



109TACD2021

Between/

[REDACTED]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Matter under Appeal

1. This matter comes before the Tax Appeal Commission as an appeal against the Respondent's PAYE/USC Balancing Statement dated 10 April 2017, which found Universal Social Charge (hereafter "USC") of €8,278.44 was payable in respect of the 2016 tax year on payments made by the Department of Social Protection to the Appellant in respect of his pension entitlements from his employment in [REDACTED].

2. The appeal was heard by me on 13 June 2019. I heard evidence from the Appellant as well as oral legal argument from both parties.

B. Facts relevant to the Appeal

3. The Appellant was an employee of [REDACTED] until that company was found to be insolvent and was wound-up in [REDACTED]. Shortly after this, a pension scheme for the employees of [REDACTED], to which the Appellant had contributed for many years, was also found to be insolvent and suffered the same fate.
4. The winding-up of this and another supplementary scheme caused the employees of [REDACTED] to lose almost all of their pensions. As a consequence, a number of employees issued proceedings against the Minister for Social Protection, Ireland and the Attorney General, alleging that the State had failed to fully transpose the European Directive for the protection of employees in the event of company insolvency.
5. Those proceedings resulted in a reference by the High Court to the CJEU on the proper interpretation of aspects of the Directive. In [REDACTED], the Third Chamber of that Court determined that the measures adopted by the State in relation to the protection of employees in the event of company insolvency did not meet the requirements of European Union law.
6. Following the ruling in Europe, the State and the trade union [REDACTED] engaged in mediation, which ultimately resulted in a recommendation that was unanimously approved by the relevant members of that organisation at a meeting held on [REDACTED]



██████████. Thereafter, the members were each provided with a written agreement which they had the option to accept or decline. Acceptance of the terms offered extinguished any further claim against the State in this respect. The Appellant in this appeal accepted the State's offer in or about ██████████ of ██████████.

7. On ██████████, the Appellant received his first fortnightly payment of his pension. USC was deducted from this initial payment at the relevant rate at that time.
8. On ██████████, the Appellant received his second fortnightly payment of his pension. On this occasion, the Appellant was not charged USC and the amount deducted two weeks previously was refunded.
9. In the sixteen month period following the Appellant's receipt of the first pension payment, none of the amounts paid to him in respect of his entitlements suffered a deduction for USC. One such payment, made on ██████████, was a lump sum constituting four years arrears of pension payments.
10. In ██████████, the Appellant received tax credit certificates which dealt with the issue of USC. These explained that the Appellant had been deemed exempt because his total income for that year had been estimated (based on the previous year) to not exceed €13,000.00. The notice informed him to notify the Respondent in the event that his income was in fact likely to exceed that figure.
11. In relation to the arrears payment of ██████████, the Respondent deducted income tax from the gross figure through the PAYE system at a rate of 40 per cent. This amounted to a significant overpayment by the Appellant as it was in reality a payment for income earned over several years. The Respondent advised the Appellant that if he submitted P60 forms in ██████████ in respect of the arrears years, an assessment of



his true income tax liability would be carried out and any overpayment would be returned to him. The Appellant did this and the Respondent duly calculated the overpayment to be €40,775.17. However, in so doing the Respondent also determined that USC was due in respect of the pension income received by the Appellant during the tax year [REDACTED]. This liability to USC amounted to €8,278.44, which was deducted from the aforesaid income tax overpayment. Consequently, the amount returned to the Appellant was balanced out at €32,496.73.

12. The Appellant contested this decision by letter to the Respondent dated [REDACTED], and referred to the Respondent's guidance document entitled "*Tax Credits, Reliefs and Rates for Tax Years 2015 and 2016*" (hereinafter referred to as "**the Guidelines**"). In this regard, the Appellant pointed to a table therein headed "*The Exempt Categories from USC are*", which table included:-

"All Department of Social Protection payments and payments similar in nature to such payments paid by other government bodies."

13. The Appellant stated that this table clearly indicated that his pension payments were exempt from USC as they were paid to him by the Department of Social Protection in settlement of his dispute over his entitlements. He asserted that the Respondent's initial non-deduction of USC was correct and that it was now "*changing the rules*" in an unfair and unreasonable fashion.

