

**FCSA**  
**Independent Arbitration Panel**

**Sent by email to:**

**Dated:** 28 April 2023

Chris Bryce – CEO of the FCSA  
Paul Bresnihan – CEO of Orange Genie

Dear Chris and Paul,

We write following the review by the Independent Arbitration Panel (IAP) held on Tuesday, 25 April 2023. This review was held following the six-month suspension after the appeal by Orange Genie on 9 November 2022.

In Section 1 of this report, we set out our conclusions on the specific questions following our non-binding recommendations from the previous appeal. The non-binding recommendations are set out in Appendix A below for reference.

As requested during the meeting, we would ask that both parties include the contents of this report in full alongside any press release, publication or announcement concerning this report.

We would ask you to treat the information in this letter as confidential until 09:00hrs on Friday, 12 May 2023 and that there is an embargo on any external communications and social media until then.

The decisions and recommendations set out here represent the collective and unanimous opinions of the members of the IAP.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Rebecca Seeley Harris', with a stylized flourish at the end.

**Rebecca Seeley Harris**  
**(Acting as Chair for this review)**

**Neil Carberry**  
**James Collings**  
**Carl Reader**

## **Section 1: Decisions related to the suspension of Orange Genie**

The IAP's task in the appeal and this review was to look at the breaches of A3e and A17, whether the procedure was followed correctly by the FCSA and whether the termination was a proportionate response.

For the reasons given in the original Appeal report on 9 November 2022, the IAP gave some non-binding recommendations, which can be seen in Appendix A below.

Part of the recommendations was for a six-month suspension after which point the IAP would reconvene to answer the following questions:

### **Question 1**

#### **Has Orange Genie paid the fine?**

The FCSA has reported that the fine was paid by Orange Genie immediately after the appeal meeting in November 2022.

### **Question 2**

#### **Has the FCSA issued updated industry guidance on so-called 'salary skimming'?**

The FCSA reported that they are carrying out a review on unlawful deductions of wages with a view to improving awareness across the industry. The IAP felt that this question needed further examination and would be part of a separate review.

However, the IAP were content that the deduction of the £2 charge was not 'salary skimming' or, in correct legal terminology, an unlawful deduction of wages. The £2 charge was deducted from the assignment rate and was never deducted from the gross pay. It is not, therefore, an unlawful deduction of wages, in line with recent case law *Zajota v. Umbrella Company Ltd* [2022] ET 2210575/22.

### **Question 3**

#### **Has the FCSA made amendments to the Umbrella Code?**

The IAP again felt that this question needed to be dealt with in a separate review but, were pleased that the FCSA reported that a draft amendment to the Code had been produced.

### **Question 4**

#### **Has Orange Genie reached compliance?**

Orange Genie fully accept that they were in breach of the Umbrella Code A3e and A17 at the time that the sanctions were enforced by the FCSA.

Orange Genie now report the following:

The £2 charge is now accounted for separately in the payslip and is shown as part of an itemised breakdown. Orange Genie reported that this had been carried out in October 2022.

Orange Genie has also added a clause to the Contract of Employment to make it clear that a £2 charge is made and what that charge is for, although this is not specifically required by the Umbrella Code.

The Key Information Document now also shows the deduction under the umbrella fees and not the worker's gross pay.

Orange Genie commissioned a report by MHA Baker Tilly to answer the following questions:

- a) Whether operation of the £2 costs which gave rise to the FCSA Code breaches were compliant under Employment tax and / or Employment law legislation?
- b) What steps had been taken by Orange Genie to address these issues? and
- c) Whether Orange Genie's current overall processes and procedures were compliant with Employment Tax and Employment Law?

It was reported to the IAP that the deduction of the £2 charge was compliant with both Employment Tax and Employment Law. It was also reported that the deduction of the £2 charge did align with HMRC Guidance and based on the review, MHA considered that the steps taken by Orange Genie have now strengthened compliance.

The FCSA also commissioned a report by BDO and that report stated that the deduction of the £2 charge was permissible under Employment Tax. The BDO report also reported that from an employment tax perspective, there would be nothing due back to the worker as the cost was deducted from the assignment rate.

**The IAP are content that the steps taken by Orange Genie are now compliant with both code A3e and A17.**

#### **Comment from the IAP**

The IAP have found that Orange Genie are now compliant with A3e and A17 and that is the extent of our remit. The question of whether Orange Genie are re-admitted as a member will depend upon the FCSA's criteria for joining. Orange Genie would need to be eligible and independently tested by an FCSA-approved Assessor, as with any other potential member.

#### **Comment from the IAP on future breaches**

We would like to make it clear that this has been an unusual case. Suspension of membership, rather than expulsion, may not have happened had the FCSA Umbrella Code and Disciplinary Procedures been more robust at the time. The FCSA are in the process of putting in place amendments to both, so breaches to their codes in future will be treated in accordance with the new procedures.

## Appendix A

### **The non-binding recommendations of the IAP from the original appeal on the 9 November 2022**

The IAP has found that the FCSA acted within its powers in this case, but that the process could have been handled better. Our recommendation in response to Question 3, above, sets out our view on how things might be improved for the future.

This brings us to this case. The IAP's formal role does not extend to binding recommendations in this regard, but we are empowered to suggest to the parties how the current situation might be resolved. Our first principle should be improving compliance for the benefit of the industry as a whole and remedying the breach, as well as setting an example to all members of the FCSA. We, therefore, suggest the following course of action, if the parties agree.

1. Orange Genie should pay the fine immediately and be suspended from membership for six months in order that the FCSA can work with Orange Genie towards compliance with the FCSA codes in place at the end of that period.
2. FCSA should issue updated industry guidance on so-called 'salary skimming'. The FCSA Umbrella Code currently requires a member to be transparent in illustrating any charges that they make but, the panel would like the Code to go further and consider whether additional charges are appropriate and whether there should be a viable opt-out of these charges for the worker. This case must be used to improve practice in all firms, not just Orange Genie.
3. The panel would also like to see amendments to the Umbrella Code to make the procedure, including the terms of reference for the Independent Arbitration Panel, and the escalation for the sanctions much clearer. The Code should be re-drafted to include more detailed steps and that failure to respond to the organisation within a certain amount of time will result in termination, where the member will be expelled for a 12-month period.
4. After six months, the panel will reconvene to hear whether Orange Genie has reached compliance and the progress made by FCSA on its codes.