ICTA s s202 B (1)(b)-Year of assessment- Employee's claim to a particular emolument from early 1995/96 disputed by the Employer- Claim accepted in 1997/98 and payment then made, including full arrears.- Whether amount referable to earlier years assessable in 1997/98 or in relevant earlier years- "becomes entitled to payment".

THE SPECIAL COMMISSIONERS

JONATHAN WHITE - Appellant
- and -
THE COMMISSIONERS OF INLAND REVENUE - Respondents

Special Commissioner: B M F O'BRIEN

Sitting in Belfast on 29 November 2002

Miss Aparna Nathan of Counsel, for the Appellant

Mr Ian Brown, Inspector of Taxes, for the Respondents

DECISION

1. The Appellant, Jonathan White, joined the Royal Ulster Constabulary on 4 September 1994.

2. Before that date, in August 1994 or earlier, he had been interviewed and had passed certain tests. He had certain promotional material supplied to him by the Police Authority, which referred to the housing allowance payable where accommodation could not be provided. He also had a significant six-page document entitled "Conditions of Service", two of the paragraphs of which read as follows:-

> "1. Conditions of Service for the Police are governed by the Police Act (Northern Ireland) 1970 and Regulations made by the Secretary of State under that Act. The following paragraphs summarise in general terms the more important conditions of service currently in force.
>
> 5. Accommodation. All ranks are either provided with free accommodation or paid a housing allowance."

3. At some date in August the Appellant signed a copy of this document accepting its terms "as the conditions applicable at the time of my appointment to the Royal Ulster Constabulary".

4. This case has arisen because paragraph 5 of that document turned out not to be applicable at the time of the Appellant's appointment. In the short interval between acceptance and appointment, the Regulations were altered by the Secretary of State and the Housing Allowance (as such) was abolished as from 1 September 1994. It was replaced - for officers in post before that date only - by a so-called "Replacement Allowance" paid on the same terms and at the same rate as had applied to the Housing Allowance at 31 August 1994.

5. During the first six months of their service, new members of the RUC underwent basic training and were housed in official accommodation. The change in the Regulations did not come to the notice of the Appellant and the others who had joined at the same time (the September intake) until they had been assigned to a police station and qualified (as they thought) for the allowance. They did not receive it.

6. In the meantime there had been a further intake in December; and the Police Authority had not yet taken steps to amend the promotional material or the summary of the Conditions of Service.

7. The matter was taken up by the staff association, the Police Federation (the Federation) on behalf of the September 1994, December 1994 and April 1995 intakes. Not meeting with any success, proceedings were instituted in the High Court in August 1995 against the Police Authority and the Chief Constable. One of the December 1994 intake, Constable Susan McCracken, was chosen as the plaintiff in these proceedings, which were regarding (to an extent at least) as a "test case". The plaintiff's claim was based on breach of contract, negligence and misrepresentation. The case was set down for hearing on 24 September 1996.

8. Very shortly before the hearing a negotiated settlement was reached. The terms represented a victory for the Federation and Constable McCracken, who obtained entitlement to the Replacement Allowance on the footing that she was to be deemed (for that purpose only) to have become a Constable on 31 August, 1994.

9. That the Police Authority should have been somewhat anxious to settle is hardly surprising. The situation was obviously embarrassing because, even if the Authority had proved successful as a matter of law, it would have been too easy for the Federation to portray the Authority as having behaved in a shabby manner towards the recruits who (like the Appellant before me) had accepted the pre-September 1994 terms of service.

10. From the point of view of the recruits other than Constable McCracken, the fact that her case was settled proved somewhat unhelpful because of the loose ends that it left. Although I have no direct evidence of what was argued during the negotiations, I do have evidence (primarily from subsequent Annual Reports of the Federation) of what happened afterwards. I find that it was agreed that the McCracken terms should be extended to such of the September, December and April intakes as could demonstrate that their positions were effectively indistinguishable from that of Constable McCracken. No individuals were identified at that stage; and the criteria for determining qualification were not established. As the Federation's Annual Report in November 1996 put it "...there remains much work to be done to ensure all those affected are treated fairly".

