TC03952

Appeal number: TC/2013/09436

INCOME TAX – termination of employment – compromise agreement signed after termination and payment of £200,000 made – appellant's case that payment made to compensate for discrimination causing injury to feelings, to protect the employer's reputation and other reasons – whether taxable under ITEPA section 401 – cases of* Walker v Adams, Oti-Obihara *and* Orthet v Vince-Cain *considered – held, payment taxable in full subject to £30,000 exemption – available exemption reduced because of redundancy payment in previous year – whether taxable income reduced by a further £30,000 "concession" given by HMRC – held, no.

FIRST-TIER TRIBUNAL
TAX CHAMBER

KRISHNA MOORTHY **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS RUTH WATTS DAVIES

Sitting in public at the Tribunals Centre, Bedford Square, London on 5 August 2014

Mr David Gray-Jones, Solicitor-Advocate, of Thomas Mansfield LLP for the Appellant

Mr Maurice Chapman, Officer of HM Revenue & Customs, for the Respondents

DECISION

Introduction and outline

1. Mr Moorthy was made redundant from his employment with Jacobs Engineering (UK) Limited ("Jacobs") on 12 March 2010. Mr Moorthy subsequently received a payment of £200,000 from Jacobs under a compromise agreement.

2. Mr Moorthy's case was that the £200,000 was not taxable because it had been paid to settle a discrimination claim, to compensate him for not being selected for a post and/or to protect Jacobs' reputation.

3. HM Revenue & Customs ("HMRC") contended that the £200,000 was taxable as a termination payment under Income Tax (Earnings and Pensions Act) 2003 ("ITEPA") s 401, other than (a) in respect of £30,000 which was specifically exempted under ITEPA s 403 and (b) a further £30,000 as representing compensation for injury to feelings.

4. On 13 August 2013 HMRC issued a closure notice and amended Mr Moorthy's self-assessment return by including £140,023[1] in his taxable income for the 2011-12 tax year. Mr Moorthy appealed the amendment to his SA return and his appeal was subsequently notified to the Tribunal.

5. We found that:

(1) the payment of £200,000 fell within ITEPA s 401;

(2) the £30,000 exemption allowed by ITEPA s 403 is reduced to £19,360 by virtue of a statutory redundancy payment of £10,640 made in the previous tax year; and

(3) the Tribunal had no jurisdiction to allow the further relief of £30,000 deducted by HMRC.

6. As a result, Mr Moorthy's 2010-11 taxable income includes an amount of £180,640 (£200,000 – £19,360) arising from the compensation payment made to Mr Moorthy. This is £40,617[2] more than the adjustment contained in HMRC's closure notice.

7. At the end of this decision, we consider the interaction between Mr Moorthy's self-assessment ("SA") liability and Jacob's PAYE deduction obligations and find that Mr Moorthy is entitled to a tax credit of £2,128, which reduces the tax on his income.

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[1] The £23 was not in dispute between the parties; its source was not explained to the Tribunal

[2] The £23 may need to be added to this amount; the Tribunal leaves that to be agreed between the parties.

Evidence

8. HMRC provided the Tribunal with a bundle of documents containing:

(1) the correspondence between the parties and between the parties and the Tribunal;

(2) two notes of telephone conversations between the parties;

(3) Mr Moorthy's SA tax return for the 2010-11 tax year;

(4) HMRC's closure notice dated 13 August 2013;

(5) Mr Moorthy's Grounds of Complaint relating to his employment tribunal claim against Jacobs ("the Complaint"); his Statement of Case for mediation and the Compromise Agreement settling his claim ("the Agreement");

(6) An internal memo dated 19 September 2012 between Mr Martin Delnon, HMRC's technical adviser in relation to termination payments and benefits, and Mr Geoff Brown of HMRC's Personal Tax Operations department; and

(7) A short letter consisting of two paragraphs from Jacobs' tax manager to HMRC, dated 15 April 2013. Neither party referred to this letter in their submissions. We noted that it referred to Mr Moorthy's claim being settled "before the conclusion of the hearing." As there was no hearing, but rather a mediation, we found that it was not safe to place any weight or reliance on this letter.

9. Mr Moorthy provided a witness statement and was cross-examined by Mr Chapman. He also answered questions from the Tribunal. We found him to be a transparently honest witness. We accepted his witness statement as evidence of fact, except for the parts beginning "in my view" or "I believe" which are self-evidently matters of opinion.

10. Mr O'Connor, the HMRC Review Officer who conducted the statutory review following Mr Moorthy's appeal against the closure notice, also provided a witness statement. We were told he was unable to attend to give oral evidence. His witness statement summarises the chronology of what happened, and sets out his view of the issue in dispute. To the extent that it does the latter, it goes beyond the scope of a witness statement. To the extent that it introduced the documents and summarised the chronology, it was not in dispute and we accepted it.

Findings of fact

11. On the basis of the evidence set out above, we make the following findings of fact.

12. Mr Moorthy was born in 1952. He began his employment with Kent County Council in 1988. In January 1999 his employment transferred to Babtie Group Ltd and in August 2004 that company was purchased by Jacob's parent company. In March 2008 Mr Moorthy's employment transferred to Jacobs.

13. By 2007 Mr Moorthy had risen to be Executive Director of Operations. This was an important and responsible job within the organisation. He was a member of the company's Local Government Services Executive Management Team ("EMT").

14. Mr Moorthy was paid £111,000 a year, plus pension rights. Depending on the performance of the business, he also received a discretionary annual bonus in the form of shares, which tended to be worth between £15,000 and £20,000.

15. Every year Jacobs held an Annual General Meeting ("AGM") which took place overseas. The company's vice-presidents ("VPs") were automatically invited to the AGM. Mr Moorthy was one grade below a VP. The tradition within Jacobs was that people at Mr Moorthy's grade who were invited three times to the AGM could expect to be promoted to VP. Mr Moorthy received his third invitation in summer 2008.

16. On 4 February 2009, all members of the EMT, and some others, were called to a meeting at which they were told that there was to be a restructuring; that there would be fewer senior jobs and that the EMT members would have to apply for those jobs. Those who were not successful might be made redundant.

17. Mr Moorthy told the Tribunal that this had been a shock. He also said that before the meeting on 4 February 2009 he had not experienced any discrimination while working at Jacobs and we find this to be a fact.

18. Mr Moorthy was not successful in obtaining one of the new posts, and on 12 March 2009 he was told that he was to be dismissed by reason of redundancy. He had a twelve month notice period and was on garden leave, receiving his normal salary (but without the performance-related share bonus) throughout this period. He could have been recalled to work during his garden leave but in fact only had a single meeting with the VP to whom he had reported. At that meeting there was no mention of redeployment or other roles. Mr Moorthy wrote to former colleagues at Jacobs asking if they could assist in providing him with an alternative role, but they were unable to help. He also sent his CV to the company's HR manager, but received no response.

19. On 12 March 2010 Mr Moorthy's employment was terminated and shortly afterwards (before the end of the 2009-10 tax year) he received statutory redundancy pay of £10,640, from which no tax was deducted.[3]

20. Following his dismissal, Mr Moorthy commenced proceedings in the employment tribunal, alleging unfair dismissal and age discrimination. The first three paragraphs of his Complaint give his age, role and notice period. Paragraphs 4-13 recite the events set out above in more detail, beginning with the meeting on 4 February 2009 and ending with Mr Moorthy's receipt of the dismissal letter.

