



141TACD2022

Between



Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) of a decision of the Revenue Commissioners (“the Respondent”) to treat a sum received by the Appellant from his employer in 2019 as a payment in respect of remuneration, chargeable to income tax under section 112 of the Taxes Consolidation Act 1997 (“the TCA 1997”) in the year of its receipt.
2. This appeal proceeded by way of oral hearing, held on 11 August 2022. The Commissioner had the benefit of written and oral submissions provided by both parties.

Background

3. The Appellant was an employee of [REDACTED] (“the employer”) from [REDACTED] until he was forced to retire against his wishes aged [REDACTED] on [REDACTED].
4. Upon this occurring the Appellant received a lump sum payment on retirement of €50,000, which was untaxed.

5. The Appellant brought a claim against the employer for unfair dismissal, in which he was successful in the [REDACTED] on the grounds that the contractual retirement age for his position was in fact [REDACTED].
6. It is apparent from the determination of the [REDACTED] of [REDACTED] that the Appellant, having won his claim, opted for reinstatement to his position as the preferred form of redress. The [REDACTED], considering it to be appropriate in the circumstances, duly ordered that it occur. The effect of this was that he was deemed reinstated on the same day as his dismissal on the same terms and conditions as he had before.
7. Upon reinstatement the Appellant became entitled to the salary that he had not received in the years 2017, 2018 and 2019.
8. In 2019 the Appellant received a gross sum matching his arrears of salary, which was subject to tax under the PAYE system as income chargeable to the year 2019 only.
9. As a consequence of the arrears being taxed as income for 2019, as opposed to 2017, 2018 and 2019, the Appellant suffered a substantially higher charge to tax than he would have had he not been unfairly dismissed and received his salary in the normal course at intervals.
10. The Appellant provided the following computation performed by his accountant, which specified how this affected him adversely:-

“Estimate of what [the Appellant] should have got:

<i>Net pay:</i>	<i>€91,364</i>
<i>Plus Pension lump sum 2021:</i>	<i>€49,275</i>
	<i>€140,639</i>
<i>Actually received</i>	<i>€53,156</i>
<i>Pension lump sum 2017 in error</i>	<i>€49,275</i>
<i>Pension received</i>	<i>€18,103</i>
	<i>€120,534</i>
<i>Difference</i>	<i>€20,106”</i>

11. It should be noted that in correspondence with the Respondent prior to delivering his Notice of Appeal, the Appellant stated that he had repaid to the employer some or all of

the €18,103 of regular pension payments received following his dismissal and before reinstatement.

12. The Commissioner heard evidence that the Appellant raised the matter of the taxation of the arrears and its adverse impact of the net amount he received with the employer. It indicated, however, that it bore no responsibility for this.
13. The Appellant contacted the Respondent on 10 December 2019 with a query as to whether his salary could be attributed to 2017, 2018 and 2019, rather than 2019 alone.
14. On 8 September 2020 the Respondent contacted the Appellant to state that section 112(3) of the TCA 1997 (as amended by section 77 of the Finance Act 2017) required that all income received after the 1 January 2018 be taxed in the tax year in which it was paid to the relevant person.
15. Thereafter, on 17 June 2021 the Appellant wrote to the Respondent and stated in correspondence that:-

“If you were to follow the arbitrary rules laid out, then the €50,000 I received as a pension lump sum in 2017 (which was only due to be received in [REDACTED] upon my actual retirement, then the 50k needs to be recategorised as salary for the remainder of 2017 and 2018.”

16. After the Respondent reiterated that the relevant legislation required that the arrears be taxed on the year of receipt, the Appellant again wrote to the Respondent in the following terms:-

“The lump sum was paid directly by my employer in error in 2017. Therefore I am entitled to have this money reallocated as salary from May 2017 to 2018. Part of the lump sum received in 2019 would then include a “taxfree” pension lump sum which was due to me in [REDACTED].”

17. The correspondence also stated:-

“Revenue are seeking to overrule a [REDACTED] Order to enforce tax legislation. The [REDACTED] Order did not say that I was to be compensated for the years I was dismissed. It stated that I was to be reinstated to the position I was in had I not been dismissed:

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

18. Having received this, the Respondent stated that it would consider whether the arrears payment fell under the exemption from tax provided by section 192A of the TCA 1997 for certain payments made “under employment law”. On 3 August 2021 the Respondent duly sent the following correspondence to the Appellant:-

“After a close examination of your case, I regret to inform you there is no relief due under S192A TCA 1997.