11. The officers from the three intakes (including the present Appellant) completed questionnaires (provided by the Federation) designed to demonstrate the degree to which they had been misled. These were sent to the Police Authority, who admitted eleven only (not including the Appellant). The Federation contemplated supporting proceedings by each of the others, individually, but decided against that course on the grounds of delay, cost and the risk of losing some cases, through inability to prove that the expectation of receiving Housing Allowance had materially induced the officer in question to join the Force. Accordingly, discussions between the Federation and the Police Authority continued.

12. Eventually, the Police Authority accepted the Federation's position and the McCracken terms were extended to, among others, the Appellant. On 4 July 1997 he completed applications for the allowance as from the date of his allocation to the Carrigfergus Police Station (4 March 1995) and signed a document entitled "Recruits Housing Allowance". That document recited that there was a dispute over entitlement to the allowance and stated that it was agreed between the Constable (i.e. the Appellant) and the Police Authority for Northern Ireland that:

"The Constable shall be entitled to receive ex gratia payments of housing

> allowance (being referred to as replacement allowance) since 1 September 1994 in accordance with the provisions of the RUC Regulations (Northern Ireland) 1984 as amended as if the Constable had first been employed as a Constable on 31 August 1994..."

13. The document also provided that the sums that had thereby become retrospectively due would be paid at the end of August 1997.The agreed statement of facts states that the arrears were paid in September and I expect that they were banked in that month. Nothing hangs on the difference.

14. It is not disputed that the Housing (or Replacement) Allowance is an emolument chargeable to tax under Case I of Schedule E. Furthermore, it is assessed and charged in the year in which it is "received" [Income and Corporation Taxes Act 1988, Section 202A (1)(a)], whether it actually relates to that year of assessment or not [section 202 (2)(a)].

15. Of the arrears paid in August/September 1997, £2624 related to the year 1995/96 and £3500 to the year 1996/97- £6124 in total. The Appellant excluded that amount from his 1997/98 self-assessment Return, but the Inspector amended the assessment to add it back. This appeal is against the Notice of Amendment. The Appellant's reason for appealing is that the inclusion of the arrears referable to the previous years brought his taxable income for 1997/98 above the threshold for Higher Rate tax, whereas the addition of £2624 and £3500 to the earlier years respectively would not have had the same effect.

16. When was that £6124 "received" for the purpose of Section 202A (1)(a)? Section 202B (1) provides that it should be treated as received at the earlier of :

"(a) the time when payment is made of or on account of the emoluments" and

"(b) the time when a person becomes entitled to payment of or on account of the emoluments."

17. Clearly, the Appellant was actually paid the whole of the arrears in August/September 1997; and it seems to me clearly arguable that he had a relevant "entitlement" not later than 10 July 1997 when his right to payment (albeit at the end of the following month) was quantified and unconditional. It is unnecessary to come to a concluded view on the latter because both dates fall within the year of assessment 1997/98. The appellant, however, contends that he "became entitled to payment" of the allowance at an earlier date so that most of the arrears (£6124) should be treated as having been received for assessment purposes in earlier years.

18. Miss Aparna Nathan, who appeared for the Appellant, submitted that entitlement to payment arose in the circumstances of this case on one of two early dates, namely (at the earliest) in March 1995, when the Appellant moved from official to private accommodation, or (at the latest) in September 1996, the time of the McCracken settlement.

19 The first alternative is based on the premise that the Police Authority was contractually bound by the terms set out in the summary "Conditions of Service", which the Appellant had accepted, including the right to be housed or to receive a housing allowance. The contractual right to one or the other of those arose immediately on the Appellant's employment in 1994, but Miss Nathan accepted that the right to receive payment of the allowance, as such, did not arise until the occurrence of the event on which it was conditional (c.f*. Pardoe v Entergy Power Development Corporation* [2000] STC 286). On this footing the actual payment in August/September 1997 was simply a very late payment, in breach of contract.

