UT Neutral citation number: [2024] UKUT 00038 (TCC)

UT (Tax & Chancery) Case Number: UT/2022/000060

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: The Rolls Building
London EC4A 1NL

Heard on: 13 December 2023
Judgment date: 12 February 2024

INCOME TAX – section 401(1)(a) ITEPA 2003 – taxpayer received £6 million payment from her former employer in settlement of Employment Tribunal proceedings and claims relating to her prior employment and its termination – whether FTT erred in law in concluding the payment was received indirectly in consequence of or otherwise in connection with the termination of her employment

Before

MR JUSTICE MILES
JUDGE RUPERT JONES

Between

SHIVANI MATHUR

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Goldberg KC, Counsel, instructed by Macfarlanes solicitors

For the Respondents: Akash Nawbatt KC and Joshua Carey, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

1. The issue in this appeal is whether the First-tier Tribunal ("FTT") erred in law when it decided that a payment of £6 million made to the Appellant by her former employer in settlement of Employment Tribunal proceedings was received indirectly in consequence of, or otherwise in connection with, the termination of her employment for the purposes of s.401(1)(a) Income Tax (Earnings and Pension) Act 2003 ("ITEPA").

2. The FTT in a decision dated 9 March 2022 released as [2022] UKFTT 00088 (TC), decided that the payment fell within section 401(1)(a) ITEPA and was taxable. It therefore dismissed the Appellant's appeal against the closure notice and amendment to her return issued by His Majesty's Revenue and Customs ("HMRC") dated 30 January 2020.

3. At the hearing before us, as they had below, Mr Goldberg KC appeared for the Appellant and Mr Nawbatt KC and Mr Carey for HMRC. We are grateful to them for the quality of their written and oral submissions.

The grounds of appeal

4. The FTT granted the Appellant permission to pursue three grounds of appeal:

> a. Ground 1: The FTT erred in its interpretation of s.401 ITEPA when determining what is required for a payment to be received directly or indirectly in consequence of, or otherwise in connection with, the termination of a person's employment – ("the Interpretation Ground");
>
> b. Ground 2: The FTT's finding that the Appellant's termination was central to the discrimination claims made by the Appellant in the Employment Tribunal proceedings was inconsistent with the evidence and the FTT's own findings ("the Findings Ground");
>
> c. Ground 3: The FTT erred in finding that that it could not determine what element of the amount in question was connected with the termination, and, separately, in determining that the only manner in which to deal with the possibility of apportionment was to ask if the Appellant had provided sufficient evidence to quantify the amount of the payment that should be apportioned as being non-taxable ("the Apportionment Ground)".

The background

5. The background to this appeal is set out in full at [5]-[53] of the FTT's decision. It can be summarised as follows.

6. On 23 April 2015 Deutsche Bank AG ("the Bank") entered into a negotiated settlement with the New York State Department of Financial Services ("DFS") which included a consent order (the "consent order"). The consent order was made in connection with an investigation by DFS, a regulator of the Bank, into the manipulation of interbank offered rates.

7. The consent order contained a monetary settlement and "Employee Discipline" section which stated at paragraph 73: "However, certain employees involved in the wrongful conduct remain employed at the Bank. The Department orders the Bank to take all steps necessary to terminate the following seven employees, who played a role in the misconduct discussed in this Consent Order but who remain employed by the Bank…." On the same day the Appellant was told by the Bank that she was one of the seven employees "who played a role in the misconduct.".

8. On 30 April 2015 the Appellant's employment was terminated by her employer, DB Group Services (UK) Limited ("the Employer"), a company in the group headed by the Bank. Like the FTT, we will refer to this as the Termination.

9. The Termination letter from the Employer to the Appellant dated 30 April 2015 stated the following:

> (1) "The [Employer] has given careful consideration to the [consent order] and has determined that the instruction is clear. We believe that this amounts to a substantial reason for termination."
>
> (2) "The Bank appreciates that the decision to dismiss you in light of the [consent order] may cause you financial hardship. Accordingly, the Bank is prepared to offer you compensation for termination of employment…"

10. The compensation offered in the accompanying draft settlement agreement was the sum of £82,135 "for the termination of your employment with the [Employer]". The Appellant did not accept the Bank's offer.

11. On 14 August 2015 the Appellant commenced Employment Tribunal ("ET") proceedings against the Employer, the Bank, and others. The "grounds of claim" included complaints of:

(1) inequality of terms (for work of equal value) under the Equality Act 2010;

(2) harassment related to sex under the Equality Act 2010;

(3) direct discrimination on grounds of sex under the Equality Act 2010;

(4) victimisation under the Equality Act 2010;

(5) whistleblowing detriments under the Employment Rights Act 1996;

(6) automatically unfair dismissal because she made protected disclosures under the Employment Rights Act 1996; and

(7) ordinary unfair dismissal under the Employment Rights Act 1996.

12. Claims (1) to (5) related to the period of the Appellant's employment. Like the FTT, we shall use the word "discrimination" (and "discriminatory") as shorthand for the conduct complained of in those claims.

13. Claims (3) and (4) included the Termination as part of the complaint of discrimination. Claims (6) and (7) related solely to the Termination.

The settlement of the ET proceedings: May 2016

14. A mediation meeting took place on 6 May 2016 to negotiate a settlement to the ET proceedings. A settlement agreement ("the Settlement Agreement") was signed by the Appellant and the Employer early on the morning of 7 May 2016.

15. Clause 1 said as follows:

> "1. BACKGROUND
>
> 1.1. [Ms Mathur]'s employment with the [Employer] (and any [Bank company]) terminated on 30 April 2015 (the "Termination Date")...

> 1.2. [Ms Mathur] issued proceedings against the [Employer], [the Bank], [the Bank] London, [PL] and [JR] for unfair dismissal, sex discrimination, unequal pay, harassment related to sex, victimisation and protected disclosure detriments in the Employment Tribunal on 14 August 2015 under case number 2202143/2015 (the "Tribunal Proceedings").
>
> 1.3. Following discussions between the parties, this Agreement sets out the terms on which [Ms Mathur] has agreed to withdraw the Tribunal Proceedings and compromise all of the claims [Ms Mathur] has or may have against the [Employer], any [Bank company], or any of its or their present or former directors, officers or employees (including, without limitation, [PL] and [JR] together, the "Relevant Persons") in respect of [Ms Mathur]'s employment and its termination."

16. Clause 2.1 of the Settlement Agreement provided for payment ("the Settlement Payment") to the Appellant of £6 million ("the Settlement Sum") "(less such income tax and national insurance contributions if any as [the Employer] is obliged by law to deduct)" "by way of damages". The clause stated that the parties believed that the first £30,000 of the Settlement Sum could be paid to the Appellant without deductions for income tax and national insurance. The payment was made without admission of liability by the Employer or the Bank.