[3] Mr Moorthy's recollection in the hearing was that he had received £9,625. However, this was the figure originally quoted to Mr Moorthy in 2009, see page 25 of the Bundle. The amount actually paid is set out in the letter dated 11 March 2010 from Jacobs at page 31 of the Bundle.

Paragraphs 14-20 are headed "unfair dismissal" and paragraphs 21 to 23 "Age Discrimination." That section opens by saying:

> "The Claimant further considers that his dismissal was unlawful as he was dismissed and/or selected for redundancy on the grounds of his age. The Claimant's dismissal therefore amounts to unlawful discrimination under Regulation 7 of the Employment Equality (Age) Regulations 2006."

21. Further details were then given:

> "Apart from [BW] who had already indicated to the Respondents his intention to retire in three months, all of the managers who were dismissed on the grounds of redundancy following the reorganisation of the LGS Business Unit are older than the managers retained. Furthermore, there was a significant gap in age between the five employees dismissed and the four, other than [BW] who were retained. The Claimant believes that the scores [in the redundancy process] of the retained employees were unreasonably higher than his and those of the other members of the EMT who were dismissed."

22. The Complaint continues by alleging that Jacobs had not provided the evidence about the scores of the other employees, or the minutes of the consultation meetings held between them and Jacobs, despite those documents having been requested on behalf of Mr Moorthy. It goes on to say that "the Claimant made clear in his appeal letter that he believed this amounted to discrimination on the grounds of his age" but that this was rejected by Jacobs. That section of the Complaint ends as follows:

> "It is submitted that the Claimant's appeal was not dealt with in a fair and reasonable way and that this, and in particular the failure to deal with the allegation of unlawful age discrimination in a meaningful and reasonable way, indicates that the Respondents were discriminating against the Claimant on the grounds of his age."

23. The next paragraph lists the remedies Mr Moorthy seeks, being:

(1) declarations that he has been unfairly dismissed and that he has been unlawfully dismissed on the grounds of age;

(2) basic and compensatory awards;

(3) compensation for financial loss;

(4) an award for injury to feelings; and

(5) interest.

24. In January 2011 the parties engaged in mediation. Mr Moorthy's Statement of Case for that process opens by saying that he is claiming unfair dismissal and age discrimination and sets out at paragraph 2 "the background to the dismissal," beginning with the announcement that there would be new roles and that Mr Moorthy was at risk of redundancy.

25. Paragraphs 3-8 are headed "Claimant's Position on Unfair Dismissal," followed by paragraphs 9-14 entitled "The Claimant's Position on Age Discrimination." This latter section includes some general allegations about (a) ageist remarks (b) Jacobs' Equal Opportunities Policy and (c) its lack of an age discrimination policy. In so far as it relates to Mr Moorthy, the section sets out the alleged age discrimination during the redundancy selection process, before ending:

> "The Claimant submits that he has shown sufficient evidence to amount to a prima facie case of age discrimination and that the Respondents will be unable to prove that no age factors, consciously or unconsciously, played a part in their decision to dismiss him."

26. The next and final part is headed "Remedy" and reads as follows:

> "15. The Claimant would have continued working for [Jacobs] until he was a least 65, and very probably older, given the imminent removal of the statutory retirement age;
>
> 16. He has taken all reasonable steps to mitigate his loss.
>
> 17. There is insufficient evidence that he would subsequently have been fairly dismissed for a non-discriminatory reason had he not been dismissed by [Jacobs] on 12.03.09.
>
> 18. If the age discrimination claim succeeds, the Claimant will be awarded damages for injury to feelings in the upper Vento[4] range."

27. The mediation resulted in the Agreement, under which Jacobs agreed to pay Mr Moorthy "an *ex gratia* sum of £200,000 by way of compensation for loss of office and employment." The payment was without admission of liability by Jacobs and was in full and final settlement of his claims as made to the employment tribunal together with "any other claims" which the parties might have against each other "arising out of or connected with the employment or its termination." There was no allocation of the sum as between different heads of claim or otherwise.

28. Half of the £200,000 was payable by Jacobs 14 days after the signed agreement reached Jacob's solicitor, and half on or before 9 April 2011. Since the full amount was included in Mr Moorthy's 2010-11 return, we find as a fact that it was all paid in that tax year.

29. The Agreement goes on to say that "the first £30,000…will be paid to Mr Moorthy without deduction of income tax" and the balance would be subject to a 20% tax deduction. The paragraph ends by stating that "the Company makes no warranty as to the taxable status of the payments made under this agreement." The Agreement also includes a tax indemnity, under which Mr Moorthy agreed to reimburse Jacobs any further tax which Jacobs was required to pay to HMRC in respect of the £200,000.

30. Mr Moorthy completed his 2010-11 tax return online on or before the due date of 31 January 2012. Under "pay from the employment" he entered "£200,000" and

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[4] This term is explained at [47] of our decision.

under "tax taken off pay in Box 1" he entered "£34,000." Under the heading "employment expenses" he entered "£200,000." In the white space he explained the background to the payment and said "legal advice I received was that this payment should be tax free. I ask for the refund of the deducted tax of £34,000." Mr Moorthy told the Tribunal that he entered the figure for expenses because an accountant friend told him that this was the only way to make the online SA calculation trigger a refund of the tax deducted from the compensation payment. The £34,000, taken together with other entries on his tax return, meant that the online calculation showed that he was due a refund of £33,883, which was inhibited by HMRC's system.

31. On 14 February 2012, Thomas Mansfield LLP wrote to HMRC setting out the reasons why they considered that the £200,000 was not taxable. Correspondence continued between Mr Gray-Jones of Thomas Mansfield LLP and Mrs Shilliam of HMRC. On 13 August 2012, Mrs Shilliam sought advice from Mr Delnon, HMRC's technical adviser for termination payments and benefits. He replied on 19 September advising that:

> "All of the discrimination complained of is alleged to have taken place during the redundancy process. So any part of the compensation which can be attributed to injury to feelings falls to be taxed under Section 401 as received in connection with the termination of the employment."

32. He also advised that a formal enquiry be opened and this began on 22 October 2012. Mrs Shilliam's letter of that date repeats the paragraph cited above from Mr Delnon's internal note. She also sent Mr Moorthy a revised calculation, removing the expenses claimed, and including £170,023 as taxable income.

33. Correspondence continued between HMRC and Mr Gray-Jones until 13 August 2013, when HMRC issued a closure notice, removing the expenses of £200,000 from Mr Moorthy's return but reducing the taxable income by £30,000 (under ITEPA s 403) plus a further £30,000, in relation to which HMRC said:

> "we do not believe there is any evidence that discrimination took place. However, by concession and in order to try and reach agreement, we offered to accept that part of the payment in the range of £25,000 to £30,000 could be treated as falling outside the charge to income tax. As you had claimed that, were your claim to age discrimination to succeed, you would be awarded damages in the 'upper Vento' range, we offered to allow that the upper limit of £30,000 be treated as falling outside the charge to income tax. We believe this is the only concession we can make and as we cannot reach agreement we must proceed on this basis."

