DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the London Fox Court First-tier Tribunal dated 19 January 2018 under file reference SC242/16/07714 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> *"The parent with care's appeal is dismissed.*
>
> *The Secretary of State's decision of 28 July 2016, revising the decision of 27 June 2016, is confirmed.*
>
> *The father is liable to pay £0.00 per week as from 2 July 2016 in statutory child support maintenance for the three qualifying children."*

This decision is given under section 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Summary

1. This appeal concerns what should be, on the face of it, a straightforward question – is a redundancy payment treated as part of a non-resident parent's current income for the purpose of assessing his child support liability?

2. The question may be straightforward but the length of this decision shows that the answer is anything but.

3. In summary, my decision is that while the taxable component of a redundancy payment counts as *historic income* for the purposes of the latest (and third) child support scheme, it does not count as *current income*.

4. The result is in several ways deeply unattractive. One arm of the State – Her Majesty's Revenue and Customs – treats redundancy payments in the hands of an employee as subject to income tax (and subject to an exemption for the first £30,000 of any such payment). At the same time another arm of the State – the Child Maintenance Service treats redundancy payments as historic income but not as current income. The consequence in this case – where a very substantial redundancy payment is made to the non-resident parent, after many years of handsomely-remunerated employment, followed by a period of nearly a year's unemployment – is that the father escapes any child support liability. I find it hard to credit that this outcome represents the Secretary of State's policy intention. However, the statutory drafting leads me inexorably to the conclusion outlined above.

Abbreviations

5. The following abbreviations are used in this decision:

CMS	Child Maintenance Service
CSMCR 2012	Child Support and Maintenance Calculation Regulations 2012 (SI 2012/2677)
FQPM	Financially Qualified Panel Member
HMRC	Her Majesty's Revenue and Customs
ITEPA	Income Tax (Earnings and Pensions) Act 2003
ITTOIA	Income Tax (Trading and Other Income) Act 2005
PAYE	Pay As You Earn

Annexes

6. This decision involves extensive reference to both child support and tax legislation. For convenience all the relevant statutory materials (and an allied HMRC Practice Note) are set out in annexes to this decision. The text of the legislation is included as it stood on the date of the Secretary of State's decision under appeal, being 27 June 2016 (but as revised on 28 July 2016).

Annex 1	ITTOIA (sections 76-79)
Annex 2	ITEPA (sections 6-10, 14-15, 62, 309 and 401-404)
Annex 3	HMRC Practice Statement 1 (1994)
Annex 4	CSMCR 2012 (regulations 4 and 34-39)

The parties

7. The Appellant is, in the language of the Child Support Act 1991, the "non-resident parent", being the father of the "qualifying children". The Second Respondent is their mother and the "parent with care". The couple went through an acrimonious divorce. The First Respondent is the Secretary of State for Work and Pensions, who makes decisions on child support liabilities through the CMS. This is a "third scheme" case, i.e. one based on the child maintenance regime established by the Child Support Act 1991 and as amended by the Child Maintenance and Other Payments Act 2008.

8. None of the parties has actively sought an oral hearing of this appeal. I am satisfied that the case can be properly determined without such a hearing.

The background to this appeal

9. What follows is necessarily only a summary of the complex and contested factual background to the case, but sufficient to understand the context of the legal issues that arise in this appeal. The parents married in 2002 and have three children, now aged 15, 13 and 12. The father was employed in a (well-paid) senior role by a City merchant bank. The parents separated in 2012. The Central Family Court made a financial remedy order on 10 June 2014, which included provision for the father to pay spousal maintenance of £1,755 a month and child maintenance of £1,500 monthly (£500 for each child).

10. The father's gross salary in the 2015/16 tax year was £187,771. However, on 8 March 2016 his employers notified him that he was being made redundant; he was then sent on "gardening leave" for three months. On 10 June 2016 he applied to the CMS for a child support assessment. On 27 June 2016 the CMS calculated his child support liability as £413.13 a week with effect from 2 July 2016, based on his historic gross income for the 2015/16 tax year, as provided through the HMRC computer interface. This assessment was equivalent to £1,795.15 a month in child support, approximately £300 a month more than the court-ordered level of child maintenance.

11. The father then asked for a reconsideration of the decision of 27 June 2016, advising the CMS that he made been made redundant on 20 June 2016. His gross

redundancy payment was £110,300, comprising an initial £30,000 that was exempt from income tax and a further £80,300 subject to tax. As a result, he was paid the net sum of £75,323,34 in July 2016, tax of £34,976.66 having been deducted. The CMS revised its assessment on 26 July 2016, substituting a nil assessment, as a result of concluding that he now had a nil income. The mother, understandably enough, lodged an appeal, following an unsuccessful request for mandatory reconsideration. The CMS justified its revised decision in the following terms in its response to the appeal:

> "A redundancy payment does not satisfy the definition of earned income because at the point an employee is made redundant, they no longer satisfy the definition of an employee and they are no longer in employment."

12. As will be seen, this explanation by the CMS was something of an over-simplification but was along the correct legal lines.

13. Meanwhile, on 20 February 2017, the father took up a new post with a higher education institution. His new employment was on a salary of approximately £43,000, and so was equivalent to rather less than 25% of his previous pay in the City (a somewhat crude comparison that disregards any other elements of the overall remuneration package he enjoyed with the merchant bank that are not replicated in the higher education sector).

The First-tier Tribunal's decision

14. The First-tier Tribunal ('the Tribunal'), sitting on 19 January 2018 and comprising a tribunal judge and a FQPM, allowed the mother's appeal and set aside the Secretary of State's revised decision dated 28 July 2018. In headline terms, the Tribunal's principal ruling was to direct the Secretary of State to recalculate the amount of child support maintenance payable from 2 July 2016 (i.e. the effective date for the maintenance calculation) on the basis that the father's current gross income was £80,331 until 20 February 2017 (i.e. the date he took up the university post). It is not clear how the Tribunal arrived at the figure of £80,331, rather than the balance of the redundancy payment, being £80,300, but nothing turns on that.

15. The Tribunal's key finding was that "for the purpose of the child support legislation, the redundancy payment was taxed under Part 2 Chapter 5 paragraph 76 of Income tax (Trading and Other Income) Act 2005 (ITTOIA)" (statement of reasons at paragraph (21); "paragraph 76" was simply a typo for "section 76"). The Tribunal then dealt with this central issue as follows in its statement of reasons (text in bold as in the original):

> "**Is the redundancy payment to be taken into account when deciding maintenance?**
>
> (29) CMS decided not to take into consideration Mr B's redundancy payment. It decided that a redundancy payment 'could not be defined as earned income'. Mr B agreed with this.
>
> (30) Mrs B asserted that the child support scheme was linked to the taxation system, and as the redundancy payment was also taxed, it should be taken into account for the purposes of child maintenance.
>
> (31) A redundancy payment up to £30,000 is exempt from tax.
>
> (32) The amount of a redundancy payment over that exemption is subject to tax.

(33) These are recorded for purpose of tax returns on Self-assessment form (SA101). This requires employment lump sums and compensation to be included on the additional information pages under **other UK income** on page Ai2.

(34) The exempt portion of redundancy payment below the £30,000 exemption is included at section 9 and compensation of over the £30,000 exemption is included at section 5.

(35) The 2012 child support scheme is predicated on information held by HMRC. In terms of the legislation, the redundancy payment (over £30,000) had to be taken into account as current income as it is recorded under Part 2 of ITTOIA.

(36) Regulation 36 of the Child Support and Maintenance Calculation Regulations 2012 deals with and sets out historic income [which] should take into account income charged under Part 2 of ITTOIA.

(37) Regulation 38, which deals with current income as an employee pursuant to Income Tax (Earnings and Pensions) Act 2003 (ITEPA) makes no specific mention of ITTOIA whereas regulation 39, which deals with current income from self-employed, does.