17. The Employer deducted £2,677,460 (the "Deducted Sum") from the Settlement Payment under PAYE when making payment to the Appellant. This was because it was not prepared to accept any risk in relation to the tax position of the Settlement Payment. It did, however, agree (in clause 2.4) to provide Ms Mathur with reasonable access to any documentation that she may reasonably require to prepare and file any tax return or to dispute any liability for tax etc.

18. Under clause 4 the Employer agreed to pay the reasonable fees incurred by the Appellant in connection with taking legal advice on the Termination and the ET proceedings up to a maximum of £400,000 including VAT. The invoice was to be sent directly to the Bank. Stephenson Harwood sent an invoice for £400,000 including VAT to the Bank in respect of their legal advice to the Appellant, and the Bank paid this bill.

19. Clause 5 stated that the Settlement Agreement related to and was in full and final settlement of the ET proceedings and any and all claims the Appellant had or may have against the Employer or the Bank for 13 types of legal claim which included breach of contract, unfair dismissal, equal pay and discrimination. Under the clause, the Appellant agreed to withdraw the ET proceedings.

The FTT Decision

20. The FTT made the following findings at [25]-[28] regarding the nature of the Appellant's written evidence and submissions filed in the ET proceedings. The evidence and argument in those proceedings were to the effect that the Termination of the Appellant's employment was integral to her claims as to her unlawful treatment (summarised at paragraph 11 above):

> 25. At paragraph 8.12 Ms Mathur's statement stated:
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> "My dismissal and the action of the Respondents in connection with my dismissal, form an Integral and inseparable part of the overall state of affairs I found myself working in and the unbroken chain of unlawful treatment to which I was subjected".
>
> 26. At paragraph 183, in a very similar vein, she stated that
>
> "my dismissal and the actions of the Respondents in connection with my dismissal forms an integral part of the overall state of affairs I found myself working in and the unbroken chain of Unlawful Treatment to which I was subjected".

27. Ms Mathur's counsel's 40-page skeleton argument for the ET preliminary hearing, dated 21 January 2016, stated at paragraph 2.8:

> "Ms Mathur's dismissal was, in fact, an integral part of the Bank's Unlawful Treatment, with the DFS Consent Order a convenient pretext for getting rid of her without having to deal with her complaints. At the time of her dismissal, all of Ms Mathur's issues were outstanding and some were purportedly under active investigation. This much is confirmed by the Respondents in paragraphs 5.15 and 5.17 of their Grounds of Resistance. Her claims of pay discrimination and the Mis-Marking of Books were being investigated at the time she was dismissed in April 2015, with her compensation (including the most recent pay decision in February 2015) under review by the Bank's Employee Relations ("ER") team. That investigation was never completed. Further, Ms Mathur was dismissed less than a week after she refused, on ethical grounds, to sign off accounts on which there had been unauthorised trading by a colleague who was not an FCA Approved Person. Ms Mathur's refusal to sign off these accounts threatened to cause difficulties for the Bank with its regulators."

28. At paragraph 4.24 the skeleton argument stated: "Ms Mathur's claim is that her dismissal was not unrelated to these outstanding issues; on the contrary the Bank dismissed her in material part because of them and/or her disclosures."

21. The Appellant's position before the FTT as to the centrality of the Termination to her claims was different from that in the ET proceedings. The FTT set out the Appellant's case on the facts at [72]:

> 72. Ms Mathur's case was built on the following view of the facts:
>
> (1) Had the ET proceedings gone to a full hearing, Ms Mathur would have received
>
> (a) nothing for unfair dismissal claims (the Termination was not unfair or wrongful (as it was made in compliance with the consent order) and, in any event, even if unfair, compensation would have been limited by the "unfair dismissal cap");
>
> (b) nothing in respect of financial loss because she had no proof of the loss;
>
> (c) a limited amount (constrained by the *Vento* guidelines) for injury to feelings.
>
> (2) But Ms Mathur had a "moral claim" against the Bank, based on discrimination, which she managed to monetise. The "moral claim" had a "nuisance value" ... In the "court of public opinion", Ms Mathur had a tale to tell which would resonate with a large audience and, even if, in law, the cost to the Employer of the ET proceedings being heard might not be significant, there were other risks in allowing that to happen that the Bank would not wish to take.

22. The FTT rejected the Appellant's case and evidence that the Settlement Sum was not connected to the Termination, in respect of which ET proceedings would have been unsuccessful, but rather was only connected to or occasioned by the nuisance value of her moral claim. It did so for two reasons.

23. The first was its assessment of the Appellant's evidence as explained at [92]-[100]:

> **Flaws in the appellant's version of events**
>
> 92. In our assessment of the evidence, there are two significant flaws in the version of events put forward by Ms Mathur in these proceedings (see [72] above).
>
> ***Underplays arguments that the Termination was itself discriminatory***
>
> 93. The first is that it significantly underplays Ms Mathur's arguments in the ET proceedings that the Termination was itself discriminatory - indeed, the culmination of the alleged longstanding discriminatory conduct over the course of her employment…
>
> 94. We put particular weight on this evidence of the Bank's perception of Ms Mathur's arguments in the ET proceedings - and in particular the Bank's perception that the "unfair dismissal cap" was not necessarily a bar to an award greater than that offered by the Bank in the Termination letter - as it

comes from a party that was closely involved in the ET proceedings but has no stake in the tax issue currently being adjudicated.

95. These "Termination as discriminatory act" arguments tied in with the large sums derived from loss of post-Termination earnings set out in Ms Mathur's schedule of loss: in the original version, produced at the direction of the ET, post-Termination loss of earnings amounted to £15.8 million, the lion's share of the "total amount claimed". In the "revised" version of the schedule of loss prepared for the "without prejudice" meeting between the parties on 9 February 2016 (which did not achieve settlement), lost post-Termination earnings were double this amount (£31 million), representing about two-thirds of the revised "total amount claimed".

96. In her evidence before this Tribunal, Ms Mathur sought to distance herself from the "Termination as discriminatory act" arguments she made in the ET proceedings, on the grounds that she advanced these arguments prior to seeing the witness statements produced by the Bank for the preliminary ET hearing ...

97. We are not persuaded, either that Ms Mathur in fact changed her mind about her "Termination as discriminatory act" arguments upon seeing the Bank's witness statements, or that the content of those statements was a material rebuttal of those arguments...

98. We place greater weight in these matters on Ms Mathur's witness statement for the preliminary ET hearing, than on her evidence in these proceedings (where they clash), because the former (i) was significantly closer in time to the events in question; and (ii) was made without the tax law questions now at issue at the forefront of Ms Mathur's mind, such that her earlier statement was less given to memories and opinions being influenced by the effect on her own tax position.

99. More generally, we also note and take into account:

(1) the absence of contemporaneous documentary, or independent expert, evidence, or of witness evidence from those involved in giving her legal advice at the time, to support Ms Mathur's contention that her legal case in the ET proceedings was weak; and

(2) the fact that, over the course of the ET proceedings, Ms Mathur incurred at least £400,000 in legal expenses and engaged a premier-league legal team (as did the Bank) - all of which indicate that she had a substantive legal case.

