

THE SPECIAL COMMISSIONERS

THOMAS JOHN CROMPTON

Appellant

-and-

**HER MAJESTY'S COMMISSIONERS OF
REVENUE AND CUSTOMS**

Respondents

Commissioner: Richard Barlow

Sitting in public in London on 26 January 2009.

Ms Hui Ling McCarthy of counsel instructed by **the Bar Pro Bono Unit** for the Appellant.

Mr Peter Death, inspector of taxes, for **HM Revenue and Customs**.

DECISION

1. The appellant appeals against a decision by the respondents to amend his 2005/06 tax return by increasing his liability by £11,852.78. The amendment followed closure on 26 July 2007 of an enquiry into that return. The sum in dispute relates to payment of a sum of £153,864.47 (the ‘compensation payment’) to Mr Crompton by the Army Board. That payment was reduced by £7,592.50 because of costs incurred by the Army Board when Mr Crompton took judicial review proceedings against it. The Army Board deducted tax from the payment at 22% of the full amount (£33,850.18). The deduction, if correct in law, was properly in respect of the full amount as the costs payable by Mr Crompton related to the litigation and were not a deductible item as far as his tax was concerned.
2. The increase of £11,852.78 was as a result of the respondents deciding that the higher rate of tax was payable but the effect of the dispute in this case is, I believe, that the amount in dispute is that amount plus £33,850.18 already deducted at source. The Army Board appears to have ignored the fact that it should have allowed £30,000 free of tax when it deducted the tax at 22% before making the payment but as I understand it the respondents have taken that into account when calculating the increase.
3. I have been asked to decide a point of principle only and will give leave to the parties to return to the First-Tier Tribunal if any consequential issues of calculation arise.
4. I would like to thank both parties for presenting the case efficiently and effectively and in particular to pay tribute to the obvious care and dedication with which Ms McCarthy represented her client pro-bono.
5. The issue in the appeal is whether the compensation payment was a payment falling within section 401(1)(a) of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) which reads so far as is relevant:

“(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,
...”
6. The parties agree that that is the provision that determines the issue in this appeal and the respondents rely principally upon “in connection with” and emphasise the fact that the connection can be indirect. The appellant’s argument is that the payment was not in fact connected with the termination of his employment. A separate argument that the payment should be regarded as

an ex gratia payment and that such a payment would not fall within the provision anyway is no longer being pursued.

7. The facts are as follows. This summary is taken from the documents, an agreed statement of facts and as further explained by Mr Crompton's oral evidence.
8. Mr Crompton was a regular soldier from 1973 to 1985 when he was discharged at his own request and left with the rank of sergeant.
9. In June 1987 he enlisted in the Territorial Army as a volunteer.
10. In about 1988 he applied for and obtained a Non Regular Permanent Staff ('NRPS') post as a clerk in the Royal Engineers and was appointed with the rank of corporal.
11. In July 1990 he was discharged from that post in order to take up a post as sergeant clerk with the Royal Electrical and Mechanical Engineers ('REME'), with the job title workshop clerk, but in 1992 or 1993 it was decided that that post should be "civilianised" and Mr Crompton was not eligible for that post as a civilian even if he had left the army and applied for it as a civilian.
12. Mr Crompton applied for a number of other NRPS posts and was not appointed to any of them even though he was correctly qualified and of the correct rank and even though NRPS applicants for such posts were supposed to be appointed in priority to other applicants. He was the only NRPS applicant for at least some of the posts he was denied so that under the rules he should undoubtedly have been appointed. Had he been successful in obtaining one of those posts Mr Crompton would have been likely to have been promoted to staff sergeant at an increased wage.
13. A different post as a storeman became free within REME shortly before Mr Crompton would have been made redundant from his existing post as workshop clerk and after he had been unsuccessful in applying for the other posts referred to in the previous paragraph. Although by then he knew that he could receive a redundancy payment in respect of the workshop clerk post he decided to apply for the storeman post. He was offered it and accepted it and so was not then made redundant.
14. He took up the storeman post on 4 February 1994 but shortly afterwards he received a letter stating that it was a term of his appointment that he must qualify as a Technical Storeman REME Class 2 within his one year probationary period and as a Class 1 storeman within three years. However, there was no Class 2 training course available in the first year. Mr Crompton pointed this out and his recollection was that he was told the conditions could not be changed. The officer who had interviewed him claimed that the conditions were altered and that he explained this to Mr Crompton.