34. Mr Moorthy appealed the decision and asked for a statutory review. On 22 November 2013 the Review Officer confirmed the decision, saying *inter alia*:

> "Looking further at the HMRC offer to exclude an additional £30,000, I note that this offer has been made in spite of the fact that HMRC believe that the whole termination payment falls under s 401 ITEPA and taxable only subject to the £30,000 threshold. Even if they [sic]

were to accept, say, that an element of the termination payment did indeed relate to discrimination, then it would appear that even this amount would still be taxable under s 401 as the alleged discrimination took place as part of the process of termination…

Strictly speaking in the absence of any settlement or agreement my conclusion should have been that the full amount of £200,000 came under s 401. I did not see anything that would lead me to any other conclusion…however, HMRC have, in their revised assessment, used a figure of £140,023. With that in mind I do not intend to disturb that assessment and therefore accept that figure as the assessable amount."

35. On 10 December 2013, Mr Gray-Jones notified the appeal to the Tribunal on behalf of Mr Moorthy.

The legislation

36. ITEPA Part 6, Chapter 3 is headed "Payments and benefits on termination of employment etc." It opens with s 401, which reads as follows:

> **Application of this Chapter**
>
> (1) This Chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with—
>
> (a) the termination of a person's employment,
>
> (b) a change in the duties of a person's employment, or
>
> (c) a change in the earnings from a person's employment,
>
> by the person, or the person's spouse or civil partner, blood relative, dependant or personal representatives.

37. ITEPA s 403 reads:

> **Charge on payment or other benefit**
>
> (1) The amount of a payment or benefit to which this Chapter applies counts as employment income of the employee or former employee for the relevant tax year if and to the extent that it exceeds the £30,000 threshold.
>
> (2) In this section "the relevant tax year" means the tax year in which the payment or other benefit is received.
>
> (3) For the purposes of this Chapter—
>
> (a) a cash benefit is treated as received—
>
> (i) when it is paid or a payment is made on account of it, or
>
> (ii) when the recipient becomes entitled to require payment of or on account of it, and
>
> (b) ...
>
> (4) For the purposes of this Chapter the amount of a payment or benefit in respect of an employee or former employee exceeds the

£30,000 threshold if and to the extent that, when it is aggregated with other such payments or benefits to which this Chapter applies, it exceeds £30,000 according to the rules in section 404 (how the £30,000 threshold applies).

(5) …

(6) In this Chapter references to the taxable person are to the person in relation to whom subsection (1) or (5) provides for an amount to count as employment income

38. ITEPA s 404 reads:

How the £30,000 threshold applies

(1) For the purpose of the £30,000 threshold in section 403(4) and (5), the payments and other benefits provided in respect of an employee or former employee which are to be aggregated are those provided—

(a) in respect of the same employment,

(b) in respect of different employments with the same employer, and

(c) in respect of employments with employers who are associated.

(2)-(3) …

(4) If payments and other benefits are received in different tax years, the £30,000 is set against the amount of payments and other benefits received in earlier years before those received in later years.

(5) …

39. ITEPA s 406 reads:

Exception for death or disability payments and benefits

This Chapter does not apply to a payment or other benefit provided—

(a) in connection with the termination of employment by the death of an employee, or

(b) on account of injury to, or disability of, an employee.

40. There are further specified exclusions from the scope of Part 6, Chapter 3 at:

(1) ITEPA ss 405(1), 407, 408 and 414A: various payments relating to pension and similar arrangements;

(2) ITEPA s 405(2): certain relocation payments;

(3) ITEPA ss 409-410: certain employee liabilities and indemnity insurance;

(4) ITEPA s 411: certain payments to members of the Armed Forces;

(5) ITEPA ss 412, 413 and 414: certain payments by foreign governments and for foreign service;

(6) ITEPA s 413A: certain payments relating to legal costs incurred by the employee exclusively in connection with the termination of the employee's employment.

Submissions of Mr Gray-Jones on behalf of Mr Moorthy

41. Mr Gray-Jones said that the payment was not taxable. Although the Agreement had not allocated the £200,000 against heads of claim, Jacobs had already paid out £10,640 on account of redundancy. The primary reasons why the payment was made were (a) because Mr Moorthy had claimed age discrimination and (b) to protect Jacob's reputation.

42. We first set out Mr Gray-Jones's submission that the payment was not taxable because it was made on account of discrimination, and then his other submissions.

Discrimination

43. Mr Gray-Jones said that there was no authority which said that payments made on the grounds of discrimination were taxable. He relied in particular on *Oti-Obihara v HMRC* [2010] UKFTT 568(TC) ("*Oti-Obihara*") which held that where discrimination is the cause of the termination, a compensation payment is only taxable to the extent that it meets financial loss caused by the termination.

44. The same approach had been taken, he submitted, in *Walker v Adams* [2003] SpC 344 ("*Walker*"). Mr Walker had been awarded £77,446, of which £12,500 was for "injury to feelings" resulting from the discrimination he had suffered. HMRC had accepted that the £12,500 was not taxable under Income and Corporation Taxes Act 1988 ("ICTA"), s 148, the predecessor section to ITEPA s 401, and the Special Commissioner, Mr BMF O'Brian, had said that HMRC's withdrawal on this point was "rightly made."

45. Mr Gray-Jones also relied on *Orthet v Vince Cain* [2004] IRLR 857 ("*Vince-Cain*"), a decision of the Employment Appeal Tribunal ("EAT"). The EAT said at [24], in relation to an award of damages for discriminatory treatment, that "we have been referred to no authority and to no authoritative commentary which holds or asserts that tax is payable on such an award."

46. In oral submissions Mr Gray-Jones said that Jacobs would have assumed, when making the Agreement, that the payment was not taxable, on the authority of *Vince Cain.*

47. Mr Gray-Jones also referred to the guidance given by the Court of Appeal in *Vento v Chief Constable in West Yorkshire* [2002] EWCA Civ 1871 at [65] as to the level of damages appropriate in discrimination claims (commonly known as the *Vento* guidelines). In *Da'Bell v NSPCC* [2010] IRLR 19 at [45], the EAT subsequently increased these guideline amounts. The maximum which could have been awarded to Mr Moorthy under the updated *Vento* guidelines was £30,000.

48. However, Mr Gray-Jones said that the *Vento* guidelines have no application in a case such as this. In making this submission he again relied on *Oti-Obihara*, where

the Tribunal said at [38] that the then maximum threshold under the *Vento* guidelines was "largely irrelevant." In particular, Mr Gray-Jones said that this was a case where aggravated damages would have been in issue, and where the employer's wish to protect its reputation was a key factor (see further below).

Financial loss

49. Mr Gray-Jones invited us to endorse and accept the methodology adopted in *Oti-Obihara*, where the Tribunal said at [43]-[44] that the correct approach was to calculate the amount payable for financial loss, part of which would be covered by the exemption in ITEPA s 403, "with the balance being compensation for discrimination and other infringements of rights not relating to financial loss flowing from the termination of the employment."

