

SINGLE STATUS PAYMENTS - IS, JSA, ESA(IR)

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INTRODUCTION

- 1 This memo is being issued to alert DMs to a decision¹ of the UT dated 25.3.10. The decision deals with the nature of the payment made to the claimant by her employer and the correct attribution of it. The payment was to compensate the claimant for the fact that she had been paid less than male colleagues performing a comparable job. These payments are sometimes described as “single status payments”. The decision of the UT will be applicable to JSA, IS and ESA(IR). A copy of the decision is at the Appendix to this memo.

1 SSWP v JP (JSA) [2010] UKUT 90 (AAC)

BACKGROUND

- 2 The claimant worked part-time for Wolverhampton City Council and was in receipt of JSA(IB). Her employer offered her a payment to redress historical pay inequalities between female and male employees. The claimant was offered a net payment of £7,217.36. She could agree to accept this sum as a final and full settlement of any unequal treatment claim that she could have brought against the council. Alternatively, the claimant had the option of taking £721.74 but this figure would be deducted from any future settlement won through action at an Employment Tribunal or as part of any negotiated settlement between herself and her employer.
- 3 It was decided by the claimant to accept the sum of £721.74 and this was duly paid to her with her salary as part of the council's normal payroll arrangements. The council described this payment as a "goodwill gesture". The question arose as to whether this payment was a payment of capital or a payment of income and, if it was income, then how it should be attributed when looking at the claimant's award of JSA(IB).

TREATMENT OF THE PAYMENT BY THE DECISION MAKER AND FIRST TIER TRIBUNAL

The decision of the DM

- 4 The DM decided that the payment was earnings and therefore a payment of income¹. It was attributed from the first day of the benefit week in which it was due to be paid. The payment was made to the claimant on 14.12.07. The DM decided that 14.12.07 was the due date but treated the payment as paid on 21.12.07 because this was the first day of the first benefit week in which it was practicable to take the payment into account² (see DMG 25045 **2.**).

1 JSA Regs, reg 98(1); 2 reg 96(1)(b)

- 5 The period in respect of which the payment had been made to the claimant was unclear so the DM applied the rule in DMG 25059 **1**. This rule applies where there is no identifiable period relating to the payment¹. The DM therefore divided the payment of £721.74 by the

1. weekly amount of JSA to which the claimant would have been entitled had the payment not been made **and**
2. amount of any disregard that would have been made on the earnings.

This resulted in a period of attribution of 105.3 weeks beginning from 21.12.07 (see paragraph 4).

1 JSA Regs, reg 94(2)(b)

- 6 The effect of taking the payment into account along with earnings from the claimant's regular part-time work ended the claimant's entitlement to JSA(IB). The claimant appealed.

The decision of the FtT

- 7 The FtT heard the claimant's appeal and upheld it. The FtT Judge decided that the payment made to the claimant was not earnings because it was not compensation for the loss of employment and that since the payment was to compensate for past pay inequalities, it should not affect future entitlement to benefit.
- 8 The effect of the FtT's decision was to restore the claimant's entitlement to JSA(IB). The Secretary of State appealed to the UT.

THE DECISION OF THE UPPER TRIBUNAL

The error of the FtT

- 9 In considering the FtT's treatment of the case, the UT Judge stated that the FtT was correct in deciding that the payment was not a "compensation payment" as defined in the legislation¹ (see DMG 26630) because the payment was not made in the respect of the termination of employment. However, the FtT should still nonetheless have considered whether the payment was a payment of income.

1 reg 98(3)

Income or capital

- 10 The payment received by the claimant had to be either income or capital. The true classification of the payment for the purposes of determining entitlement to income related benefits depended on the nature of the payment as received by the claimant. How the paying body describes the payment might be of some relevance but is not decisive.
- 11 Generally a payment of income will be regular and will recur whilst a payment of capital would tend to be a one-off payment (see DMG 29020 - 29021) but that does not mean that all one-off payments are capital and so cannot be income.

- 12 The UT Judge decided that the payment was income because the payment
1. was calculated as earnings by the employer to which the claimant was properly entitled **and**
 2. had it been paid on time would have been income.

Once the payment was properly classified as income then the payment had to be attributed.

Attribution of the payment

- 13 The period for which the £721.74 was paid could not be clearly identified because the payment was a fraction of a final amount as determined by the claimant's employer on account of anticipated employment tribunal proceedings. Therefore the period of attribution had to be determined in accordance with DMG 25059 1.. This means¹ that the payment was divided by the

1. weekly amount of JSA to which the claimant would have been entitled had the £721.74 not been paid **and**
2. amount of any disregard that would have been made on the earnings.

1 JSA Regs, reg 94(2)(b)

- 14 When deciding the date that the payment had to be treated as paid the UT Judge held that the payment was not a late payment of money due earlier. It was not due to the claimant until the claimant's employer had paid it to her. The payment was in recognition of what the employer should have paid some years earlier with regard to paying the claimant the proper rate for the job. The DM had determined the date that the payment should be treated as paid was the first day of the benefit week in which it was practicable to take it into account¹ (DMG 25045 2.) The Judge held this to be the correct approach.