14. He also pointed out in his correspondence that, even if he was incorrect in this regard, the fact that the arrears lump sum was being assessed as "*relevant emoluments*" for the purposes of USC for the [REDACTED] tax year meant that he was paying USC at the highest rate on the bulk of the €127,345.48 paid to him that year in respect of his pension. Had it instead been assessed as relevant income earned in respect of the years [REDACTED],



■■■■, ■■■■ and ■■■■, he would only have paid the base USC rate applicable in each year, thereby lowering his liability.

15. The Appellant was also in correspondence with the Department of Social Welfare on the matter at this time. On ■■■■■■■■■■, an official in that Department explained to him that the payments made under the ■■■■■■■■■■ scheme were unique and were not social welfare or similar payments drawn from money granted to the Department of Social Protection in this context by the Dáil. The official stated that the Department of Social Protection received monies in relation to the scheme from the Central Fund of the Exchequer, which the Department then administered on behalf of the State.

16. Having not received what he believed was a satisfactory response from either the Respondent or the Department, the Appellant appealed to this body on ■■■■■■■■■■.

C. Relevant Legislation

17. Section 531AM OF THE Taxes Consolidation Act, 1997 as amended (hereinafter referred to as “TCA 1997”) is entitled “*Charge to Universal Social Charge*” and contains the main charging provisions in relation to USC. At the material time, subsection (1) thereof provided, *inter alia*, that:-

“With effect from 1 January 2011, there shall be charged, levied and paid, in accordance with the provisions of this Part, a tax to be known as ‘universal social charge’ in respect of the income specified in paragraphs (a) and (b) of the Table to this subsection.



Table

(a) The income described in this paragraph (in this Part referred to as ‘relevant emoluments’) is emoluments to which Chapter 4 of Part 42 applies or is applied, including—

- (i) any allowable contributions referred to in Regulations 41 and 42 of the PAYE Regulations,*
- (ii) the initial market value (within the meaning of section 510(2)) of any shares, excluded from the charge to income tax by virtue of section 510(4), appropriated in accordance with Chapter 1 of Part 17,*
- (iii) the market value (determined in accordance with section 548) of the right referred to in section 519A(1) or 519D(1), and*
- (iv) any gain exempted from income tax by virtue of section 519A(3) or 519D(3),*

but not including—

- (I) social welfare payments and similar type payments,*
- (II) excluded emoluments,*
- (III) emoluments disregarded by an employer on the direction of an inspector in accordance with Regulation 10(3) of the PAYE Regulations,*
- (IV) any amount in respect of which relief is due under section 201(5)(a) and paragraphs 6 and 8 of Schedule 3, and*
- (V) emoluments of an individual who is resident in a territory with which arrangements have been made under subsection (1)(a)(i) or (1B)(a)(ii) of section 826 in relation to affording relief from double taxation, where*



those emoluments are the subject of a notification issued under section 984(1)."

(b) The income described in this paragraph (in this Part referred to as "relevant income") is income, without regard to any amount deductible from or deductible in computing total income, from all sources as estimated in accordance with the Tax Acts, other than—

(i) The income described in this paragraph (in this Part referred to as "relevant income") is income, without regard to any amount deductible from or deductible in computing total income, from all sources as estimated in accordance with the Tax Acts, other than—

(ii) any emoluments, payments, expenses or other amounts referred to in subparagraphs (I) to (V) of paragraph (a) of this Table,

(iii) any gains, income or payments to which any of the following provisions apply –

(I) Chapter 4 of Part 8;

(II) Chapter 5 of Part 8;

(III) Chapter 7 of Part 8;

(IV) Chapter 5 of Part 26;

(V) Chapter 6 of Part 26;

(VI) Chapter 1A of Part 27;

(VII) Chapter 4 of Part 27,

18.Section 531AM(2) provides that:-



“Universal social charge shall not be payable for a tax year by an individual who proves to the satisfaction of the Revenue Commissioners that his or her aggregate income for the tax year does not exceed €13,000.00.”

19.Section 983 of Chapter 4 of Part 42 of TCA 1997 defines emolument as:-

“anything assessable to income tax under Schedule E, and references to payments of emoluments include references to payments on account of emoluments”

20.Section 19 of TCA 1997 contains Schedule E and paragraph 2 of that Schedule provides that:-

“Tax under this Schedule shall be charged in respect of every public office or employment of profit, and in respect of every annuity, pension or stipend payable out of the public revenue of the State, other than annuities charged under Schedule C, for every one euro of the annual amount thereof.”