50. Having invited us to endorse the approach, Mr Gray-Jones then submitted that Mr Moorthy's case should be distinguished from that of Mr Oti-Obihara on the facts, because Mr Moorthy had spent a year on garden leave, for which he had been fully remunerated. As a result, Mr Gray-Jones said that no sum should be allocated to financial loss, so that the whole amount was "compensation for discrimination and other infringements of rights" and not taxable.

51. Even if the Tribunal disagreed with his main submissions, and considered that some part of the payment should be allocated against "financial loss", Mr Gray-Jones submitted that this should be a relatively low sum.

Reputation

52. Mr Gray-Jones also submitted that the payment was not taxable because it was made to protect Jacobs' reputation. Mr Moorthy had headed up the Local Government Services team. In reliance on the opinion given in Mr Moorthy's witness statement at [34]-[36], Mr Gray-Jones said that public sector contractors are particularly aware of the need for equal opportunities, and had it become known that Mr Moorthy had been subject to discrimination, this would have damaged Jacobs' chances of qualifying for these contracts.

53. He again referred to *Oti-Obihara* at [29] which says:

> "an employer such as Morgan Stanley would be very mindful of its reputation in an area such as this, and would, no doubt, be eager to settle claims promptly and perhaps even generously in its desire to act responsibly and perhaps also in its desire to keep the matter from public airing."

54. At [48] the Tribunal in that case said that the tax-free amount included the part of the payment which reflected "the employer's likely concerns as to its reputation and privacy in a matter such as this."

Other submissions

55. Mr Gray-Jones also relied on *Crompton v HMRC* [2009] UKFTT 71 (TC) ("*Crompton*"), a case in which a soldier's compensation payment from the Army was outside ITEPA s 401 because it had been paid as a result of the Army's failure to appoint him to various posts before his eventual termination. Mr Gray-Jones said that

there was a parallel with Mr Moorthy, who had not been selected for one of the new positions; the failure to select him pre-dated his redundancy, so could not be "connected with or in consequence of" his termination.

56. Although Mr Moorthy had claimed unfair dismissal, Mr Gray-Jones said that the highest possible award which could have been made by an employment tribunal was £62,500. Even if we were to find that part of the payment attached to that head of claim, the balance (ie, £137,500) should be apportioned to Mr Moorthy's discrimination claim.

57. Mr Gray-Jones confirmed that it was not part of his client's case that the payment fell within the exemption in ITEPA s 406 as being for injury or disability.

58. Finally, even if the Tribunal did not accept his other submissions, Mr Gray-Jones invited us to leave in place the HMRC concession relating to the £30,000.

Submissions of Mr Chapman on behalf of HMRC

59. Mr Chapman said that the payment had been received "directly or indirectly in consideration or in consequence of, or otherwise in connection with" the termination of Mr Moorthy's employment. It was therefore taxable under ITEPA s 401, excepting the £30,000 allowed by ITEPA s 406. To fall within s 401 it was only necessary that there be a connection with the termination; even a loose connection would suffice. But on the facts of this case there was a strong connection. Mr Moorthy's own evidence was that there had been no discriminatory treatment until the meeting on 4 February 2009, where Mr Moorthy was advised he was at risk of redundancy.

60. Mr Chapman went on to say that *Walker* and *Oti-Obihara* could be distinguished from Mr Moorthy's situation, because in both of those cases the appellants had been discriminated against before there was any question of terminating their employment.

61. He rejected Mr Gray-Jones' reliance on *Crompton,* saying that Mr Crompton's payment was not "in connection with" the termination of his employment. The Special Commissioner in that case, Judge Barlow, says at [35]:

> "A connection must be some sort of link, joint or bond between two things. Here there is no such link between the payment of compensation and the termination of Mr Crompton's employment with the army. The payment was for the selection board's unfair treatment of Mr Crompton but that did not lead to his leaving the army."

62. Finally, Mr Chapman said that HMRC accepted that there had been injury to feelings connected with the termination, and by concession had agreed that a further £30,000 was not taxable. This was in line with the *Vento* guidelines for discrimination payments. HMRC were not seeking to withdraw from that concession.

Discussion on ITEPA s 401 in the context of the facts of this case

63. Our starting point is the statute. ITEPA s 401 brings into charge a payment which is "directly or indirectly in consideration or in consequence of, or otherwise in connection with" the termination of a person's employment.

64. This is a very widely drawn provision. Not only does it catch payments made directly in consideration of a termination, or directly in consequence of a termination, but indirect payments of either type, but is then further expanded to include payments which are not even in consideration or in consequence of a termination but "*otherwise* in connection with" a termination.

65. We respectfully agree with the Upper Tribunal (Judge Gordon Reid and Kenneth Mure QC) when they analysed the similar wording in in ICTA 1988 s 148, the earlier version of ITEPA s 401, in *HMRC v Kenneth Colquhoun* [2010] UKUT 431 (TCC) at [12]:

> "The statutory language of section 148(2) has been broadly drawn. That can be seen from the use of words and phrases such as *indirectly* and *otherwise in connection with*. *Otherwise* may simply mean *in any way* and is consistent with the Parliamentary intention to catch a wide range of payments."

66. The question for us is whether the £200,000 compensation payment made to Mr Moorthy falls within ITEPA s 401. We answer this question by analysing the facts as found.

(1) Mr Moorthy confirmed to us that he had not suffered any discrimination, whether by age or otherwise, before 4 February 2009, when he was advised he was at risk of redundancy. That meeting was the beginning of a process which led to the termination of his employment, and was "a shock" to Mr Moorthy. Until then he had been treated as a valued employee. He had been selected for the overseas AGM on three occasions and was on track to be a VP. He had been awarded share bonuses. There was no injury to feelings before 4 February 2009 and so nothing here to occasion part or all of the compensation payment.

(2) Mr Moorthy's Complaint began with an introduction, followed by ten paragraphs which recite the events which took place, starting with the meeting on 4 February 2009 and ending with the receipt of his dismissal letter. This is the background to the termination, and covers nothing else.

(3) Paragraphs 14-20 of the Complaint set out his unfair dismissal claim, which is self-evidently bound up with the termination.

(4) Paragraphs 21-23 set out Mr Moorthy's age discrimination claim, which is (emphasis added) that: "*his dismissal* was unlawful as *he was dismissed and/or selected for redundancy* on the grounds of his age. *The Claimant's dismissal* therefore amounts to unlawful discrimination." All the details which follow concern the allegedly discriminatory redundancy process, and the failure to deal in a non-discriminatory way with Mr Moorthy's appeal against his dismissal.

(5) There is no mention in the Complaint of any matters other than those which relate to and form part of the termination of Mr Moorthy's employment.

(6) The first of the remedies sought in the Complaint is (emphasis added) "declarations that he has been *unfairly dismissed* and that he has been u*nlawfully dismissed on* the *grounds of age.*" The next two heads are financial remedies for that unfair and unlawful dismissal. It is clear that any payment made by way of financial remedy for unfair or wrongful dismissal is directly in consequence of the termination of Mr Moorthy's employment.

(7) The next remedy is for "injury to feelings." There was no injury to feelings until 4 February 2009. Furthermore, the only facts which have been relied on in the Complaint are bound up with the termination of Mr Moorthy's employment. Any financial remedy given for the "injury to feelings" is necessarily "connected with" his termination.