The payment received from [REDACTED] resulted from the [REDACTED] Determination [REDACTED] of [REDACTED]. According to that determination your “preferred form of redress would be reinstatement [REDACTED] [REDACTED]”. The determination states “[REDACTED] [REDACTED] the Complainant was unfairly dismissed and should be reinstated [REDACTED] until he reaches the age of [REDACTED]”.

According to your correspondence and supporting documentation you were reinstated with [REDACTED] with effect from 6/5/2017. The amount paid to you in December 2019 was arrears of pay for the period from 6/5/2017 up to the end of December 2019. This is confirmed in the letter dated 10/12/2019 from the [REDACTED] [REDACTED].

As outlined in Section 192A(5) of the Taxes Consolidation Act “This section shall not apply to so much of the payment under our 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”. The payment made was in respect of the employment income due to you from the date of dismissal to the date you were reinstated so does not qualify for exemption under Section 192A”.

I also confirm that, as previously advised, your Arrears of Pay were taxed correctly in 2019.

In regard to your pension sum of €50,000, I have confirmed with [REDACTED] [REDACTED] that this payment was treated as Retirement Lump Sum and was paid directly to you tax free and regardless of which tax year it was paid in, it would still be treated as Exempt income.

You have also been granted tax relief on your AVC payment of €50,000 for tax years 2019 and 2020. Tax relief on this AVC has been granted against your Employment income - tax relief on an AVC is only available against employment income, it cannot be allowed against other sources of income.”

19. Having received the foregoing decision, the Appellant duly appealed to the Commission.

Legislation and Guidelines

20. Part 5 of the TCA 1997 is entitled “*Principal Provisions Relating to the Schedule E Charge*” and the first provision therein is section 112, which is entitled “*Basis of assessment, persons chargeable and extent of charge.*” Subsections (1) and (2) therein provide:-

“(1) Income tax under Schedule E shall be charged for each year of assessment on every person having or exercising an office or employment of profit mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.

(2) (a) in this section, “emoluments” means anything accessible to income tax under Schedule E.

(b) Where apart from this subsection emoluments from an office or employment would be for a year of assessment in which a person does not hold the office or employment, the following provisions shall apply for the purpose of subsection (1):

(i) if in the year concerned the office or employment has never been held, emoluments shall be treated as emoluments for the first year of assessment in which the office or employment is held, and

(ii) if in the year concerned the office or employment is no longer held, the emoluments shall be treated as emoluments for the last year of assessment in which the office or employment was held.

21. Section 77 of the Finance Act 2017 amended section 112 of the TCA 1997 by inserting the following additional subsections:-

“(3) Notwithstanding subsection (1) and subject to subsections (4) and (6), the income tax under Schedule E to be charged for the year of assessment 2018 and subsequent years of assessment in respect of emoluments to which Chapter 4 of

Part 42 applies or is applied shall be computed on the amount of the emoluments paid to the person in the year of assessment.

(4) Where emoluments chargeable under Schedule E arise in the year of assessment 2017, and those emoluments are also chargeable to income tax in accordance with subsection (3) for the year of assessment 2018 or a subsequent year of assessment, the amount of the emoluments chargeable to income tax for the year of assessment 2017 shall, on a claim being made by the person so chargeable, be reduced to the amount of emoluments that would have been charged to income tax had subsection (3) applied for that year of assessment.”

(5) Where a person dies and emoluments are due to be paid to that deceased person, the payment of such emoluments shall be deemed to have been made to the deceased person immediately prior to death.

(6) (a) In this subsection, “proprietary director” has the same meaning as it has in section 472.

(b) Subsection (3) shall not apply to –

(i) emoluments paid directly or indirectly to a body corporate (or by any person who is connected (within the meaning of section 10) with the body corporate) to a proprietary director of the body corporate, or

(ii) emoluments in respect of which notification has issued under section 984(1).”

22. Section 192A TCA 1997 is entitled “*Exemption in respect of certain payments under employment law*”. In full, it provides:-

“(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 6

(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.”

23. Section 7 of the Unfair Dismissals Act 1977 (as amended) is entitled “Redress for Unfair Dismissal” and the parts relevant to this appeal provide:-

“(1) Where an employee is dismissed and the dismissal is an unfair dismissal, the employee shall be entitled to redress consisting of whichever of the following the

adjudication officer or the Labour Court, as the case may be, considers appropriate having regard to all the circumstances:

(a) re-instatement by the employer of the employee in the position which he held immediately before his dismissal on the terms and conditions on which he was employed immediately before his dismissal together with a term that the re-instatement shall be deemed to have commenced on the day of the dismissal, or

(b) re-engagement by the employer of the employee either in the position which he held immediately before his dismissal or in a different position which would be reasonably suitable for him on such terms and conditions as are reasonable having regard to all the circumstances, or

