



12TACD2020

BETWEEN/

APPELLANT

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Appeal

1. This is an appeal against a determination of the Revenue Commissioners that a payment does not qualify for exemption from income tax under section 192A of the Taxes Consolidation Act, 1997.
2. On agreement of the parties, the appeal is adjudicated without a hearing in accordance with section 949U of the Taxes Consolidation Act, 1997.

Facts

3. The Appellant was an employee of [REDACTED] (hereinafter 'the employer'). On 19 September 2013 an agreement was executed by the employer and the Appellant which provided that the employer would make a payment of €65,000 to the Appellant and a payment of €10,000 to a firm of solicitors as a contribution to the Appellant's legal costs.



4. The agreement is described as a ‘Severance Agreement’ with [REDACTED] described as the “Company” and the Appellant described as the “Employee”. The recitals to the agreement provide:

“WHEREAS

1. *The Employee has been given notice of termination of his employment with the Company by reason of redundancy, effective on 19 September 2013 (the “Effective Date”);*
2. *The Company has agreed to make a termination payment to include the Employee’s statutory redundancy entitlements to the Employee in the amount and on the terms hereinafter set forth.”*

5. Clause 2 of the Severance Agreement provides:

“2. TERMINATION

- 2.1 *The Employee acknowledges that his employment with the Company shall terminate by reason of redundancy with effect from the Effective Date.”*

6. Clause 3 of the Severance Agreement includes the following:

“3. CONSIDERATION, WAIVER AND RELEASE

- 3.1 *In consideration of the Employee’s agreement to the terms and conditions hereof and in full and final settlement, satisfaction, release and discharge of any and all claims, actions or causes of action, suits, complaints, contracts, liabilities, agreements, promises, debts or damages, whether existing or contingent, known or unknown, and whether arising under statute, common law, equity or otherwise arising out of the Employee’s employment with the Company or the termination thereof as the Employee*



may have against the Company, any Associated Company, directors, employees, officers, representatives, agents, successors, shareholders and assigns, the Company shall pay to the Employee the gross sum of €65,000 inclusive of the Employee's statutory redundancy entitlement (the "Termination Payment") which sum shall be paid to the Employee in a tax efficient manner but at no extra cost or expense whatsoever to the Company."

7. Clause 4 of the Severance Agreement includes the following:

"4. TAXATION INDEMNITY

...

- 4.3 *The Company gives no warranty as to the amount of tax or pay related social insurance contributions that may be chargeable by reason of the Termination Payment and other arrangements set out in this Agreement."*

8. Clause 5 of the Severance Agreement provides:

"5. NO ADMISSION

The execution of this Agreement shall not be construed as an admission of a breach of statute or law by either party or breach of any duty or obligation by the Company to the Employee and is entered into without admission of liability."

9. Clause 13 of the Severance Agreement provides:

"13. INDEPENDENT LEGAL ADVICE AND LEGAL COSTS

- 13.1 *The Employee acknowledges that he has taken legal advice from [REDACTED] Solicitors on and understands the effect and implications of this Agreement and every part thereof. The Employee further acknowledges*



that he has entered into this Agreement without any coercion of any description.

13.2 *Subject to production of valid VAT invoice the Company shall pay the sum of €10,000, inclusive of VAT, to [REDACTED] Solicitors by way of contribution to the Employee’s legal costs.”*

10. It is the payment made under the Severance Agreement described above that is the subject matter of the appeal to the Appeal Commissioners.

Legislation

11. Section 192A of the Taxes Consolidation Act, 1997 provides:

“192A Exemption in respect of certain payments under employment law

(1) *In this section*

“relevant Act” means an enactment which contains provisions for the protection of employees’ rights and entitlements or for the obligations of employers towards their employees;

“relevant authority” means any of the following –

- (a) *a rights commissioner,*
- (b) *the Director of the Equality Tribunal,*
- (ba) *an adjudication officer of the Workplace Relations Commission,*
- (bb) *the Workplace Relations Commission,*
- (bc) *the District Court,*
- (c) *the Employment Appeals Tribunal,*
- (d) *the Labour Court,*
- (e) *the Circuit Court, or*
- (f) *the High Court.*

(2) *Subject to subsections (3) and (5), this section applies to a payment under a relevant Act, to an employee or former employee by his or her employer*



or former employer, as the case may be, which is made, on or after 4 February 2004, in accordance with a recommendation, decision or a determination by a relevant authority in accordance with the provisions of that Act.