(8) The remaining remedy is interest. Since all the financial payments being sought are in consequence of, or connected to, the termination, the same must be true of the interest on those sums.

(9) The Statement of Case follows a similar pattern. The only facts given are under the heading (emphasis added) "the background *to the dismissal,*" beginning with the announcements that there would be new roles and that Mr Moorthy was at risk of redundancy. Paragraphs 3-8 are headed "Claimant's Position on Unfair Dismissal" – again, self-evidently bound up with the termination of Mr Moorthy's employment.

(10) Paragraphs 9-14 deal with the age discrimination claim. In so far as the information in these paragraphs pertains to Mr Moorthy (rather than setting out general allegations about ageist remarks, Jacobs' failure to monitor their Equal Opportunities Policy and the lack of an age discrimination policy) all deal with the alleged age discrimination during the redundancy selection process. The section ends, tellingly, with the words "the Respondents will be unable to prove that no age factors, consciously or unconsciously, played a part *in their decision to dismiss him.*"

67. On the basis of the facts of this case, we have no hesitation in finding that the payment of £200,000 in its entirety was made "directly or indirectly in consideration or in consequence of, or otherwise in connection with" the termination of Mr Moorthy's employment, and therefore falls within ITEPA s 401.

68. The only exemptions from that charging provision are:

(1) the £30,000 exemption at ITEPA s 403;

(2) the exemptions at ITEPA s 406 for payments on death, injury or disability, which Mr Gray-Jones accepted was not in point in Mr Moorthy's case; and

(3) those relating to pensions, foreign governments/service, relocations, employee's legal costs, liabilities and indemnity insurance and certain army payments, none of which are relevant to Mr Moorthy.

69. Whether or not the payment was also to compensate Mr Moorthy for discrimination, unfair dismissal, injury to feelings, redundancy and/or financial loss is immaterial. It is likewise irrelevant whether or not Jacobs made the payment partly or entirely to protect its reputation. The payment can be any of these things, or all these them, but because it is "directly or indirectly in consideration or in consequence of, or otherwise in connection with" the termination of Mr Moorthy's employment, it falls within ITEPA s 401. It is therefore unnecessary for us to respond to Mr Gary-Jones's arguments on how the £200,000 should be apportioned.

70. Mr Gray-Jones cited various authorities in support of his contention that the payment fell, in whole or in part, outside the broad net cast by ITEPA s 401. We consider each of these below, together with the reasons why we have not followed them.

Walker v Adams

71. The facts in *Walker* were as follows. Mr Walker was a Protestant. In July 1993 the dairy for which he worked was taken over by another firm, and during "the latter months of 1993" Mr Walker experienced discrimination on the grounds of his religion. In February 1994 he agreed to leave the company. It was accepted that this was "constructive dismissal based on religious discrimination." Mr Walker claimed compensation for discrimination at the Northern Ireland employment tribunal, and in July 1996 his former employer conceded the case and the tribunal awarded Mr Walker £77,446. Of that sum, £12,500 was awarded for "injury to feelings." The balance of £63,946 was in respect of net income loss, including future losses and pension rights.

72. As Mr Gray-Jones has pointed out, during the hearing HMRC's representative withdrew from their earlier position that the £12,500 was taxable, and the Special Commissioner's only comment on this was that their withdrawal was "rightly made."

73. In relation to the remaining sum of £63,946, the Special Commissioner found that it was within ICTA s 148, because:

> "the unlawful discrimination founded the tribunal's jurisdiction and Mr Walker's right of action. The chain of causation seems to me to be clear. The discrimination caused the termination of Mr Walker's employment; the termination caused the financial losses; and those losses gave rise to the £64,946 award. The link between the payment and the termination is, to my mind, incontrovertible, and well within the wording of s 148(2). The word 'otherwise' shows that the relevant connection or link may be looser than would be required for a strict causation test."

74. This Tribunal respectfully agrees with the Special Commissioner that "the link between the payment and the termination" in this case was "incontrovertible". What we are unable to understand on the facts of the case as recorded in the decision is why the £12,500 paid for "injury to feelings" was also not "in connection with" the termination.

75. However, this point was not explored in the judgment. All we have is the brief comment that HMRC's withdrawal was "rightly made." It is of course possible that the £12,500 was paid for "injury to feelings" in the period before the termination of Mr Walker's employment was in contemplation or considered, and so was not "in connection with" that termination, but that is speculation.

76. In our judgment, the lack of reasoning means that this decision is not a reliable authority on which to found an argument that payments to compensate employees for discrimination are always non-taxable, as Mr Gray-Jones has submitted.

Oti-Obihara

77. Mr Oti-Obihara had allegedly suffered discrimination long before the termination of his employment was in contemplation. The Tribunal (Judge Sadler) records at [27] that:

> "The appellant was in protracted dispute with his employer, Morgan Stanley, in relation to matters which in themselves did not relate to, or constitute, actual termination of the appellant's employment, namely claims made by the appellant that he was humiliated and harassed by comments and actions of Morgan Stanley employees which were racially-motivated and therefore discriminatory."

78. At [28] the Tribunal says that:

> "In this protracted dispute there is no evidence that, until the later stages, the question of the termination of the appellant's employment was an issue - on the contrary, both parties were intent on the appellant remaining employed…It appears that it was only when the appellant began proceedings in the employment tribunal, in early June 2005, that the question of constructive dismissal was raised. Thereafter matters did proceed in a trajectory which resulted in the termination of the appellant's employment and the subsequent negotiation of the compromise agreement in which the appellant withdrew all his various claims in consideration of Morgan Stanley making the settlement payment."

79. Despite the evidence that the discrimination pre-dated any discussions about termination, or any possible claim for constructive dismissal, the Tribunal states at [30] that it nevertheless does not accept that "the discrimination suffered by [Mr Oti-Obihara] was unrelated to the termination of the employment."

80. Having made that finding, the Tribunal continues:

> "If the nexus between the discrimination and the termination of the employment is established, the *Walker* case shows that a compensation payment made on the occasion of the termination of employment for discrimination is taxable to the extent that it is compensation for financial loss suffered by reason of the termination of the employment - only to that extent is a payment received in connection with the termination of the employment. Any other amount received by reason of discrimination represents compensation for the infringement of the

> right not to be discriminated against, not compensation for the termination of the employment."

81. The Tribunal in *Oti-Obihara* thus relied on *Walker* as an authority for its finding that a payment for discrimination is not taxable. But as we have observed, in *Walker* the point was not argued, it was simply accepted.

82. *Walker* considered only discrimination, but the Tribunal in *Oti-Obihara* went further. At [44] it sets out what it considers to be the correct methodology, which is (a) to isolate the amount of the payment which relates to "financial loss," subjecting that to tax, and then (b) to exclude from tax "the balance being compensation for discrimination and other infringements of rights." Included in the amount which that Tribunal excluded from tax using this methodology is the part of the payment which relates to "the appellant's likely rights under United States legislation and the employer's likely concerns as to its reputation and privacy in a matter such as this," see [48].

