to the 2010 contract, which was the contract which was relevant to those assessments. Before the F-tT, Mr Firth had argued that Mainpay had not failed to take reasonable care because it had taken advice, and that HMRC's statement of case was too vague, in particular because there was no pleading at all about causation.

77. The UT listed Mr Firth's four arguments in paragraph 123. He had repeated two of the arguments he had relied on in the F-tT. He had added that the F-tT was wrong to hold that Mainpay's carelessness brought about a loss of tax, and had failed to deal with Mainpay's argument that Mr Hugo was an independent contractor and it was reasonable for Mainpay to rely on his advice.

78. Ms Choudhury's response was that whether or not HMRC should be allowed to rely on its statement of case was essentially a case management decision for the F-tT with which the UT should be slow to interfere. Mainpay had not asked for further particulars of the statement of case. The F-tT had been entitled to hold that the pleading of causation was sufficient, as the implication of the statement of case was that it was the failure to take reasonable care to ensure that the 2010 contract was an overarching contract which caused the loss of tax.

79. The UT quoted the relevant provisions of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (2009) SI No 273 and the relevant authorities. Whether HMRC had pleaded the issues sufficiently was for the F-tT to evaluate judicially. The UT accepted that it should be slow to interfere with such an evaluation (paragraph 129). It quoted paragraphs 85 and 86 of HMRC's statement of case in paragraph 131.

80. It concluded, on the adequacy of the pleading, that the F-tT reached 'a decision which was within the range of reasonable decisions available to it' (paragraph 132). It added, having referred to paragraph 91 of HMRC's statement of case (in paragraph 132), that, read as a whole, the statement of case did 'justify the F-tT's decision, set out above, to permit HMRC to rely on its pleading' (paragraph 133). It postponed the question whether HMRC had failed to give particulars of causation until later (paragraph 136).

81. The UT summarised the F-tT's conclusions on failure to take reasonable care in paragraph 140. The F-tT had tested Mainpay's assertion by 'scrutinising what advice was given, by whom, with what qualifications, and on the basis of what information, assumptions and draft documentation. Having carried out that exercise, [the F-tT]

effectively concluded that the advice was deficient, because [none of the advisers] had been asked the right questions, with sufficient clarity, and provided with the necessary draft documents, to advise Mainpay whether the 2010 contract and the proposals were effective to create a single employment, which was the essence of the arrangement' (paragraph 140).

82. The UT recorded that Mr Firth 'challenged virtually every aspect of [the F-tT's] reasoning and conclusions…' The UT did not agree with his argument that the F-tT had made any error of law in reaching its decision. 'The extent to which taking advice provides a reasonable care defence depends on the facts…' (paragraph 141). Mr Firth's 'errors of law' were 'on examination' disagreements either with the reasoning of the F-tT or with the weight which it had given to relevant factors (paragraph 142).

83. The UT considered and rejected five of those criticisms in paragraph 142. It observed, in paragraph 142(3), 'It is obvious from [the F-tT's] decision read as a whole that the failure to take reasonable care essentially arose from the failure by Mainpay to obtain advice from a qualified tax adviser as to whether the 2010 contract was an overarching contract of employment. That was HMRC's case, and [the F-tT] accepted it'.

84. The next issue was causation. As the UT explained, it then considered both the argument that HMRC had not sufficiently pleaded its case on causation and whether the F-tT had erred in law in deciding that Mainpay's failure to take reasonable care brought about the loss of tax (paragraph 144). The UT quoted paragraphs 212-215 of the F-tT's decision. It listed Mr Firth's detailed criticisms in paragraph 146. He argued that the inadequate pleading had led the F-tT to 'create its own case' on causation. He argued that there were five further errors of law (which the UT listed in paragraph 47). One of those arguments, which he repeated in this court, was that it was necessary for the F-tT to have considered what would have happened without the carelessness; HMRC had to establish 'with precision the "counterfactual" situation in order to prove causation'.