- (3) *A payment made in accordance with a settlement arrived at under a mediation process provided for in a relevant Act shall be treated as if it had been made in accordance with a recommendation, decision or determination under that Act of a relevant authority.*
- (4) (a) *Subject to subsection (5) and without prejudice to any of the terms or conditions of an agreement referred to in this subsection, this section shall apply to a payment –*
- (i) *made, on or after 4 February 2004, under an agreement evidenced in writing, being an agreement between persons who are not connected with each other (within the meaning of section 10), in settlement of a claim which–*
- (I) *had it been made to a relevant authority, would have been a bona fide claim made under the provisions of a relevant Act,*
- (II) *is evidenced in writing, and*
- (III) *had the claim not been settled by agreement, is likely to have been the subject of a recommendation, decision or determination under that Act by a relevant authority that a payment be made to the person making the claim,*
- (ii) *the amount of which does not exceed the maximum payment which, in accordance with a decision or determination by a relevant authority (other than the Circuit Court or the High Court) under the relevant Act, could have been made under that Act in relation to the claim, had the claim not been settled by agreement, and*



- (iii) *where –*
- (I) *copies of the agreement and the statement of claim are kept and retained by the employer, by or on behalf of whom the payment was made, for a period of six years from the day on which the payment was made, and*
 - (II) *the employer has made copies of the agreement and the statement of claim available to an officer of the Revenue Commissioners where the officer has requested the employer to make those copies available to him or her.*
- (b) (i) *On being so requested by an officer of the Revenue Commissioners, an employer shall make available to the officer all copies of –*
- (I) *such agreements as are referred to in paragraph (a) entered into by or on behalf of the employer, and*
 - (II) *the statements of claim related to those agreements kept and retained by the employer in accordance with subparagraph (iii) of that paragraph.*
- (ii) *The officer may examine and take extracts from or copies of any documents made available to him or her under this subsection.*
- (5) *This section shall not apply to so much of a payment under a relevant Act or an agreement referred to in subsection (4) as is–*
- (a) *a payment, however described, in respect of remuneration including arrears of remuneration, or*
 - (b) *a payment referred to in section 123(1) or 480(2)(a).*
- (5A) *This section shall not apply to payments made pursuant to an order under section 2B of the Employment Permits Act 2003.*



- (6) *Payments to which this section applies shall be exempt from income tax and shall not be reckoned in computing total income from the purposes of the Income Tax Acts.”*

12. Section 123 of the Taxes Consolidation Act, 1997 provides:

“123 General tax treatment of payments on retirements or removal from office or employment

- (1) *This section shall apply to any payment (not otherwise chargeable to income tax) which is made, whether in pursuance of any legal obligation or not, either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment or any change in its functions or emoluments, including any payment in commutation of annual or periodic payments (whether chargeable to tax or not) which would otherwise have been so made.*
- (2) *Subject to section 201, income tax shall be charged under Schedule E in respect of any payment to which this section applies made to the holder or past holder of any office or employment, or to his or her executors or administrators, whether made by the person under whom he or she holds or held the office or employment or by any other person.*
- (3) *For the purposes of this section and section 201, any payment made to the spouse, civil partner, or any relative or dependant of a person who holds or has held an office or employment, or made on behalf of or to the order of that person, shall be treated as made to that person, and any valuable consideration other than money shall be treated as a payment of money equal to the value of that consideration at the date when it is given.*
- (4) *Any payment chargeable to tax by virtue of this section shall be treated as income received on the following date –*





- (a) *in the case of a payment in commutation of annual or other periodical payments, the date on which the commutation is effected, and*
- (b) *in the case of any other payment, the date of the termination or change in respect of which the payment is made,*
and shall be treated as emoluments of the holder or past holder of the office or employment assessable to income tax under Schedule E.
- (5) *In the case of the death of any person who if he or she had not died would have been chargeable to tax in respect of any such payment, the tax which would have been so chargeable shall be assessed and charged on his or her executors or administrators, and shall be a debt due from and payable out of his or her estate.*
- (6) *Where any payment chargeable to tax under this section is made to any person in any year of assessment, it shall be the duty of the person by whom that payment is made to deliver particulars of the payment in writing to the inspector not later than 14 days after the end of that year.”*