83. We can see no basis for excluding, from the wide scope of ITEPA s 401, payments which were "in connection with" the termination of the employment, simply because they were compensation for the breach of an employee's rights under foreign law, or because were paid to protect the employer's reputation. Had this been the intention of the parliamentary draftsman, it would have been a straightforward matter to add further provisions to the long list of exemptions already included within ITEPA Part 6, Chapter 3.

84. As we have reiterated, ITEPA s 401 applies where the payment was "received directly or indirectly in consideration or in consequence of, or otherwise in connection with" the termination. The fact that a payment is also in consequence of something else does not prevent the section applying.

Orthet v Vince-Cain

85. *Vince-Cain* is a decision of the Employment Appeal Tribunal ("EAT"). Mrs Vince-Cain had been awarded damages at the employment tribunal, including an award of £15,000 for "injury to feelings." She appealed to the EAT on the basis that the ET should have specified that that part of her award was net of tax.

86. The EAT said at [29]:

> "The question is: should such awards be taxed? We are acutely conscious that decisions relating to tax liability may be appealed and determined only by General Commissioners, pursuant to ss.31(1) and 31B of the Taxes Management Act 1970. On the other hand, once an issue is placed before an employment tribunal relating to how an applicant's loss is to be compensated, the tribunal must decide that issue by reference, if necessary, to the incidence of taxation…"

87. The judgment continues by referring to what the EAT considers to be the relevant statutory provisions:

> "**30.** Pursuant to s.19 of and Schedule E to, the Income and Corporation Taxes Act 1988, tax is charged 'in respect of any office or employment or emoluments therefrom...' There is, however, an exception under s.148 and Schedule 11, relating to payments and benefits 'received in connection with...the termination of a person's employment' which is made
>
> 3.(a) in connection with the termination of the employment by the death of the employee or
>
> (b) on account of injury to or disability of the employee.
>
> **31.** That regime is replicated in the Income Tax (Earnings and Pensions) Act 2003 in respect of what is called, under the modern terminology, 'employment income' which involves 'general earnings' (see ss.4 and 6 and the exceptions for death or disability at s.406). The 2003 statute may be relevant to the present case, depending upon the year of assessment of the payments of the awards. In any event, as we explained in our first judgment, Mr Evans [for Mrs Vince-Cain] accepts there is no relevant distinction in principle between the terminology of one and the other. It is from these passages in the tax statutes that, it is said, the problem in our case arises."

88. It is immediately clear that the EAT are referring here, not to what is now ITEPA s 401, but to what is now ITEPA s 406 – the exemption for payments made for injury and disability.

89. We therefore infer that the EAT considered that the "injury to feelings" at issue in Mrs Vince-Cain's case came within what is now s 406, the statutory exception for payments made "on account of injury to, or disability of, an employee."

90. The leading caselaw on the meaning of that phrase is *Horner v Hasted* [1995] STC 766, which considered the identical provision in the earlier legislation at ICTA s 188. At first instance the Special Commissioner said at [7.18] that, to fall within the exemption:

> "there must be an identified medical condition that disables or prevents the employee from carrying out the duties of the employment. Medical evidence confirming the precise nature of the disability must therefore be seen in all cases and it must be clear that the nature of the disability prevented the employee carrying out the specific duties of the employment."

91. At the High Court in the same case Lightman J put it slightly differently, saying (at page 800) that to fall within ICTA s 188:

> "it must be established:
>
> (1) that the disability alleged by an employee is a relevant disability, that is to say, a total or partial impairment (which may arise from physical, mental or psychological causes) of his ability to perform the functions or duties of his employment; and
>
> (2) that the person making the payment does so not merely in connection with the termination of employment (compare the language

> of the exemption of payment made on the death of an employee) but on account of the disability of the employee.
>
> In short, there must be established as an objective fact a relevant disability and as a subjective fact that the disability is the motive for payment by the person making it."

92. It is clear that ITEPA s 406 section does not encompass payments for injury to feelings. It would of course be possible, on the facts of a given case, for discrimination to be the cause of relevant disability, such as a mental health condition, and for an employer to pay compensation in consequence. But as we understand the facts of *Vince-Cain,* that was not the position. To the extent that the EAT's decision rests on its misreading of ITEPA, we respectfully consider it to be unreliable.

Other case law

93. No other cases were cited to us. However, noting in particular that our analysis of the scope of ITEPA s 401 may run counter to the position taken by the Special Commissioner in *Walker,* and that we have disagreed with the *ratio* of the Tribunal in *Oti-Obihara* and the EAT's judgment in *Vince-Cain,* we sought to establish whether there was any other case law which we should consider. We identified two cases, *Mr A v HMRC* [2009] SpC 734 ("*Mr A*"),[5] and *Norman v Yellow Pages* [2010] EWCA Civ 395 ("*Norman*"), and we briefly consider them below.

94. In *Mr A,* Special Commissioner Tildesley considered how much of a £250,000 compensation payment made by a bank to its employee was within ITEPA s 401. Mr A claimed that £175,000 was non-taxable as being paid for loss of reputation, with a further £25,000 being non-taxable as being for injury to feelings. HMRC's position was that "the mere fact that compensation may be for distress or for humiliation or for damage to reputation was not sufficient to take it outside s 401(1)," see [37] and that only £10,000 of the payment fell outside that section.

95. At [48] the Special Commissioner held that "the compensation paid except that for injury to feelings was directly connected to the termination of his employment." At [49] he says "I prefer the respondents' position which was that the compensation allocated to injury to feelings should be limited to a maximum of £10,000" and at [50] the Special Commissioner allocates £10,000 to "injury to feelings" which "does not count as employment income." Although he does not explicitly state that he also endorsed HMRC's legal analysis – namely that a payment for injury to feelings is within ITEPA s 401 if it is connected to the termination – that is a reasonable inference from his conclusion.

96. The facts in *Norman* were that the appellant had signed a compromise agreement with her employer under which she was to be paid £53,000. However, the employer deducted basic rate tax from the part of the payment which exceeded £30,000. Ms Norman claimed breach of contract, arguing that she should have received the gross amount. At [6], Pill LJ records:

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[5] Although not cited by either party before the Tribunal, it is referred to in Mrs Shilliam's letter to Mr Gray-Jones of 8 January 2013.

> "The Respondents' understanding was that they were liable to pay to HMRC tax on the sum above £30,000 and they made their calculation and payment on that basis. It is common ground that damages for injury to feelings are not generally subject to such a tax deduction. It is to be recognised that a significant part of the Appellant's proposed case to the tribunal was based on injury to her feelings by the alleged conduct of the Respondents' employees."

97. The Court then considered *Vince-Cain, Harvey on Industrial Relations and Employment Law* and HMRC's Employment Income Manual, before concluding at [18] that "even if the parties had themselves reached an agreement as to apportionment, which in this case they did not, the Revenue would not be bound to accept it." There was thus no breach of contract.

98. *Norman* does not consider the tax statutes at all. It proceeds from the assumption that "damages for injury to feelings are not generally subject to such a tax deduction" but puts forward no reasoned argument, because both parties were agreed on the point. The Court concluded that the parties' view of apportionment would in any event not bind HMRC. We respectfully conclude that this case casts no light on the scope of ITEPA s 401.