85. In paragraphs 148-156 the UT considered and rejected a new 'knock-out' argument from HMRC, based on the words of section 118(5). That argument was that 'once a failure to take reasonable care is established, it inevitably follows that the taxpayer brought about the loss or situation', and that there was no need 'to establish a separate causal link between the alleged carelessness and the loss of tax'. Ms Choudhury submitted that changes to the legislation in 2008 meant that 'causation could not be approached as a "but for"' test'. The UT accepted that it was not easy to reconcile two earlier decisions of the UT, in particular (*Atherton v HMRC* [2019] UKUT 41 (TCC) and *Bella Figura v HMRC* [2020] UKUT 120 (TCC)).

86. The starting point was that HMRC had the burden of showing 'that the careless behaviour brought about the loss of tax' (paragraph 153). The 'more difficult question is what HMRC need to do to discharge that burden, and whether they did enough in this case' (paragraph 154). The UT did not accept that the effect of section 118(5) was that all HMRC had to do was to show carelessness and a loss of tax. It could not be right that 'there was no additional burden of proof on HMRC in relation to causation' (paragraph 155).

87. What HMRC had to show 'to establish that a taxpayer has failed to take reasonable care to avoid the loss of tax' would depend 'entirely on the facts'. If the relevant lack of care was a deficiency in advice, HMRC needed to establish that the relevant deficiency could have been avoided by the taxpayer. How would depend on the facts and on the nature of the deficiency in the advice. The UT gave examples in paragraph 157. To that extent, HMRC needed to show what the taxpayer 'should have done differently' (paragraph 158). But the burden of proof did not entail that HMRC had 'to prove a particular counter-factual outcome'. If the carelessness was a failure to take advice, HMRC was not obliged to show, on the balance of probabilities, what the result of remedying the deficiency would have been. HMRC did not have to prove that if the deficiency in advice had been remedied, 'a failure in the arrangement to achieve its intended purpose, which led to a loss of tax, would have been remedied'. Not all problems can be fixed. The F-tT should not be required to speculate about the taxpayer's response to adequate advice (paragraph 159).

88. Nothing in section 118(5) removed the need for a '*connection* (to use a more neutral term) between the carelessness and the loss of tax'. Carelessness was not enough; it the carelessness must have been a failure to avoid *bringing about* the loss of tax'. A general lack of care 'which did not *contribute* to the loss of tax is not enough' (paragraph 161) (my emphases).

89. The F-tT was entitled to reach the conclusions which it did on 'the causation issue'. It was entitled to conclude that Mainpay's 'failure to take reasonable care to ensure that the 2010 Contract was an overarching contract of employment which *caused* the loss of tax' (my emphasis). On the facts found, Mainpay should 'have done differently'. It should have asked 'an appropriately qualified adviser whether the 2010 Contract as drafted (including a provision stating that it was not a contract of employment) was an overarching contract of employment, or otherwise effective to achieve the aim of the arrangements in relation to reimburse expenses'. The F-tT was not required to go further to put HMRC to proof of what Mainpay would have done if it had taken that advice, such as amending the contract, introducing a retainer so that there was mutuality in the gaps between assignments or deciding not to claim the deductions which gave rise to the loss of tax (paragraph 161).

90. It followed that HMRC's pleading was adequate and that the F-tT's conclusion that it was adequate was reasonably open to it (paragraph 162).

91. In paragraphs 163-164 the UT considered and rejected Mr Firth's arguments that Mainpay had acted reasonably in relying on the advice of its independent contractor, Mr Hugo.

The grounds of appeal from the UT to this court

92. There are 3 grounds of appeal to this court.

1. The F-tT and the UT erred in law in applying the wrong test to decide whether two discontinuous periods of work (which 'are accepted to amount to employment') are part of the same employment or are separate employments.

2. The F-tT erred in law in deciding that when an employee incurs some expenditure, the employer may not use a reasonable estimate of that expenditure in calculating the appropriate deduction for tax purposes and the UT erred in law in upholding the F-tT.
3. The F-tT and the UT erred in law in using the wrong test to decide whether Mainpay's carelessness brought about a loss of tax.

93. The UT gave permission to appeal on ground 3. Lewison LJ later granted permission to appeal on grounds 1 and 2. There was no Respondent's Notice or cross-appeal by HMRC which suggested that HMRC disagreed with any of the UT's reasoning.

