[2017] UKUT 453 (TCC)

Appeal number: UT/2016/0157

5 ***INCOME TAX – termination payments made to football player employees – whether taxable as earnings "from an employment" under sections 9(2) and 62 of the Income Tax (Earnings and Pensions) Act 2003 – whether subject to national insurance contributions under section 6 of the Social Security Contributions and Benefits Act 1992 – whether the FTT was right to hold that the distinction was***
10 ***between "receipt of remuneration or profits in respect of office" (taxable under section 9(2)), and "sums paid in consideration of the surrender by the recipient of rights in respect of the office" (not so taxable) – that distinction upheld and described as being between cases where the entire contract of employment is abrogated in exchange for the termination payment (as in Henley v. Murray [1950]***
15 ***1 All ER 908), and cases where the payment is made in pursuance of a pre-existing obligation to make such a payment arising under a contract of employment.***

UPPER TRIBUNAL
20 **TAX AND CHANCERY CHAMBER**

BETWEEN

THE COMMISSIONERS FOR HER
25 **MAJESTY'S REVENUE AND CUSTOMS**

Appellants

and

TOTTENHAM HOTSPUR LIMITED

Respondent

30

TRIBUNAL: Sir Geoffrey Vos, Chancellor of the High Court and Upper Tribunal Judge Tim Herrington

Sitting at the Royal Courts of Justice, Rolls Building, on 8th November 2017

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Ms Aparna Nathan (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the Appellants, HMRC

Mr Jolyon Maugham QC and Ms Georgia Hicks (instructed by Deloitte LLP) for the Respondent, Tottenham Hotspur Limited

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DECISION

Introduction

1. This is an appeal from the decision of the First-Tier Tribunal (Tax Chamber) (Judge Jonathan Richards and Mr Michael Sharp FCA) released on 3rd June 2016, by which the FTT decided that certain termination payments made to two football players contracted to Tottenham Hotspur were neither taxable as earnings from their employment under sections 9 and 62 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") nor subject to national insurance contributions under section 6 of the Social Security Contributions and Benefits Act 1992 ("SSCBA").

2. Tottenham Hotspur Limited ("THL"), the respondent to this appeal, is the parent company of Tottenham Hotspur Football & Athletic Co. Limited ("THF&ACL"), a Premier League football club. We shall refer to both THL and THF&ACL together as "Tottenham Hotspur".

3. The appeal concerns lump sum payments made by Tottenham Hotspur to professional footballers, Mr Wilson Palacios ("Mr Palacios") and Mr Peter Crouch ("Mr Crouch") (together the "Players"), in connection with the early termination of their employment contracts. The question is whether these payments are to be treated as general "earnings from an employment" or an "emolument of the employment" within the meaning of sections 9(2) and 62(2) of ITEPA or only as "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" within the meaning of section 401(1) of ITEPA. It is common ground that if the payments are to be properly regarded as "from an employment", the first £30,000 will be taxable (which it would not otherwise be), and the payments will be subject to national insurance contributions under section 6 of SSCBA (which they would not otherwise be).

4. The appeal raises the potentially important question of whether the FTT was right to regard the authorities as establishing that the distinction is between "receipt of remuneration or profits in respect of office" on the one hand (which are "from an employment" and therefore taxable under section 9(2) of ITEPA), and "sums paid in consideration of the surrender by the recipient of rights in respect of the office" on the other hand (which are not "from an employment" and therefore not taxable under section 9(2) of ITEPA). In this context, the main submission that The Commissioners for Her Majesty's Revenue and Customs ("HMRC") made was that the FTT ought to have held that the fact that the Players' employment contracts included clauses expressly allowing for early termination of their fixed terms only by mutual consent was sufficient to mean that the agreed termination payments were "from an employment".

Factual background

5. On 9th March 2009, Mr Palacios entered into a fixed term contract of employment with THF&ACL ("Mr Palacios' Contract"). Mr Palacios' Contract was due to expire on 30th June 2014.

6. On 28th July 2009, Mr Crouch entered into a fixed term contract of employment with THF&ACL ("Mr Crouch's Contract"). Mr Crouch's Contract was due to expire on 30th June 2013.

7. Provisions permitting early termination only by mutual agreement of the parties (absent 'just cause' or 'sporting just cause') were imported into both Players' employment contracts by virtue of Rule 13 of the *Regulations on the Status and Transfer of Players* (the "FIFA Rules") and Rule C.1(k)(iv) of the *Rules and Regulations of the Association: Season 2011-2012* (the "FA Rules"), which are set out below. Mr Crouch's Contract contained an express provision in paragraph 14.13 of schedule 1 to the effect that "[t]his agreement shall cease and terminate on the said 30 June 2014 unless … 14.13.2 This agreement shall have been previously been terminated by mutual consent of both [THF&ACL] and [Mr Crouch]".

8. In 2011, Tottenham Hotspur wanted to reduce its wage bill, because its commercial income had declined since it had not been involved in the Champions League that season. As a result, it sought transfers for the Players. Stoke City Football Club ("Stoke") was identified as a possible destination for them. At first, neither player wanted to leave Tottenham Hotspur for Stoke, but they both ultimately agreed to do so, in return for lump sums to be paid to them by Tottenham Hotspur.

9. On 28th August 2011, Mr Palacios received a letter from Tottenham Hotspur stated to be "subject to contract" and headed "Re: Termination Payment", which provided:

> "Upon the termination of your employment with Tottenham Hotspur Football Club this transfer window to join Stoke City Football Club, I am writing to confirm that Tottenham will agree to pay you the following sums as a termination payment:
>
> £900,000 upon the permanent transfer of your registration
>
> A further £510,000 payable on 15th August 2012
>
> Please note the above sums will be taxed at source".