1 reg 96(1)(b)

- 15 The weekly amount of the payment was effectively decided by the same rule that decided the period of attribution. This is because the weekly figure will be the amount of JSA(IB) which would have been paid had the claimant not received the payment plus the appropriate disregard - see paragraph 5 of this memo. Therefore the rules which determine the weekly amount (see DMG 25062 et seq) do not apply.

- 16 In deciding the appeal in the Secretary of State's favour, the Judge restored the decision of the DM (see paragraphs 4 - 6, above).

SUMMARY

17 A payment which is made to compensate a person for past pay inequalities has to be taken into account if that person or their partner is entitled to

1. IS **or**
2. JSA **or**
3. ESA(IR).

These payments are sometimes called “single status payments” but may be called something else.

18 In accordance with the decision of the UT, the payment is a payment of income and falls to be attributed as earnings.

19 The period of attribution will depend on the facts of the case. If the period can be identified¹ then the payment should be taken into account for a period equal to the length of the period that the payment represents in accordance with DMG 25056 for IS and JSA or DMG 48070 for ESA(IR). If the period cannot be identified² then the period of attribution should be calculated in accordance with DMG 25059 for IS and JSA or DMG 48073 for ESA(IR).

*1 JSA Regs, reg 94(2)(aa); IS (Gen) Regs, reg 29(2)(aa); ESA Regs, reg 91(2)(b); 2 JSA Regs, reg 94(2)(b);
IS (Gen) Regs, reg 29(2)(b); ESA Regs, reg 91(2)(c)*

20 Attribution commences with the date that the payment is treated as paid¹. For these payments that date will be a date determined by when the payment is made. The payment should be treated as paid² on the first day of the benefit week in which

1. it is due to be paid **or**
2. practicable to take the payment into account (if this rule is used the DM should record the reasons for using it).

The “due” date will be the date on which the payment is made to the claimant. For IS and JSA, DMG 25045 provides guidance and DMG 48050 provides guidance for ESA(IR).

*1 JSA Regs, reg 94(2); IS (Gen) Regs, reg 29(2); ESA Regs, reg 91(2); 2 JSA Regs, reg 96(1);
IS (Gen) Regs, 31(1); ESA Regs, reg 93(1)*

- 21 The weekly amount of the payment should be calculated in accordance with the period in respect of which the payment is made¹. For IS and JSA, DMG 25062 et seq provides guidance and DMG 48079 et seq provides guidance for ESA(IR).

1 JSA Regs, reg 97(1); IS (Gen) Regs, reg 32(1); ESA Regs, 94(1)

ANNOTATIONS

Please annotate the number of this memo (DMG memo 31/10) against the following DMG paragraphs:

25059, 26013, 48073, 49016

CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, GS36, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in Memo DMG 26/08 - Obtaining legal advice and guidance from DMA Leeds.

DMA Leeds: May 2010

APPENDIX

CJSA/0475/2009

[2010] UKUT 90 (AAC)

Secretary of State for Work and Pensions v JP (JSA)

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (held at Wolverhampton on 28 August 2008 under reference 053/08/02354) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is that the Secretary of State's decision of 14 February 2008 was correct in law.

REASONS FOR DECISION

A. What I have to decide

1. The claimant's employer made her an offer of settlement under the Equal Pay Act 1970. They paid her 10% of the offer on the following basis. If she accepted the terms of the offer, she would be paid the remaining 90%. If she did not, she could retain the 10% but it would be treated as paid on account of any award that might be made by an employment tribunal. She kept the money, but did not sign the agreement. In those circumstances, two issues arise. The income/capital issue: is the payment income or capital? The attribution issue: if it is income, in what weeks is it treated as paid and for what amount?

B. The oral hearing

2. I held an oral hearing to assist me with these issues. Both parties were represented. Stephen Brown of the Department for Work and Pensions' Legal Services represented the Secretary of State. Mark Perlic, a Senior Welfare Rights Officer for Wolverhampton City Council, represented the claimant. I am grateful to both of them for their arguments at the hearing. I am also grateful for the subsequent written submissions.

3. I hope the representatives will not mind that I have not set out their detailed arguments on all the topics that have been analysed orally and in writing. There were so many permutations that much of the discussion has been rendered redundant by the way that I have decided the two issues and my reasoning on each issue does not precisely coincide with the arguments for either party.

C. The payment to the claimant

4. The claimant worked part-time for Wolverhampton City Council. On 10 December 2007, the authority sent her a letter headed: Implementation of the National Agreement on Pay and Conditions 1997 – Single Status. After a short reference to the future implementation of a job evaluation scheme under the Single Status Agreement, it turned to redressing historical inequalities between male and female employees. Following discussions with trade unions, the authority wished to make an offer of settlement. It continued:

'The compensation payment has been calculated based on your current hourly rate, current hours of work, length of service and by comparison against different levels of comparators. Your compensation payment is based on an average pay level for your particular comparator group, multiplied by length of service rounded up to the nearest half year. Calculations will be based on a maximum of six years. ...