Conclusion on discrimination, injury to feelings and reputational protection

99. In our judgment the statute is plain. Any payment which is made "directly or indirectly in consideration or in consequence of, or otherwise in connection with" a termination is taxable, unless it falls within the £30,000 exemption in s 403, the death/disability exemptions in s 406 or the other specified exemptions in ss 407-414A.

100. *Walker* is not an authority for finding that there is some free-standing tax relief for discrimination payments: the point was not argued in that case. The Tribunal in *Oti-Obihara* simply relied on *Walker* without further analysis, and then went on to extend it further, inverting the statute so that it covers only financial loss payments. *Vince-Cain* was confused about the underlying statutory provisions.

101. Neither *Walker* nor *Oti-Obihara* is binding on this Tribunal, although we have respectfully considered both judgments. The EAT in *Vince-Cain* themselves accepted that "decisions relating to tax liability" fell outside their jurisdiction and we concur: this Tribunal is not bound by a judgment of the EAT which purports to decide the scope of a taxing statute. We have inferred that the Special Commissioner in *Mr A* has taken the same approach as us in applying ITEPA s 401, while the only judgment of a higher court, *Norman,* does not shed any light on the issue.

102. There is nothing in the case law which changes our conclusion that Mr Moorthy's payment comes within the scope of ITEPA s 401, subject to the exemption in ITEPA s 403, which we discuss below.

103. Of course, if a compensation payment is made to an employee for discrimination, injury to feelings or to protect the employer's reputation which is not "directly or indirectly in consideration or in consequence of, or otherwise in

connection with" a termination, it is normally not taxable. But that is not Mr Moorthy's position.

104. Mr Gray-Jones put forward a number of other arguments, to which we now turn.

Crompton

105. Mr Crompton was an enlisted soldier. He applied for various posts but failed the selection procedures. Finally he took a post as a storeman. After he had accepted that post, it was established that he was not sufficiently qualified, and that there was no way of obtaining the relevant qualifications. Mr Crompton took up a redundancy offer. He received a compensation payment, and the issue before the Tribunal was whether this was paid "in connection with" the termination, or otherwise.

106. The Tribunal (Judge Barlow) found as follows:

> "[31]…Mr Crompton left the army either of his own volition or by way of redundancy at the time of leaving the storeman post and not because of his failure to be selected for the posts he was not offered by the selection boards.
>
> 32. Mr Death [for HMRC] argued that without the termination of the employment there would have been no loss to compensate but I hold that is not the case. The compensation in question was paid because Mr Crompton had not been selected for posts for which he applied and which would have enabled him be promoted to staff sergeant and so to earn more than he otherwise would have but that would have been the case whether he stayed in the army or not. Logically, Mr Crompton should have received compensation for the selection boards' failings even if he had stayed in the army because the compensation was awarded for failings in the procedure leading to his not being offered posts which he was not offered while still in the army's employment. He remained in that employment for some months after the selection boards' had rejected his applications."

107. Judge Barlow said that to fall within s 401 there must be "a connection" between the payment and the termination, and here there was not. As Mr Chapman cited, and we repeat here for ease of reference, Judge Barlow says at [35]:

> "A connection must be some sort of link, joint or bond between two things. Here there is no such link between the payment of compensation and the termination of Mr Crompton's employment with the army. The payment was for the selection board's unfair treatment of Mr Crompton but that did not lead to his leaving the army. He left the army because the storeman job came to an end in the circumstances already described."

108. Mr Gray-Jones sought to argue that this case was in point because Mr Moorthy had failed to be selected for one of the available posts at Jacobs and was thus made redundant. However, the differences are plain. Mr Moorthy was made redundant as a direct result of not obtaining one of the available positions. There is a clear connection between his termination and the selection process, and a connection, too, between his compensation payment and the discrimination which he alleges took

place during that selection process. Mr Crompton was paid his compensation for the failures of the selection boards, and Judge Barlow found that there was no connection between those failures and the termination of his employment.

The view taken by Jacobs

109. Mr Gray-Jones submitted that the quantum of the settlement amount would have been agreed by the parties on the understanding that it was not taxable.

110. There is no factual support for this submission. The Agreement stated that "the first £30,000…will be paid to Mr Moorthy without deduction of income tax" and the balance would be subject to tax deduction at 20%. It explicitly states: "the Company makes no warranty as to the taxable status of the payments made under this agreement." Further, it also includes a tax indemnity, under which Mr Moorthy agreed to reimburse Jacobs any further tax which Jacobs was required to pay to HMRC in respect of the £200,000. These contractual terms all indicate that Jacobs considered that further tax might well still be payable, whether by Mr Moorthy directly or from Jacobs as employer.

111. Even had Jacobs considered the whole sum to be tax free, its belief cannot determine the tax treatment: that would be to put the cart before the horse.

Conclusion on ITEPA s 401

112. For the reasons set out above, we find that the £200,000 was "received directly or indirectly in consideration or in consequence of, or otherwise in connection with" the termination of Mr Moorthy's employment.

Discussion on quantum

113. We now consider the extent to which the £200,000 is taxable on Mr Moorthy. There are three issues:

(1) the interaction between the redundancy payment made in the prior year, and the payment of £200,000;

(2) how the PAYE rules apply in the context of Mr Moorthy's SA liability; and

(3) the HMRC "concession" which further reduced the amount subject to tax in the closure notice.

The law on the £30,000 limit and application to Mr Moorthy

114. ITEPA s 403(1) says that a payment within ITEPA s 401 "counts as employment income of the employee or former employee for the relevant tax year if and to the extent that it exceeds the £30,000 threshold."

115. ITEPA s 403(4) says that in working out whether or not the £30,000 threshold has been exceeded, a payment must be aggregated with "other such payments or benefits to which this Chapter applies, according to the rules in section 404."

116. ITEPA s 404(1)(a) requires that payments "in respect of the same employment" be aggregated. ITEPA s 404(4) says "If payments and other benefits are received in different tax years, the £30,000 is set against the amount of payments and other benefits received in earlier years before those received in later years."

117. Mr Moorthy received a statutory redundancy payment of £10,640 in 2009-10. ITEPA s 309 sets out the position of such payments.

> **309 Limited exemptions for statutory redundancy payments**
>
> (1) No liability to income tax in respect of earnings arises by virtue of a redundancy payment…, except where subsection (2) applies.
>
> (2) ...
>
> (3) No liability to income tax in respect of employment income other than earnings arises by virtue of a redundancy payment…except where it does so by virtue of Chapter 3 of Part 6 (payments and benefits on termination of employment etc).
>
> (4) …
>
> (5) In this section…
>
> "redundancy payment" means a redundancy payment under Part 11 of ERA 1996 or Part 12 of ER(NI)O 1996...

118. ITEPA s 309(1) thus provides that a statutory redundancy payment is not taxable as earnings under ITEPA s 62. However, the effect of ITEPA s 309(3) is that a statutory redundancy payment is nevertheless counted towards the £30,000 limit in ITEPA s 401.

119. It is clear from ITEPA ss 403 and 404 as set out above, that termination payments from the same employer must be aggregated, whether they occur in a single tax year or in more than one tax year.

