



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113764/2019

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Heard via written submissions on 20 April 2020

Employment Judge R Gall

10 **Mr Barry McCrindle**

**Claimant
Represented by:
Ms M Gribbon -
Solicitor**

15 **The Secretary of State for Business, Energy
and Industrial Strategy**

**Respondent
Represented by:
Mr P Soni -
Senior Tribunal
Officer**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim is successful. The respondent is ordered to pay to the claimant the sum of £1,128.98, being tax and national insurance deducted from a sum earlier paid to the claimant.

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REASONS

1. This Judgment results from written submissions made by parties. It was agreed that this case would proceed by way of written submissions rather than proceeding to an in-person hearing. A timetable was put in place. Written submissions were made by each party, with an opportunity for comment upon submissions of the other party being given to each party. This process, the timetable and the submissions made were current before in-person hearings became impossible having regard to the coronavirus pandemic.
2. This claim was brought following payment by the respondent to the claimant of an amount awarded to the claimant by the Employment Tribunal at an earlier date. The relevant sum was awarded by the Employment Tribunal by way of a basic award following upon unfair dismissal of the claimant by his

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then employer. It was ordered to be paid to the claimant by the respondent in that earlier case, the claimant's then employer.

3. The former employer of the claimant, against whom the award was made by the Employment Tribunal, then became insolvent, a liquidator being appointed. A claim was subsequently made by the claimant to the respondent in this case seeking payment under the provisions of the Employment Rights Act 1996 ("ERA") which provide for certain payments to be paid by the respondent to employees on insolvency of their employer.
4. The respondent paid the basic award to the claimant, however under deduction of tax and national insurance of £1,128.98. The claimant brings this claim seeking that the respondent is ordered to pay that amount to him. He argues that it ought not to have been deducted.
5. There was agreement on the relevant and essential facts.
6. It was agreed that the claimant had obtained an award from the Employment Tribunal in the case of unfair dismissal brought by him against his former employer. That award included payment of a basic award of £4,785.
7. The claimant's former employers had then become insolvent, a liquidator being appointed on 4 February 2019.
8. The claimant sought from the respondent payment to him of the basic award, his former employer not having pay that amount to him.
9. The respondent made payment to the claimant of £3,656.02. That was the basic award under deduction of tax and national insurance of £1,128.98.
10. The point of difference between the parties was in relation to that amount of £1,128.98. The claimant said that the sum deducted fell to be paid to him. The respondent said that it had been properly deducted.

The issue

11. The issue for the Tribunal was whether tax and national insurance had properly been deducted by the respondent in making payment to the claimant of his claim in respect of the basic award. If it had been the claim would be unsuccessful. If it ought not to have been deducted, then the claim would be successful.

Applicable law

12. Part XII of ERA in Sections 182 to 190 sets out provisions applicable on insolvency of an employer. Section 182 states that the Secretary of State will make payment to a party out of the National Insurance fund if satisfied as to the entitlement of the party to an amount.
13. Insolvency is required for such a payment to be made.
14. Section 184 of ERA details the debts to which the provisions involving payment by the Secretary of State apply. Section 184 (1) (d) confirms that this part of ERA applies to: –
- “any basic award of compensation for unfair dismissal....”*
15. In relation to deduction of tax the relevant Act is the Income Tax (Earnings and Pensions) Act 2003 (“ITEPA”).
16. Section 309 of ITEPA provides for limited exemptions from tax for statutory redundancy payments. Those limited exemptions relate to an approved contractual payment, a redundancy payment and a statutory payment, all as defined in that Section.
17. Sections 401 to 403 of ITEPA deal with employment income which is not earnings related.
18. Section 401 states that this chapter of ITEPA applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of or otherwise in connection with the termination of a person’s employment.

19. Section 403 provides a threshold of £30,000 which applies before tax and national insurance are chargeable on any such payment.
20. The basic award is calculated in accordance with the provisions in Section 119 of ERA. Section 122 of ERA provides that deductions can be made from the basic award when it is being calculated by an Employment Tribunal. There is no provision for deduction of income tax and national insurance in terms of that Section.
21. As a general rule, income tax is payable on earnings derived from employment. This is in terms of Section 6 of ITEPA. Taxable earnings are defined in Section 62 of ITEPA. National Insurance contributions are also due on employment earnings. This is in terms of Section 6 of the Social Security Contributions and Benefits Act 1992.
22. The case *of Du Cros v Ryall* (1935) 19 TC 444 ("*Du Cros*") is potentially relevant in determination of tax treatment of a basic award under ERA. It is a decision upon a sum paid to an individual upon wrongful termination of his employment. That sum was held not to be taxable. It did not represent income.

Submissions

Submissions for the claimant

23. In her written submissions Ms Gribbon rehearsed the position detailed above as to the award of the Employment Tribunal made to the claimant which included a basic award. Her position was that with the claimant's former employer having become insolvent, the basic award fell to be met by the respondent. It felt to be met at its "full value". Deduction of tax and national insurance was not appropriate.
24. Ms Gribbon was aware of the argument advanced by the respondent. As detailed below the respondent referred to Section 309 of ITEPA. The respondent's position was that the payment did not fall within the categories mentioned in that Section. Tax and national insurance were therefore appropriately deducted.