15. Whether there was a misunderstanding between Mr Crompton and the officer or whether the officer made a mistake is not something I can resolve.
16. Either way, the result was that Mr Crompton, whether acting under a misapprehension on his part or under a mistake caused by the officer, decided to take redundancy after all and he left the army on 18 February 1994. He was paid a redundancy payment.
17. Shortly after he left, on a social visit to the sergeant's mess, he was told about or understood for the first time the new conditions which were ones he could have achieved. Again, whether the conditions then came to his attention for the first time or he understood them for the first time, but had heard about them earlier, is not a matter I can, or need to, resolve.
18. Mr Crompton made an application to the Industrial Tribunal but in September 1994 it ruled that he was ineligible as that Tribunal does not deal with soldiers' employment.
19. Mr Crompton then applied to the Army for "redress", by a letter dated 19 December 1994.
20. That letter reads as follows (so far as is material):
 - “1. In accordance with Section 180/181 of the Army act 1955, I ... hereby claim:
 - a. That I have been wronged in the manner specified in para 2 below.
 - b. That I am entitled to the redress specified in para 3 below.
 2. I think I have been wronged in the following manner in that I have been made redundant ... I was unfairly selected and unfairly dismissed. I believe that serious breaches of procedures occurred in the following areas:
 - a. I was not considered for the current post of Workshop Clerk ...
 - b. Even though procedures dictated that redundant Non-Regular Permanent Staff were to be given priority over other candidates for any newly created posts ... I can only deduce ... that this was not the procedure adopted.
 3. I claim that I am entitled to the following redress:
That I be reinstated into an NRPS position ...”
21. The army procedure then continued at a somewhat Jarndycian pace. On 16 July 2001 the Army Board gave its decision which included the following:

“Regarding whether the correct redundancy procedures were followed, the Board agreed with the results of the Board of Inquiry that they clearly had not been followed. In seeking an alternative NRPS post, 5 of the selection boards Sergeant Crompton attended had not afforded him the correct priority when he was correctly qualified, of the correct rank and the only NRPS candidate. ... We therefore find in his favour on this complaint.

[The Board then reject Mr Crompton’s complaint that the adjutant had not correctly informed him about the changed conditions for the storeman post].

Relative to those 5 selection boards in which Sergeant Crompton was disadvantaged as cited by the Board of Inquiry we agree that he was materially disadvantaged. As redress we offer compensation for the actual financial losses he suffered as a consequence of the Selection Boards’ failings”.

22. That document and Mr Crompton’s complaint refer to redundancy procedures but in fact Mr Crompton was not made redundant as a consequence of the Selection Boards’ procedural failings because he took up the storeman post. It was some months afterwards that he was made redundant from the storeman post, at least partly because of the misunderstanding about the conditions, and indeed he received a redundancy payment.
23. On 25 October 2002 the Treasury Solicitor had given the Army Appeals Wing advice about the level of compensation that should be paid as a result of the Selection Boards’ failings and that advice was based on what the Employment Tribunal would have awarded for unfair dismissal had it had jurisdiction. The Treasury Solicitor also advised that the first £30,000 would be tax free under the then equivalent provision to section 401 of ITEPA.
24. On 24 May 2005 the Army Board wrote to Mr Crompton offering him the £153,864.47 that has given rise to this appeal. In doing so they stated that the award was very generous compared with an award in civilian employment.
25. As far as the reasons for making the award were concerned that letter summarised the Board of Inquiry findings as follows and it seems clear that that the summary was intended to state why the award was being made:

“... the Army Board determined, “In seeking an alternative NRPS post, 5 of the selection boards Sergeant Crompton attended had not afforded him the correct priority when he was correctly qualified, of the correct rank and the only NRPS candidate. ... We therefore find in his favour on this complaint”. In paragraph 7, the Board directed that as redress, “we offer compensation for the actual financial losses he suffered as a consequence of the selection board failings.”