(38) We decided to read into regulation 38 that current income as defined and subjected to ITTOIA has to be taken into account.

(39) CMS referred throughout its response to earned income and therefore decided not to include the redundancy payment, as it is not earned income.

(40) We decide that as the wrong approach. The legislation does not refer to earned or unearned income – it refers to income charged to tax under tax legislation."

Where the First-tier Tribunal went wrong in law

16. The Tribunal first fell into fundamental error when making its finding that for child support purposes "the redundancy payment was taxed under Part 2 Chapter 5 section 76 of Income Tax (Trading and Other Income) Act 2005 (ITTOIA)". That error then infected all its reasoning thereafter. There are two interconnected reasons why the Tribunal was mistaken in law in its conclusion.

17. The first reason is because ITTOIA (see Annex 1) does what it says on the tin. ITTOIA does not tax income from an employee's job; it taxes *trading and "other income"*, the "other" being variously property income, savings and investment income and miscellaneous income (see ITTOIA section 1(1)). In particular, Part 2 of ITTOIA, relied upon by the Tribunal, charges to tax "the profits of a trade, profession or vocation" (see ITTOIA section 3(1)(a)). So, while ITTOIA is relevant to the assessment of income tax liabilities imposed on the self-employed person, it does not tax the income of an employee (which is the province of ITEPA – see Annex 2). The father may well have had some investment income liable to tax under ITTOIA, but he had been *employed* (and not *subcontracted*) by the merchant bank, in which capacity he plainly fell within the ITEPA regime.

18. The second and more specific reason is because Chapter 5 of Part 2 of ITTOIA (comprising sections 56-94A) is headed "Trade Profits: Rules allowing Deductions". The heading to sections 76-80 in turn is "Redundancy payments, etc." But, following

from the above, section 76 of ITTOIA is not about the tax treatment of redundancy payments in the hands of *employees*. Rather, it stipulates how HMRC must deal with redundancy payments when computing the tax liabilities of *employers* and other types of trading businesses more generally. In short, section 76 puts beyond any doubt that a business or trader enjoys a statutory right to a deduction for redundancy payments that it has paid out to its employees when calculating the business's trading profits. Sections 77-79 likewise make it clear that the thrust of these provisions is concerned with the impact of redundancy payments on the trading profits of the business concerned (see e.g. section 77(2)).

19. This error then carries through into the Tribunal's analysis of the central issue, as the misunderstanding is repeated at paragraph (35) of the statement of reasons, where again it is wrongly asserted that "the redundancy payment (over £30,000) had to be taken into account as current income as it is recorded under Part 2 of ITTOIA." There is undoubtedly a £30,000 rule, but (as discussed below) its source is ITEPA, not ITTOIA. The Tribunal's error is then compounded by its bold decision to read into regulation 38 of the CSMCR 2012 a reference to ITTOIA. The fact is that regulation 38 expressly refers to ITEPA but makes no reference whatsoever to ITTOIA (in contrast to regulation 39, which deals with self-employment and so for which trading income may well be relevant). Finally, the Tribunal criticised CMS for referring to "earned income" as the reason for excluding the redundancy payment from the child support assessment. The Tribunal stated that the CSMCR 2012 do not refer to earned or unearned income, but rather to "income charged to tax under tax legislation". However, in fact the expression "charged to tax" appears in regulation 36 (historic income) and is not to be found in regulation 38 (current income). As we shall see, that distinction is crucial.

20. So what approach should the Tribunal have adopted? This question involves consideration of the nature of a redundancy payment, its treatment under tax legislation and how that treatment is mirrored (or not) in the child support legislation.

The nature of a redundancy payment

21. Redundancy payments can be statutory (under Part 11 of the Employment Rights Act 1996) or non-statutory or a mixture of both. Either way, the starting point under domestic law (the position may be more complex under EU law) is that a redundancy payment is not conceived of as a payment of earnings or income; rather, it is more akin to a payment of capital. Thus, traditionally a redundancy payment has always been recognised as compensation for the loss of a job and so as the payment an employee receives for what is, in effect, the compulsory purchase of his existing employment. This conventional view is exemplified by the analysis of Lord Woolf in *Mairs (Inspector of Taxes) v Haughey* [1994] AC 303 at 320A-320C:

> "A redundancy payment has therefore a real element of compensating or relieving an employee for the consequences of his not being able to continue to earn a living in his former employment. The redundancy legislation reflects an appreciation that an employee who has remained in employment for the minimum time has a stake in his employment which justifies his receiving compensation if he loses that stake. It is distinct from the damages to which he would be entitled if his employment were terminated unlawfully. It is also unlike a deferred payment of wages in that the entitlement to a redundancy payment is never more than a contingent entitlement, which no doubt both the employer and employee normally hope will never accrue."

Tax treatment of redundancy payments (and other terminal payments)

22. The tax treatment of redundancy payments is often misunderstood. In part this is because such payments are often not made in isolation – they may well be paid at the same time as other payments which are part of the employee's contractual pay and taxed as such (e.g. arrears of pay, holiday pay, bonuses and payments in lieu of notice (otherwise known as PILON)). In summary, and at the risk of some over-simplification, redundancy payments (properly so-called) are not subject to income tax as "earnings", but they are liable to tax as a type of "terminal payment".

23. So far as "earnings" are concerned, the definition in ITEPA section 62 – namely "(a) any salary, wages or fee, (b) any gratuity or other profit or incidental benefit of any kind … or (c) anything else that constitutes an emolument of the employment" – is extremely wide. It is undoubtedly broad enough to cover many types of payment made on termination of an employment (e.g. contractual arrears or holiday pay). However, there is an express exemption for statutory redundancy payments from liability for income tax as earnings, the basic rule being that "no liability to income tax *in respect of earnings* arises by virtue of a redundancy payment or an approved contractual payment" (see ITEPA section 309(1), emphasis added). Non-statutory redundancy payments are likewise not treated as "earnings" for the purpose of liability to income tax, pursuant to the decision of the House of Lords in *Mairs (Inspector of Taxes) v Haughey*. Lord Woolf concluded there that such a non-statutory redundancy payment "instead of being an emolument from employment … is a payment to compensate the employee for not being able to receive emoluments from employment" (at 320D). However, the matter does not rest there.

24. This is because any payment to an employee on the termination of employment, although not chargeable as "earnings", may well be subject to income tax as "employment income" (ITEPA Part 6 Chapter 3 sections 401-416; see also section 309(3)), at least (assuming it qualifies for the exemption) to the extent that its value exceeds £30,000 (ITEPA section 403). Part 6 is headed "Employment income: income which is not earnings or share-related", so confirming that a redundancy payment does not constitute a payment of earnings. Chapter 3 in turn is headed "Payments and benefits on termination of employment etc". Payments covered by Part 6 do count as employment income – see section 7(6)(a) of ITEPA, discussed further below. As such, they fall within the definitions of both "employment income" and "specific employment income" (see ITEPA section 7(2)(c), (4) and (6)). However, they do not fall within the definition of "general earnings" (see section 7(3)).

25. Part 6 Chapter 3 of ITEPA is effectively a residual category of charge to income tax – payments that fall within its scope are chargeable to income tax but only to the extent they are not otherwise subject to tax (see ITEPA section 401(3)). Redundancy payments are plainly within scope, being received directly or indirectly in consideration of or inconsequence of or otherwise in connection with the termination of a person's employment (ITEPA section 401(1)). It follows that redundancy payments, whether statutory or non-statutory, are subject to the "£30,000 rule". These ITEPA provisions explain why the father in the present case received the first £30,000 of his redundancy payment "tax free" whilst being subject to income tax on the balance of £80,300. HMRC's statement of practice SP 1/94 confirms the effect of these provisions (see Annex 3).