100. We thus find, contrary to the version of events advanced on her behalf in these proceedings, that, up to and including the point of settlement, Ms Mathur continued to believe in the strength of her legal arguments in the ET proceedings, including important arguments that the Termination was itself discriminatory, backing significant claims (of at least £15 million) for post-Termination earnings in her schedule of loss; and that the Bank recognised her as having a substantial legal case for significant damages (not necessarily constrained by the "unfair dismissal cap") during that time (whilst of course vigorously disputing it).

24. The FTT's second reason for rejecting the Appellant's case that there was no connection between the Termination and the Settlement Sum was that the former was the "trigger point, catalyst and enabling event" for the ET proceedings and the settlement of them. This was explained at [105]-[114]:

Overlooks the Termination as trigger for the ET proceedings and their settlement

105. The second significant flaw in the version of events put forward by Ms Mathur is that it overlooks the importance of the Termination as the trigger point, catalyst and enabling event for her bringing proceedings in the ET 3½ months later, and settling them (in return for the Settlement Payment) about 9 months after that.

106. In part we view the Termination as triggering Ms Mathur's bringing of ET proceedings because, as found above, in addition to the claims for unfair dismissal, a significant part of Ms Mathur's claims in the ET was arguments that the Termination was itself discriminatory.

107. But even as regards those parts of the ET proceedings that related solely to allegedly discriminatory events prior to the Termination - in our view the Termination was the trigger for those claims being made, and then settled.

108. The starting point is that we find that, prior to the Termination, Ms Mathur had been deeply reluctant to pursue claims of discrimination with any degree of formality whilst still employed at the Bank …

…

111. In our assessment of the evidence, there was no change to this deep-seated reluctance to take formal action against the Bank for discrimination, down to the time of the Termination…

112. The Termination transformed the position: most of the reasons for Ms Mather's deep reluctance to take formal action against the Bank for discrimination - her sense of responsibility to others at the Bank, her concerns about the impact on her prospects, having seen what happened to others who pursued grievances formally - fell away. The Termination opened the way for the highly effective negotiating posture vis-à-vis the Bank presented in the appellant's case - and which we, in general terms, accept: that Ms Mathur positioned herself as a "nuisance" to the Bank and negotiated the Settlement Payment as the price to make her "go away". This negotiating stance would, as a practical and realistic matter, have been very difficult, if not impossible, without the Termination.

113. It is in our view telling, and in keeping with the evidence more generally, that the Termination was the subject of first sub-clause of the first clause of the Settlement Agreement, headed "Background", followed by a sub-clause about Ms Mathur's bringing the ET proceedings, and a third and final sub-clause summarising the settlement: these three events were, in substance as well as in this contemporaneous documentation, the key background to the making of the Settlement Payment.

114. We do not therefore accept the version of events put forward in the appellant's case, that the Termination was a "coincidence" as regards the Settlement Payment; rather, it was the triggering event and catalyst for the bringing of the ET proceedings, and enabled Ms Mathur to take the highly-effective "nuisance claim" negotiating posture that led to the settlement and the Settlement Payment.

25. Having found these facts, the FTT then applied section 401(1) ITEPA at [115]-[116]:

Applying s.401(1)

115. Having made these further findings of fact as part of analysing what we regard as significant flaws in the version of events in the appellant's case, we now turn to the core task of applying the statutory words, construed purposively, to the facts, viewed realistically.

116. In our view, the facts of this case open up two avenues of potential 'connection', in line with the statutory language in s.401(1), between the Termination and the Settlement Payment.

26. Thus it found that the Settlement Payment fell within section 401 through two alternative avenues at [116]-[123].

27. The first was that it was received "indirectly in consequence of" the Termination, as explained at [117]-[118]:

117. One avenue of connection arises from our factual finding that the Termination was the trigger and catalyst for Ms Mathur bringing the ET proceedings (which were settled by the making of the Settlement Payment), and put Ms Mathur in the position to take a "nuisance claim" negotiating position in securing settlement. In our view, this factual matrix answers to the statutory language of Ms Mathur receiving the Settlement Payment *indirectly in consequence of* the Termination: the bringing of the ET proceedings was, substantively and realistically, in consequence of the Termination; and the Settlement Agreement, including its negotiation, was, in the same way, in consequence of the ET proceedings.

118. For the avoidance of doubt, we do not accept the appellant's contentions

(1) that the negotiations leading to settlement of the ET proceedings somehow interrupted the consequential chain between Termination and Settlement Payment: as set out above, the settlement negotiations were in consequence of ET proceedings, which were themselves in consequence of the Termination; or

(2) that there was particular significance in the fact that the ET proceedings were against two individual senior employees at the Bank, as well as against the Employer and the Bank.

28. The second, and alternative, avenue was its finding that the Settlement Payment was received "otherwise in connection with" the Termination. It reached this conclusion for two reasons.

29. The first was the substantive consequential relationship between the two based upon its finding that the Termination was both a trigger and catalyst for the claim as explained at [119]-[121]:

> 119. If we are for some reason wrong to have found that the facts of this case mean that Ms Mathur received the Settlement Payment *indirectly in consequence of* the Termination, we would have found, in the alternative, that, due to the same factual matrix, she received it *otherwise in connection with* the Termination.
>
> 120. It would also be true to say that, had the Termination not occurred, Ms Mathur would not have received the Settlement Payment; however, in our view, this "but for" approach is not sufficient to satisfy the statutory words, construed purposively - if, as Mr Goldberg QC argued through a hypothetical example at the hearing, a claim would never had been brought had the claimant not suffered a cycling accident, and so had the time (off work) to bring the claim, we agree with Mr Goldberg that it would not be right to conclude that, by that reason alone, the claim was brought *indirectly in consequence of* or *otherwise in connection with* the cycling accident. A "but for" test might be satisfied in such a case, but, looking at the facts realistically, the claim is not substantively connected to the cycling accident: one can easily imagine other ways a claim might have been brought by a claimant who was short of time (such as finding someone else to assist). Here, when viewing the facts realistically, there is in our view a substantive consequential relationship, albeit indirect, between the Termination and the Settlement Payment - it is not easy imagine how such a payment would otherwise have been received, had the Termination not occurred, given our findings about the "triggering" and "catalyst" effect of the Termination.
>
> 121. In taking this view of the statutory wording, we are not following the Special Commissioner in *Crompton*, who commented at [36] of that decision that a circumstance that occasions a claim leading to a payment, but has nothing to do with the merits of the claim or whether it would succeed - such as the fact that the claimant's employment terminated, and he would never have claimed had he remained employed - does not constitute linkage between the payment and the termination of the sort envisaged by s.401(1). In the light of the emphasis on the breadth of the statutory language made in decisions of higher authorities subsequent to *Crompton* - the Upper Tribunal in *Colquhoun* at [12], affirmed by the Upper Tribunal and Court of Appeal in *Moorthy* (at [52] and [40] respectively) - we do not believe that the restriction applied by the Special Commissioner - that a circumstance occasioning a claim leading to a payment must relate to the merits of the claim - should be followed. Rather, this Tribunal must look at all the facts of the case, realistically, and decide whether they answer to the statutory words. In the particular circumstances of this case, for the reasons we have given, in our view they do.