You will receive an interim payment amounting to 10% of the final amount in your December salary. This amount is paid as a goodwill gesture on the part of the Council. Whilst there will be no requirement for you to repay this amount if you choose not to sign a COT3 Agreement (see below) it will be deducted from any future settlement achieved through action at an Employment Tribunal or as part of any negotiated settlement with you as an individual.'

The letter twice states: 'You **must** sign a COT3 agreement to receive a compensation payment.' These paragraphs are also relevant:

'The compensation payment that you receive will be the figure in the COT3 agreement. All tax and National Insurance Contributions due, in relation to the payment made to you, have been paid over the HM Revenue and Customs by the Council. The amounts due were calculated by way of a central settlement reached with the Department ... As a result of the agreement, no individual liabilities have been calculated, because of this, you are not required to report the amount paid to you to HM Revenue and Customs for any purpose whatsoever.

The Council also intends to treat the payments as not amounting to pensionable pay and the compensation payment will not therefore be subject to deductions in relation to pension contributions nor will they count towards your pension benefits.'

5. The structure of the core of the COT3 agreement is this. Clause 1 states the total settlement payment. On one copy of the covering letter, this amount is stated as £7,217.36. On another copy, the word 'net' has been written in and 16% added to produce a gross figure of £8,372.13. Clause 2 provides that the authority makes the payment without admission of liability. Clause 3 set out what the payment is for. It is in full and final settlement of two heads of claim. Stated simply these are: (i) claims as to the past; and (ii) claims that arise within the following three years. Clause 4 provides that the settlement payment is intended to compromise claims under (ii). I was not shown any details of precisely how the total settlement payment was calculated or of how it was divided between past wages that should have been paid and the compromise of future claims.

6. In a letter of 20 June 2008, the authority's Principal Human Resources Officer wrote:

'The goodwill payment was paid to employees via normal payroll arrangements, but it does not constitute salary or pay. Unfortunately our Payroll Services described it as backpay on the pay advice slip. This error was corrected in payments going forward.'

7. Apparently, 95% of employees signed the agreement. The claimant did not and decided to pursue compensation through an employment tribunal. She received 10% of the net total settlement figure (£721.74) from the authority. As she was entitled to do, she retained that amount.

D. What the decision-maker decided about the payment

8. The decision-maker obtained and relied on advice from the Adjudication and Constitutional Issues Division of the Department for Work and Pensions. The advice was that the payment was earnings, but not a compensation payment as the claimant's employment was continuing.

E. What the tribunal decided

9. The appeal tribunal allowed the appeal and decided:

'The payment of compensation of £721.74 is not to be treated as earnings under Regulation 98 JSA Regulations 1996.

Compensation under sub para (3)(a) is defined as compensation from termination of employment which this payment is not.

In any event the payment is to compensate for possible past historic inequalities and should not have been used to affect the Appellant's entitlement to Income Support in the future. (see CIS 590/1993).'

F. What the tribunal's decision was wrong

10. The tribunal was correct to decide that the payment was not a compensation payment within regulation 98(1)(b) and (3)(a) of the Jobseeker's Allowance Regulations 1996 (SI No 207):

'98 Earnings of employed earners

(1) Subject to paragraphs (2) and (3), "earnings" means in the case of employment as an employed earner, any remuneration or profit derived from that employment and includes-

...

(b) any compensation payment; ...

(3) In this regulation "compensation payment" means any payment made in respect of the termination of employment other than- ...'

As it recorded, the payment was not in connection with the termination of the claimant's employment. However, that was not sufficient to determine the appeal. The tribunal should have gone on to decide whether it was nonetheless income.

The Income/Capital Issue

G. The social security caselaw

11. The classification of particular payments as income or capital has been discussed in a number of decisions.

Compensation for unfair dismissal

12. The starting point is the decision of the Court of Appeal in *R v National Insurance Commissioner, ex parte Stratton* [1979] ICR 290. The case concerned a squadron leader with a permanent commission who was made redundant. He received a payment calculated according to his length of service and future expected service. The issue arose whether this payment was capital or income for the purposes of unemployment benefit. The Court of Appeal held that it was capital. Lord Denning MR (at pages 296-297) distinguished redundancy payments from compensation for unfair dismissal. A redundancy payment was a capital payment to compensate for loss of employment, whereas compensation for unfair dismissal was for loss of future income. He emphasised (at page 298): 'The matter depends on the true characteristic of the payment, not on the way that it is described or calculated.'