26. Finally, it should be noted for completeness that there have recently been some significant changes to the tax treatment of termination payments, although these reforms do not affect the current type of case. The relevant amendments were made by section 5 of the Finance (No.2) Act 2017, with effect from 6 April 2018, which bites on "relevant termination payments" (see generally House of Commons Library

Briefing paper 8084, *Taxation of termination payments* (2 July 2018)). However, as HMRC's Employment Income Manual (EIM 13750) explains:

> "Statutory redundancy payments and contractually approved payments (see EIM13760) are not within the definition of 'relevant termination awards' (see EIM13874). These payments are always chargeable to income tax as specific employment income and benefit from the £30,000 threshold available in section 403 ITEPA 2003."

27. In summary, therefore, a redundancy payment is typically taxable as a *termination payment* under Part 6 Chapter 3 of ITEPA and not as *earnings* (even if made under some contractual provision). This distinction for the purposes of the charge to income tax reflects the traditional characterisation, described at paragraph 21 above, of a redundancy payment as being something other than earnings. The question then is how these principles play out in the context of child support legislation.

The child support treatment of redundancy payments

28. A non-resident parent's child support liability is dependent upon that person's "gross weekly income" (see Child Support Act 1991, Schedule 1, paragraphs 2-5, as amended). A person's gross weekly income is to be determined in accordance with regulations (Child Support Act 1991, Schedule 1, paragraph 10). Those regulations are the CSMCR 2012, of which regulation 2 defines gross weekly income as "income calculated under Chapter 1 of Part 4" (i.e. under regulations 34-42). According to regulation 34(1), the father's gross weekly income "for the purposes of a calculation decision is a weekly amount determined at the effective date of the decision on the basis of either historic income or current income in accordance with this Chapter", i.e. Chapter 1 of Part 4 the CSMCR 2012.

29. The default position is that *historic* income applies in preference to *current* income (see regulation 34(2)). There are exceptions to that general priority rule where either the non-resident parent's "current income differs from historic income by an amount that is at least 25% of historic income" (regulation 34(2)(a)); or the amount of historic income is nil or no historic income is available (regulation 34(2)(b)). The first of these exceptions necessarily requires a comparison of the father's historic and current income. In the present case the father's argument was that following his redundancy his current income differed from his historic income by an amount that was at least 25% of historic income.

30. In the current appeal the father's *historic* income was not in dispute. Applying the general rule as laid down by regulation 35, and "taking the HMRC figure last requested from HMRC in relation to the non-resident parent" (see regulation 35(1(a)), the father's historic income was £187,771, being his PAYE income for 2015/16 as sourced from HMRC. It will be recalled that the father was unemployed from 20 June 2016 and did not take up his new job until February 2017.

31. But what then was the comparator, i.e. his *current* income, as at the effective date (2 July 2016)? Regulation 2 of the CSMCR 2012 states that "current income" has the meaning given by regulation 37. In turn, regulation 37(1) provides that current income is the aggregate of income "(a) as an employee or office-holder; (b) from self-employment; and (c) from a pension" as that figure is "calculated or estimated as a weekly amount at the effective date of the relevant calculation decision in accordance with regulations 38 to 42." Regulation 38 is headed "Current income as an employee or office-holder" (and so the statutory text includes references to ITEPA) while regulation 39 is headed "Current income from self-

employment" (and so the text cross-refers to ITTOIA). The Tribunal, of course, had fallen into error by trying to read references to ITTOIA into regulation 38.

32. The basic rule for employees is laid down by regulation 38(1), namely that a "non-resident parent's current income as an employee or office-holder is income of a kind that would be taxable earnings within the meaning of section 10(2) of ITEPA and is to be calculated as follows" (emphasis added). Paragraphs (2)-(5) of regulation 38 then proceed to deal with the mechanics of the calculation of taxable earnings (and so explain what is meant by "as follows") and are not relevant for present purposes.

33. It follows the crux of the issue in the present case was whether the father's redundancy payment fell within the terms of the expression "income of a kind that would be taxable earnings within the meaning of section 10(2) of ITEPA" (regulation 38(1)). However, before turning to unpick section 10(2) it is important to understand the overall architecture of ITEPA, which is constructed upon a series of interlocking definitions in the preceding sections within Part 2 of ITEPA, which is headed "Employment income: charge to tax".

34. Chapter 1 of Part 2 of ITEPA (sections 3-5) is introductory in nature, thus setting out the structure of the employment income Parts – notably that earnings are dealt with by Part 3 and employment income other than earnings or share-related income by Part 6 (see section 3(1)).

35. Chapter 2 of Part 2 (sections 6-8) is headed "Tax on employment income". Section 6(1) explains that the charge to tax on employment income under Part 2 is a charge to tax on "general earnings" and "specific employment income" respectively, implying that the two concepts are mutually exclusive. Section 7 of ITEPA then provides some important definitions and so merits inclusion here in its entirety (see also Annex 2):

> **"Meaning of 'employment income', 'general earnings' and 'specific employment income'**
> **7.–** (1) This section gives the meaning for the purposes of the Tax Acts of "employment income", "general earnings" and "specific employment income".
> (2) "Employment income" means—
> (a) earnings within Chapter 1 of Part 3,
> (b) any amount treated as earnings (see subsection (5)), or
> (c) any amount which counts as employment income (see subsection (6)).
> (3) "General earnings" means—
> (a) earnings within Chapter 1 of Part 3, or
> (b) any amount treated as earnings (see subsection (5)),
> excluding in each case any exempt income.
> (4) "Specific employment income" means any amount which counts as employment income (see subsection (6)), excluding any exempt income.
> (5) Subsection (2)(b) or (3)(b) refers to any amount treated as earnings under—
> (a) Chapters 7 and 8 of this Part (application of provisions to agency workers and workers under arrangements made by intermediaries),
> (b) Chapters 2 to 11 of Part 3 (the benefits code),
> (c) Chapter 12 of Part 3 (payments treated as earnings), or
> (d) section 262 of CAA 2001 (balancing charges to be given effect by treating them as earnings).
> (6) Subsection (2)(c) or (4) refers to any amount which counts as employment income by virtue of—
> (a) Part 6 (income which is not earnings or share-related),

> (b) Part 7 (income and exemptions relating to securities and securities options), or
> (c) any other enactment."

36. The following points should therefore be noted about the definitions in section 7.

37. First, there is a considerable overlap between "employment income" (but not "specific employment income") and "general earnings", in that they both include earnings within Chapter 1 of Part 3 of ITEPA and any amount treated as earnings by virtue of section 7(5) (see sections 7(2)(a) and (b) and 7(3)(a) and (b)).

38. Second, the differences between "employment income" and "general earnings" are two-fold, namely that "employment income" also includes any amount counting as employment income by virtue of section 7(6) (see section 7(2)(c)), a category excluded from the definition of "general earnings", while "general earnings" excludes any "exempt income".

39. Third, the concept of "any amount counting as employment income" (and so the differentiating factor between "employment income" and "general earnings") is defined to include any amount counting as such by virtue of ITEPA Part 6 (see section 7(6)(a)) of ITEPA – this, as we have seen, contains the provisions on taxing termination payments, including redundancy payments (see Chapter 3 of Part 6 of ITEPA).

40. Fourth, "specific employment income" is defined by section 7(4) to mean any amount counting as employment income by virtue of subsection (6) but excluding exempt income (see further section 8).

41. It will be recalled, as a starting point, that "employment income" and "general earnings" are both defined to include "earnings within Chapter 1 of Part 3" and "any amount treated as earnings" by virtue of subsection (5). Can either of these formulations include a redundancy payment? Taking them in reverse order, and as to the latter, none of the provisions specified in section 7(5) include redundancy payments, so it follows necessarily that redundancy payments cannot count as an amount "treated as earnings" for the purpose of either section 7(2)(b) or 7(3)(b). So, the question then is whether redundancy payments fall within the first limb of either definition as being "earnings within Chapter 1 of Part 3". Part 3 of ITEPA deals with "Employment income: earnings and benefits etc. treated as earnings", and there is just a single provision within Chapter 1 of Part 3, namely section 62. The definition provision is section 62(2) of ITEPA, which provides as follows:

> "(2) In those Parts "earnings", in relation to an employment, means—
> (a) any salary, wages or fee,
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
> (c) anything else that constitutes an emolument of the employment."