120. As a result, Mr Moorthy "used up" part of his £30,000 exemption in the previous tax year. In 2010-11 only the balance of £19,360 remains to be used against the £200,000 payment.

The PAYE obligation

121. Where an employer made a "relevant payment" to an employee after his employment had ceased, then the version of Regulation 37 of the Income Tax (PAYE) Regulations 2003 which was in force in 2010-11 required that the employer "must deduct tax at the basic rate in force for the tax year in which the payment was made."

122. A "relevant payment" is defined at Regulation 4 as being a payment of, or on account of "net PAYE income"; that in turn is defined in Regulation 3 as "PAYE income" less any allowable pension or charitable contributions. Regulation 2 states that the definition of PAYE income is to be found at ITEPA s 683, and that section says that "PAYE income" includes "PAYE employment income", which in turn includes "any taxable specific income from an employment for the year (determined in accordance with section 10(3))." That section defines "taxable specific income"

from an employment for a tax year as including any specific income which counts as employment income under Part 6. The termination of employment provisions are at Part 6, Chapter 3.

123. The result of that somewhat convoluted definitional exercise means that Jacobs had to deduct basic rate tax from Mr Moorthy's £200,000 payment, other than that which was exempt under ITEPA s 403.

124. However, instead of only exempting £19,360, Jacobs treated the full £30,000 as tax free. The basic rate tax which should have been, but was not, deducted from the payment was thus £2,128 (£10,640 x 20%).

125. Under TMA s 59B(1), Mr Moorthy is required to pay tax on the difference between the income included on his SA return and "any income tax which in respect of that year has been deducted at source." TMA s 59B(7) reads:

> "In this section any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income."

126. As a result, Mr Moorthy is entitled to a credit for the basic rate tax of £2,128 which Jacobs should have deducted from the £10,640 but failed to do so. This deduction is available to him, irrespective of whether HMRC seek to recover that tax from Jacobs.

The Tribunal's decision and the further £30,000

127. HMRC opened an enquiry into Mr Moorthy's SA return under TMA s 9A. It was closed under TMA s 28A, which so far as relevant to this decision, reads:

> **Completion of enquiry into personal or trustee return**
>
> (1) An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions…
>
> (2) A closure notice must either—
>
> (a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions.

128. In this case, HMRC's closure notice amended Mr Moorthy's SA return. Mr Moorthy then appealed to the Tribunal under TMA s 31(1)(b), which reads:

> **Appeals: right of appeal**
>
> (1) An appeal may be brought against—
>
> (a) …
>
> (b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return)…

129. TMA s 50 is headed "Procedure." Section 50(7) reads:

> (7) If, on an appeal notified to the tribunal, the tribunal decides
>
> (a) that the appellant is undercharged to tax by a self-assessment…
>
> the assessment or amounts shall be increased accordingly…

130. Mr Moorthy's SA return, as amended by the closure notice, gives him full relief for £30,000 when relief of only £19,360 was due; in consequence, it also did not give him the benefit of the £2,128 tax credit. Mr Moorthy was therefore undercharged to tax because of the net effect of these two errors, and this Tribunal, in accordance with TMA s 50(7)(a), decides that his tax "shall be increased accordingly."

131. The closure notice also gave Mr Moorthy a further tax-free amount of £30,000. Mr Delmont, the HMRC technical specialist, had already given his view that the full amount of the £200,000 was within ITEPA s 401, subject to the exemption in s 403. The Review Officer subsequently said:

> "this offer has been made in spite of the fact that HMRC believe that the whole termination payment falls under s 401 ITEPA and taxable only subject to the £30,000 threshold…Strictly speaking in the absence of any settlement or agreement my conclusion should have been that the full amount of £200,000 came under s 401. I did not see anything that would lead me to any other conclusion…however, HMRC have, in their revised assessment, used a figure of £140,023. With that in mind I do not intend to disturb that assessment and therefore accept that figure as the assessable amount."

132. As will be clear from the rest of this judgment, we agree with Mr Delmont and the Review Officer that the whole payment falls under ITEPA s 401 subject only to the exemption in s 403. The further deduction of £30,000 has no statutory basis. This Tribunal has no authority to allow a tax relief given by HMRC despite the fact that its officers know it is not due.

133. We therefore find that Mr Moorthy has been undercharged by the omission of this £30,000 from his SA return and that his tax "shall be increased accordingly".

134. We realise that HMRC have called this further £30,000 a "concession," and note that a differently constituted Tribunal has held that concessions are justiciable in this Tribunal, see *Bishop v HMRC* [2013] UKFTT 522 at [131]-[136], a decision of Judge Mosedale. That is not a unanimous view, see *Prince* [2012] UKFTT 157 (TC), a decision of the Chamber President, Judge Bishopp.

135. We do not need to express a view on the extent of this Tribunal's jurisdiction over concessions, because allowing Mr Moorthy a further relief of £30,000 was not a "concession" in the sense meant by Judge Mosedale. She defined extra-statutory concessions at [131] of *Bishop* as "rules published by HMRC without any specific legislative authority to do so but in reliance on HMRC's general care and management powers as a public body." There is no general or public "concession" which allows a taxpayer in receipt of a termination payment to treat £30,000 as

attributable to non-taxable "injury to feelings" or "discrimination" in a situation where the payment for injury to feelings and/or discrimination was "received directly or indirectly in consideration or in consequence of, or otherwise in connection with in connection with" the termination. We have no jurisdiction to take this "concession" into account when deciding Mr Moorthy's appeal.

136. If we were to be wrong in this, so that we do have that jurisdiction, we would find that the granting of this further £30,000 was, in any event, an unlawful concession, and that we were unable to take into account for that reason. Concessions are made under HMRC's general care and management powers, given by TMA s 1. As Lord Hoffman said in *Wilkinson v HMRC* [2006] STC 270 at [21], these powers cannot be construed:

> "so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant."

137. The legislation on termination payments explicitly allows certain limited exceptions to the charging provision: a £30,000 exemption, payments on account of death or disability, and specified pension-related payments etc. It would have been possible for parliament to grant a further exemption, so as to cover all discrimination payments connected to the termination, or (for example) payments up to the level of the *Vento* guidelines, but unless that happens, in our judgment HMRC acts beyond its powers if it grants that relief.

The decision

138. We therefore dismiss Mr Moorthy's appeal. The taxable income in his amended SA return is further increased to include both the £30,000 which related to the "concession" and the £10,640 which was previously treated as part of the £30,000 exemption but which had already been given in the previous year. Mr Moorthy is to be given the benefit of a tax credit of £2,128.

139. We realise that our decision to increase Mr Moorthy's tax assessment over and above the figures included in the closure notice may appear harsh. Mr Moorthy would have paid less tax had he not appealed to the Tribunal. However, at the beginning of the hearing we alerted Mr Moorthy and Mr Gray-Jones to this possibility. We also drew their attention to the failure of Mr Moorthy, Jacobs and HMRC to take into account the previous year's redundancy payment, and the consequences which that failure might have on the outcome if the appeal was lost. It would of course have been possible to withdraw the appeal during the hearing, but that was a matter for Mr Moorthy and his representative.

140. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to

"Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 21 August 2014