(c) (i) if the employee incurred any financial loss attributable to the dismissal, payment to him by the employer of such compensation in respect of the loss (not exceeding in amount 104 weeks remuneration in respect of the employment from which he was dismissed calculated in accordance with regulations under section 17 of this Act) as is just and equitable having regard to all the circumstances, or

(ii) if the employee incurred no such financial loss, payment to the employee by the employer of such compensation (if any, but not exceeding in amount 4 weeks remuneration in respect of the employment from which he was dismissed calculated as aforesaid) as is just and equitable having regard to all the circumstances,

and the references in the foregoing paragraphs to an employer shall be construed, in a case where the ownership of the business of the employer changes after the dismissal, as references to the person who, by virtue of the change, becomes entitled to such ownership.

(1A) In relation to a case falling within section 6(2)(ba) the reference in subsection (1)(c)(i) to 104 weeks has effect as if it were a reference to 260 weeks.

Submissions

Appellant

24. The Appellant in his Notice of Appeal and Statement of Case submitted that the decision of the Respondent to tax the payment received from the employer following reinstatement for the tax year 2019 was in breach of his constitutional rights and his rights under the

European Convention on Human Rights as it ran contrary to a decision of the Labour Court. It was also submitted in written argument that if the effect of section 112 of the TCA 1997 was to make the payment chargeable in 2019 only, then it was unconstitutional.

25. At hearing however it was accepted on behalf of the Appellant that the jurisdiction of the Commissioner did not extend to determining these issues. This is discussed briefly in the subsequent section of this determination.
26. The Appellant submitted at hearing that the payment was in any event one clearly falling under section 192A of the TCA 1997. In its Determination, the ██████████ had ordered that he be given the redress of reinstatement as a result of a breach of his rights protected under employment law. The sum paid following his reinstatement was a payment made in consequence of this breach. Nowhere in the Determination of ██████████ was it stated that the payment made to him was for remuneration not received. The payment should thus be exempt from income tax.
27. The Appellant also submitted that the pension lump sum he received in 2017 following his unfair dismissal should be reallocated or recategorised as income earned in the years 2017 and 2018. Concomitantly, a portion of the sum received in 2019 should be taken to include the tax free pension payment. This, the Appellant said, would result in a tax saving of €3,737.00, in accordance with the computations of his accountant.

Respondent

28. The Respondent submitted that, while section 192A of the TCA 1997 exempts from taxation payments made “under employment law”, subsection (5)(a) therein is clear that arrears of remuneration falling under this heading are excluded expressly. The Respondent contended that it was clear that the payment made to the Appellant after his reinstatement was for the salary he had not received during the period when he was unfairly dismissed.
29. The consequence of this, submitted the Appellant, was that the payment received in 2019 was chargeable to tax under section 112 of the TCA 1997. Subsection (3) therein leaves it no discretion. Income received in a given year must be taxed in that year. This was a change brought about by section 77 of the Finance Act 2017. Previously, arrears of the kind received by the Appellant would have been taxable based on the year to which they were attributable. It was the Appellant’s misfortune, for which the Respondent expressed sympathy, that the amendment of the legislation had this adverse impact on him, however it could not be otherwise based on its wording.

30. The Appellant also submitted that there was no basis upon which it could reallocate or reclassify the retirement lump sum received in 2017 to taxable income for the years 2017 and 2018 and attribute part of the payment received following reinstatement as a tax free sum. In any event, the Respondent did not accept that doing so would have any tax benefit from the Appellant's point of view.

Material Facts

31. The facts material to this appeal are as follows:-

- the Appellant was an employee with the employer when, on 5 [REDACTED], he was forced to retire at the age of [REDACTED] against his wishes;
- shortly after this the Appellant received a lump sum on retirement of €50,000, which was untaxed;
- the Appellant issued proceedings for unfair dismissal and won his claim before the [REDACTED] in [REDACTED] 2019;
- the Appellant opted for reinstatement as his preferred form of redress, which the [REDACTED] was prepared to order;
- after reinstatement the Appellant received a payment from the employer. This corresponded with salary that he had not received from the employer during the period of his unfair dismissal;
- the net sum that the Appellant actually received however upon his reinstatement was €53,156. Had the Appellant not been dismissed unfairly and received his salary at intervals over 2017, 2018 and 2019 his net pay would have been €91,364;
- the cause of this was that the gross payment to the Appellant was charged to the tax year 2019 in its entirety. The salary was not apportioned between the tax years 2017, 2018 and 2019 as it would have been had he not been dismissed unfairly.