10. It appears that no formal compromise agreement was subsequently entered into between Tottenham Hotspur and Mr Palacios. Nonetheless, the payments mentioned in the letter of 28th August 2011 were made.

11. On 31st August 2011, Mr Matthew Collecott ("Mr Collecott"), the Group Operations and Finance Manager of THL, sent a text message to Mr Crouch's accountant, which said that: "[b]ottom line is player won't be part of 25 man squad and will sit out 2 years – Stoke won't take as asking too much".

12. Later that day, Mr Crouch agreed to leave Tottenham Hotspur and join Stoke. As part of his negotiations with Tottenham Hotspur, he signed a formal compromise agreement with THF&ACL, which provided that: -

    i) Mr Crouch's employment with THF&ACL was terminated on 31st August 2011, and his basic weekly salary was payable up to and including that date.

    ii) THF&ACL would pay Mr Crouch a "Termination Payment" totalling £3 million in three equal instalments, acknowledged by the parties to be "a non-contractual payment made in connection with the termination of [Mr Crouch's] employment by [THF&ACL]".

    These payments were duly made.

13. On 10th December 2014, HMRC issued determinations under Regulation 80 of the Income Tax (PAYE) Regulations 2003 and decisions under section 8 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999. These indicated that the lump sum payments represented earnings from the Players' employments and were therefore subject to (i) income tax under section 9 of ITEPA and (ii) national insurance contributions under section 6 of SSCBA.

14. On 3rd June 2015 (following a review by HMRC), Tottenham Hotspur appealed these decisions to the FTT. Tottenham Hotspur argued that the lump sum payments represented compensation for the early termination of the Players' contracts and, as such, were not "from" the Players' employments.

15. On 3rd June 2016, the FTT released its decision in favour of Tottenham. Its reasons may be summarised as follows: -

    i) In order to answer the question of whether the payments are "from" the Players' employments, it is necessary to focus on the reason why they were made. The relevant distinction is between "receipt of remuneration or profits in respect of the office" and "sums paid in consideration of the surrender by the recipient of rights in respect of the office" (*Henley v. Murray* [1950] 1 All ER 908 ("*Henley*")). Only in the former case is a payment "from" employment.

    ii) A payment is "from" employment where it is made in lieu of notice pursuant to a contractual provision agreed at the outset of employment. This is because the payment represents the security of employment which the employee required in order to enter into the employment contract (*EMI Group Electronics Ltd v. Coldicott* [1999] STC 803 ("*EMI*")).

    iii) The existence of substantial reasons unconnected with the employee's employment for making or receiving the payment is not sufficient to prevent a payment being "from" employment, provided that there is a

"sufficiently substantial" employment-related reason for it (*Kuehne & Nagel Drinks Logistics Ltd v. HMRC* [2012] EWCA Civ 34).

iv) *Hofman v. Wadman* (1946) 27 TC 192 ("*Hofman*") does not support the conclusion that a payment made by an employer as part of a mutual agreement to terminate an employment contract early is inevitably "from" employment. The true basis of the decision is that there was no termination of the employment contract. Understood in this way, the decision is consistent with the distinction in *Henley*.

v) A payment may still represent consideration for the abrogation of rights enjoyed under an employment contract in circumstances where the parties agree to vary the terms of the employment contract (*Martin v. HMRC* [2015] STC 478 ("*Martin*")).

vi) *Richardson v. Delaney* [2001] STC 1328 ("*Richardson*") envisages that a breach of contract is required for a payment to amount to consideration for the abrogation of rights, but *Martin* reaches the opposite conclusion. *Martin* is to be preferred, because the logic of *Richardson* requires determination of whether a breach has occurred in order to ascertain the correct tax position, even where the parties have entered into a compromise agreement to avoid litigating that issue.

vii) In the present case, there was no operative right of termination under the Players' employment contracts, except for clauses permitting early termination by mutual consent. Payments made pursuant to agreements entered into under these clauses do not fall within the principle in *EMI*. This is because the clauses provide no additional rights, and therefore no greater security of employment, than the Players would have enjoyed under the general law of contract.

viii) The present case is not distinguished from *Henley* by the fact that the Players could have chosen to remain in employment and receive their salaries until the expiry of their fixed-term contracts. In *Henley* (i) the Court of Appeal did not attach any significance to such matters, and (ii) in any event, the payment was made as a result of agreement between the parties.

ix) Contrary to HMRC's submission, Sections K, L and M of the Rules section of the *Premier League Handbook: Season 2011/12* (the "Premier League Rules") do not operate to prevent a club benefitting from a transfer fee if the transferred player's contract is terminated in breach of its terms. Indeed, Mr Collecott's evidence was that he could not think of a single situation in which the board of the Premier League had refused to register a transfer for any reason.

x) Accordingly, the payments were made in return for the surrender of the Players' rights under their contracts, fell within the scope of the principle in *Henley*, and were not "from" employment.

16. On 15th July 2016, HMRC applied for permission to appeal the FTT's decision. Permission was granted by Judge Richards on 4th August 2016.

The relevant rules

17. The relevant rules were referred to at paragraphs 31-42 of the FTT's decision. We reproduce them here for convenience.