25. It was accepted by Ms Gribbon that the basic award did not fall within one of the 3 categories detailed in Section 309. Her position was that the sum had been awarded to the claimant as he been unfairly dismissed. It was an amount under £30,000. She referred to a schedule which appeared in Harvey on Industrial Relations and Employment Law, saying that the payment fell within category 6 in that schedule, meaning that no tax and national insurance was deductible.
26. Sections 401 – 403 of ITEPA were referred to by Ms Gribbon. She said that the payment of the basic award was received by the claimant directly or indirectly in consequence of termination of his employment. It was a sum under £30,000. It was not subject to tax and national insurance.
27. The Employment Tribunal had power to make deductions from the basic award, Ms Gribbon highlighted. That was in terms of Section 122 of ERA. For the respondent to make deductions from the basic award as awarded by the Employment Tribunal meant that the respondent was usurping the role of the Employment Tribunal. The respondent was liable in terms of Section 184 of ERA for any basic award. The basic award therefore ought to be paid to the claimant without any deduction in respect national insurance or income tax.

Submissions for the respondent

28. The respondent highlighted Section 309 of ITEPA. The relevant terms of that Section are set out above. The respondent said that the payment to the claimant was not within one of the 3 categories detailed in that Section. Tax and national insurance were therefore appropriately deducted by the respondent, it was submitted. Putting it slightly differently, there was an exemption from tax and national insurance for payments in the 3 categories detailed in Section 309. A basic award was not one of those exemptions.

Discussion and decision

29. I was grateful to both parties for the succinct arguments which they advanced. I was also grateful to them for each setting out the essential and relevant facts. Those were agreed, looking at the respective submissions.

30. It is perhaps surprising that this point has not, as far as I can ascertain, been one litigated thus far. Neither party referred me to any authority dealing with the point.
31. It was common ground that a basic award is a debt which falls to be paid by the respondent if satisfied as to insolvency, termination of the employee's contract and entitlement of the employee to payment of a basic award on the appropriate date. Nothing turns on any of those elements, it being accepted by the respondent that the claimant met the criteria of being entitled to payment of a basic award and that his employer was insolvent.
32. The question was whether in making payment to the claimant the respondent properly deducted from it tax and national insurance.
33. The provisions of Section 309 of ITEPA which provide exemption from taxation specifically relate to redundancy payments. That Section is in a part of the Act dealing with redundancy payments and is headed "Limited exemptions for statutory redundancy payments."
34. As I understand it, the respondent argues that because this section deals with redundancy payments with there being no equivalent section dealing with basic awards, then in circumstances where a basic award is not within the terms of Section 309, tax and national insurance are appropriately deducted from payment by the respondent in respect of the basic award.
35. Section 309 was accepted by Ms Gribbon as not providing a basis on which she could argue that this claim should be successful. She relied upon the basic award being a payment made in consequence of or otherwise in connection with termination of the claimant's employment. Providing it fell under the financial limit of £30,000, Ms Gribbon's position was that payment of the basic award by the respondent was one in respect of which deduction of tax and national insurance was not appropriate, having regard to Section 401 of ITEPA.
36. A basic award is designed to compensate an employee for his or her loss of employment, in circumstances where the ending of his or her employment

constitutes an unfair dismissal. It does not relate to actual loss of income. The compensatory award exists to enable a former employee to recover the relevant amount in respect of actual loss of income. The basic award is arrived at by application of a mathematical formula based on age, length of service and pay. It is the same calculation which is undertaken to ascertain a redundancy payment.

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37. A basic award is an amount ordered by the Employment Tribunal to be paid to a successful claimant where an unfair dismissal has occurred. It matters not whether such a claimant has obtained an alternative job immediately or not. Any income earned from any such alternative job is irrelevant in determination of whether a basic award is to be made and if so what the amount of any such award is to be.

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38. Section 184 of ERA confirms that a basic award is a debt to which that part of ERA applies, leading to responsibility for payment resting with the respondent in this case.

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39. I do not see that a basic award is an amount related to or derived from earnings or income. It is in my view a sum designed to compensate for losing of security of employment which has been built up by an employee over his or her years of service. I regard it as an amount paid which meets the definition within Section 401 of being "*received directly or indirectly or otherwise in connection with termination of a person's employment.*"

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40. The conclusion I have reached, therefore, is that where an employer has been ordered by Employment Tribunal to make payment of a basic award, has not met that payment and has become insolvent, the Secretary of State (the respondent in this case) must make payment of that basic award as ordered by the Employment Tribunal, without deduction of tax and national insurance.

41. That being so, the sum deducted by the respondent from the payment to the claimant is properly due to him. The respondent is therefore ordered to make payment to the claimant of the sum of £1,128.98.

5 Employment Judge:

R Gall

Date of Judgement:

28 April 2020

Entered in Register,

Copied to Parties:

28 April 2020