13. In *R(SB) 21/86*, the claimant's employment was terminated. An industrial tribunal decided that she had been unfairly dismissed. The tribunal's award included a compensatory award under section 74 of the Employment Protection (Consolidation) Act 1978 to reflect the time that she would spend obtaining new employment. The issue arose whether this award was earnings for the purposes of supplementary benefit. Mr Commissioner Rice followed *Stratton*. He decided (at [11]) that a compensatory award 'is a payment in lieu of the remuneration the claimant would have received, had his employment not been unfairly terminated.' He also decided (at [12]) that it was irrelevant that the claimant's employment had come to an end before the payment was made: 'The compensation has its origin in past employment, and it is immaterial that the award is made through a statutory body.'

Sex Discrimination

14. In *CIS/0590/1993*, the claimant had been dismissed by her employer because she was pregnant. An industrial tribunal decided that her dismissal had amounted to discrimination under the Sex Discrimination Act 1975. The tribunal's award included a net payment of £541 for loss of salary. The issue arose whether that amount was capital or income for the purposes of income support. Mr Commissioner Rowland (now Upper Tribunal Judge Rowland) decided that it was earnings. He followed *R(SB) 21/86*. Having referred to the comments of Lord Denning and Templeman LJ in *Stratton*, he went on:

'7. ... I would accept that they were made in the context of loss of remuneration under fixed term contracts and that R(SB) 21/86 does represent an extension of the principle considered by the Court of Appeal. Nevertheless, I am content to follow R(SB) 21/86. Where there is a contract which is not for a fixed term, the claimant is entitled to remain in employment until lawfully dismissed. The length of time likely to have elapsed before that event occurred is taken into account in assessing the compensation payable for loss of earnings. I do not consider that there is any distinction in principle between loss of remuneration under a fixed term contract and loss of remuneration under any other contract. The loss of earnings element of a compensatory award of an industrial tribunal is an income receipt rather than a capital receipt and is "earnings" rather than "income which does not consist of earnings".'

Part-time Workers

15. After the oral hearing, Upper Tribunal Judge Wikeley gave his decision in *EM v London Borough of Waltham Forest* [2009] UKUT 245 (AAC). I gave the parties the chance to comment on its relevance. The case concerned a payment in settlement of a potential claim under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI No 1551). The claimant had worked for the local authority as a part-time driver from March 1997. Unlike a full-time driver, he was not entitled to a bonus payment. In 2003, he was paid the arrears of bonus payments that he should have received under the 2000 Regulations from August 2000. The issue arose whether these payments were capital or income for the purposes of housing benefit. Judge Wikeley decided that they were capital. His reasons were:

'39. There is, of course, no definition of either capital or income in the 1987 Regulations or indeed the 2006 Regulations. In CH/1561/2005, which concerned the impact of a payment of arrears of working families' tax credit on entitlement to housing benefit, Mr Commissioner Jacobs (as he then was) explained the position with customary clarity (at paragraph 19):

"The Regulations deal with both income and capital. They provide for the calculation of both, for disregarding both, for treating income as capital and capital as income, for student income and for benefit income. What they do not do is to provide a definition of income or capital. The provisions operate at the stage after the money has been classified. They assume an initial classification without explaining how it is to be made. It is not possible to deduce the classification from the provisions of the legislation. Even the provisions that treat income as capital or vice versa assume an initial classification that is displaced."

40. That classification is ultimately a question of law (*Lillystone v Supplementary Benefits Commission* [1982] 3 F.L.R. 52). There is, inevitably, a considerable body of case law on the distinction. As Bridge J. observed in *R v Supplementary Benefit Commission ex parte Singer* [1973] 1 W.L.R. 713 at 717, the “essential feature of receipts by way of income is that they display an element of periodic recurrence. Income cannot include ad hoc receipts”. The term “income” in the statutory scheme “should be given its ordinary and natural meaning” (*Morrell v Secretary of State for Work and Pensions* [2003] EWCA Civ 526 at paragraph 31 per Richards J., also reported as R(IS) 6/03), and presumably the same should apply to the notion of “capital”. That said, there will clearly be difficult borderline cases which may go either way (*R v West London Supplementary Benefits Appeal Tribunal, ex parte Taylor* [1975] 2 All ER 790 at 794b per May J.).

41. I must confess that at the initial stage of granting permission to appeal in this case I was inclined to the view that the payments in this case constituted income by way of earnings in the form of arrears of bonus payments. I had formed this provisional view in the light of the breadth of the expression “any remuneration of profit derived from that employment” in regulation 28(1) (now regulation 35(1)), which of course includes “any bonus or commission” (regulation 28(1)(a)). However, in the light of the approach taken in CH/1561/2005, I am satisfied that that preliminary view was mistaken. It was to start at the wrong end of the problem.

42. The reason is that Part VI of the 1987 Regulations deals with the assessment of income and capital. Chapters II-V (regulations 21-36) provide for various types of income and their assessment, while Chapter VI (regulations 37-45) govern capital and its assessment. So, for example, regulation 28 cannot determine whether a payment is income or capital. The question of whether particular payments amount to income or capital is a logically prior question.