26. I should perhaps add that although the award was considerably more than the Employment Tribunal could have awarded in analogous circumstances it appears the Army was prepared to take into account loss of pension and expenses such as the fact that Mr Crompton sold his house at a disadvantageous price to pay for the failed litigation in the Tribunal and in judicial review proceedings.
27. In evidence Mr Crompton stated the following:

“If I’d kept the storeman’s job I couldn’t really say compensation would not have arisen but I knew I’d been let down and I think I might have looked into it. But I might have worried about upsetting the apple cart.

If I’d have got one of the other jobs [i.e. those he should have been given if the selection boards had acted correctly] I would not have got as far as taking the storeman’s job”.
28. The first of those quoted passages acknowledges that if he had continued in the storeman’s job Mr Crompton might not have pursued the compensation claim. The second passage makes the obvious point that if he had been given the job he was entitled to under the selection rules he would not have become a storeman with the unspoken consequence that he would neither have had the redundancy payment from the storeman job nor the compensation now under consideration, though equally he would not have lost pension entitlements and had several years of worry and expense pursuing his claim for redress which has ultimately succeeded.
29. Ms McCarthy argued that the actual termination of employment consisted of the resignation or dismissal by redundancy of Mr Crompton from the storeman post and that there was no causative link between that and the Selection Boards’ failures for which he was compensated by the payment now in question. He did not leave the storeman post because he was not selected for any of the five posts he should have been given had the Selection Boards acted correctly; rather he left the storeman post because he thought he could not comply with the conditions. Nor did he take a redundancy from the previous workshop clerk post because of the selection boards’ failings. In fact he was not made redundant at that point. His move to the storeman post was triggered by those failings but the workshop clerk post was not the one he held at the time he left the Army.
30. Ms McCarthy also pointed out that Mr Crompton left the Army, according to the Board of Inquiry, of his own volition because he chose not to accept the revised conditions which the Board of Inquiry concluded he had been informed about.
31. I agree with those submissions so far as any direct causative link between the termination of Mr Crompton’s employment and the failings of the Selection Boards is concerned. Mr Crompton left the Army either of his own volition or

by way of redundancy at the time of leaving the storeman post and not because of his failure to be selected for the posts he was not offered by the Selection Boards.

32. Mr Death argued that without the termination of the employment there would have been no loss to compensate but I hold that is not the case. The compensation in question was paid because Mr Crompton had not been selected for posts for which he applied and which would have enabled him be promoted to staff sergeant and so to earn more than he otherwise would have but that would have been the case whether he stayed in the Army or not. Logically, Mr Crompton should have received compensation for the Selection Boards' failings even if he had stayed in the Army because the compensation was awarded for failings in the procedure leading to his not being offered posts which he was not offered while still in the Army's employment. He remained in that employment for some months after the Selection Boards' had rejected his applications.
33. Even if it is the case that he was over-compensated that makes no difference, as to which see by analogy *Able UK –v- Revenue and Customs Commissioners* [2007] EWCA Civ 1207 [2008] STC 136 at page 141e, where it is acknowledged that the classification of compensation is not to be confused with its method of calculation.
34. Mr Death referred to *Walker –v- Adams* Spc 344 in which the Special Commissioner held that the link between an award of compensation and the termination of employment might be looser than a strict causation test, in particular because the word “otherwise” is added before the concept of “connected with” in reference to the compensation and the termination of employment, that is to say connected with otherwise than “in consideration of” or “in consequence of” the termination. I agree that a connection between the payment and the termination that is not in consideration of the termination or in consequence of the termination is obviously wider than either of those two possibilities but it must still be a “connection”.
35. A connection must be some sort of link, joint or bond between two things. Here there is no such link between the payment of compensation and the termination of Mr Crompton's employment with the army. The payment was for the Selection Board's unfair treatment of Mr Crompton but that did not lead to his leaving the Army. He left the Army because the storeman job came to an end in the circumstances already described.
36. 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.

37. Mr Crompton's appeal is therefore allowed and he should not be taxed on the compensation payment. If any residual issues of calculation arise either party is at liberty to apply for a further hearing of the appeal to determine them.