21.Section 531AL of TCA 1997 is headed “Universal Social Charge” and provides definitions in relation to USC. In this section, “aggregate income for the tax year” in relation to an individual and a tax year is defined as the aggregate of an individual’s:-

*“(a) relevant emoluments in the tax year, including relevant emoluments that are paid in whole or in part for a tax year other than the tax year during which the payment is made, and
(b) relevant income for the tax year”*

22.Section 531AL also defines “social welfare payments” as “payments made under the Social Welfare Acts”.



23. “Similar type payments” are defined in s.531AL as those:-

“...which are of a similar character to social welfare payments but which are made by—

(a) the Department of Education and Skills,

(b) the Department of Agriculture, Food and the Marine,

(c) the Health Service Executive,

(d) an education and training board in relation to attendance at a non-craft training course funded by An tSeirbhís Oideachais Leanúnaigh agus Scileanna,

(e) a sponsor in respect of participation in programmes known as the Community Employment Scheme and the Jobs Initiative Scheme, or

(f) any other state or territory;”

24. Section 48B of the Pension Act 1990 (as amended by the Social Welfare and Pensions (No. 2) Act 2014) is entitled “Payment of moneys by Minister for Finance in respect of liabilities accruing under certain relevant schemes”. This is the provision which established the mechanism for the payment of money to persons whose pension scheme has become insolvent and was wound up. It provides, *inter alia*, that:-

“(1) The Minister for Finance may, at the request of the Minister, following consultation with the Minister for Public Expenditure and Reform, pay moneys to an approved person for the purpose of the discharge by the approved person of the liabilities of an eligible pension scheme, referred to in paragraph (b) of the definition of eligible pension scheme.



(2) The Minister for Finance may, after consultation with the Minister for Public Expenditure and Reform, authorise a person to be an approved person for the purposes of this section.

(3) The moneys referred to in subsection (1) that are required by the Minister for Finance for the making of a payment under that subsection shall be paid out of the Central Fund or the growing produce thereof.”

D. Submissions of the Appellant

25. The Appellant submitted that the Respondent’s assessment of [REDACTED] that found him liable to pay USC of €8,278.44 in respect of the payments made to him in [REDACTED] by the Department of Social Protection was in error.

26. The Appellant submitted that this was so, firstly, because the Guidelines excluded them. In this regard he cited a passage in that text, later amended, which provided that “[a]ll Department of Social Protection payments and payments of a similar nature to such payments paid by other Government bodies...” were exempt. He said that this caused him to have a reasonable expectation that he would not be liable for USC.

27. He also contended that the payment that was made to him was exempt because it was a social welfare or similar type payment because it was paid by the Department of Social Protection. He pointed to the fact that that Department was the Defendant in the proceedings that resulted in the CJEU ruling and which concluded with a settlement whereby the State agreed to make payments to the employees of



██████████ in respect of their entitlements under the wound-up pension scheme.

28. Without prejudice to his primary argument that the income received in respect of his pension was exempt from USC, the Appellant further submitted that the Respondent's decision to treat the arrears payment as income received in ██████████ was unfair and unreasonable. He submitted that had he received his pension payments from the date he became entitled to them in ██████████, he would have been charged a lesser amount in USC in relation to his overall pension payments.

E. Submissions of the Respondent

29. The Respondent submitted that in assessing the pension payments as liable for USC, it was correctly applying the relevant provisions of TCA 1997.

30. Counsel for the Respondent submitted that section 531AM(1) obliged it to charge USC in accordance with the provisions of Part 18D of TCA 1997. The Appellant's income paid pursuant to the mechanism established by the Social Welfare and Pensions (No. 2) Act 2014 was an emolument under s.531AM(1)(a) in the form of a pension and was not a "*social welfare [or] similar type payment*" excluded from USC under s.531AM(1)(a)(I). The finances for social welfare payments are granted to the Department of Social Protection by the Oireachtas in the Budget each year and are specified to be for the purposes of social welfare. The finances for pension payments of the kind made to the Appellant are, in contrast, drawn from the Central Fund of the Exchequer managed by the Minister for Finance.