30. The second way in which the Settlement Payment and the Termination were found to be otherwise connected was through the centrality of the Termination to the substance of the claims made which were then settled:

> 122. Although this first "avenue of connection" between the Settlement Payment and the Termination is sufficient to conclude that s401(1)(a) applies to the disputed amount, there is another such avenue, arising from our finding that the Termination was central to significant claims made by Ms Mathur in the ET proceedings: not just to her unfair dismissal claims but also to her claims based on discriminatory conduct by the Bank; and that, in the perception of both parties to the negotiations

that led to the settlement, those claims had legal substance and were supported by significant figures in Ms Mathur's schedule of loss.

The FTT's decision on apportionment

31. The FTT at [123]-[127] went on to address the issue of whether the Settlement Sum might be apportioned into taxable and non-taxable sums according to whether it related to termination or non-termination claims. This issue had not been raised or argued by the parties but the FTT found that no apportionment should be made for the following reasons:

> 123. The question that arises as regards this avenue of connection is whether the disputed amount should be apportioned as between (i) payment received in settlement of claims relating to the Termination (the "**first portion**") and (ii) payment received in settlement of other claims (the "**second portion**"), on the basis that only the first portion satisfied the requirement of being received *indirectly in consequence of* or *otherwise in connection with* the Termination.
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> 124. We note that in *Moorthy* the Upper Tribunal did not consider that apportionment of an amount of compensation between events which occurred before and after termination of employment, reflecting the different tax treatment of compensation for discrimination before termination, as against compensation paid in connection with termination, would be impossible or excessively difficult.
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> 125. In this case there are real evidential difficulties in apportioning the disputed amount between the first portion and the second portion in a realistic and commercial way, given that
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> (1) the Settlement Payment was a single undifferentiated lump sum;
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> (2) Ms Mathur's schedule of loss (either in the form produced at the direction of the ET, or the later "revised" form prepared for a "without prejudice" meeting between the parties) played no part in the negotiation of the Settlement Sum;
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> (3) there was no factual evidence before the Tribunal, such as papers held by Ms Mathur or the Bank, or witness evidence from either of them, to support an apportionment;
>
> (4) there was no expert evidence before the Tribunal to support an apportionment; and
>
> (5) neither party in these proceedings attempted such an apportionment, or gave a formula for doing so - rather, each adopted an "all or nothing" approach.
>
> 126. In our view these evidential difficulties can only be resolved by asking ourselves whether the party with the burden of proof in this case, the appellant, has produced evidence sufficient to persuade us that a certain amount of the disputed amount should be apportioned to the second portion. We answer this in the negative, because, apart from arguing that *the whole* of the disputed amount should be apportioned to the second portion (which we reject), the appellant produced no persuasive evidence or arguments to support any other position.
>
> 127. Even if the foregoing reasoning is flawed, such that a material part of the disputed amount could, on the evidence before us, realistically be apportioned to the second portion, we consider, on the facts of this case, that the amount so apportioned would nevertheless still fall within s401(1), given our conclusions as to the first "avenue of connection" (see [117 and 119] above).

The Law

ITEPA

32. ITEPA imposes income tax on *employment income*, being *general earnings* (dealt with in Part 3) and *specific employment income* i.e. an amount that counts as employment income by virtue of, inter alia, Part 6 (which deals with employment income other than earnings or share-related income).

Chapter 3 of Part 6 deals with payments and benefits on termination of employment etc. The following provisions are most relevant.

33. Section 401 (and 401(1)(a) in particular) provides:

> "(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
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> (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."

34. In this case there are three potentially relevant exceptions to the taxability of payments which would otherwise fall to be taxed under section 401(1)(a).

35. Section 403 (Charge on payment or other benefit) provided (at the relevant time):

> "(1) The amount of a payment or benefit to which this Chapter 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."

36. Hence the first £30,000 of the Settlement Sum was paid without deduction being made by the Employer.

37. Section 406 (Exception for death or disability payments and benefits) provided (at the relevant time):

> "This Chapter does not apply to a payment or other benefit provided—
>
> .. (b) on account of injury to, or disability of, an employee."

38. The simple point is that the award for injury to feelings (as opposed to financial loss) in relation to a discrimination claim would not be taxable (albeit the amount should be quantified by reference to the *Vento* guidelines as described below).

39. Section 413A (Exception for payment of certain legal costs) provides (materially):

> "(1) This Chapter does not apply to a payment which meets conditions A and B.

(2) Condition A is that the payment meets the whole or part of legal costs incurred by the employee exclusively in connection with the termination of the employee's employment.

(3) Condition B is that either—

(a) the payment is made pursuant to an order of a court or tribunal, or

(b) the termination of the employee's employment results in a settlement agreement between the employer and the employee and—

(i) the settlement agreement provides for the payment to be made by the employer, and

(ii) the payment is made directly to the employee's lawyer…"

40. Hence there were no deductions from the £400,000 paid to the Appellant's solicitors, Stephenson Harwood, as part of the settlement agreement.

Authorities on section 401(1)(a)

41. The FTT comprehensively considered the authorities on the relevant statutory provisions at [59]-[71] of its decision. We adopt and agree with much of its analysis.

42. In *Crompton v HMRC* [2009] UKFTT 71 (TC) ("*Crompton*") the taxpayer was in the Territorial Army. He received a compensation payment for the actual financial losses he suffered as a consequence of failings of army selection boards (when he applied for other posts within the army, but was wrongly rejected). Subsequent to those failings, he was made redundant and left the Territorial Army. The Special Commissioner held that s.401(1)(a) did not apply to the compensation payment: there was no link, joint or bond between the compensation payment and the termination of the taxpayer's employment with the army. The payment was for the selection boards' unfair treatment of the taxpayer but that did not lead to his leaving the army. He left the army either of his own volition or by way of redundancy and not because of his failure to be selected for posts for which he had applied. Accordingly, the compensation payment was not connected with the termination of the taxpayer's employment within s.401(1)(a).

43. At [36] of the decision, the Special Commissioner said:

"I reject the contention that the possibility that Mr Crompton, on his own admission, might not in fact have pursued the claim if he had stayed in the army forms such a link. He might or might not have pursued it. He certainly had not decided that he would not pursue the complaint if he stayed in the army. Even if I assume he would not have pursued the claim if he had stayed in the army the fact that he left was only a circumstance that occasioned his decision to make the claim. It had nothing to do with the merits of the claim or whether it would succeed. That circumstance does not constitute a linkage between the payment and the termination of his employment of the sort envisaged by the legislation."