43. My conclusion, in short, is that the two larger payments in question were capital rather than income in the hands of the claimant (as to the smallest of the three sums, see paragraph 14 above). I therefore agree with Mr Forsdick’s analysis that in essence those two payments were by way of a capital settlement for the resolution of the potential claim under the PTWR 2000 that the claimant had against his local authority employer. Mr Stagg set out a number of arguments to the contrary and as I am disagreeing with his analysis, I will set out my reasons for so doing in more detail.

44. First, Mr Stagg observed that there was no actual litigation or specific dispute between Waltham Forest and the claimant at the time. That may well be

true in a rather narrow legalistic sense, subject to the caveat that there was clearly a long-running dispute between the council on the one hand and the generality of its workforce of part-time drivers on the other and their union (even if the claimant was not himself a member). However, the claimant was evidently in a position where he could easily have lodged a complaint with the employment tribunal, as he had three months beginning with the date of the last act or failure to act comprising the less favourable treatment or detriment to which the complaint related in which to do so (PTWR Regulations, regulation 8(2)). So time did not start running until the date when the council moved its part-time workers on to the same terms as their full-time equivalents as regards bonus payments. I have also found that the claimant signed a compromise agreement.

45. Second, Mr Stagg relied upon the wide terms of regulation 28(1) of the 1987 Regulations as conclusive in terms of the classification of these payments. However, this is to ignore the strictures of Mr Commissioner Jacobs in CH/1561/2005. Mr Stagg's approach assumes that the payments are income and then relies on a provision which only applies to income to determine the logically prior issue of classification. Furthermore, the label attached to the payments by the employer cannot determine their true legal character. Indeed, the local authority's own further submission to the tribunal very fairly, and in my view accurately, described the use of the term "back pay" in the 6 September 2003 memorandum as "probably a casual description rather than a considered legal view".

46. Third, Mr Stagg stressed that the payments (or at least the two larger amounts) were clearly calculated on the basis of the weekly bonus payments that the claimant would have earned had the provisions governing full-time drivers been applied throughout to part-time drivers. I agree with Mr Forsdick – they way in which the sums were calculated cannot detract from the fact that they were payments by way of settlement of a potential (and indeed highly probable) legal liability under the PTWR 2000. In other words they were capital payments for a breach of those Regulations and were not paid in respect of a clear contractual liability for a past period.

47. In addition, the terms of regulation 8(7)-(14) of the PTWR 2000 make it plain that had the matter gone to a tribunal, there is no guarantee that the amount awarded would be based simply on the bonus payments which had been denied. That loss was clearly a relevant factor (regulation 8(9)(b) of the PTWR 2000) but the ultimate criterion was "just and equitable" compensation (regulation 8(7) and (9)). In practice the process of settlement would also have

taken into account the fact that by making the payments the local authority was avoiding the costs of potentially protracted litigation in the employment tribunal (and perhaps beyond). On that basis the facts of this case can be distinguished from CIS/590/1993, relied on by the council and the tribunal, where the compensation was directly referable to a loss of earnings caused by an act of sex discrimination. In addition, the payment in that case covered just five weeks, not a breach that had endured for (as here) three years.

48. Fourthly, I take into account the fact that the claimant had no clear-cut and absolute contractual right to the bonus payments between the date in 2000 when the PTWR came into force and 2003. The PTWR 2000 did not operate by way of implying a statutory term into his contract that he was automatically entitled to all the benefits enjoyed by full-time workers. This is in stark contrast to the position under equal pay legislation, under which the right to equal pay takes effect by way of an equality clause in the individual's contract of employment, so giving rise to the usual contractual remedies. Instead, the PTWR 2000 gave the claimant a statutory right to complain to an employment tribunal about less favourable treatment, and the tribunal, assuming it found the complaint well founded, then had a wide range of potential remedial orders available to it. I also note that the precise scope and effect of the PTWR 2000 has been tested all the way to the House of Lords (*Matthews & Ors v. Kent and Medway Towns and Fire Authority & Others* [2006] UKHL 8) and has been disputed in connection with all manner of part-time posts, including judicial office-holders (*Department for Business Enterprise & Regulatory Reform v O'Brien & Another* [2009] EWHC 164 (QB)).

49. Finally, I have not overlooked the fact that the payments appear to have been treated as income for PAYE purposes and subject to income tax accordingly. However, I do not attach much weight to that feature of the case. It is unclear from the papers before me how much, if any, thought was devoted to the matter. It may be that HMRC might take the view that the sums were earnings for the purposes of income tax. The employer might also have simply assumed that the appropriate course of action was to run them through the payroll, subject to normal PAYE procedures (in which event, they would presumably have been treated as income for the 2003/04 tax year alone, and as not affecting previous tax years).