42. The reference to "those Parts" is to the employment income Parts of ITEPA, i.e. Parts 2 to 7 of ITEPA, spanning sections 3 to 554 inclusive (see further section 3). So, does a redundancy payment fall within the scope of this definition of "earnings"?

43. As to limb (a) of the section 62(2) definition, a redundancy payment is certainly not a "salary, wages or a fee" – to find as much would be entirely inconsistent with the notion that such a payment is in effect capital compensation for the loss of a job rather than deferred wages (see *Mairs (Inspector of Taxes) v Haughey*).

44. As to limb (b) of the definition of "earnings", a redundancy payment is not by any stretch of the imagination a "gratuity or other profit". Mr Kevin O'Kane, in a submission on behalf of the Secretary of State, seeks valiantly to mount an argument that a redundancy payment in excess of the statutory minimum is an "incidental benefit of any kind obtained by the employee". Section 62(2)(b) is undoubtedly very widely drawn (so much so that it is difficult to envisage what type of benefit might escape the clutches of sub-section (b) and yet be caught by sub-section (c)). Given its expansive terms, at first sight it might seem section 62(2)(b) is broad enough to cover redundancy payments. But as Mr O'Kane identifies there is a counter-argument – and one which I conclude is insuperable. This concerns the intersection of section 10(2) of ITEPA and regulation 38(1) of the CSMCR 2012, which I deal with below.

45. As to limb (c), *Mairs (Inspector of Taxes) v Haughey* is again high authority for the proposition that a redundancy payment is not an "emolument" of a person's employment. This decision of the House of Lords accounts, of course, for why there is specific provision in statute for redundancy payments to be subject to income tax, but based on their status as a type of terminal payment rather than as earnings.

46. Chapter 3 of Part 2 of ITEPA (sections 9-13) is headed "Operation of tax charge". The crucial provision here is section 10, which is headed "Meaning of 'taxable earnings' and 'taxable specific income'". Section 10(1) thus begins by making a further semantic distinction between two concepts. The first is the notion of "taxable earnings" while the second is "taxable specific income", both being derived from an employment. Section 10(2) of ITEPA then provides that:

> "(2) Taxable earnings from an employment in a tax year are to be determined in accordance with—
>
> (a) Chapter 4 of this Part (rules applying to employees resident, ordinarily resident and domiciled in the UK), or
>
> (b) Chapter 5 of this Part (rules applying to employees resident, ordinarily resident or domiciled outside the UK)."

47. Section 10(3) of ITEPA in turn declares that:

> "Taxable specific income from an employment for a tax year means the full amount of any specific employment income which, by virtue of Part 6 or 7 or any other enactment, counts as employment income for that year in respect of the employment."

48. As a matter of construction, there can be no overlap between sections 10(2) and (3). "Taxable earnings" from an employment are determined in accordance with Chapter 4 of Part 2 of ITEPA (or Chapter 5 for foreign residents) (i.e. within sections 14-41ZA). In contrast "taxable specific income" from an employment is "the full amount of any specific employment income" based on e.g. Part 6 or 7 of ITEPA. Part 6, of course, covers income which is not earnings or share-related, and includes termination payments.

49. Returning to regulation 38(1) of the CSMCR 2012, that provides that the father's current income is "income of a kind that would be taxable earnings within the meaning of section 10(2) of ITEPA". In the present appeal the father was resident, ordinarily resident and domiciled in the UK, and so his taxable earnings were determined by Chapter 4 of Part 2 of ITEPA (see section 10(2)(a)). The basic rule is that "taxable earnings" are an individual's "general earnings" – see ITEPA sections

14 and 15 (and especially section 15(2)). That statutory formulation excluded his redundancy payment – that was a form of "specific employment income" which fell outside the ambit of either "general earnings" or "taxable earnings".

50. The bottom line is that redundancy payments are covered by section 10(3) and not by section 10(2) of ITEPA. It follows that such payments are not caught by the plain wording of regulation 38(1) of the CSMCR 2012.

51. It follows that the Tribunal erred in law by including the father's redundancy payment in the calculation of his current income. This is despite the fact it was taxed by HMRC (but as specific employment income, rather than as earnings) and that it undoubtedly represented a considerable asset for the father.

The First-tier Tribunal's variation decision in the alternative

52. The Tribunal also considered in the alternative, if it was wrong about HMRC's tax treatment of the redundancy payment, whether that payment could be made subject to a variation (statement of reasons at paragraphs (50)-(54)). The Tribunal concluded that it could, as "the redundancy payment above £30,000 can be taken into account, as it is miscellaneous income charged pursuant to Chapter eight of Part 5 ITTOIA" (paragraph (52)).

53. The variations regime under the third child support scheme is much less extensive than under the two predecessor systems. Regulation 69(1) of the CSMCR 2012 provides for a variation where the non-resident parent "has unearned income equal to or exceeding £2,500 per annum". Regulation 69(2) then provides that in this context "unearned income":

> "… is income of a kind that is chargeable to tax under—
> (a) Part 3 of ITTOIA (property income);
> (b) Part 4 of ITTOIA (savings and investment income);
> (c) Part 5 of ITTOIA (miscellaneous income)."

54. As noted, the Tribunal found that regulation 69(2)(c) applied, and in particular Chapter 8 of Part 5 of ITTOIA. Chapter 8 comprises just three sections, being sections 687-689. This is very much a residual category of charge to income tax (the clue being in the title "miscellaneous income"). As the CMS's supplementary submission to the Tribunal explained, Part 5 of ITTOIA "captures a small minority of income types that do not fall into the other income categories". Chapter 8, relied on by the Tribunal, is headed "Income not otherwise charged". Furthermore, section 687(1) explains that "income tax is charged under this Chapter on income from any source that is not charged to income tax under or as a result of any other provision of this Act or any other Act." Given that the father's redundancy payment was (subject to the £30,000 exemption) charged to tax under section 403 of ITEPA, the payment could not be treated as falling within regulation 69(2)(c) and so no variation was permissible. It would be different if there was evidence that the funds had been invested, as then there would be the potential for a variation based on regulation 69(2)(b) and Part 4 of ITTOIA (assuming the interest received exceeded £2,500 a year).

The disposal of the present appeal

55. For the reasons set out above, the decision by the First-tier Tribunal involves an error of law, being based on a flawed understanding of the income tax treatment of redundancy payments to employees. As a result, the father's appeal to the Upper Tribunal must be allowed and the First-tier Tribunal's decision set aside. As the appeal turns on a pure matter of statutory construction, there is no point in remitting

the matter to a fresh First-tier Tribunal for redetermination. I can re-make the decision in the terms that the previous Tribunal should have made it, given a proper understanding of the relevant legal provisions. That re-made decision is as follows:

> *"The parent with care's appeal is dismissed.*
>
> *The Secretary of State's decision of 28 July 2016, revising the decision of 27 June 2016, is confirmed.*
>
> *The father is liable to pay £0.00 per week as from 2 July 2016 in statutory child support maintenance for the three qualifying children."*

Some reflections

56. The outcome of this appeal demonstrates that it is overly simplistic, if not plain wrong, to say that the third child support regime determines a non-resident parent's income exclusively by reference to HMRC's assessment for income tax purposes, i.e. if a payment is taxable by HMRC then it counts as income under the Child Support Act 1991. Thus, the mother's argument that the child support scheme is linked to the taxation system, and as the redundancy payment was taxed for the purpose of income tax, it should also be taken into account for the purposes of child maintenance, does not hold good in all circumstances.