44. In *HMRC v Colquhoun* [2011] STC 394 ("*Colquhoun*") the Upper Tribunal said:

"*Structure of relevant statutory provisions*

[12] The statutory language of s 148(2) [the statutory predecessor to s401] has been broadly drawn. That can be seen from the use of words and phrases such as 'indirectly' and 'otherwise in connection with'. 'Otherwise' may simply mean 'in any way' and is consistent with the parliamentary intention to catch a wide range of payments. In *Walker* [*v Adams* [2003] STC (SCD) 269] a compensation payment awarded for constructive dismissal of a former employee fell within the charge to the extent that it related to loss of income but not to the extent that it compensated for injury to feelings. Special Commissioner O'Brien observed (in an appeal relating to

> s148, ICTA) that: '[t]he word "otherwise" shows that the relevant connection or link may be looser than would be required for a strict causation test.' While we are not entirely clear what is meant by a 'strict causation test' we agree with the general sentiment that the word 'otherwise' does not restrict the scope of s148(2) and is entirely consistent with a broad approach to the application of the phrase 'in connection with'. As [counsel for HMRC] submitted, the language could hardly be less prescriptive."

45. The Court of Appeal in *Moorthy v HMRC* [2018] STC 1028 ("*Moorthy*") held that the FTT and the Upper Tribunal were correct in holding that the entirety of the payment to the taxpayer fell within the language of s.401(1)(a). Following the taxpayer's dismissal from his employment on grounds of redundancy, he brought proceedings in the ET against his former employer for unfair dismissal and unlawful age discrimination. Those proceedings were compromised on terms that the taxpayer agreed to accept "an *ex gratia* sum of £200,000 by way of compensation for loss of office and employment," without any admission of liability by the former employer, in full and final settlement of his existing claims and any other claims arising out of or connected with his employment or its termination. There was no suggestion that any part of the settlement payment related to anything which occurred before the date when the chain of events was set in motion which led to the taxpayer's selection for redundancy and the termination of his employment.

46. The Court of Appeal held that the payment was at the very least connected with the termination of the taxpayer's employment, and that the tribunals had been entitled so to find. It did not matter that the payment was made to the taxpayer after his employment had ceased or that it might have been a payment, in whole or part, of a capital nature. Part of the purpose of s.401 was to avoid the need for enquiries of that nature, by deeming any payments that fell within the statutory language to be employment income charged to tax under ITEPA.

47. Henderson LJ said at [48], about the scope of s.401:

> "Counsel for Mr Moorthy also advanced a bold submission that the language of s 401 is not in fact widely drawn, and if Parliament had intended any or all connections to suffice, it would not have used the specific terms 'in consideration or in consequence of ' to limit the residual words in s 401(1). In my judgment, this submission puts the matter the wrong way round. The word 'otherwise' before 'in connection with' shows that the kinds of connection envisaged by the section must be wider than the specific examples given of payments and other benefits received directly or indirectly in consideration or in consequence of the termination of a person's employment (or a change in the duties of or earnings from that employment). In any event, it is unnecessary for present purposes to explore the outer limits of the kinds of connection which Parliament had in mind, because (as I have already said) it is obvious on any reasonable view that the entirety of the £200,000 received by Mr Moorthy was connected with the termination of his employment."

Apportionment

48. The Upper Tribunal in *Moorthy* ([2016] STC 1178) noted at [55]:

> "We acknowledge that there is some force in [taxpayer's counsel]'s submission that there appears to be an anomalous distinction between payments of compensation for discrimination before termination, which in [*A v HMRC* [2015] UKFTT 189 (TC)] were held not to be taxable as earnings under s62 ITEPA, and such compensation paid in connection with termination which, on our view of s401, counts as earnings. However, in our judgment, that is a consequence of such payment being deemed to be earnings by s401. It is true that this may require an amount of compensation to be apportioned between events which occurred before and after termination so that they can be treated differently for tax purposes. But we do not consider that such apportionment would be impossible or excessively difficult. The need to carry out

> such an exercise does not, in our judgment, compel a different construction of the words of s401, which are clear."

49. In *Tilley v Wales* [1943] AC 386, the taxpayer entered into an agreement with his employer under which he was paid £40,000 in return for the employer being released from paying his pension and reducing his salary. The House of Lords held that so much of the £40,000 as related to commutation of pension was not subject to income tax, but that so much as was paid in compromise of the reduction of salary was. Lord Porter said this at the end of his judgment, at p398:

> "It only remains, therefore, to see whether the sum attributable to the release of the pension can be separated from that payable for the reduction of salary. It was only faintly argued on behalf of the Crown that such a division was not possible, but it was said that there were no materials on which such a calculation could be made inasmuch as the cessation of the salary and the commencement of the pension were dependent on many unascertainable matters, among others on the appellant's choice of the time of his retirement. No doubt, there are difficulties, but the resultant figure seems no more incalculable than, say, the length of time during which an injured workman would have continued to earn wages had he not received his injury, a period difficult no doubt to ascertain, but one which has constantly to be estimated in dealing with cases of personal injury."

Discussion and Analysis

Ground 1 – Interpretation

The Appellant's submissions

50. Mr Goldberg submitted that in deciding that the Settlement Sum was indirectly in consequence of or, alternatively, otherwise in connection with, the Termination, the FTT gave too wide an interpretation to the words "indirectly in consequence of" and "otherwise in connection with" and, when those phrases are correctly interpreted, the Settlement Sum does not fall within the charging provisions of s.401(1)(a) ITEPA 2003.

51. Mr Goldberg accepted that the legislation is to be construed purposively and is to be applied to the facts, viewed realistically. He also accepted that the wording of the legislation is wide but, even so, it is not of unlimited width: leaving aside cases where a payment is received directly or indirectly in consideration of a termination (which this case is not), a payment is not charged to tax by s.401(1)(a) unless it is received directly or indirectly in consequence of, or otherwise in connection with, a termination. No matter how the payment is received, the receipt must be in consequence of or otherwise in connection with the termination: the receipt may be direct or indirect, but it must in any event have the necessary consequential link or be otherwise in connection with the termination.

52. Mr Goldberg argued that at [116] to [123] the FTT failed to follow the decision in *Crompton* in which the Special Commissioner held, at paragraphs 34 and 35 of his Decision that, no matter how wide the wording of s.401(1), before the charge imposed by that section can apply, there must (in the case of a claim based on the existence of a connection) be a "connection" which requires "some sort of link, joint or bond between two things". Sometimes, for A to be in connection with B, there must be a strong or close nexus. By parity of reasoning Mr Goldberg contends that, in the case of a claim based on a sum received being a consequence of a termination, the receipt must be a result of the termination.