18. The FIFA Rules include the following: -

i) "13 Respect of contract: A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement".

ii) "14 Terminating a contract with just cause: A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause".

iii) "15 Terminating a contract with sporting just cause: An established professional who has, in the course of the season, appeared in fewer than ten per cent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause…".

iv) "16 Restriction on terminating a contract during the season: A contract cannot be unilaterally terminated during the course of a season".

v) "17 Consequences of terminating a contract without just cause: The following provisions apply if a contract is terminated without just cause:

1. In all cases, the party in breach shall pay compensation.

[…]

4. In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods. …".

19. The Premier League Rules included the following: -

i) Rule K.24: "If the parties agree to terminate a Player's contract before its expiry date they shall forthwith notify the Football Association and the Secretary [of the Premier League] to that effect".

ii) Rule K.40: "Upon the termination of a Player's contract by a Club under the provisions of clause 16 of Form 13 or clause 10.1 of Form 13A becoming operative or upon the termination by a Player of his contract with his Club under the provisions of clause 17 of Form 13 or clause 11.1 of Form 13A becoming operative, the Club shall forthwith release the Player's registration".

iii) Rule K.41: "Except in the case of a Retired Player … upon a Player's contract being terminated by mutual consent, his Club shall retain the Player's registration for such period (if any) and on such terms (if any) as the parties may in writing agree. Should the Player sign for another Club (or Football League club) during that period, that Club (or Football League club) shall pay to the Club retaining the registration a compensation fee determined, in default of agreement, by the Professional Football Compensation Committee".

iv) Rule L.1: "A Player shall not play for a Club in a League Match unless that Club holds his registration with effect from at least one hour before kick off and for League Matches to be played between the close of the Transfer Window and the end of the Season either:

1.1. his name is included on the Squad List; or …".

v) Rule L.27: "Subject to the provisions of Rules K.40 and K.41, a contract registration shall terminate:

27.1 in the case of a Contract Player, upon it being transferred in accordance with Rule M.11 …"

vi) Rule M.11: "The transfer of the Registration of a Contract Player shall be effected in the following manner:

11.1 the Transferor Club and the Transferee Club shall enter into a Transfer Agreement in Form 17 signed on behalf of each Club by an Authorised Signatory in which shall be set out full particulars of all financial and other arrangements agreed between the Transferor Club and the Transferee Club and, except as provided below, between the Transferor Club and the Contract Player in relation to the transfer of the Contract Player's registration whether the same are to take effect upon completion of the transfer or at any time thereafter;

11.2 any such arrangements as between the Transferor Club and the Contract Player to which the Transferee Club is not privy may be omitted from Form 17 provided that they are forthwith notified in writing to the Secretary by the Transferor Club…".

vii) Rule M.12: "All transfer arrangements in respect of Contract Players are subject to the approval of the Board [of the Premier League]".

viii) Rule M.26: “The Compensation Fee payable by a Transferee Club to a Transferor Club upon the transfer of the registration of a Contract Player to the Transferee Club shall be such sum as shall have been agreed between the Transferee Club and the Transferor Club and set out in the Transfer Agreement”.

20. The FA Rules included the following: -

i) Rule C.1(g)(i): “A Player’s registration may be transferred from one Club to another ... The Player must be re-registered by the Club to which the registration is transferred”.

ii) Rule C.1(i)(i): “A Player registered with The Association can play only for the Club holding the registration unless:

(A) in the case only of benefit, testimonial and charity matches, the Player obtains by written request special permission of The Association; or

(B) is temporarily transferred in accordance with Rule C.1(g)(vi); or

(C) is registered under a Scholarship in accordance with Rule C.3; or

(D) has the written permission of the Club, copied to The Association, to play not more than two trial matches for another Club, provided that such matches are not for the first team of that Club in a Competition Match and are both within a period of one month from the date of such permission, which shall not be repeated in the same playing season for the same Player to the same Club”.

iii) Rule C.1(k)(ii): “Should a Player not be selected to play or attend as a substitute for a period of four weeks, the Player may apply to the Club to cancel the agreement and registration. If refused, the Player is free to apply to the most senior league of which the Club is a member for the cancellation of the agreement upon such terms as may be desirable. If either the Club or Player is dissatisfied with the decision of that league, each shall be entitled to appeal to a League Appeals Committee”.

iv) Rule C.1(k)(iv): “Except by mutual consent, a Club or Player is not entitled to determine an agreement between them without the written consent of The Association or in accordance with Rule C.1(l)”. Rule C.1(l) states the practice that shall prevail where an agreement “provides for either the Club or Player terminating by 14 days’ notice”.

v) Rule C.1(k)(v): “When an agreement has been determined by mutual consent, notice signed by the Club and the Player shall at once be sent to The Association who will cancel the registration”.

<u>The grounds of appeal</u>

21. HMRC's grounds of appeal can be briefly summarised as follows: -

i) The FTT gave inadequate weight in paragraphs 96 and 97 of its decision to the express term in paragraph 14.13 of schedule 1 to Mr Crouch's Contract, and to the Rules (set out above) which enshrine the Players' rights to remain until the end of their fixed term contracts unless the contract is terminated for cause or by mutual agreement. These terms provided the Players with "the security, or continuity, of salary which [they] required as an inducement to enter the employment" (*EMI*), and meant that there was a "sufficiently substantial" employment-related reason for making the payments (*Kuehne supra*).

ii) The FTT was wrong to follow *Henley* at paragraphs 75 and 94 of its decision, because there the abrogation of the employee's rights was imposed upon him, and the court left open the question of a termination by mutual consent.

iii) The FTT wrongly interpreted *Martin* in paragraph 100 of its decision. There, Warren J had found that the payments were taxable as they flowed from an amended employment contract, which had been agreed as a first stage, before the parties acted in accordance with that amended contract.

iv) The FTT wrongly failed in paragraphs 101 and 102 of its decision to follow the binding decisions of *Richardson* and *Hofman*, where agreed termination payments were held to be taxable.

v) The FTT failed to attach sufficient importance to FA Rule C.1(k)(v) and Premier League Rule L.27 which provide that termination of a player's contract will result in termination of the player's registration, and to FIFA Rule 17.4 which imposes sanctions on clubs that terminate a player's contract without cause or consent. Tottenham Hotspur would not have breached these rules.