The submissions

94. In his oral submissions, Mr Firth described the issue raised by ground 1 as 'the single discontinuous employment issue'. His argument was that, as all the service by the workers was done under the same contract with Mainpay, that amounted to a single employment for the purposes of all the provisions of ITEPA which refer to 'the' or 'an employment.' That was so even if there were gaps between assignments, so that that service was on 'different occasions'. He argued that the first step was 'to apply contract law to see what the contract is'. The next step was to 'apply the statute'. It was clear from the relevant authorities that it is the parties' intention which is decisive in construing a contract. The parties' intention here was that there should be one 'single' contract between them. That was so irrespective of the position during the gaps between assignments.

95. He accepted, nevertheless, that the parties' apparent intention is not a decisive factor in cases when a court has to decide how to classify a contract: for example, the fact that the parties describe a contract as a licence does not prevent a court from deciding, by reference to the rights and obligations created by it, that that contract, is, in law, a lease, the parties' description notwithstanding. Here whether the parties had created separate contracts of employment or one contract of employment depended on their intention, which was to be gleaned from the terms of their contract. Arnold LJ asked Mr Firth how, if a single contract was sometimes a contract of employment and sometimes not a contract of employment, that could amount to one employment. Mr Firth's reply was that 'It is the same employment because it is the same contract'. There were not just two possible alternatives. There was a third, which is a single contract governing many assignments.

96. The contract of employment is a concept which is rooted in the common law, as the decision of the Supreme Court in *PGMOL* shows (see paragraph 75, above). When the court considers whether there is a contract of employment, it is the contractual position which matters. It is the substance, not the label, which matters. He accepted that the contract here could be a contract of employment during an assignment, and not a contract of employment in a gap between assignments, and could then become a contract of employment again during a further assignment. He argued that there were three types of relevant contract for the purposes of the relevant provisions of ITEPA: an overarching contract of employment, a single contract of employment for one

assignment, and, as here, a 'discontinuous contract of employment', which, for the purposes of the relevant provisions of ITEPA, gives rise to one employment, and not to two or more distinct employments. The concept of 'employment' is tied to the contract. It is for the parties to choose what type of contract they have made. If what they have chosen is one contract, it follows that there is one employment. The UT and the F-tT had wrongly created 'multiple contracts out of the air'.

97. Mr Firth told us that that ground 3 raised an important issue and that several cases which raise this point have been stayed. It was not enough, he argued, for HMRC to show that a taxpayer had acted carelessly. HMRC had also to plead and prove that the taxpayer's carelessness had caused a loss of tax. Section 36(1) provides for a test of factual causation, and it was relevant, and might be decisive, to consider what would have happened if the taxpayer had not been careless. If the loss of tax would have occurred even if the taxpayer had taken reasonable care, section 36(1) does not apply. The definition in section 118(5) of the TMA had not removed the previous requirement that the carelessness must cause the loss. The earlier statutory language included the phrase 'as a result of'. None of the extraneous materials which might be relevant to the construction of section 118(5) suggested that the promoters of the TMA intended that the enactment of section 118(5) would remove the previous causal requirement. Section 118(5) is a definition of carelessness, and no more than that.

98. He illustrated his point with an example. It was careless not to read relevant advice. But if that advice supported the tax return, the carelessness had not brought about or caused any loss of tax. The relevant test would often be, was but was not necessarily, the 'but-for' test. He referred in this context to concurrent causes. Arnold LJ asked Mr Firth if his submission was that there was a test of legal causation. He replied that what was necessary was 'factual causation'. Legal causation was not relevant in this case. If Mainpay did not win on factual causation it could not win on legal causation.

99. He submitted that it was not clear what test the UT was proposing, or had applied. The question was whether any carelessness caused a loss of tax. The target was the tax return, not the planning of any underlying scheme. There had to be an inaccuracy in the tax return which brought about the loss of tax. If the focus of the inquiry was advice which the taxpayer had taken, HMRC had to allege that if advice had been taken the loss of tax would have been avoided. In other words, the question was 'Did the carelessness found by the F-tT cause the loss of tax?'. There could be no carelessness if the taxpayer could have acted in a way which was not careless. Moreover, a rejection of a requirement to prove the counterfactual amounted to a rejection of the need to prove causation.