50. Yet it is by no means self-evident that the payments in question were properly taxable as earnings. There is, of course, a considerable body of jurisprudence in revenue law on such issues. However, a sum that is paid as damages or by way of compromise for breach of a contract of employment, or

as compensation for breach of a statutory right, is not taxable as earnings from employment: see *Du Cros v Ryall* (1935) 19 TC 444 and more recently *Wilson v Clayton* [2004] EWCA Civ 1657. In any event, the issue for the Upper Tribunal is the true character of these payments in the light of the legislation governing housing benefit entitlement, not revenue law.'

H. Analysis

16. The payment received by the claimant must be either capital or income. There is no other possibility: *R(IS) 3/93* at [20]. Income bears its ordinary and natural meaning, unless the context indicates otherwise: *Morrell v Secretary of State for Work and Pensions* reported as *R(IS) 6/03* at [31]. It must be classified by reference to its true characteristics: *Stratton*.

17. I commented on income and capital in *CH/1561/2005*:

'18. On basic principle, there is no reason why a particular sum of money must bear a single classification. Income and capital are separate but related concepts. A sum of money cannot be both at the same time for the same person and purpose. But it can change from one to the other and vary in classification from person to person and purpose to purpose. Take a person's wages. As paid they are income. When part is paid into a savings account, that part becomes capital. As capital it generates interest that can be taken as income. And if sums are regularly paid out from the account to assist a child at university, they may be capital as regards the parent but income in the hands of the child.

19. At first sight, the legislation appears to be contradictory on the appropriate classification. The result seems to depend on which provision is given priority. Ms O'Neill began with Schedule 5 and treated that as having priority. Ms Bailey rejected that starting point and emphasised instead regulation 68. This confusion is only apparent on the assumption that the legislation determines the classification. That assumption is false. The Regulations deal with both income and capital. They provide for the calculation of both, for disregarding both, for treating income as capital and capital as income, for student income and for benefit income. What they do not do is to provide a definition of income or capital. The provisions operate at the stage after the money has been classified. They assume an initial classification without explaining how it is to be made. It is not possible to deduce the classification from the provisions of the legislation. Even the provisions that treat income as capital or vice versa assume an initial classification that is displaced.'

18. Those comments were made in their context and do not necessarily apply in every other context. The legislation may specifically include a particular type of payment in the income provisions. If so, tribunals must accept and apply the provision as it stands, even if they would have classified the payment as capital. In practice, the terms of the legislation will reflect the opinion of those who made it on the proper classification of a payment and it is likely that that will be correct. My comments stand as a warning against reading conclusions about one provision from the particular terms of other provisions. They also stand as a warning against interpreting general terms without regard to their context. Regulation 98(1) makes no provision for Equal Pay Act payments. It does, though, provide that “‘earnings’ means ... any remuneration and profit derived from that employment’”. My comments apply to this type of provision. It is not permissible simply to interpret the words as they stand. In their context, they only apply to sums ‘derived from that employment’ that are income in nature. They do not necessarily apply to any payment, regardless of whether it is income or capital, just because it happens to be derived from an employment.

19. Classification of a payment depends on the nature of the payment, not the label used by the parties or their treatment of the payment. The way that the parties have described the payment is relevant, but not decisive. The authority’s treatment of the payment is equivocal. On the one hand, it said that the payment was not salary and described it as a goodwill gesture and a compromise. On the other hand, it paid tax and national insurance and it calculated the payment by reference to the wages the claimant would have received, albeit in a generalised way. The claimant has not said how she viewed or treated the payment. However, she retained it without signing the agreement and can only have done so with a view to bringing proceedings in the employment tribunal. On that basis, the authority described it as a payment on account.

20. (I have not been able to think of any reason why the claimant might retain the payment without either signing the agreement or bringing proceedings in the employment tribunal. It is, I suppose, conceivable that she might prefer to receive benefit than to receive the balance. However, that would raise issues of notional income or capital under regulations 105 and 113 of the Jobseeker's Allowance Regulations.)

21. The payment has to be classified in order to determine the claimant’s financial position for jobseeker's allowance purposes. It depends on the nature of the payment as received, not on the nature of the payment as made. That is the position in tax law: Lord Simonds in *Inland Revenue Commissioners v Reid's Trustees* [1949] AC 361 at 371-372. The same principle applies in social security. Given the reason why the classification is made, the proper focus is on whether the payment was income or capital as received by the claimant.

22. At the time it was received, the payment was a one-off payment. In *R v Supplementary Benefits Commission, ex parte Singer* [1973] 1 WLR 713 at 717, the Divisional Court (speaking through Bridge J) said that income had to

be recurrent. However, that reasoning must be read in its context. The Court was influenced by the need to prevent the provisions relevant to that case producing an inappropriate result:

‘The essential feature, in our judgment, of receipts by way of income is that they display an element of periodic recurrence. Income cannot include ad hoc receipts. This principle of distinction is untouched by the definition in the regulations. On the contrary, its importance is emphasized by the provision in paragraph 1 of Schedule 1 for assessment of the current year's income by reference to that of the previous year. This provision would work most inequitably if it meant that the ad hoc receipts of one year must be assumed to be repeated in the ensuing year.’