22. In oral argument, Ms Aparna Nathan focused primarily on the first ground of appeal. She submitted, on the basis of *Richardson*, that where a payment is made in pursuance of a contractual provision agreed between the parties at the outset of the employment which enables the employer to terminate the employment on making the payment, that payment is an emolument from the employment. In this case, HMRC pointed to the rules (and, in the case of Mr Crouch's Contract, an express clause) providing for termination without cause only where both parties agreed to that termination. There was, they submitted, no difference between the case where the contract actually stipulated for a specific termination payment or enabled one to be calculated, and this case where the contract stipulated that the parties could in the future agree a termination, and where they later agreed a payment as part of that exercise. A player can insist on staying on and being paid, unless he gives his consent. There will be sporting sanctions and fines if the club dismisses him without cause.

The cross-appeal and Tottenham Hotspur's submissions

23. THL originally raised a series of questions by way of cross-appeal. They said first that Mr Collecott's text message of 31st August 2011 amounted to an anticipatory breach of Mr Crouch's Contract, in that Tottenham Hotspur was saying that Mr Crouch would not be played at all if he stayed on for the remaining two years of his contract. That demonstrated an intention not to be bound by the express terms in Rule 15 of the FIFA Rules and Rule C.1(k)(ii) of the FA Rules, and was also a fundamental breach of the Players' contracts, which they accepted when they agreed to leave and entered into compromise agreements. Moreover, THL argued that the FTT ought to have implied a term into the Players' contracts to the effect that they would be considered for squad selection throughout the terms of those contracts, and that Tottenham Hotspur would not behave in such a way as to destroy the relationship of trust and confidence between it and the Players. The text message of 31st August 2011 breached both these implied terms.

24. After the main appeal had been argued, THL reconsidered its position and decided not to pursue the cross-appeal. Accordingly, this judgment concentrates only on HMRC's appeal.

25. Mr Jolyon Maugham QC, leading counsel for Tottenham Hotspur, submitted that the FTT decision was correct. He argued that the law could be reduced to three essential propositions:

i) First, that a sum of money paid on the termination of a contract of employment and in abrogation of the rights enjoyed under a contract of employment is not "from" that employment (Court of Appeal in *Henley* at page 363).

ii) Secondly, that a sum of money paid under and in accordance with a contract of employment – including pursuant to a clause which enables the employer to terminate the employment on making that payment – is "from" that employment (Court of Appeal in *EMI* at pages 809-810, and *Martin* at paragraph 63 per Warren J).

iii) Thirdly, (i) and (ii) are treated differently for tax purposes because, when a contract of employment contains a clause entitling an employee to a sum of money on early termination, the security of knowing he will get that sum on early termination forms part of the consideration for which he works. A sum of money paid under that clause is, therefore, "from" his employment (*EMI* at pages 811 and 815, and *Dale v De Soissons* [1950] 2 All ER 460 ("*Dale*") at page 462).

26. In oral argument, Mr Maugham said that proposed provisions in the Finance Bill 2017-19 would, if enacted, make the payments in issue in this case taxable and subject to National Insurance Contributions above the £30,000 tax-free cap, even if they fell outside sections 9 and 62 of ITEPA. This was common ground and was said to reduce the importance, for the future, of what this tribunal has to decide in this case.

27. Mr Maugham submitted that the tribunal had to have regard to the reason why the payments were made, as that determined whether the necessary causal relationship existed between the employment contract and the payment. In *Dale* and *EMI*, where the employee contracted for a payment of a stipulated sum or a sum calculated by a formula, the making of that payment was what the employee received for providing services to the employer, and that was why it was properly regarded as "from an employment". It was wrong to say that a termination payment made in lieu of notice for a footballer is only free of tax if there is no 'payment in lieu of notice' clause in the employment contract. *Henley* decided that the distinction is between a payment for the abrogation of the employment contract, and a payment in pursuance of the employment contract. Moreover, in *Henley* and *Richardson*, the payments reflected the entirety of the amounts outstanding under the fixed term contracts, whereas in this case, the termination payments were less than the outstanding amounts. *Richardson* was wrong, perhaps because *Henley* was not cited to Lloyd J in that case.

28. Mr Maugham did not accept that the Players could not be sacked, nor that the club only receives a transfer fee if termination is by mutual agreement. FIFA Rule 17 contemplates dismissal without good reason. The FTT was right in paragraph 38 of its decision and there is no appeal on questions of fact. Even taking HMRC's case at its highest, the unlikelihood of sacking the employee tells you nothing about the nature of the payment. Mr Henley in *Henley* could not have been sacked as he had a controlling interest in the employer, but here the Players could have been dismissed. Further, the pressure on the Players was great as it was found as a fact that to be "benched" would be bad for their careers.

<u>Authorities relevant to HMRC's appeal</u>

29. It is certainly the case that the key authorities on the question of when termination payments are to be regarded as "from an employment" are not entirely straightforward. To gain the clearest view of them, it is important, in our view, to consider the primary cases in chronological order, and to look reasonably closely at the facts on which they were decided. For that reason, we shall start with such a treatment, before moving on to consider the correctness of the FTT decision and HMRC's grounds of appeal.