53. Mr Goldberg submitted that the purpose of the legislation is to tax payments which are, in one way or another, some form of compensation for termination: the legislative scheme here shows that for a payment to be in connection with a termination there must be a close and strong nexus between

the payment and the termination. Where a termination payment is routed to an employee through a chain of companies in accordance with a plan devised by an employer, and there is an attempt to change the nature of the payment as it passes through the chain, there can be no doubt that the payment received is a direct or indirect consequence of termination, or is connected with termination, because it is received as part of the employer's plan: the link between receipt and termination is close and strong. In such a case, the termination of the employment is the true source of the receipt.

54. Mr Goldberg submitted that the FTT had failed at FTT [116] to [123] to recognise the fundamental importance of its earlier findings. It had ignored its finding at [47] that the Settlement Sum was arrived at by horse trading and that the Appellant's schedule of loss played no part in the negotiation at the mediation:

> 47. The Settlement Sum was arrived at during the day-long mediation by "horse trading" negotiation; it was not broken down into further amounts or paid by reference to any specific heads of Ms Mathur's claims; and Ms Mathur's schedule of loss (either in its original form as produced at the direction of the ET, or the "revised" form prepared for the "without prejudice" meeting on 9 February 2016) played no part in the negotiations at the mediation meeting. The Settlement Sum was simply the figure that was agreed in order to settle.…

55. He also submitted that the FTT had ignored its finding at [88] that the payment was not received directly in consequence of the Termination but of the settlement:

> 88. It is clear from the Settlement Agreement that the Settlement Payment was not received by Ms Mathur directly or indirectly *in consideration of* the Termination. Nor do we consider that the Settlement Payment was received by Ms Mathur *directly in consequence of* the Termination; rather, it was received by her in consideration of, and directly in consequence of, her settling.

56. He also argued that the FTT ignored its finding in the last two sentences of [112] as set out above, that the Appellant positioned herself as a "nuisance" to the Bank and negotiated the Settlement Payment as the price to make her "go away".

57. Mr Goldberg contended that it follows from those findings that the Settlement Sum was received not directly or indirectly in consideration or in consequence of, or otherwise in connection with the Termination or claims made in the Employment Tribunal proceedings in respect of Termination but, rather, from horse trading and for going away. Although going away came after the Termination, it was not and could not be directly or indirectly "in consideration or in consequence of or otherwise in connection with the termination", since the Appellant only became a nuisance after the Termination had occurred. The Settlement Sum was (viewed objectively) received from the post-termination nuisance value which the Appellant was able to generate by her highly effective negotiating posture.

58. At FTT [117], the FTT held that the termination put the Appellant in the position to take a nuisance claim negotiating position when, in accordance with the FTT's finding at FTT [112], whilst Termination gave her an opportunity to make the claim, it was her ability to position herself as a nuisance to the Bank that resulted in the payment to "go away", rather than anything done to her by the Bank or by her in relation to the Termination.

59. Although the FTT held at FTT [120], that there was a substantive consequential relationship, albeit indirect, between the Termination and the receipt of the Settlement Sum, it did so on the basis that "*it is not easy [to] imagine how such a payment would otherwise have been received had the termination not occurred given our findings about the "triggering" and catalyst effect of the Termination*".

60. However, as a matter of law, it does not follow from the fact that an event is a catalyst or a trigger that the things which follow the event are consequences of it. That is a description of a "but for" test which the FTT confirmed at FTT [120] was not the correct interpretation of the legal test.

61. In addition, even if the Termination was the catalyst or trigger for the proceedings, on the facts found at FTT [88] and [112], the payment was not a consequence of the Termination but was the result and in consequence of agreeing to stop being a nuisance which has nothing to do with the Termination.

HMRC's submissions

62. HMRC submitted that the FTT was correct for the reasons it gave. Counsel made further submissions which are reflected in our analysis and conclusions and need not be repeated here.

Analysis and conclusions

63. We are not satisfied that the FTT erred in law in relation to its interpretation of s.401(1)(a) ITEPA in construing: "payments…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."

64. The FTT correctly considered that the provision is to be construed broadly and the payment does not require 'a close and strong nexus' to the termination. As the Court of Appeal stated at [48] in *Moorthy*:

> The word 'otherwise' before 'in connection with' shows that the kinds of connection envisaged by the section must be wider than the specific examples given of payments and other benefits received directly or indirectly in consideration or in consequence of the termination of a person's employment (or a change in the duties of or earnings from that employment)."

65. The final catch-all test within section 401 is provided by "otherwise in connection with". The link between the payment and the termination can be broader than a standard causative link – otherwise these additional words would be otiose. It does not require a sophisticated or legalistic analysis of causation. This is also consistent with the Upper Tribunal's decision in *Colquhoun* at [12] where the Upper Tribunal stated:

> "The statutory language of section 148(2) [the statutory predecessor to s401] has broadly been drawn. That can be seen from the use of words and phrases such as indirectly and otherwise in connection with. Otherwise may simply mean in any way and is consistent with the Parliamentary intention to catch a wide range of payments".

66. These observations (approved by the Court of Appeal in respect of the "taxability issue") about the width of the legislation are consistent with the Upper Tribunal's decision in *Moorthy* at [52]:

> "We take the same view of s 401 ITEPA as the Upper Tribunal in *Colquhoun* took in relation to s 148(2) ICTA. We consider that the language of s 401 is clear and its scope is wide …Section 401 is not restricted to payments made under a contractual entitlement or to payments made at the time of termination. The only question that determines whether s 401 applies is whether the payment was directly or indirectly in consideration or in consequence of, or otherwise in connection with the termination of a person's employment. We consider that the FTT was correct, in [69], to disregard the possible reasons for the payment, such as the desire to settle Mr Moorthy's claim for unfair dismissal and injury to feelings or protect Jacobs's reputation, as irrelevant. Once it is established on the facts, as the FTT found in [67], that the settlement payment was, directly or indirectly, in consideration or

> in consequence of, or otherwise in connection with the termination of Mr Moorthy's employment then it is within s 401." (emphasis added)

67. In the passage from the Upper Tribunal's decision in *Moorthy* quoted above, the Upper Tribunal expressly approved [69] of the FTT's decision in that case in which it said:

> "Whether or not the payment was also to compensate Mr Moorthy for discrimination, unfair dismissal, injury to feelings, redundancy and/or financial loss is immaterial. It is likewise irrelevant whether or not Jacobs made the payment partly or entirely to protect its reputation. The payment can be any of these things, or all these them, but because it is "directly or indirectly in consideration or in consequence of, or otherwise in connection with" the termination of Mr Moorthy's employment, it falls within ITEPA s 401. It is therefore unnecessary for us to respond to Mr Gary-Jones's arguments on how the £200,000 should be apportioned."

68. Mr Goldberg did not identify any error in the FTT's interpretation of the principles it derived from those authorities. Rather, as before the FTT, the Appellant seeks to advance many of the arguments rejected in *Moorthy*.