57. The totality of the HMRC-CMS linkage may well be (largely) the case so far as *historic* income is concerned, where the emphasis is on "income charged to tax". However, even there the alignment between income tax treatment and the child support scheme is not complete. For example, while HMRC collects information on taxpayers' unearned income, e.g. through self-assessment returns, it does not share information with the CMS unless specifically requested to do so. In turn, the CMS does not request such information from HMRC unless the person with care specifically requests a variation on the grounds of unearned income (and the CMS accepts their request): see further House of Commons Briefing Paper No.7773 *Child maintenance: variations, including the new notional income criterion (GB)* (March 8, 2019), p.8.

58. This case has shown that the HMRC-CMS symmetry of treatment does not apply in the context of *current* income for employees, for whom current income is defined solely by reference to taxable earnings for the purposes of section 10(2) of ITEPA (see regulation 38(1)). It does not include payments that fall within section 10(3), e.g. redundancy payments.

59. There will undoubtedly be cases in which the impact of this lack of symmetry is less dramatic, and may result in child support payments being deferred rather than lost. For example, assume the father had received a much more modest (and more typical) redundancy payment of £30,000 at the start of the 2016/17 tax year, been unemployed for a year and then found a new job paying £32,000 a year at the start of the 2017/18 year. A child support assessment carried out in the course of the 2016/17 year would be based on his nil current income, but on review during 2017/18 the new assessment would be based on the HMRC historic income of £30,000, the 25% tolerance not being breached. In the present case, however, it may well be that the child support assessment will never "catch up" in this way. The appeal file does not reveal what has happened in the present case in subsequent years. However, presumably the father's gross historic income for the following tax year (2016/17) would include the taxable element of his redundancy payment, along with some income from the job he started in February 2017. This may well be (indeed, almost certainly will be) a figure that is 25% more than his current income in 2017/18, as a

result of which his new child support liability would exclude any consideration of the redundancy payment.

60. If one takes a broader perspective, it is not just the child support system's treatment of redundancy payments that has disadvantaged the mother in the present case. She has also been adversely affected by two other changes to the statutory child maintenance arrangements that have been made since their inception.

61. The first was the abolition of the previous rule which excluded from the statutory arrangements cases that were the subject of consent orders in the courts. This change was made on the transition from the first to the second child support scheme. Before March 3, 2003, a court order (in practice a consent order) in effect provided a permanent shield against the intervention of the then Child Support Agency. The insertion of section 4(10)(aa) into the Child Support Act 1991 by the Child Support, Pensions and Social Security Act 2000 changed all that. The embargo on CMS involvement is now time-limited to one year from the date of the court order. At the time of this change there was widespread concern amongst family law practitioners that this would lead to tactical applications to the Agency to unpick agreed settlements. In the present case the father could certainly have applied to the CMS at any time after 10 June 2015. Had he done so then, his child support liability would have increased by approximately £300 a month. It is no surprise that he did not make such an application until his redundancy was due to take effect. In fairness, it should be noted that the one of the father's arguments is that the mother was unwilling to negotiate a change to the child maintenance provision in place to reflect his changed circumstances. Whatever the rights and wrongs of that argument, the fact is that section 4(1)(aa) allowed the father to opt out of the court system, which takes a holistic view of family assets, and into a child support regime with its formulaic and narrower approach.

62. The second is the abolition of the assets rule in the variations scheme. The first and second child support schemes (under the Child Support Act 1991 as amended first by the Child Support Act 1995 and secondly by the Child Support, pensions and Social Security Act 2000) both provided for a variation to apply where a non-resident parent had assets in excess of £65,000. The assets variation was not replaced in the third child support scheme, resulting in stinging criticism from Mostyn J in *Green v Adams* [2017] EWFC 24; [2017] 2 FLR 1413:

> "22. Finally, I am constrained to mention an extraordinary state of affairs arising from recent amendments to the child support legislation. The tribunal appeals which I have mentioned were in relation to assessments made under the second regime which was introduced by the Child Support, Pensions and Social Security Act 2000. Under that regime there was, as explained above, a facility to seek variation on the grounds that the non-resident parent had 'assets'. That regime was replaced by the third regime provided for by the Child Maintenance and Other Payments Act 2008. That third regime has been in full force since 26 November 2013. This case was transferred into that regime on 10 October 2015. For reasons which I cannot fathom the 'assets' ground of variation has been removed from this latest regime. Therefore, it is possible, as in this case, for a father to live on his capital, which may be very substantial indeed, and to pay no child support at all. The father was only required to pay the pitiful minimum sum of £7 a week from the early part of this year because it was then that he received his state pension. In my opinion the government needs to consider urgently the reinstatement of the 'assets' ground of variation."

63. Mostyn J returned to the same theme in his follow-up judgment in *Green v Adams* [2017] EWFC 52; [2017] 2 FLR 1423:

> "23. Before I leave the case I am constrained to refer to some developments arising from paragraph 22 of my principal judgment where I bemoaned the abolition of the assets ground of variation in the most recent child support regime and urged the government to consider its reinstatement.
>
> 24. I have read with interest the recent Gingerbread report 'Children Deserve More' which is to be found at https://gingerbread.org.uk/content/2380/Findings. This records how the matter to which I referred was taken up by the mother's MP with the relevant minister. At page 23 the report records that the minister's first reply explained that, compared to the CSA, the scope of income which could be captured by a possible variation had been widened to include almost all sources of gross income identified in the self-assessment process. The minister stated *'this will make it harder for wealthier individuals, with income from other sources, to avoid their responsibilities by minimising the amount of child maintenance they pay.'* The author of the report rightly points out that this was a non-sequitur because the assets ground of variation was focussed on people who arrange their affairs so that they do not have any income but who rather live on their capital. At page 28 the report records that, after being pressed, the minister gave a second reply which was that *'[the child maintenance scheme] does not attempt to provide a unique, bespoke solution in respect of the care of each child whose parents live apart, as it would be prohibitively expensive and time-consuming to do so.'* This is dispiriting. The scheme should surely strive to provide a just solution in all cases; for the few as well as the many. Justice surely should not be sacrificed on the altar of managerial efficiency. Ease of administration surely does not furnish an objectively reasonable justification for a process that allows a multi-millionaire father to get away with paying child support for his son of a mere £7 per week.
>
> 25. The assets ground of variation reposed on the statute-book, to my knowledge, quite unremarkably for over 10 years, and was in fact successfully deployed in this case (as I described in my principal judgment). To empower a factfinder to determine if arrangements have been made to place assets in non-income-producing structures would not, on any view, be prohibitively expensive and time-consuming; but even if it were relatively expensive and time-consuming, why as a matter of justice should the exercise not be carried out? If the ground is not reinstated then I foresee more cases seeking singular awards of capital, such as the one which I have determined, coming before the family court. And the family court taking an ever more expansive view of what does constitute singular expenditure."

64. The Government's response to these judicial strictures was to introduce a new variation for assets exceeding a prescribed value, being £31,250 (see regulation 69A of CSMCR 2012, inserted by regulation 2 of the Child Support (Miscellaneous Amendments) Regulations 2018 (SI 2018/1279) with effect from 13 December 2018; see further House of Commons Briefing Paper No.7773 *Child maintenance: variations, including the new notional income criterion (GB)* (8 March 2019)). Where a variation is made out, a notional income of 8% is applied to the value of the assets. However, the reintroduction of a form of an assets variation could not assist the mother in the present case as the decision on her case was made on the law as it stood in July 2016.

Conclusion

65. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the father's appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). There is no point in remitting the appeal to a differently constituted First-tier Tribunal for consideration of those matters (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)). Instead, I re-make the First-tier Tribunal's decision in the terms set out above.

Signed on the original
on 15 October 2019

Nicholas Wikeley
Judge of the Upper Tribunal

Annex 1

Income Tax (Trading and Other Income Act 2005 (ITTOIA)

76 Redundancy payments and approved contractual payments

(1) Sections 77 to 79 apply if–

(a) a person ("the employer") makes a redundancy payment or an approved contractual payment to another person ("the employee"), and

(b) the payment is in respect of the employee's employment wholly in the employer's trade or partly in the employer's trade and partly in one or more other capacities.