<u>*Hofman* (1946): High Court: Macnaghten J</u>

30. The facts of *Hofman* were that, on 2nd May 1940, Mr Hofman entered into a fixed term employment contract (as did his son and daughter) with Parnall Components Ltd, a company that operated a factory. Clause 4 of their contracts provided for fixed annual remuneration payable monthly. The parent company, Parnall Aircraft Ltd, wanted to terminate their contracts, but there was no operative provision enabling it to do so. Mr Hofman agreed to consent to the termination on terms that he set out in a letter to the parent company dated 5th December 1940. This letter read:

> "I now confirm that it is agreed: 1. That the existing Service Agreements dated 2nd May 1940 shall be cancelled forthwith, subject to continuance of the fixed remuneration provided for in Clause 4 … for the period ending 31st December 1941. It is to be understood that each of your Directors agrees to render such assistance to our staff at [the factory at] Littlers Close as may be requested…"

31. Macnaghten J decided that the continuing payments were taxable under Schedule E of the Income Tax Act 1918. He said this at pages 196-197: -

> "…it is said on [Mr. Hofman's] behalf that, although the payments are described as salary, they should be regarded as payments made for the loss of office, as if Parnall Components, Ltd., being anxious to install Mr. Hill as the works manager at their factory, had broken their agreement of 2nd May, 1940, without the Appellant's consent, and he had thereupon brought an action for breach of contract against the company and had recovered those sums by way of damages, or as if, in consideration of the cancellation of the agreement of 2nd May, 1940, Parnall Components, Ltd. had agreed to pay a lump sum down. I can see no reason why such a construction of the letter of 5th December 1940, should be placed upon it. **The letter is quite plain. The agreement of 2nd May, 1940, is to be cancelled but not wholly cancelled; the provision for the payment of the fixed salary of £750 per annum is to remain in force until the end of the year 1941.** There is no reason for construing it in any other way. The words are quite plain: "That the existing Service Agreements dated 2nd May 1940 … shall be cancelled forthwith, subject to the continuance of the fixed remuneration provided for in Clause 4". I cannot read that as meaning anything else than the obligation of Parnall Components, Ltd. to pay that salary, and at the same time the waiver of its right to call upon Mr. Hofman to perform the duties of a works manager. **It is said that he ceased to hold the office of works manager, and no doubt he did; but the continuance in the office of works manager does not affect the question of his liability to Income Tax under Schedule E in respect of the remuneration paid to him by Parnall Components, Ltd**. …" (emphasis added).

32. The case is only really problematic because Macnaghten J said: "[i]t is said that he ceased to hold the office of works manager, and no doubt he did", which rather contradicted what he had said before, namely that "[t]he letter is quite plain. The agreement of 2nd May, 1940, is to be cancelled but not wholly cancelled". It seems to us that, on a proper reading of his judgment, Macnaghten J was saying that the employment contract was not wholly cancelled. Mr Hofman would no longer be works manager but would still be offering services in some capacity. If the case is understood in that way (as it was in *Henley* and *EMI*) it makes perfect sense. It was a case of partial termination or variation of the contract of employment, with payments continuing to be made thereunder, thus making them taxable.

Henley (1950): Court of Appeal

33. The facts of *Henley* were that Mr Henley was the managing director and a director of a property company and its subsidiary development company. He was also the controlling shareholder of the property company. His contract as managing director provided that he was entitled to a fixed salary, and that his employment was to continue until 31st March 1944, after which it was terminable by either side with three months' notice. In 1943, the companies fell upon hard times, and the trustees of debenture holders in the subsidiary were asked to assist with the disposal of certain properties. They refused to do so unless Mr Henley's service agreements and directorships were terminated with immediate effect. Mr Henley ultimately agreed, in return for certain payments being made.

34. The Court of Appeal held that these payments were not taxable under Schedule E. The three judges gave slightly differing reasons. Sir Raymond Evershed MR was concerned that the General Commissioners had not made adequate findings of fact as to the nature of the bargain that had been reached and was also concerned to limit the principle that the case might be seen as laying down. He continued as follows at page 360: -

> "But anticipating what I shall say hereafter, I think beyond any question the bargain made in this case, and in face of the pressure from the assurance society, was this: that Mr. Henley was willing to submit to the pressure put upon him and to sever his connection with these companies altogether, to put an end to his contract, not for nothing, but provided that certain sums which were already due and unpaid were paid, and also, that there should be paid as a lump sum a further sum of money as compensation or as consideration - which I think is the more accurate word for his giving up altogether his contractual rights and ceasing entirely then and there to serve either of these companies as director, managing director or otherwise. That was the bargain and the nature of the bargain upon which my conclusion of the case depends. It is far removed from the case of an amiable arrangement for the mutual convenience of both parties though the result might not greatly differ. And I am not saying what, if the case had been of the latter kind, the proper conclusion would be".

35. Sir Raymond then continued at pages 362-3 by explaining how *Hofman* was to be understood: -

> "It is quite clear I think that bargains of this kind may take at any rate one of two forms. A man who has a contract in respect of which he is entitled to periodic remuneration may say. "Well, I will take now a lump sum instead of the periodic remuneration in the future, and though I will continue to serve under my contract, I shall not be expected to do quite as much work", or he may even say, "I shall not be expected to do any work at all." If that were the form of the arrangement in this case, I think it would be true to say that the lump sum which was paid was profits which

became payable under his contract, and that it was paid to him by virtue of his office or employment of profit within the meaning of the Schedule. Many of the cases cited were examples of that type of arrangement, for instance *Prendergast v Cameron* 23 TC 122; *Wales v Tilley* 25 TC 136, and lastly the case which was relied on by the learned Judge in the Court below [Croom-Johnson J], *Hofman v Wadman* 27 TC 192.

… it is quite plain that the real basis of the decision [in *Hofman*] was … that the bargain there was that … the employers, should remain liable under the contract for the remuneration they had contracted to pay though they gave up their right to call upon Mr. Hofman, their works manager, to perform the duties under the contract which he was bound to perform.