69. The Appellant placed some reliance on the decision in *Crompton*. As identified by the FTT at [121], the decision in *Crompton* pre-dates the Upper Tribunal's Decision in *Colquhoun* and those of the FTT, Upper Tribunal and Court of Appeal in *Moorthy*. In those circumstances, the FTT did not err in law in applying the principles derived from those later authorities. Further, as also identified by the FTT at [60], the FTT in *Crompton* found on the particular facts in that case that the relevant payment was for the selection boards' unfair treatment of the taxpayer but that that unfair treatment did not lead to his leaving his employment and therefore the payment for that unfair treatment was not connected with the termination of his employment.

70. Finally, the Appellant's argument that any negotiations which settle Employment Tribunal proceedings breaks the necessary causal connection with termination is not only inconsistent with the width of s.401 but is also inconsistent with s.413A. Section 413A, carving out an exception for the legal costs of proceedings, would be wholly unnecessary if a settlement sum negotiated to compromise ET proceedings did not satisfy the necessary causal connection required by s.401.

71. Furthermore, we do not consider that the FTT misapplied section 401 ITEPA given the nature of the factual findings it made. There is no error in its application of the law to the facts at where it gave its reasons for finding that the Settlement Payment was received indirectly in consequence of ([117]-[118]) or otherwise in connection with ([119]-[122]) the Termination.

> 117.One avenue of connection arises from our factual finding that the Termination was the trigger and catalyst for Ms Mathur bringing the ET proceedings (which were settled by the making of the Settlement Payment), and put Ms Mathur in the position to take a "nuisance claim" negotiating position in securing settlement. In our view, this factual matrix answers to the statutory language of Ms Mathur receiving the Settlement Payment *indirectly in consequence of* the Termination: the bringing of the ET proceedings was, substantively and realistically, in consequence of the Termination; and the Settlement Agreement, including its negotiation, was, in the same way, in consequence of the ET proceedings.
>
> …
>
> 119. If we are for some reason wrong to have found that the facts of this case mean that Ms Mathur received the Settlement Payment *indirectly in consequence of* the Termination, we would have found, in the alternative, that, due to the same factual matrix, she received it *otherwise in connection with* the Termination.

…

> 122. Although this first "avenue of connection" between the Settlement Payment and the Termination is sufficient to conclude that s401(1)(a) applies to the disputed amount, there is another such avenue, arising from our finding that the Termination was central to significant claims made by Ms Mathur in the ET proceedings: not just to her unfair dismissal claims but also to her claims based on discriminatory conduct by the Bank; and that, in the perception of both parties to the negotiations that led to the settlement, those claims had legal substance and were supported by significant figures in Ms Mathur's schedule of loss.

72. The FTT chose to divide the tests within the statutory language and held that the Settlement Payment satisfied both the tests of "indirectly in consequence of" and "otherwise in connection with". We do not think that it is necessary to parse things in this way. A holistic approach could equally have been taken and the composite test applied. But nothing turns on this nuance.

73. The final part of Mr Goldberg's challenge under this ground is not made out. The FTT did not ignore its earlier findings at [47], [88] and [112] in coming to its conclusion. These paragraphs cannot be read in isolation from the whole of its findings and core reasoning set out above at [93]-[100], [105]-[114] and [117]-[122]. The Appellant's arguments are based on a selective and partial reading of the Decision.

74. The FTT did not find that the Settlement Sum was paid simply as a result of the Appellant making herself a nuisance such that it was not paid indirectly in consequence of or in connection with the Termination. Quite the reverse, the FTT found that the parties believed there to be substance to the ET proceedings, that the Termination was central to the grounds of claim pursued in those proceedings (in addition to the Termination being a catalyst, trigger and enabling event for the ET claim) and the payment directly related to the settling of those proceedings. Even though a close factual nexus is not necessarily required, there was in fact such a connection between the Termination and the payment. The FTT was entitled on the evidence to conclude that despite there having been two links in the chain, from Termination to ET proceedings to settlement, there remained a clear and obvious connection between the Termination and the payment.

75. The FTT found that the Appellant's Termination was central to her claims in the Employment Tribunal proceedings which the settlement compromised. Therefore, it was entitled to conclude that the Settlement Sum was paid, at least, "in connection" with the termination of the Appellant's employment and so, irrespective of the Bank's motivation for paying, was wholly taxable under s.401; save to the extent it fell within any of the relevant exemptions, ie. the £30,000 exemption in s.403; the £40,000 agreed between the parties for injury to feelings (s.406) and the £400,000 legal costs which was paid without deduction under s.413A.

76. As Mr Nawbatt correctly observed, in order to comply with s.413A, paragraph 4.1 of the Settlement Agreement provided for the contribution of £400,000 to the Appellant's legal costs "in connection with taking advice on the termination of the Employee's employment and the Tribunal Proceedings" to be paid directly to the Appellant's solicitors. The Appellant's argument failed in our view to explain how she can maintain her claim that the Settlement Sum was not connected "in any way" to the termination of her employment or should otherwise be apportioned in circumstances where she has taken the benefit of the £30,000 threshold in s.403 and the s.413A exemption in respect of the £400,000 payment in respect of her legal fees.

77. This ground of appeal is dismissed – there was no error of law in the FTT's interpretation or application of section 401 to the facts in this case.

78. In reality this ground of appeal constituted a disguised challenge to the FTT's factual findings and evaluative judgments but Mr Goldberg did not suggest these to be perverse or irrational in respect of this ground. This is considered further in respect of Ground 2.

Ground 2 - Findings

Appellant's submissions

79. Mr Goldberg noted that the FTT found at [122] that there was a second "avenue of connection" between the Settlement Sum and the Termination as "the Termination was central to significant claims made by the Appellant in the ET proceedings: not just to her unfair dismissal claims but also to her claims based on discriminatory conduct by the Bank; and that, in the perception of both parties to the negotiations that led to the settlement, those claims had legal substance and were supported by significant figures in the Appellant's schedule of loss."

80. The FTT also found (at [112]) that the Appellant positioned herself as a nuisance such that the Bank was prepared to pay a price to make her "go away". It is those negotiations that were the source of the Settlement Sum.

81. Mr Goldberg submitted that the FTT erred in law in finding that, because the Termination was central to claims made by the Appellant in the proceedings, there was therefore the requisite connection between the Termination and the Settlement Sum.

82. But apart from that point, and in addition to it, he argued that there is no evidential basis for the FTT to assert that Termination was central to the claims made by the Appellant to the extent that they informed the Settlement Sum. The discrimination claim made in the Employment Tribunal proceedings detailed the "sustained campaign" of discrimination that had been suffered by the Appellant over many years. The unchallenged evidence was that the Bank would have wanted to avoid the embarrassment of the claims becoming public and that the Appellant was able to turn a moral claim into cash ([49]).