23. In the Court of Appeal decision of *Morrell* at [35], Richards J left open the question whether ‘an element of regularity or recurrence is essential’. Sedley LJ agreed with Richards J, but Thorpe LJ said at [57]: ‘Regular recurring payments designed to meet outgoings might serve as one definition of income.’ With respect, Richards J had described the search for a definition as an ‘elusive quest’ (at [31]) and there are many examples in the tax cases of one-off payments being treated as income.

24. The claimant did not repudiate the authority’s stipulation that the payment would be treated as paid on account of any award by an employment tribunal or of any negotiated settlement. In the circumstances, the claimant received the payment in anticipation that of proceedings in the tribunal. The only appropriate analysis is that the claimant received the payment on that basis.

25. Unlike *EM v London Borough of Waltham Forest*, there is no element of compromise here. If she pursues her case, the claimant will certainly obtain an award in the employment tribunal. The only issue will be whether that award is higher or lower than the offer made by the authority. If she settles the case, any settlement will be based on a calculation of the likely outcome. Either way, the analysis is the same.

26. Under the social security caselaw, the classification of a payment depends on what the payment is made for. Is it for loss of a capital asset, such as a job or a right to bring proceedings? Is it for loss of income, past or future? The essence of any claim by the claimant will be for the amount she would have been paid if the authority had honoured the equality clause that was part of her contract of employment by virtue of the Equal Pay Act. It will be for wages that she ought to have been paid. However the case is presented to an employment tribunal (under the Equal Pay Act, as a sex discrimination claim, as a breach of contract or whatever), the calculation of the award will depend predominantly on the wages that were properly payable to her under her contract. This is in contrast to the nature of the award in a part-time workers case, as analysed in *EM v London Borough of Waltham Forest*. The award will be paid as a lump sum, but predominantly calculated as earnings to which the

claimant was properly entitled. If they had been paid at the time, they would have been income. The fact that they are paid later and as a lump sum does not change their essential nature. As Mr Commissioner Goodman said in *R(SB) 4/89* at [8] of a payment of arrears of special hardship allowance: 'being a compensation for loss of earnings it has, in my judgment, an income character whether it is paid in arrears or not.' And if the payment awarded by a tribunal would be income, so must a payment on account of that award.

27. I have considered the authorities cited by Judge Wikeley in paragraph 50 of his decision. They do not apply to the issue I have to decide. In *Du Cros v Ryall* (1935) 19 TC 444, a company had employed the taxpayer under a fixed term contract of service. It repudiated that contract. He sued and the employer counter-claimed. The proceedings were settled on the basis that the tax payer received a payment as damages for the cancellation of the agreement. Finally J held that there was no evidence to show that the arrangement was anything other than as described by the parties – a payment for the cancellation of a fixed term contract. In *Wilson v Clayton* [2003] EWCA Civ 1657, the issue was the precise provision under which a payment was taxable. In the event it was not taxable, but only because it was less than the threshold in the taxing provision that applied.

28. For those reasons, the payment that the claimant received from the authority was income in her hands. That being so, I must decide the attribution issue.

The Attribution Issue

29. This is governed by regulations 94, 96 and 97. As in force in late 2007, they read:

'94 Calculation of earnings derived from employed earner's employment and income other than earnings

(1) Earnings derived from employment as an employed earner and income which does not consist of earnings shall be taken into account over a period determined in accordance with the following paragraphs and at a weekly amount determined in accordance with regulation 97 (calculation of weekly amount of income).

(2) Subject to the following provisions of this regulation, the period over which a payment is to be taken into account shall be-

(a) in a case where it is payable in respect of a period, a period equal to the length of that period;

(b) in any other case, a period equal to such number of weeks as is equal to the number obtained (and any fraction shall be treated as a corresponding fraction of a week) by dividing the net earnings, or in the

case of income which does not consist of earnings, the amount of that incomes less any amount paid by way of tax on that income which is disregarded under paragraph 1 of Schedule 7 (sums to be disregarded in the calculation of income other than earnings), by the amount of jobseeker's allowance which would be payable had the payment not been made plus an amount equal to the total of the sums which would fall to be disregarded from that payment under Schedule 6 and Schedule 6A (sums to be disregarded in the calculation of earnings) or, as the case may be, any paragraph of Schedule 7 other than paragraph 1 of that Schedule, as is appropriate in the claimant's case,

and that period shall begin on the date on which the payment is treated as paid under regulation 96.

96 Date on which income is treated as paid

- (1) Except where paragraph (2) or (3) applies, a payment of income to which regulation 94 (calculation of earnings derived from employed earner's employment and income other than earnings) applies shall be treated as paid-
 - (a) in the case of a payment which is due to be paid before the first benefit week pursuant to the claim, on the date on which it is due to be paid;
 - (b) in any other case, on the first day of the benefit week in which it is due to be paid or the first succeeding benefit week in which it is practicable to take it into account.