If that is a correct analysis then it seems to me that the case is clearly one of the first kind which I have stated - a case in which the contract persists. Though the right of one party to call upon the other for performance of its terms may be modified, or indeed wholly given up, still the corresponding right to acquire payment either of the whole sum or of some less figure is preserved and is still payable under the Contract."

36. Sir Raymond then explained a second class of case (actually two further classes of case – one of contractual abrogation, and one of damages paid for wrongful dismissal) in contra-distinction to that in *Hofman* at page 363 as follows: -

"But there is another class of case where the bargain is, as it seems to me, of an essentially different character, for in the second class of case the contract itself goes altogether and some sum becomes payable for the consideration of the total abandonment of all the contractual rights which the other party had under the contract.

In the course of the argument an extreme case was put to Mr. Selwyn Lloyd and Mr. Hills of an employer who breaks wrongfully a contract of service and discharges a servant wholly therefrom and the servant then sues for damages for wrongful dismissal. Although of course it is true to say that the sum awarded as damages arises from the contract in the sense that if there had never been a contract the sum of damages could never have been awarded, still both Mr. Selwyn Lloyd and Mr. Hills admitted, as I think they were bound to do, that in a case of that sort it would be impossible to suggest, if the facts were merely as I have stated them, that the sum awarded to him for damages was taxable under Schedule E."

37. Finally, Sir Raymond reached his conclusion at page 363 to the effect that *Henley* was a case where the payment was made for the total abrogation of the employment contract as follows: -

"I think in the circumstances of this case as I have stated them it is also not open to the Crown to say that the sum of £2,000 odd constituted profits from the office or employment, since I think upon its true analysis it constituted the consideration payable to Mr. Henley for the total

abrogation imposed upon him of his contract of employment; so that from 6th July, 1943, no contract existed under which that figure or any other sum could be paid."

38. Somervell LJ stated his conclusions somewhat differently, having said that he agreed with Sir Raymond. He reached the same conclusion, but provided an opportunity for commentators to say that he did so on a different basis. He started by stating the facts as he saw them as follows at page 366: -

> "It is common ground that that sum was not in respect of remuneration for past services. It was in respect of the salary that he could have earned if he had not resigned and the agreement had continued.
>
> The first, and I think, important fact of this case is that it is one in which the service agreement was terminated and came to an end, so that the Appellant was not in a position to perform his part of it, and the employers were under no obligation to perform their part."

39. Somervell LJ then said that the Revenue had conceded that damages for wrongful dismissal were not taxable under Schedule E, before saying that *Henley* was, in effect, a case where damages for wrongful dismissal had been agreed without litigation, concluding at page 367: -

> "It seems to me on the evidence that that is what happened here. The employer said, "You must go". I think it is perhaps clear from the position that he held that he need not have gone, but he, as he said, was forced into it; he did it at the request of the employers. The sum which he stipulated for according to his letter, it seems to me, must legally be in precisely the same position as would have been a sum for damages for wrongful dismissal.
>
> I would like to say that I am dealing with the facts of this case only. In this case it is clear that although there was not, as it were, any abrupt or dictatorial act by the employer - because probably there could not be - the initiative for the determination and the request for the determination came from the employer."

40. Somervell LJ's final contribution was to add a little uncertainty by saying: -

> "What would be the position if there were a mutual agreement between the employer and the employed that the service should be ended abruptly and a sum paid is a matter which can be dealt with when it arises".

41. Jenkins LJ also agreed (either with Sir Raymond or Somervell LJ or both – which is not clear). He also stated his understanding of the facts at page 368, concluding that: -

> "There is no express finding on this vital point but I think it is a matter of inference. The board requested the Appellant to resign. He agreed and this payment was made to him. It is not to be assumed that the payment was

> voluntarily made by the company for no consideration, and I think the necessary inference is that the bargain was to the effect that the Appellant should resign and that in consideration of his so resigning the company should make him this payment".

5 42. His conclusion of law on those facts was that: -

> "the payment in question was not a payment of remuneration but was a payment made in consideration of the Appellant at the request of the company, giving up his right to continue to be employed by the company down to 31st March, 1944, and to earn and receive his contractual remuneration down to that date … It was a simple case of resignation under which the office was to be immediately vacated and no further services were to be performed … this sum can only be regarded on the facts of this case as paid to the Appellant in consideration of his surrendering his right to serve on and be remunerated down to the end of his contractual engagement …".

43. On analysis, therefore, it seems to us that the only real confusion is caused by Sir Raymond's anticipatory summary at page 360, and by Somervell LJ's indication that he was not deciding what should happen in a case of mutually agreed termination of an employment contract. These passages make it look as if the pressure placed on Mr Henley to agree might have some special significance and affect the *ratio decidendi*. We do not think, on analysis, that that is correct. Sir Raymond's substantive treatment of the legal position makes clear that the case is one where "the bargain [was one where] the contract itself goes altogether and some sum becomes payable for the consideration of the total abandonment of all the contractual rights which the other party had under the contract". Jenkins LJ held that the payments were not taxable because they were paid "in consideration of [Mr Henley] surrendering his right to serve on and be remunerated down to the end of his contractual engagement". Somervell LJ may have equiparated the situation with a payment for wrongful dismissal, but reached the same conclusion as the remainder of the court.

Dale (1950): Court of Appeal

44. In *Dale*, the facts fell on the other side of the line. Colonel de Soissons was appointed on a three-year fixed term from 1st January 1945 for a fixed salary of £3,000 per annum plus a commission on profits. The employer was entitled to terminate the agreement at 31st December 1945 or 31st December 1946, in return for payment of £10,000 or £6,000, respectively, as "compensation for loss of office". The company terminated the agreement on 31st December 1945 and paid the required £10,000 to Colonel de Soissons.