100. HMRC must allege that if the taxpayer had taken advice, the loss would have been avoided. HMRC did have to allege that advice taken by the taxpayer was careless. HMRC did not have to adduce evidence about that: it was open to the expert tribunal to take a view. The only counterfactual which HMRC had to plead and prove was that if reasonable care had been taken the loss of tax would have been avoided because the additional income would have been shown in the tax return. He also accepted in answer to a question by Arnold LJ that if HMRC 'did enough' the evidential burden would shift to the taxpayer. He agreed with Arnold LJ that Mainpay's case in the F-tT had been that

if it had been properly advised in 2010, that would have resulted in the 2013 contract, which was drafted differently, but which was not effective either, as the scheme was intrinsically flawed. The right target was not advice about the scheme, but advice about the tax return.

Discussion

Ground 1

101. Mr Firth agreed, as he had to, that a court's classification of a contract is a result of an analysis of the legal effect of all of the terms of contract, and does not wholly depend on the parties' intention (as expressed in the terms which they have agreed in the contract). The effect of his submissions was nevertheless that he insisted that, in this case, all that mattered was that the parties had agreed that there was one contract between them and that that one feature of their express joint intention somehow overrode the court's independent classification of the contract. The hidden premise of his argument is that the parties can, if they label a contract in a particular way, negate the court's duty to classify the effect of the contract as a whole. That submission is contrary to decisions like *Street v Mountford* [1985] AC 809 and the long sequence of employment cases referred to, for example, in this court's decision in *PGMOL*. It follows that his agreement, which I recorded in the first sentence of this paragraph, was more apparent than real.

102. I readily accept that the relationship between the parties to this contract is, at times, to be classified as a contract of employment, and at other times, not. It does not follow from that intermittent classification as a contract of employment, coupled with the fact that the relationship between the parties is governed by the same contract throughout, that the contract is to be or can be classified as a continuing contract of employment throughout its life. It cannot be classified in that way, because in the gaps between assignments, there is no contract of employment at all. The correct analysis is that there is intermittent employment under a contract of employment when a worker is on an assignment, followed by periods when there is no contract of employment, and, therefore, no employment at all, in the gaps between assignments. That analysis is consistent with what the parties have agreed, save that they cannot agree that there is a 'continuing' or overarching contract of employment when the correct legal analysis is that there is no contract of employment at all during those gaps between assignments. The intermittent periods of employment are not, for the purposes of the relevant statutory provisions, one employment. They are successive employments. The F-tT and the UT were right so to hold.

Ground 3

103. Ground 3 raises three issues.

1. Is there a causal requirement, and if so, what is it?
2. If there is, did the F-tT err in law in its application of that requirement to the facts it found?
3. Was the F-tT entitled to hold that HMRC's pleading was adequate?

Is there a causal requirement?

104. The first question is what test is imposed by sections 36 and 118(5) of the TMA. There are at least two parts to this question. The first is whether there is a causal requirement at all. The second is, if there is, what it entails in a case like this.

105. HMRC tried to persuade the UT that the words of section 118(5) of the TMA were a complete answer to Mainpay's argument on causation. The UT was not persuaded. HMRC did not cross-appeal against that conclusion. It is not, therefore, open to HMRC to revive that argument on this appeal. For the avoidance of doubt, I consider, in any event, that that argument is wrong, as I will now explain.

106. Section 36 is not the only relevant provision which uses the formula 'brought about carelessly'. The phrase is also used in section 29(4). The phrase must mean the same in section 36 as it means in section 29(4). Section 29(1) enables the tax authorities to make an assessment when they discover that income which ought to have been assessed to tax has not been so assessed, and to correct that by making an assessment of the amount or further amount which ought to have been assessed to tax. They may not do so if an error or mistake in the return was made on the basis of or in accordance with a generally prevalent practice (section 29(2)). They may only make such an assessment if one of two conditions is met. The first is that the 'situation' described in section 29(1) has been 'brought about carelessly' (or deliberately) by the taxpayer or his agent. The phrase 'brought about' is a synonym for 'caused'.