Submissions on behalf of the Appellant

13. The Appellant submits that the payment under the Severance Agreement was a payment of compensation by his employer arising from a complaint of bullying made by the Appellant in the course of his employment with the employer. In support of the appeal, the Appellant provided two letters from [REDACTED] Solicitors, a letter dated 29 August 2013 and a letter dated 14 April 2015.
14. In the letter dated 29 August 2013, being a letter from [REDACTED] Solicitors to the employer, it is stated that the Appellant made a formal complaint of bullying on 14 June 2013, that the complaint was investigated by an external investigator and that the report of the external investigator dated 14 August 2013 did not uphold the complaint made by the Appellant. The letter further stated that the Appellant was



entirely dissatisfied with the outcome of the investigation and wished to appeal the entire findings of the external investigator. The letter raised a question as to the proper forum for an appeal. The letter continued by seeking an acknowledgement from the employer that all internal remedies had been exhausted and confirmation that the most effective appeal was a referral of all issues to the Labour Relations Commission for a hearing by a Rights Commissioner. The letter concluded:

“We note also the suggestion of mediation. The writer is a mediator and is committed to mediation as an alternative means of dispute resolution, particularly when it is envisaged that the parties in dispute will continue to be in employment. We have recommended to our client, and we confirm to you now, that this particular dispute is tailor made for mediation...”

15. In the letter dated 14 April 2015, being a letter from [REDACTED] Solicitors to the Appellant, it is stated that a mediation was scheduled for 19 September 2013 and that during the mediation it became clear to the Appellant that he saw no future in his employment with the employer. The letter further states that the speed with which the matter was dealt by the employer, the substantial package agreed and that the employer paid for the mediation with no contribution by the Appellant, confirmed to the Appellant’s legal representative that the employer considered the Appellant a *‘substantial problem to be resolved and resolved as quickly as possible’*.
16. The Appellant submits that the settlement agreed with his employer is strongly indicative of the employer accepting culpability for the complaint of bullying made by the Appellant. The Appellant further submits that the level of contribution to the legal costs of the Appellant demonstrates the extent of the involvement of the legal representative in assisting the Appellant in being compensated.



Submissions on behalf of the Revenue Commissioners

17. The Revenue Commissioners submit that the payment does not meet the statutory requirements in section 192A, and consequently, the payment is not exempt from income tax under section 192A(6).
18. The Revenue Commissioners submit that the payment does not come within section 192A(3) as the payment was not made under a mediation process provided for in a relevant Act. The Revenue Commissioners acknowledge that a dispute resolution process took place but the process was not a mediation process provided for in a relevant Act.
19. The Revenue Commissioners submit that the payment does not come within section 192A(4) as an ‘out of court’ settlement as, for the settlement to be an ‘out of court’ settlement, the matter must be advanced to the point where there is a real prospect that the matter will be presented to a court for decision.
20. The Revenue Commissioners submit that reliance should be placed on the ‘Severance Agreement’ and the wording of that agreement in considering the tax consequences of the payment made to the Appellant. The Revenue Commissioners submit that the ‘Severance Agreement’ supports the view that the payment was not a payment to which section 192A applies.

Analysis and Findings

21. Section 192A(6) provides that, if the section applies, payments shall be exempt from income tax and shall not be reckoned in computing total income for the purposes of the Income Tax Acts. Section 192A(4) describes the requirements that must be satisfied for a payment made under an agreement to come within the section. Section 192A(5) provides that the section shall not apply to so much of a