31. It was submitted by the Respondent that if the Guidelines could have been taken to suggest that s.531(1)(a)(I) excluded *all* payments made by the Department of Social Protection, they were in error. The Respondent pointed to the usual disclaimer contained in all such Revenue documents, including the Guidelines, to the effect that the contents therein could not be relied on as a definitive interpretation of the law and could not override rights and obligations in the tax code, as decided on by the Oireachtas.

32. Moreover, the Respondent submitted that the manner in which the USC liability was calculated in relation to the arrears lump sum was in accordance with the relevant legislation. In this respect, Counsel referred me to Section 531AL TCA, which provides that:-

“aggregate income for the tax year”, in relation to an individual and a tax year, means the aggregate of the individual’s—

(a) relevant emoluments in the tax year, including relevant emoluments that are paid in whole or in part for a tax year other than the tax year during which the payment is made, and

(b) relevant income for the tax year...”

33. The Respondent submitted that, as the payment to the Appellant was an emolument, the legislation mandated that when calculating the Appellant’s aggregate income for the purposes of his USC liability, the Respondent do so by including the whole of the lump sum. The legislation did not permit the Respondent, in this context, to regard the payment as “relevant income” for the years ■■■■, ■■■■, ■■■■ and ■■■■.



F. Analysis and Findings

34. The first issue that arises in this appeal is whether the payments made to the Appellant by the Department of Social Protection in relation to his [REDACTED] pension entitlements were exempt from USC. If the answer to this is no, the second issue that arises is whether the lump sum arrears element of the 2016 pension payments should have been assessed on the basis that it was, for the purposes of calculating the Appellant's USC liability, relevant income under the TCA for the years [REDACTED], [REDACTED], [REDACTED] and [REDACTED], rather than for the year [REDACTED].

Whether the payments were a social welfare or similar type payment

35. In relation to the first issue, I find that the Respondent was correct in determining that the payments to the Appellant in respect of his pension entitlements were relevant emoluments under section 531AM TCA and were not excluded from USC.

36. The Table in section 531AM(1) provides that the income described in that paragraph is "*emoluments to which Chapter 4 of Part 42 applies or is applied*", and goes on to include a number of specific types of emolument. Section 983 provides that, for the purposes of Chapter 4 of Part 42, "*'emoluments' means anything assessable to income tax under Schedule E, and references to payments of emoluments include references to payments on account of emoluments...*". Paragraph 2 of Schedule E provides that "[t]ax under this Schedule shall be charged ... in respect of every annuity, pension or stipend payable out of the public revenue of the State..."

37. It was common case between the parties that the pension payments made to the Appellant the subject of this appeal were paid out of the Central Fund pursuant to section 48B of the Pension Act 1990. They are therefore "*payable out of the public*



revenue of the State” within the meaning of Paragraph 2 of Schedule E, and are accordingly an emolument to which Chapter 4 of Part 42 of TCA 1997 applies.

38.Section 531(AM)(a)(I) TCA excludes from the definition of “*relevant emoluments*” for USC purposes “*social welfare and similar type payments*”. Social welfare payments are defined in s.531AL as “*payments made under the Social Welfare Acts*” and similar type payments as those made by certain enumerated entities “*which are of a similar character to social welfare payments*”.

39.Having carefully considered the submissions of the parties, I am satisfied and find as a material fact that the payments received by the Appellant the subject of this appeal are not payments made under the Social Welfare Acts; rather, they are payments made pursuant to section 48B of the Pension Act, 1990. Equally, the payments are not made by one of the entities enumerated in the definition of “*similar type payments*” contained in section 531AL, and therefore they cannot be said to be such similar type payments.

40.I also accept as correct the Respondent’s submission that this finding is reinforced by the fact that the payments are not drawn from monies granted by the Dáil to the Department of Social Protection as part the social welfare budget. Instead, they are payments from the Central Fund provided to the Department of Social Protection by the Minister for Finance in consultation with the Minister for Public Expenditure and Reform. They are entirely distinct from the types of payment that form part of the social welfare system. The Appellant correctly submits that the Department of Social Protection has a connection to the payments in that he receives the payments from that Department. He further emphasised that the Department was the primary Defendant in the proceedings which resulted in the reference to the CJEU and the subsequent mediation. However, the fact that the Department may be tasked with



administering the payments is not sufficient to render those payments social welfare payments or similar type payments.