107. The heading of section 36 of the TMA is 'Loss of tax brought about carelessly…'. Section 36(1) extends the relevant time limit 'in a case involving a loss of income tax…brought about carelessly by the person…' The phrase 'brought about' is, again, a synonym for 'caused'. Section 118(5) must be read as a whole. It simply repeats the phrase 'brought about'. That makes it clear that section 118(5) endorses, and does not qualify, still less contradict, the apparent meaning of the phrase 'brought about' in section 36(1). The focus, rather, is explaining what 'carelessly' means for the purposes of the TMA. Section 118(5) explains that there is the relevant lack of care if 'a person fails to take reasonable care to avoid bringing about that loss or situation'.

108. Paragraph (2) of the headnote of *R (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 675; [2023] 1 WLR 2594 articulates a general rule of statutory construction, that when a statutory definition is read as a whole, the ordinary meaning of the word of phrase being defined can be used to throw light on the meaning of the phrase as defined. I have reached a clear view about the meaning of sections 29 and 36(1) without resorting to this rule, but if that view requires support, this general rule provides it. If any further support is needed, I rely on Mr Firth's submission that if section 118(5) has the meaning for which HMRC contended in the UT, it had a profound and unheralded effect on the position under the previous legislative provisions, which clearly required a causal link between the loss and the acts or omissions of the taxpayer. Such a change would have required very clear language. There are no words to show that any such causal link has been removed by section 118(5). On the contrary, the words 'brought about', which are used in the heading and in the text of section 36, and in section 118(5) show the very opposite.

What does the causal requirement entail in this case?

109. There are two broad issues. The first is to identify the 'loss' of income tax referred to in the heading of section 36 and in section 36(1). It must be the same 'loss of tax' as is referred to in section 29(1). The relevant 'loss of tax' occurs for the purposes of both provisions if income ought to have been assessed to tax and has not been.

110. The second issue is how section 36(1) should be applied. On the arguments in this case, the F-tT had to decide five sub-issues:

i. whether the taxpayer did something which was careless
ii. if so, what that was;
iii. whether that carelessness brought about the loss of tax;
iv. where burden of proof lies; and
v. whether HMRC's pleading was adequate.

Did the F-tT apply the test correctly to the facts it found?

111. The F-tT's reasoning was that Mishcon de Reya's advice made it clear that the 2010 contract was not intended to be a contract of employment. There was little evidence about what prompted the change to the 2013 contract. Mr Hugo's evidence what that the sector was constantly evolving and Mainpay therefore took advice on 'an ongoing basis'. Mainpay said initially that it automatically paid the standard subsistence allowance, and told workers that it was 'able to account for a proportion of' their income as 'subsistence Allowance' which would be 'tax-free'. They were told this was 'automatic' and that they were not asked to send in supporting evidence. After the changes to the amounts of allowance, workers were told that they would get £5 automatically, and that if they wanted to claim £10 all they had to do was log on and change the £5 to £10. They were not required to post any evidence. Subsistence allowances were claimed in about 90% of cases.

112. The F-tT considered (see paragraphs 36 and 37 above) what basis, if any, there was for the subsistence rates used by Mainpay. The F-tT did not consider that 'the arrangements operated by Mainpay were a genuine attempt to reimburse subsistence expenses genuinely incurred' (paragraph 56, above). The F-tT recorded Mainpay's argument about causation (paragraph 58, above).

113. The F-tT found, first, that Mainpay had been careless. The point about the advice sought from, and given by, Mishcon de Reya, is that its premise was that the expenses in question were deductible business expenses (see paragraph 66, above). Mr Hugo knew that the question whether expenses can be reimbursed tax-free is itself complicated (see paragraph 66, above). It was not 'reasonable' for him to rely on a vague assurance that the form of the contract would not affect Mainpay's ability to do reimburse expenses. He could not have expected Mishcon de Reya to do that, since they did not have the relevant information (paragraph 67, above). The fact that Mainpay had a different adviser who advised on expenses and who did not appear to have been consulted on that point confirmed the F-tT's view that it was not reasonable to rely on vague assurances from Mishcon de Reya, when they did not have full background facts (paragraph 69, above).

114. The F-tT having found that Mainpay were careless then had to consider whether that carelessness brought about the loss of tax. I have italicised, in my summary in

paragraphs 57-71, above, some of the passages in decision 1 which show that the F-tT clearly understood that sections 36(1) and 118(5) require a causal link between carelessness of the taxpayer and the loss of tax. In the relevant paragraphs, the F-tT quoted the statutory words four times, and used various synonyms, including 'cause' (and cognate words), 'as a result of', and 'led directly to'.