Analysis

32. While the Appellant abandoned his constitutional arguments at hearing, for the avoidance of doubt the Commissioner notes that in *Lee v Revenue Commissioners [2018] IECA 118*, the Court of Appeal held that the sole function of an Appeals Commissioner is to determine if tax is owed under tax legislation and, if it is found to be owing, the amount. Questions of the constitutional validity of legislation must be pursued by a person at first instance in the High Court, if they wish to do so. For the same reason, an Appeals Commissioner is not

empowered to depart from the meaning of legislation where questions of equity or fairness arise (on this see *The State (Whelan) v Smidic*, [1938] 1 I.R. 626, *Menolly Homes Ltd v The Appeal Commissioners* [2010] IEHC 49, *State (Calcul International Ltd.) v The Appeal Commissioners*, III ITR 577.

33. The first question that falls to be determined in this appeal is whether the payment made to the Appellant falls to be taxed under section 192A of the TCA 1997 as a “payment under employment law”, and is thus exempt from tax, or under section 112 of the TCA 1997.
34. The Appellant brought an employment claim against his employer as a result of being forced to retire at the age of ■. In this he was successful in the ■■■■■ and opted for reinstatement. Pursuant to section 7 of the Unfair Dismissal Act 1977 (as amended) the Appellant was thus returned to the position he held prior to his dismissal, with reinstatement deemed to have commenced on ■■■■■.
35. There is no doubt that the payment made to the Appellant by the employer was a payment made “under a relevant Act” within the meaning of section 192A(2) of the TCA 1997. However, subsection (5)(a) therein expressly excludes from its ambit payments “...however described, in respect of remuneration including arrears of remuneration”.
36. The redress granted to the Appellant was reinstatement, pursuant to which he was deemed in effect not to have been dismissed and was therefore entitled to arrears of unpaid salary. This was what the payment made to him represented. As such, section 192A(5)(a) of the TCA 1997 clearly provides that it cannot be exempted and therefore it must be taxed under section 112 of the TCA 1997.
37. Section 112(3) of the TCA 1997 is now equally clear in providing that all income is to be charged to the year in which it was paid. Section 7 of the Unfair Dismissals Act 1977 (as amended) entitles a person to reinstatement on the terms and conditions they held immediately before dismissal. It is a question of fact, however, when the salary arrears were paid by the employer. This was in 2019 in a lump sum. Accordingly, there is no doubt that, in accordance with the plain meaning of section 112(3) of the TCA 1997, it must be charged for that year alone. Section 7 of the Unfair Dismissals Act 1977 (as amended) requires that a reinstated person be given the same terms and conditions of employment that they had previously. It does not address the question of taxation. If, as the Appellant argued, the meaning of this legislation is to require that a person be put in the position that they were in before dismissal, including taking account of taxation issues, this would be a matter as between the Appellant and the employer. The Commissioner stresses that he makes no comment on the merits of such a claim one way or the other.

38. The Commissioner has sympathy with the position in which the Appellant finds himself. Despite proving that he was dismissed unfairly and obtaining redress with the effect that he was deemed reinstated that same day, his charge to income tax was much higher than it would have been had his rights and entitlements under his contract of employment been respected. As noted already however, the Commissioner is not empowered to consider questions of fairness or equity. Any change to take account of circumstances such as those in which he finds himself must come, if it is to come, from the Oireachtas. Similarly, if there is a desire to challenge the validity of legislation then that must be pursued in the Superior Courts. The Commissioner wishes to emphasise again that he makes no comment about the merits of any such challenge.
39. The final issue is that concerning the suggested reallocation or recategorisation of the tax free lump sum pension payment received by the Appellant in 2017 as taxable income attributable to the year 2017 and 2018, and the concomitant deeming of part of the payment received in 2019 as a tax free payment.
40. The approach stance by the Respondent in respect of this suggestion was that the character and purpose of the payment from 2017 was a matter of fact that could not be altered. There was no power under the tax acts by which it could deem a payment made for one purpose as a payment for another and reassign it in the manner suggested.
41. The Appellant did not identify legislation by which its contention regarding the treatment of the lump sum pension payment could be given effect by the Commissioner and, consequently, it is not possible for the Commissioner to make any determination in favour of the Appellant in this regard.

Determination

42. This is a case in which the Appellant is deserving of much sympathy, though it may be of little consolation. There is no doubting the fact that his circumstances are unfortunate. Having received vindication in [REDACTED], he still suffered significant adverse tax consequences. Nevertheless, for the reasons given above the Commissioner must find that the decision of the Respondent to tax the payment received in 2019 in the wake of his reinstatement for that year must stand.
43. This appeal is determined under section 949AK of the TCA 1997. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.



Conor O'Higgins
Appeal Commissioner
23 August 2022

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997.