41. The Appellant further submitted that the Guidelines led him to believe that the reason no USC was returned in [REDACTED] and was not charged for a period thereafter was because all payments from the Department of Social Welfare were exempt. The Appellant submitted in effect that this gave rise to a legitimate expectation on his part that he would not be liable to USC on the payments he received and/or that the Respondent is estopped by virtue of the statement contained in the Guidelines from seeking to assess the pension payments to USC. I have some sympathy with this submission, and agree with the Appellant that the relevant wording in the Guidelines was, at best, imprecise.

42. However, it is well established both by decisions of this Commission and by decisions of the Courts that the Tax Appeals Commission does not have the jurisdiction to consider or determine arguments grounded in legitimate expectation or estoppel because such points fall outside our statutory jurisdiction (see, *e.g.*, ***Lee -v- Revenue Commissioners* [2021] IECA 18** at paragraph 68).

43. Therefore, while I fully understand the sense of dissatisfaction and frustration with the Guidelines which was eloquently expressed by the Appellant at the hearing before me, I am not empowered to consider whether the wording used by the Guidelines could operate to take the payments he received out of the ambit of USC on a legitimate expectation or estoppel basis.

44. Accordingly, I find that the Respondent's decision that the pension payments were liable to USC was valid and should stand.



Whether the method of assessment was in error

45. Having found that the payments were subject to USC, I turn now to the decision of the Respondent to assess the arrears payments as “*relevant emoluments*” for the year [REDACTED].
46. The Appellant argued that the approach adopted by the Respondent was contrary to its Customer Service Charter on the grounds that it undertook therein to administer the law “*fairly, reasonably and consistently.*” While a breach of the Respondent’s Customer Service Charter may be actionable (see ***Keogh –v- Criminal Assets Bureau VI ITR 635***), it is actionable on a legitimate expectation basis and, as stated above, the Tax Appeals Commission does not have the jurisdiction to consider such an argument.
47. For the reasons outlined above, I am satisfied that the payments made to the Appellant, including the payment of arrears he received in [REDACTED], constituted emoluments within the meaning of Chapter 4 of Part 42 of TCA 1997 and were therefore “*relevant emoluments*” for the purposes of section 531AM(1)(a).
48. Section 531AL defines a taxpayer’s aggregate income for a tax year as including “*relevant emoluments in the tax year, including relevant emoluments that are paid in whole or in part for a tax year other than the tax year during which the payment is made*” [emphasis added]. It is clear from this that the Respondent was required to treat the payment received by the Appellant on [REDACTED] as part of the Appellant’s aggregate income for that tax year, notwithstanding that the payment was comprised in part of the payment of arrears relating to prior years. It was not within the power of the Respondent to decide that parts of the payment should be assessed as emoluments arising in different tax years to the tax year in which it was received.



49. The Appellant also contrasted what he alleged was a more flexible attitude adopted by the Respondent in relation to income tax credits claimed by other contributors to the pension scheme. He said that this was further evidence of unfairness and unreasonableness on the part of the Respondent.

50. Leaving aside the apparent evidential issues in respect of this argument, the alleged treatment of other taxpayers in relation to an entirely distinct part of the tax code could not supersede the plain and unambiguous meaning of the provisions of the TCA governing the charging of USC.

51. Accordingly, I am satisfied that the Respondent was correct to assess the arrears lump sum received by the Appellant on [REDACTED] as “*relevant emoluments*” for the [REDACTED] tax year and part of the Appellant’s aggregate income for that tax year.

G. Conclusion

52. For the reasons outlined above, I find that the Respondent was correct in determining that:-

- (a) the pension payments made to the Appellant by the Department of Social Protection during [REDACTED] were not excluded from liability to USC under section 531AM of TCA 1997; and,
- (b) the arrears sum paid to the Appellant on [REDACTED] was, pursuant to section 531AL of TCA 1997, part of the Appellant’s aggregate income for the 2016 tax year and was correctly assessed to USC on that basis by the Respondent.



53.Accordingly, I will refuse the Appellant's appeal. I find that the Respondent's assessment that the Appellant is liable to pay €8,278.44 in respect of USC for the [REDACTED] tax year is correct and determine pursuant to section 949AK(1) of the Taxes Consolidation Act, 1997 that the assessment should stand.



**MARK O'MAHONY Appeal
Commissioner 18 June 2021**