20. The second alternative is founded on the agreement between the Police Authority and the Federation that the McCracken settlement terms would be applied also to other indistinguishable cases. Miss Nathan submitted that the Appellant was entitled to the benefit of that agreement and that the Police Authority should have accepted that immediately. It was only the Police Authority's delay that put payment of the arrears referable to 1995/96 and 1996/97 into 1997/98.

21. The Inspector, Mr Ian Brown, did not accept that the Appellant had a contractual entitlement (thought he was, I believe, constrained to agree that if Miss Nathan's first premise was sound, her conclusion would follow). Whatever the character of the collateral agreement at the time of the McCracken settlement, the dispute over its effect resulted in there being no quantifiable amount to be assessed until July 1997. The Appellant did not become entitled to payment until then.

22. Mr. Brown also relied on the PAYE provisions in Section 203 (1) (under which the payer of an emolument is required to deduct tax on the making of any such payment) and Section 203A(1) (which determines the time at which the payment is to be treated as made). The latter mirrors the rules for ascertaining the time of receipt in Section 202B (1). Mr. Brown submitted that, in Schedule E, assessment and collection go hand in hand and the concept of "becoming entitled" is the same for both purposes. Just as there was nothing quantifiable before 1997/98 to be assessed, there was nothing from which tax could be deducted.

23. In my judgement, Miss Nathan's argument based on the Appellant's initial contract faces a very great - indeed insuperable - difficulty. The Police Authority is not an ordinary employer and the terms of service in the RUC were, in effect, statutory. Before 4 September 1994 the Appellant had no contract at all; and on

that date the Police Authority had no power to offer new recruits a contract that included a right (unconditional or otherwise) to a housing allowance.

24. In relation to the second early date contended for (the McCracken settlement), I am unable, on the evidence before me, to find that the dispute that arose over the application of the settlement to other recruits was not a bona fide dispute. The absence of agreed criteria constituted a serious flaw. I assume that the Federation believed that Constable McCracken would have succeeded in her action: at the same time, it was recognised that others might not. The possibility of distinguishing between cases existed (even if their bare facts were very similar). In those circumstances, I do not believe that the Appellant can be said to have any entitlement to payment before the Police Authority decided in 1997 to accept the Federation's claim. Even then, the offer to the Appellant was subject to his making formal application (I attach no real importance to that) and to his signing the "Recruits Housing Allowance" document by which the Appellant acknowledged that the payment of the allowance was "ex gratia". Before those things were done, the Appellant's claim to entitlement to payment was not established. Even then, the due date for payment in accordance with the document had not arrived, but I do not need to decide the significance, if any, of that.

25. Furthermore, while I accept that assessment and collection are, in general, different matters, I believe that they work together in Schedule E. "Receipt" and "payment" are the two sides of the same coin and in my view there is no room for attaching different meanings to "becomes entitled to payment…of the emoluments" in section 202B (1)(b) and "becomes entitled to the payment" in Section 203A (1)(b). If assessments had been made in respect of housing allowance in earlier years, the appropriate tax should have been deducted in the same years (in effect, reducing the Appellant's normal salary, doubtless to his surprise).

26. The argument for the Appellant logically involves, I think, the proposition that he should have included appropriate amounts in his Returns for the earlier years, at the time when the Returns were due. Any difficulty over quantum could, Miss Nathan suggested, have been dealt with by the Inspector by way of an estimated assessment. I do not look favourably on the proposition that an Inspector has a general power to make an estimated assessment in a situation where the true amount (if any) is inherently unascertainable.

27. In my view, the assessability of an emolument for a particular year of assessment must be capable of being judged at the time, not later than immediately after the year in question. In the present case the Appellant could not have demonstrated his entitlement to payments of housing allowance, in respect of the period prior to 6 April 1997, at the relevant time or times. The actual entitlement was calculated as if the Appellant had been entitled to the allowance since March 1995; but that appears to me to be retrospective entitlement and is no more what section 202B (1)(b) is looking to as is prospective entitlement.

28. For those reasons I uphold the Notice of Amendment.

B M F O'BRIEN

SPECIAL COMMISSIONER

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