115. There is nothing in decision 1 which suggests that the F-tT having considered whether, and having decided that, Mainpay failed to take reasonable care to avoid the loss of tax, the F-tT did not then apply a test of causation in deciding that that failure to take reasonable care did bring about, or cause the relevant loss of tax. On the contrary, the F-tT did apply a causal test. Its conclusion was that it was 'clear that the failure to take reasonable care to ensure that the contract in question was an overarching contract of employment led directly to the loss of tax as a result of Mainpay treating the expenses as deductible when in the absence of an overarching contract, they were not' (paragraph 71, above).

116. The loss of tax in this case was that part of the workers' pay was treated as tax-free when it should have been subject to the deduction of tax. On the F-tT's findings, it is obvious that had Mainpay taken reasonable care, the contracts would have been overarching contracts of employment. If they had been overarching contracts, the reimbursement of those expenses would not have been liable to tax (subject to the issue raised by ground 2). Mainpay did not take reasonable care to ensure that the contracts were overarching contracts. Mainpay nevertheless reimbursed the expenses free of tax, as if the contracts were overarching contracts, when, in law, those payments were liable to tax. Had Mainpay taken reasonable care, therefore, on the F-tT's findings, that loss of tax would have been avoided.

117. On these particular facts, HMRC had, in the words of Mr Firth, 'done enough'. I do not consider that it was necessary for the F-tT to make any more findings about what would have happened if Mainpay had taken reasonable care. The F-tT nevertheless considered what would have happened if Mainpay had asked for specific advice (paragraph 71, above), even though that was not necessary on these facts. I do not consider that the F-tT was required to speculate about what might have happened if further advice had been sought, all the more so because a taxpayer cannot be required to waive legal advice privilege, so that the F-tT would not necessarily have and in this case did not have all the relevant evidence. I agree with the UT's analysis in paragraphs 159 and 161 (see paragraphs 87 and 89, above). That is reinforced by what I say in the next paragraph about the burden of proof.

The burden of proof

118. It is not in dispute that HMRC has the burden of proving that section 36(1) applies (as the UT accepted in paragraph 153 of decision 2). On the facts of this case HMRC had made out a prima facie case that Mainpay had been careless, and that that carelessness had brought about a loss of tax. There was then an evidential burden on Mainpay, if it wished to contradict that prima facie case, to adduce evidence to show, on the balance of probabilities, that it had taken reasonable care, and/or that any lack of care did not bring about the loss of tax. Mainpay did not do that. Mainpay argues, however, that it

was not sufficiently informed about HMRC's case to understand it and therefore appropriately to rebut it. That is the next issue which I must consider.

Was HMRC's pleading adequate?

119. The F-tT decided that HMRC's pleadings, taken as a whole, and properly understood, did raise the issues in a way which enabled Mainpay to know what case it had to meet. The F-tT considered that the statement of case and skeleton argument showed that the carelessness related to 'the question whether or not the subsistence expenses were deductible at all (on the basis that the contract was not an overarching contract of employment)…' (paragraphs 58 and 59, above). The F-tT also considered that it was implicit in that way of putting the case that it was the failure to take care to ensure that the contract was an overarching contract of employment caused the loss of tax, given HMRC's case that the reimbursement of expenses was not deductible if the contract was not an overarching contract of employment (paragraph 70, above).

120. This issue is a partial exception to my statement in paragraph 16, above. I consider that the UT's reasons for upholding the F-tT's decision about the adequacy or otherwise of HMRC's pleading are relevant to the task of this court. I agree with the UT that the F-tT considered this argument carefully. I also agree with the UT that the F-tT's view about whether or not Mainpay knew what case it had to meet on its appeal was, in the first instance, similar to a case management decision by the F-tT. The threshold for intervention by the UT (let alone for this court), is commensurately high. I agree with the UT that it is not met.

Conclusion

121. For these reasons, I would dismiss this appeal.

Lord Justice Arnold

122. I agree.

Lady Justice King

123. I also agree.