97 Calculation of weekly amount of income

- (1) For the purposes of regulation 94 (calculation of earnings derived from employed earner's employment and income other than earnings), subject to paragraphs (2) to (7), where the period in respect of which a payment is made-
 - (a) does not exceed a week, the weekly amount shall be the amount of that payment;
 - (b) exceeds a week, the weekly amount shall be determined-
 - (i) in a case where that period is a month, by multiplying the amount of the payment by 12 and dividing the product by 52;
 - (ii) in a case where that period is three months, by multiplying the amount of the payment by 4 and dividing the product by 52;

- (iii) in a case where that period is a year by dividing the amount of the payment by 52;
- (iv) in any other case by multiplying the amount of the payment by 7 and dividing the product by the number equal to the number of days in the period in respect of which it is made.'

30. In the typical case for which these provisions were designed, they are straightforward to apply. When a claimant receives a payment, three questions have to be answered. (i) Over what period must it be taken into account? Regulation 94 deals with this. (ii) Beginning on what date? Regulation 96 deals with this. (iii) For what weekly amount? Regulation 97 deals with this.

31. This case is not straightforward. Without any reference to caselaw and on the basis that the payment to the claimant was income paid on account of anticipated employment tribunal proceedings, I would apply those provisions as follows. As to regulation 94, the payment was not paid in respect of a period. It was a lump sum paid on account of an award that would be made in proceedings that had not yet begun. That award would consist of, or at least include, an amount in respect of the wages that the claimant should have been paid in the past. But that period had not been identified. There was as yet no clear period to which the payment could relate. The payment on account falls within regulation 94(2)(b). As to regulation 96, the payment was never due to be paid at all; it was simply paid into the claimant's bank account. It falls within regulation 96(2)(b) to be treated as paid on the first benefit week in which it is practicable to take it into account after payment. The '*first succeeding* benefit week' actually reads as the first week after 'the benefit week in which is due to be paid'. On that reading, regulation 96 would not apply and the payment would never be treated as being paid. That would be absurd. That can, and must, be avoided by reading 'first succeeding' as the first week after the actual date of payment. Practicability is determined by when the decision-maker is able to take the amount into account for the purposes of the calculations that lead to entitlement. In this case, that was the week following payment. As to regulation 97, this is not relevant. It only applies if payment is made in respect of a period, which this was not. The terms of this regulation contradict the terms of regulation 94 which provides that the amount is to be determined in accordance with regulation 97. It cannot do that, because by its own terms regulation 97 does not apply. The result is that regulation 94(2)(b) applies with the effect, put shortly, that the payment is attributed so as to deprive the claimant of a jobseeker's allowance for the maximum number of weeks.

32. That analysis was without reference to caselaw. The equivalent income support provisions were considered in *CIS/0590/1993*. The Commissioner decided that the income support equivalent to regulation 94 had to be applied to the payment of the earnings in respect of which the tribunal's award was made, not to the award itself. He attributed those earnings to the past period in which they should have been paid. The result was an overpayment of income support. As the overpayment did not arise from a misrepresentation or failure

to disclose by the claimant, it was not recoverable from her. This final part of that reasoning overlooked the Secretary of State's power to recover duplicate payments under section 74 of the Social Security Administration Act 1992.

33. With respect, I disagree with that analysis, at least as applied to the circumstances of this case. It confuses the payment with what the payment is compensation for. It was not a late payment of money that was due earlier. The money should have been due earlier, but it was not. It would have been due earlier if the local authority had honoured the equality clause in the claimant's contract, but it did not. Nor was the payment made *in respect of a period*. At most, it was a payment on account of an amount that would be *calculated* by reference to a period. In fact, it is a lump sum calculated on one basis that was accepted by the claimant to be used as part payment for proceedings that had not at that time even begun. Either way, it was not paid in respect of that period within the meaning and intendment of the legislation.

34. The regulations I have quoted contain a series of attributions and deemings. They do not change the nature of the payment to which they apply. Their application must be grounded in reality. That reality is the payment that was made. The reality is not the wages that were not paid and for which any award that is eventually made will compensate. It is necessary to look behind that award to determine its nature as capital or income. But looking behind the award is not the same as equating the award with the wages that were not paid any more than an award for loss of earnings in negligence is the money that the claimant would otherwise have received.

35. As a check on my conclusion, I have stood back from the details of the legislation and considered whether this is a sensible outcome in the context of the function that legislation performs. The context of the provisions is *income-based* jobseeker's allowance. It provides public financial support for jobseekers who have insufficient income to support themselves. Payments of income are almost always made in respect of the past and are used for a forward period. A claimant is paid at the end of one month for work done in that month and has that money available to meet future expenditure. That is the claimant's position. She received income when the payment was made into her account and she was able to use that money for her living expenses in the future.

I. Disposal

36. I allow the appeal, and set aside and re-make the decision of the First-tier Tribunal by confirming the decision of the Secretary of State.

**Signed on original
on 25 March 2010**

**Edward Jacobs
Upper Tribunal Judge**