(2) For the purposes of this section and sections 77 to 80 "redundancy payment" means a redundancy payment payable under–

(a) Part 11 of the Employment Rights Act 1996 (c. 18), or

(b) Part 12 of the Employment Rights (Northern Ireland) Order 1996 (S.I. 1996/1919 (N.I. 16)).

(3) For the purposes of this section and those sections–

"contractual payment" means a payment which, under an agreement, an employer is liable to make to an employee on the termination of the employee's contract of employment, and

a contractual payment is "approved" if, in respect of that agreement, an order is in force under–

(a) section 157 of the Employment Rights Act 1996, or

(b) Article 192 of the Employment Rights (Northern Ireland) Order 1996.

77 Payments in respect of employment wholly in employer's trade

(1) This section applies if–

(a) the payment is in respect of the employee's employment wholly in the employer's trade, and

(b) no deduction would otherwise be allowable for the payment.

(2) In calculating the profits of the trade, a deduction is allowed under this section for the payment.

(3) The deduction under this section for an approved contractual payment must not exceed the amount which would have been due to the employee if a redundancy payment had been payable.

(4) If the payment is made after the employer has permanently ceased to carry on the trade, it is treated as made on the last day on which the employer carried on the trade.

(5) If there is a change in the persons carrying on the trade, subsection (4) does not apply so long as a person carrying on the trade immediately before the change continues to carry it on after the change.

(6) The deduction under this section is allowed for the period of account in which the payment is made (or treated under subsection (4) as made).

78 Payments in respect of employment in more than one capacity

(1) This section applies if the payment is in respect of the employee's employment with the employer–

(a) partly in the employer's trade, and

(b) partly in one or more other capacities.

(2) The amount of the redundancy payment, or the amount which would have been due if a redundancy payment had been payable, is to be apportioned on a just and reasonable basis between–

(a) the employment in the trade, and

(b) the employment in the other capacities.

(3) The part of the payment apportioned to the employment in the trade is treated as a payment in respect of the employee's employment wholly in the trade for the purposes of section 77.

79 Additional payments

(1) This section applies if the employer permanently ceases to carry on a trade or part of a trade and makes a payment to the employee in addition to–

(a) the redundancy payment, or

(b) if an approved contractual payment is made, the amount that would have been due if a redundancy payment had been payable.

…

(3) If, in calculating the profits of the trade–

(a) no deduction would otherwise be allowable for the additional payment, but

(b) a deduction would be allowable for it if the employer had not permanently ceased to carry on the trade or the part of the trade,

a deduction is allowed under this section for the additional payment.

(4) The deduction under this section is limited to 3 times the amount of–

(a) the redundancy payment, or

(b) if an approved contractual payment is made, the amount that would have been due if a redundancy payment had been payable.

(5) If the payment is made after the employer has permanently ceased to carry on the trade or the part of the trade, it is treated as made on the last day on which the employer carried on the trade or the part of the trade.

(6) The deduction under this section is allowed for the period of account in which the payment is made (or treated under subsection (5) as made).

Annex 2

Income Tax (Earnings and Pensions) Act 2003 (ITEPA)

6 Nature of charge to tax on employment income

(1) The charge to tax on employment income under this Part is a charge to tax on—

(a) general earnings, and

(b) specific employment income.

The meaning of “employment income”, “general earnings” and “specific employment income” is given in section 7.

(2) The amount of general earnings or specific employment income which is charged to tax in a particular tax year is set out in section 9.

(3) The rules in Chapters 4 and 5 of this Part, which are concerned with—

(a) the residence and domicile of an employee in a tax year,

(aa) whether section 809B, 809D or 809E of ITA 2007 (remittance basis) applies to an employee for a tax year, and

(b) the tax year in which amounts are received or remitted to the United Kingdom,
apply for the purposes of the charge to tax on general earnings but not that on specific employment income.
(3A) The rules in Chapter 5B, which are concerned with the matters mentioned in subsection (3)(a) to (b), apply for the purposes of the charge to tax on certain specific employment income arising under Part 7 (securities etc).
(4) The person who is liable for any tax charged on employment income is set out in section 13.
(5) Employment income is not charged to tax under this Part if it is within the charge to tax under Part 2 of ITTOIA 2005 (trading income) by virtue of section 15 of that Act (divers and diving supervisors).

NB Section 6(5) has since been amended by the Enactment of Extra-Statutory Concessions Order 2018/282 art.4(2) with effect from April 6, 2018 but not materially for the purposes of the present appeal.

7 Meaning of "employment income", "general earnings" and "specific employment income"
(1) This section gives the meaning for the purposes of the Tax Acts of "employment income", "general earnings" and "specific employment income".
(2) "Employment income" means—
(a) earnings within Chapter 1 of Part 3,
(b) any amount treated as earnings (see subsection (5)), or
(c) any amount which counts as employment income (see subsection (6)).
(3) "General earnings" means—
(a) earnings within Chapter 1 of Part 3, or
(b) any amount treated as earnings (see subsection (5)),
excluding in each case any exempt income.
(4) "Specific employment income" means any amount which counts as employment income (see subsection (6)), excluding any exempt income.
(5) Subsection (2)(b) or (3)(b) refers to any amount treated as earnings under—
(a) Chapters 7 to 9 of this Part (agency workers, workers under arrangements made by intermediaries, and workers providing services through managed service companies),
(b) Chapters 2 to 10 of Part 3 (the benefits code),
(c) Chapter 12 of Part 3 (payments treated as earnings), or
(d) section 262 of CAA 2001 (balancing charges to be given effect by treating them as earnings).
(6) Subsection (2)(c) or (4) refers to any amount which counts as employment income by virtue of—
(a) Part 6 (income which is not earnings or share-related),
(b) Part 7 (income and exemptions relating to securities and securities options),
(ba) Part 7A (employment income provided through third parties), or
(c) any other enactment.

NB Section 7(5)(a) has been amended by the Finance Act 2017 Sch.1(3) para.10 with effect from April 6, 2017. In addition, section 7(5)(ca) has been inserted by the Finance (No. 2) Act 2017 s.5(2) with effect from April 6, 2018. Neither amendment is material for the purposes of the present appeal.

8 Meaning of "exempt income"
For the purposes of the employment income Parts, an amount of employment income within paragraph (a), (b) or (c) of section 7(2) is "exempt income" if, as a

result of any exemption in Part 4 or elsewhere, no liability to income tax arises in respect of it as such an amount.

9 Amount of employment income charged to tax

(1) The amount of employment income which is charged to tax under this Part for a particular tax year is as follows.

(2) In the case of general earnings, the amount charged is the net taxable earnings from an employment in the year.

(3) That amount is calculated under section 11 by reference to any taxable earnings from the employment in the year (see section 10(2)).

(4) In the case of specific employment income, the amount charged is the net taxable specific income from an employment for the year.

(5) That amount is calculated under section 12 by reference to any taxable specific income from the employment for the year (see section 10(3)).

(6) Accordingly, no amount of employment income is charged to tax under this Part for a particular tax year unless—

(a) in the case of general earnings, they are taxable earnings from an employment in that year, or

(b) in the case of specific employment income, it is taxable specific income from an employment for that year.

10 Meaning of "taxable earnings" and "taxable specific income"

(1) This section explains what is meant by "taxable earnings" and "taxable specific income" in the employment income Parts.

(2) "Taxable earnings" from an employment in a tax year are to be determined in accordance with Chapters 4 and 5 of this Part.

(3) "Taxable specific income" from an employment for a tax year means the full amount of any specific employment income which, by virtue of Part 6, 7 or 7A or any other enactment, counts as employment income for that year in respect of the employment.

(4) Subsection (3) is subject to Chapter 5B (taxable specific income from employment-related securities etc: internationally mobile employees).