40 45. The Court of Appeal (Sir Raymond Evershed MR, Bucknill and Jenkins LJJ) decided *Dale* two weeks after *Henley*. Sir Raymond (with whom Bucknill and Jenkins LJJ agreed) began at page 126 by commenting that "[c]ases of this character are never easy" and "the line between those in which the taxpayer has succeeded and those in which he has failed may perhaps be described as "a

little wobbly"". He concluded clearly, however, by saying at page 127 that "the correct answer is that given by Roxburgh, J., namely, that this £10,000 was part of the remuneration which Colonel de Soissons was entitled to get under, and received from, his contract of service". The formula "by way of compensation for loss of office" used in the contract was not conclusive. At page 128, Sir Raymond summarised his conclusion as follows: -

> "the effect of it was that Colonel de Soissons engaged himself, if called upon, to serve for three years at a remuneration which was specified, but the right was given to the company to make his term a shorter one. In that event, as it seems to me, the remuneration for the services took the form in part of a remuneration plus a commission for the period he in fact served, plus a further sum which he was contractually entitled to get under the terms of his agreement and as part of the bargain which he made."

46. As it seems to us, therefore, the parameters of the distinction between a payment for the abrogation of a contract of employment and a payment made in pursuance of a contract of employment were already in existence after *Henley* and *Dale* in 1950.

Clayton v. Lavender (Inspector of Taxes) (1965) 42 TC 607 ("*Clayton*"): High Court: Stamp J

47. We were taken in detail to the decision in *Clayton*, but we must confess to not having gained much further assistance from it. There, Mr Clayton was employed for five years at an annual remuneration of £4,000, but agreed after one year to terminate his contract forthwith, in return for a sum of £4,000 per annum for the next year, and £2,000 per annum for the year after that, payable in monthly instalments. He rendered no further services thereafter. Stamp J held that the payments were made "in consideration of the surrender of his rights in respect of his office or employment". He said that he was "conscious that in so holding [he was] not following the judgment of Macnaghten, J., in *Hofman*", commenting that he did think it relevant that no further services were to be performed in *Clayton*. This seems to us to be an entirely orthodox application of *Henley*, notwithstanding some of the comments made by Stamp J in relation to that decision.

EMI (1999): Court of Appeal

48. The facts of *EMI* concerned the contracts of various senior employees of EMI. These provided that EMI would give the employees six months' notice of its intention to terminate employment, but the company reserved the right to make payment of the equivalent of salary in lieu of notice. It ultimately decided to make the payments in lieu of notice.

49. Both HMRC and Tottenham Hotspur relied particularly on a passage in Chadwick LJ's judgment (with which Simon Brown LJ and Rattee J agreed) at page 810 as follows: -

> "The question, therefore, is whether a payment in lieu of notice made in pursuance of a contractual provision, agreed at the outset of the employment, which enables the employer to terminate the employment on making that payment is properly to be regarded as an emolument from that employment. In the absence of authority which compels a contrary conclusion, I would have no doubt that that question must be answered in the affirmative. It seems to me to fall squarely within the tests posed by Lord Radcliffe in *Hochstrasser (Inspector of Taxes) v Mayes* [1960] AC 376 at 391–392, 38 TC 673 at 707—'paid to him in return for acting as or being an employee' and by Lord Templeman in *Shilton v Wilmshurst (Inspector of Taxes)* [1991] STC 88 at 91, [1991] 1 AC 684 at 689—'an emolument "from being or becoming an employee"'—which Lord Woolf approved in *Mairs (Inspector of Taxes) v Haughey* [1993] STC 569 at 579, [1994] 1 AC 303 at 320–321.
>
> The point can, I think, be illuminated by considering the related question **'why is the employee entitled to six months' notice of the employer's intention to terminate his employment?' The answer must be 'because that was the security, or continuity, of employment which the employee required as an inducement to enter into the contract of employment'.** The answer to the question 'why is the employee entitled to a payment equal to his salary for the remainder of the six-month period if his employment is terminated by less than six months' notice?' must be the same: 'that was the security, or continuity, of salary which he required as an inducement to enter the employment'" (emphasis added).

50. The remainder of Chadwick LJ's judgment dealt with the question of whether there was authority which compels a contrary conclusion. In dealing with *Henley* at page 813h, Chadwick LJ seems to have thought that it was based on the payment being liquidated damages for wrongful dismissal, but correctly interpreted *Dale* as being decided on the basis that the payments there were "properly to be treated as an element of remuneration". He concluded that there was a true analogy with *Dale*. At page 815, he said this: -

> "In *Dale* … the bargain, made **at the commencement of the employment**, was that the employee would be employed for a term of three years **unless the employer, on payment of a sum of money**, chose to terminate the employment at the end of the first or the second year. In the present case the bargain, **again made at the commencement of the employment**, was that the employee would be employed for a term which would continue for a period of six months after the taxpayer company gave notice of intention to dismiss; **unless the taxpayer company, on payment of a sum of money**, chose to terminate the employment within that period of six months. The fact that, in the one case, the payment was fixed at the outset while, in the other case, the payment would be fixed by reference to the salary at the time of termination is immaterial. In both cases the bargain made **at the commencement of the employment was that the employee should have the security of employment—or the security of a right to continue receiving salary—for a given period; or**

that, in the alternative and at the option of the employer, the employee should receive an additional payment on termination. In both cases the employee was entitled to the additional payment, in the event which happened, in lieu of salary from continuing employment **under the terms of the contract by which he had agreed to serve the employer**" (emphasis added).