- payment, however described, in respect of remuneration including arrears of remuneration or a payment referred to in section 123(1) or section 480(2)(a).
22. In considering if a payment made under an agreement has tax consequences, the starting point is the agreement. As the terms agreed by the parties are embodied in the agreement, the meaning of the agreement is determined from a consideration of the agreement as a whole, and without recourse to previous declarations of subjective intent by either party. The agreement conveys the matters agreed upon by the parties and due regard should be given to the words chosen by the parties.
23. The Severance Agreement expresses in clear terms that the Appellant was being given notice of the termination of his employment and that his employer agreed to make a termination payment to the Appellant. The payment of €65,000 is described as a termination payment. The Appellant agreed to accept the payment without any admission of a breach of statute or law by either party or a breach of any duty or obligation by the employer to the Appellant, and in full and final settlement of any claims arising out of the Appellant's employment with the employer.
24. At the time of executing the Severance Agreement, the respective position of the parties was that the employer had a report of an external investigator which did not uphold the Appellant's complaint of bullying and the Appellant had engaged legal representation to appeal the findings of the report of the external investigator. In the correspondence from the Appellant's legal representative to the employer a question is raised as to the proper forum for an appeal and a proposal that the most effective appeal could be a referral of all issues to the Labour Relations Commission. There is no evidence that a claim was made by the Appellant to a relevant authority. The parties arranged a mediation process.
25. In my view, there is no evidence to rebut the express terms of the Severance Agreement. The agreement is expressed in clear language. The Severance



- Agreement conveys that the payment was made on the termination of the employment of the Appellant. Although the Appellant submits that the payment made by his employer was because he made a complaint of bullying, however, the agreed terms were embodied in the Severance Agreement and there is no reference to the payment being made by the employer for a breach of the employment rights of the Appellant arising from his complaint of bullying. The Appellant agreed to accept the payment without any admission of liability of the employer. In executing the Severance Agreement, the Appellant expressly acknowledged in the agreement that he had taken legal advice on and understood the effect and implications of the agreement.
26. Section 192A(3) provides that a payment may be exempt from tax if it is made in accordance with a settlement arrived at under a mediation process provided for in a relevant Act. There is no evidence that a claim was made by the Appellant to a relevant authority. The mediation process between the Appellant and the employer is not identified as a mediation process which has its origins in a relevant Act. The evidence presented is the parties themselves agreeing to mediation. For the provisions of section 192A(3) to apply the settlement should be arrived at under a mediation process provided for in a relevant Act.
27. Section 192A(4) provides that a payment may be exempt from tax if it is made under an agreement between unconnected persons which is evidenced in writing and being in settlement of a claim which, had the claim been made to a relevant authority, would have been a bona fide claim under the provisions of a relevant Act and, had the claim not been settled by the agreement, is likely to have been the subject of a recommendation, decision or determination by a relevant authority. The requirements in subsection (4) specifically refer to a statement of claim. The Revenue Commissioners submit that for a settlement to be considered an ‘out of court’ settlement it must be advanced to the point where there is a real prospect that the matter will be presented to a court for decision. There is no reference in section



192A(4) to ‘out of court’ settlements. This wording appears in a leaflet published by the Revenue Commissioners and in the Notes for Guidance on the Taxes Consolidation Act, 1997. While it may be wording which is a convenience of language, it is important that a consideration of whether section 192A(4) applies is by reference to the wording of the section. As regards the Appellant, no statement of claim has been produced. There is no evidence that a claim was made by the Appellant to a relevant authority. As regards the requirements in section 192A(4), the respective position of the parties at the date of the Severance Agreement is the employer had a report of an external investigator which did not uphold the Appellant’s complaint of bullying and the Appellant has engaged legal representation to appeal the findings of the report of the external investigator.

28. In any event, section 192A(5) provides that the section shall not apply to a payment referred to in section 123(1). Section 123(1) provides that income tax shall be charged under Schedule E in respect of any payment which is made, whether in pursuance of any legal obligation or not, either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment. I find the payment was made under the Severance Agreement on the termination of the employment of the Appellant.

Determination

29. For the reasons outlined above, the appeal is dismissed and I determine that the determination of the Revenue Commissioners that the payment under the Severance Agreement does not qualify for exemption under section 192A of the Taxes Consolidation Act, 1997 shall stand. The appeal is hereby determined in accordance with section 949AL of the Taxes Consolidation Act, 1997.





FIONA McLAFFERTY
APPEAL COMMISSIONER

12th DECEMBER 2019