(5) Subsection (3) is also subject to sections 554Z9 to 554Z11 (employment income under Part 7A: remittance basis).

14 Taxable earnings under this Chapter: introduction

(1) This Chapter sets out for the purposes of this Part what are taxable earnings from an employment in a tax year in cases where section 15 (earnings for year when employee UK resident) applies to general earnings for a tax year.

(2) In this Chapter—

(a) sections 16 and 17 deal with the year for which general earnings are earned, and

(b) sections 18 and 19 deal with the time when general earnings are received.

(3) In the employment income Parts any reference to the charging provisions of this Chapter is a reference to section 15.

15 Earnings for year when employee UK resident

(1) This section applies to general earnings for a tax year for which the employee is UK resident except that, in the case of a split year, it does not apply to any part of those earnings that is excluded.

(1A) General earnings are "excluded" if they—

(a) are attributable to the overseas part of the split year, and

(b) are neither—

(i) general earnings in respect of duties performed in the United Kingdom, nor

(ii) general earnings from overseas Crown employment subject to United Kingdom tax.

(2) The full amount of any general earnings within subsection (1) which are received in a tax year is an amount of "taxable earnings" from the employment in that year.

(3) Subsection (2) applies whether or not the employment is held when the earnings are received.

(4) Any attribution required for the purposes of subsection (1A)(a) is to be done on a just and reasonable basis.

(5) The following provisions of Chapter 5 of this Part apply for the purposes of subsection (1A)(b) as for the purposes of section 27(2)—

(a) section 28 (which defines "general earnings from overseas Crown employment subject to United Kingdom tax"),

(b) sections 38 to 41 (which contain rules for determining the place of performance of duties of employment), and

(c) section 41ZA (which is about determining the extent to which general earnings are in respect of United Kingdom duties).

(6) Subject to any provision made in an order under section 28(5) for the purposes of subsection (1A)(b), provisions made in an order under that section for the purposes of section 27(2) apply for the purposes of subsection (1A)(b) too.

62 Earnings

(1) This section explains what is meant by "earnings" in the employment income Parts.

(2) In those Parts "earnings", in relation to an employment, means—

(a) any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

(3) For the purposes of subsection (2) "money's worth" means something that is—

(a) of direct monetary value to the employee, or

(b) capable of being converted into money or something of direct monetary value to the employee.

(4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7)).

309 Limited exemptions for statutory redundancy payments

(1) No liability to income tax in respect of earnings arises by virtue of a redundancy payment or an approved contractual payment, except where subsection (2) applies.

(2) Where an approved contractual payment exceeds the amount which would have been due if a redundancy payment had been payable, the excess is liable to income tax.

(3) No liability to income tax in respect of employment income other than earnings arises by virtue of a redundancy payment or an approved contractual payment, except where it does so by virtue of Chapter 3 of Part 6 (payments and benefits on termination of employment etc.).

(4) For the purposes of this section—

(a) a statutory payment in respect of a redundancy payment is to be treated as paid on account of the redundancy payment, and

(b) a statutory payment in respect of an approved contractual payment is to be treated as paid on account of the approved contractual payment.

(5) In this section—

"approved contractual payment" means a payment to a person on the termination of the person's employment under an agreement in respect of which

an order is in force under section 157 of ERA 1996 or Article 192 of ER(NI)O 1996,

"redundancy payment" means a redundancy payment under Part 11 of ERA 1996 or Part 12 of ER(NI)O 1996, and

"statutory payment" means a payment under section 167(1) of ERA 1996 or Article 202(1) of ER(NI)O 1996.

(6) In subsection (5) "employment" , in relation to a person, has the meaning given in section 230(5) of ERA 1996 or Article 3(5) of ER(NI)O 1996.

401 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.

(2) Subsection (1) is subject to subsection (3) and sections 405 to 414A (exceptions for certain payments and benefits).

(3) This Chapter does not apply to any payment or other benefit chargeable to income tax apart from this Chapter.

(4) For the purposes of this Chapter—

(a) a payment or other benefit which is provided on behalf of, or to the order of, the employee or former employee is treated as received by the employee or former employee, and

(b) in relation to a payment or other benefit—

(i) any reference to the employee or former employee is to the person mentioned in subsection (1), and

(ii) any reference to the employer or former employer is to be read accordingly.

402 Meaning of "benefit"

(1) In this Chapter "benefit" includes anything in respect of which, were it received for performance of the duties of the employment, an amount—

(a) would be taxable earnings from the employment, or

(b) would be such earnings apart from an earnings-only exemption.

This is subject to subsections (2) to (4).

(2) In this Chapter "benefit" does not include a benefit received in connection with the termination of a person's employment that is a benefit which, were it received for performance of the duties of the employment, would fall within—

(a) section 239(4) (exemption of benefits connected with taxable cars and vans and exempt heavy goods vehicles), so far as that section applies to a benefit connected with a car or van,

(b) section 269 (exemption where benefits or money obtained in connection with taxable car or van or exempt heavy goods vehicle),

(c) section 319 (mobile telephones), or

(d) section 320 (limited exemption for computer equipment).

(3) In this Chapter "benefit" does not include a benefit received in connection with any change in the duties of, or earnings from, a person's employment to the extent that it is a benefit which, were it received for performance of the duties of the employment, would fall within section 271(1) (limited exemption of removal benefits and expenses).

(4) The right to receive a payment or benefit is not itself a benefit for the purposes of this Chapter.

403 Charge on payment or other benefit where threshold applies

(1) The amount of a payment or benefit to which this section 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 (but see section 402B(3)) —

(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) a non-cash benefit is treated as received when it is used or enjoyed.

(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 aggregated with—

(a) other payments or benefits in respect of the employee or former employee that are payments or benefits to which this section applies, and

(b) other payments or benefits in respect of the employee or former employee that are payments or benefits—

(i) received in the tax year 2017-18 or an earlier tax year, and

(ii) to which this Chapter applied in the tax year of receipt,

it exceeds, £30,000 according to the rules in section 404 (how the £30,000 threshold applies).

(5) If it is received after the death of the employee or former employee—

(a) the amount of a payment or benefit to which this section applies counts as the employment income of the personal representatives for the relevant year if or to the extent that it exceeds £30,000 according to the rules in section 404, and

(b) the tax is accordingly to be assessed and charged on them and is a debt due from and payable out of the estate.

(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 or, as the case may be, in relation to whom section 402B(1) provides for an amount to be treated as an amount of earnings.

404 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) For this purpose employers are "associated" if on a termination or change date—

(a) one of them is under the control of the other, or

(b) one of them is under the control of a third person who on that termination or change date or another such date controls or is under the control of the other.

(3) In subsection (2)—

(a) references to an employer, or to a person controlling or controlled by an employer, include the successors of the employer or person, and

(b) "termination or change date" means a date on which a termination or change occurs in connection with which a payment or other benefit to which [section 403][1] applies is received in respect of the employee or former employee .

(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) If more than one payment or other benefit is received in a tax year in which the threshold is exceeded—
(a) the £30,000 (or the balance of it) is set against the amounts of cash benefits as they are received, and
(b) any balance at the end of the year is set against the aggregate amount of non-cash benefits received in the year.
(6) In subsection (3)(b), the reference to a payment or other benefit to which section 403 applies includes a reference to a payment or other benefit—
(a) received in the tax year 2017-18 or an earlier tax year, and
(b) to which this Chapter applied in the tax year of receipt.

Annex 3

HMRC Practice Statement 1 (1994) (issued 17 February 1994 and as revised)

1. Section 309(1) and (3) Income Tax (Earnings and Pensions) Act (ITEPA) provide that statutory redundancy payments shall be exempt from Income Tax as employment income, with the exception of any liability under section 401 of that Act.