83. He argued that the FTT failed properly to take into account the fact that years of discrimination prior to termination – and unrelated to the Termination – were in fact the basis of the Appellant's moral claim and the fact that the Bank would have limited concern regarding claims that were based on termination.

HMRC's submissions

84. HMRC again submitted that the FTT was correct for the reasons it gave. Counsel made further submissions which are again reflected in our analysis and conclusions and need not be repeated here.

Analysis and conclusions

85. The question for this tribunal is whether there was evidence before the FTT sufficient to support the finding that the Appellant's Termination was central to the discrimination claims made by the Appellant in the ET proceedings. Mr Goldberg submits there was simply no evidence to support the finding. The onus is on the Appellant to identify the evidence which was relevant to that finding – see *Georgiou v Customs and Excise Commissioners* [1996] STC 463, at 476:

> "… for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged;
> secondly, show that it is significant in relation to the conclusion;

> thirdly, identify the evidence, if any, which was relevant to that finding; and
> fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make.
> What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court."

86. This challenge was one to the FTT's factual finding, and although Mr Goldberg did not refer to it, engaged the test in *Edwards v Bairstow* [1956] AC 14 (HL) – *"no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal"* - not simply that there was insufficient evidence to support the FTT's factual findings but there was no evidence at all or that the findings were perverse or unreasonable.

87. We are satisfied there was ample evidence to support the FTT's finding as to the centrality of the Termination to the discrimination claims in the ET proceedings. The relevant evidence includes the Employment Tribunal pleadings, witness statements and skeleton arguments which the FTT summarised at [16] – [32], in particular the evidence quoted above at [25] – [28]. That contemporaneous evidence provided a clear evidential basis for the FTT's finding that the Appellant's Termination was central to the discrimination claims made by the Appellant in the Employment Tribunal proceedings.

88. Likewise, the FTT made significant findings, in a careful and comprehensive decision, supported by a range of evidence and thorough reasons at [93]-[100] and [105]-[114], as to why it did not accept the Appellant's evidence that there was no or little connection between the Termination and the ET proceedings, including those for discrimination, and hence no or little connection with the Settlement Sum.

89. The FTT expressly addressed the inconsistency between the Appellant's evidence in the FTT proceedings with the Employment Tribunal documentation stating: "We place greater weight in these matters on Ms Mathur's witness statement for the preliminary ET hearing, than on her evidence in these proceedings (where they clash), because the former (i) was significantly closer in time to the events in question; and (ii) was made without the tax law questions now at issue at the forefront of Ms Mathur's mind, such that her earlier statement was less given to memories and opinions being influenced by the effect on her own tax position".

90. Its reasons were rational and supportable. It also had the benefit of seeing and hearing the Appellant give evidence. There was sufficient evidence available to it upon which the FTT was entitled to rely when making the findings. It also gave reasonable and sufficient reasons for its findings - ones that a reasonable tribunal properly instructed could have given on the evidence before it.

91. We dismiss this ground of appeal. There was no error of law in relation to the FTT's factual findings. The FTT properly noted that the ET claim was partly based on discrimination prior to Termination but found that the Termination was central to the ET proceedings and the Settlement Sum. The FTT did not find that the Settlement Sum was paid substantially on the basis of a moral or nuisance claim rather than on the legal merits nor did it find that was it paid substantially on the basis of the pre-termination discrimination claim rather than the Termination claims. We have already observed that the Appellant's arguments about the factual findings involved a partial selection. The Decision must be read as a whole. There is no inconsistency within the Decision and the conclusions reached by the FTT were rationally supportable.

92. As we have set out above, the FTT did not err in law in finding that, because the Termination was central to claims made by the Appellant in the proceedings, there was therefore the requisite connection between the Termination and the Settlement Sum.

Ground 3 - Apportionment

Appellant's submissions

93. Mr Goldberg submitted that the FTT erred in law at [123]-[127] in concluding:

(1) that there was no evidence before the FTT which enabled it to make an apportionment;

(2) that if the FTT did not consider there was sufficient evidence to make an apportionment it should decide that all of the Settlement Sum should be subject to tax rather than inviting the parties to present further evidence; and

(3) that, in any event, a portion of the Settlement Sum would fall within the charging provisions of s.401(1) even though it related to claims which had nothing to do with the Termination.

94. He argued that the correct position is that:

(i) there was sufficient evidence that would permit an apportionment to be made, particularly in circumstances where it could not be expected that the payer of a negotiated settlement would ever concede that it was liable, let alone quantify the extent of its liability. Given that the amount of any payment to make the Appellant go away would depend on the "nuisance" that she could cause, there was considerable evidence (in her witness statement and the supporting documentation) as to the nature and extent of the discrimination that the Appellant had suffered prior to any termination (as compared with the claim that she suffered discrimination on termination) as well as evidence of the amounts that the Bank had been prepared to offer for termination of employment (see, for example, [12], [13], [50], [76]);

(ii) if the FTT (which raised the question of apportionment itself) believed that an apportionment was the right course to take, it should have ordered the parties to agree the apportionment, failing which the matter should be restored for argument before the FTT as to the correct apportionment in relation to which the parties would be free to call evidence;

(iii) so far as a portion of the Settlement Sum related to claims not arising from the Termination is concerned, it cannot have been in connection with or in consequence of the Termination; and

(iv) the conclusion of the FTT, at [127], that a portion of the Settlement Sum is in consequence of the Termination demonstrates that it has interpreted s.401(1) too widely: it cannot be a correct construction of the charging provision that a receipt derived from claims unrelated to termination is in connection with a termination just because the termination is the catalyst or trigger for the bringing of the claims which are not otherwise related to the termination.

Analysis and conclusions

95. We agree with Mr Nawbatt's submissions on this ground.

96. The Appellant did not advance a positive case or any evidence or argument in support of apportionment before the FTT. Therefore, it is not open to her, on appeal, to challenge the FTT's conclusion that she did not discharge the burden, which falls on her, to establish that the disputed amount of the Settlement Sum should have been apportioned between taxable and non-taxable portions.

97. Further, and in any event, the FTT did not err in law in concluding that the Appellant had failed to discharge her burden of establishing that any portion of the single undifferentiated lump sum did not fall within s.401 in circumstances where: (a) there was no factual evidence before the Tribunal to support an apportionment; and (b) apart from arguing that the whole of the disputed amount should be apportioned as not falling within s.401 (which the FTT rejected) "the appellant produced no persuasive evidence or arguments to support any other" apportionment (see [126]).

98. We dismiss this ground of appeal. The FTT did not err in not apportioning the Settlement Sum into taxable and non-taxable sums – its reasoning at [123]-[127] was cogent.

Overall Conclusion

99. The FTT's decision was carefully reasoned and it contained no error of law. Having rejected each of the grounds of appeal, this appeal must be dismissed.

MR JUSTICE MILES
JUDGE RUPERT JONES

RELEASE DATE: 12 February 2024