2. Lump sum payments made under a non-statutory scheme, in addition to, or instead of statutory redundancy pay, will also be liable to Income Tax only under section 401 ITEPA 2003 provided they are genuinely made solely on account of redundancy as defined in the Employment Rights Act 1996. This will be so whether the scheme is a standing one which forms part of the terms on which the employees give their services or whether it is an ad hoc scheme devised to meet a specific situation such as the imminent closure of a particular factory.

3. However, payments made under a non-statutory scheme which are not genuinely made to compensate for loss of employment through redundancy may be liable to tax in full. In particular, payments which are, in reality, a form of terminal bonus will be chargeable to Income Tax as earnings under section 62 ITEPA 2003. Payments made for meeting production targets or doing extra work in the period leading up to redundancy are examples of such terminal bonuses. Payments conditional on continued service in the employment for a time will also represent terminal bonuses if calculated by reference to any additional period served following issue of the redundancy notice.

4. HM Revenue and Customs (HMRC) are concerned to distinguish between payments under non-statutory schemes which are genuinely made to compensate for loss of employment through redundancy and payments which are made as a reward for services in the employment or more generally for having acted as or having been an employee. As arrangements for redundancy can often be complex and provide for a variety of payments, it follows that each scheme must be considered on its own facts. HMRC's practice, in these circumstances, is to allow employers to submit proposed schemes to their Inspector of Taxes for advance clearance.

5. An employer or any other person operating a redundancy scheme, who wishes to be satisfied that lump sum payments under a scheme will be accepted as liable to tax only under section 401 ITEPA 2003 should submit the full facts to the inspector for consideration. Applications for clearance should be made in writing and should be

accompanied by the scheme document together with the text of any intended letter to employees which explains its terms.

Annex 4

Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677)

4.— Meaning of "latest available tax year"

(1) In these Regulations "latest available tax year" means the tax year which, on the date on which the Secretary of State requests information from HMRC for the purposes of regulation 35 (historic income) or regulation 69 (non-resident parent with unearned income), is the most recent relevant tax year for which HMRC have received the information required to be provided in relation to the non-resident parent under the PAYE Regulations or in a self-assessment return.

(2) In this regulation a "relevant tax year" is any one of the 6 tax years immediately preceding the date of the request for information referred to in paragraph (1).

34.— The general rule for determining gross weekly income

(1) The gross weekly income of a non-resident parent for the purposes of a calculation decision is a weekly amount determined at the effective date of the decision on the basis of either historic income or current income in accordance with this Chapter.

(2) The non-resident parent's gross weekly income is to be based on historic income unless—

(a) current income differs from historic income by an amount that is at least 25% of historic income; or

(b) the amount of historic income is nil or no historic income is available.

(3) For the purposes of paragraph (2)(b) no historic income is available if HMRC did not, when a request was last made by the Secretary of State for the purposes of regulation 35, have the required information in relation to a relevant tax year.

(4) "Relevant tax year" has the meaning given in regulation 4(2).

(5) This regulation is subject to regulation 23(4) (change to current income outside the annual review or periodic current income check).

35.— Historic income – general

(1) Historic income is determined by—

(a) taking the HMRC figure last requested from HMRC in relation to the non-resident parent;

(b) adjusting that figure where required in accordance with paragraph (3); and

(c) dividing by 365 and multiplying by 7.

(2) A request for the HMRC figure is to be made by the Secretary of State—

(a) for the purposes of a decision under section 11 of the 1991 Act (the initial maintenance calculation) no more than 30 days before the initial effective date; and

(b) for the purposes of updating that figure, no more than 30 days before the review date.

(3) Where the non-resident parent has made relievable pension contributions during the tax year to which the HMRC figure relates and those contributions have not been deducted under net pay arrangements, the HMRC figure is, if the non-resident parent so requests and provides such information as the Secretary of State requires, to be adjusted by deducting the amount of those contributions.

36.— Historic income – the HMRC figure

(1) The HMRC figure is the amount identified by HMRC from information provided in a self-assessment return or under the PAYE regulations, as the sum of the income on which the non-resident parent was charged to tax for the latest available tax year—

(a) under Part 2 of ITEPA (employment income);

(b) under Part 9 of ITEPA (pension income);

(c) under Part 10 of ITEPA (social security income) but only in so far as that income comprises the following taxable UK benefits listed in Table A in Chapter 3 of that Part—

(i) incapacity benefit;

(ii) contributory employment and support allowance;

(iii) jobseeker's allowance; and

(iv) income support; and

(d) under Part 2 of ITTOIA (trading income).

(2) The amount identified as income for the purposes of paragraph (1)(a) is to be taken—

(a) after any deduction for relievable pension contributions made by the non-resident parent's employer in accordance with net pay arrangements; and

(b) before any deductions under Part 5 of ITEPA (deductions allowed from earnings).

(3) The amount identified as income for the purposes of paragraph (1)(b) is not to include a UK social security pension.

(4) The amount identified as income for the purposes of paragraph (1)(d) is to be taken after deduction of any relief under section 83 of the Income Tax Act 2007 (carry forward trade loss relief against trade profits).

(5) Where, for the latest available tax year, HMRC has both information provided in a self-assessment return and information provided under the PAYE Regulations, the amount identified for the purposes of paragraph (1) is to be taken from the former.

NB Regulation 36(2) has since been amended by the Child Support (Miscellaneous Amendments) Regulations 2019/1084 reg.14 with effect from July 4, 2019 but not materially for the purposes of the present appeal.

37.— Current income – general

(1) Current income is the sum of the non-resident parent's income—

(a) as an employee or office-holder;

(b) from self-employment; and

(c) from a pension,

calculated or estimated as a weekly amount at the effective date of the relevant calculation decision in accordance with regulations 38 to 42.

(2) Where payment is made in a currency other than sterling, an amount equal to any banking charge payable in converting that payment to sterling is to be disregarded in calculating the current income of a non-resident parent.

38.— Current income as an employee or office-holder

(1) The non-resident parent's current income as an employee or office-holder is income of a kind that would be taxable earnings within the meaning of section 10(2) of ITEPA and is to be calculated as follows.

(2) As regards any part of the non-resident parent's income that comprises salary, wages or other amounts paid periodically—

(a) if it appears to the Secretary of State that the non-resident parent is (or is to be) paid a regular amount according to a settled pattern that is likely to continue for the foreseeable future, that part of the non-resident parent's income is to be calculated as the weekly equivalent of that amount; and

(b) if sub-paragraph (a) does not apply (for example where the non-resident parent is a seasonal worker or has working hours that follow an irregular pattern) that part of the non-resident parent's income is to be calculated as the weekly average of the amounts paid over such period preceding the effective date of the relevant calculation decision as appears to the Secretary of State to be appropriate.

(3) Where the income from the non-resident parent's present employment or office has, during the past 12 months, included bonus or commission or other amounts paid separately from, or in relation to a longer period than, the amounts referred to in paragraph (2), the amount of that income is to be calculated by aggregating those payments, dividing by 365 and multiplying by 7.

39.— Current income from self-employment

(1) The non-resident parent's current income from self-employment is to be determined by reference to the profits of any trade, profession or vocation carried on by the non-resident parent at the effective date of the relevant calculation decision.

(2) The profits referred to in paragraph (1) are the profits determined in accordance with Part 2 of ITTOIA for the most recently completed relevant period or, if no such period has been completed, the estimated profits for the current relevant period.

(3) The weekly amount is calculated by dividing the amount of those profits by the number of weeks in the relevant period.

(4) In paragraphs (2) and (3) the “relevant period” means a tax year or such other period in respect of which the non-resident parent should, in the normal course of events, report the profits or losses of the trade, profession or vocation in question to HMRC in a self-assessment return.

(5) In the case of a non-resident parent who carries on a trade, profession or vocation in partnership, the profits referred to in this regulation are the profits attributable to the non-resident parent's share of the partnership.

(6) The profits of a trade, profession or vocation that the non-resident parent has ceased to carry on at the effective date of the relevant calculation decision are to be taken as nil.