51. In our view, *EMI* does indeed go a long way towards making good Mr Maugham's third proposition recited above, to the effect that the distinction between a payment made to abrogate an employment contract and a payment made in pursuance of an employment contract is that "when a contract of employment contains a clause entitling an employee to a sum of money on early termination, the security of knowing he will get that sum on early termination forms part of the consideration for which he works". It is to be noted that the clauses in question always had the effect of entitling the employee to a sum of money if the contract were to be terminated. HMRC's submission was that a clause that had no such effect was good enough, but it can be commented even at this stage that there is a significant difference between a clause that provides for a payment on termination, and one which does not.

Richardson (2001): High Court: Lloyd J

52. The facts of *Richardson* were that, from 1st December 1994, Mr Delaney was employed at a salary of £60,000 per annum. His employment could be terminated by either party on 18 months' notice (clause 1.2), and his employer could terminate his contract immediately by paying him salary in lieu of notice (clause 1.3). In December 1995, following negotiations, it was agreed that Mr Delaney's employment would be terminated immediately on the basis that his employer would pay him £75,000 and he would retain his company car.

53. It may be noted at the outset that, whilst *Henley* was indeed not cited to Lloyd J, *EMI* was, and Chadwick LJ's judgment in *EMI* makes extensive reference to *Henley*. Lloyd J also said at page 181 that he had read the judgment in *EMI* in full. As we have said, Mr Maugham submitted that *Richardson* was wrong, though in the course of later submissions suggested that the decision was "probably right, but for the wrong reasons".

54. Lloyd J concluded his judgment as follows at page 185-6: -

"As I say, the circumstances are not precisely within the ambit of the previous decision in *EMI*, and of course they are further away still from *Dale v. de Soissons*. But it is fair to note that if the employer on the 1 December had tendered to the taxpayer £90,000, however made up, by way of payment in lieu of notice, it is clear that that payment would have been an emolument from the employment, and therefore taxable under s 19, and that is what the Court of Appeal held in *EMI* itself. Equally, if, rather than pay in lieu of notice, the notice had been given and had remained a notice under 1.2, taking effect in 18 months' time, and if the

employer had gone on paying the taxpayer, the monthly salary of course would have been subject to tax.

The question then is how can it be said that by giving a notice under 1.2, retaining the taxpayer in employment for four weeks, paying him for that period, which is unquestionably subject to tax, and then agreeing with him a package for the immediate termination of the employment after the four weeks, which in economic terms as between him and the employer is at any rate very close to what would have been due to have been paid if the 1.3 option had been taken, and thereby terminating his employment, how can that variation between the 1.2 and the 1.3 procedures, both of which would be subject to tax, how can this intermediate course manage to escape being subject to tax?

In my judgment, the answer is that it does not. The only way in which it could is that which was identified to and by the General Commissioners, namely that the payment was of damages or other compensation for a breach of contract by the employer, but the plain and simple fact is that there was no breach by the employer. The employer was acting perfectly well within its rights in giving notice on the 1 December under clause 1.2, and it was acting perfectly lawfully when it came to an agreement with the taxpayer on or about the 28 December, and whereby the employment came to an end by agreement in consideration of the payment. There is no breach of contract involved there and, in my judgment therefore, the General Commissioners' conclusion was one which is based on a finding which was not open to them, and the only possible conclusion is that the whole sum was indeed chargeable to tax rather than only the excess over £30,000."

55. As it seems to us, valid criticisms can be made of parts of this formulation, but there is little purpose in our subjecting the judgment to a meticulous analysis, when we have the clear guidance of the Court of Appeal in *Henley*, *Dale* and *EMI* to follow.

Martin (2015): UT(TCC): Warren J

56. *Martin* did not concern the question of whether a payment made by an employer to an employee was "from" employment, but whether a payment made by an employee to an employer (namely repayment of part of a signing bonus following termination of employment) could constitute "negative taxable earnings". However, the Upper Tribunal chose to adopt similar principles and analysed many of the authorities referred to above.

57. Having summarised cases including *Henley* and *Dale*, Warren J summarised the applicable principles at paragraph 63 as follows: -

"One sees in these authorities that the search is for the reason for which the payment in question is made. The cases show that a distinction is to be drawn between those where the payment flows from the implementation of the contract (as in *Dale v de Soissons*) and those where the payment

arises as the result of the abrogation of the contract (as in *Henley v Murray*). Mr Tolley suggests that there is a material distinction between cases where the payment arises as a result of something which one or other of the parties is permitted to do in accordance with the terms of the contract (again as in *Dale v de Soissons*) and a case which involves a breach of contract. *Henley v Murray* does not, however, establish that such a distinction is material. It did not involve breach: there was no breach of contract in the parties to it agreeing to vary its terms, indeed going so far as to abrogate it".

58. We broadly agree with the analysis in this paragraph.

59. With that introduction to the authorities, we turn now to deal with the grounds raised by HMRC in support of their appeal against the FTT's decision.

<u>Ground 1: The FTT gave inadequate weight to the express terms of the contracts allowing for termination by mutual agreement</u>

60. We have looked carefully at HMRC's submissions on the precise terms of the contractual arrangements between each of the Players and Tottenham Hotspur, and we accept that the relationship is a highly regulated one, constrained by the detailed provisions of the three sets of rules to which we have referred. We do not, however, think that it is as important as HMRC submitted that each of the Players was entitled to stay on for the full term of their contract unless they agreed a consensual termination. In fact, Tottenham Hotspur could have dismissed either of the players without cause had they been prepared to accept the relatively draconian consequences of doing so. But that too does not seem to us to be the real issue.

61. The real question is whether, in the light of the authorities we have explained, it would be right to regard an express clause in an employment contract allowing consensual termination of a fixed term, but not providing expressly for any payment as part of such an arrangement, as being equivalent to a 'payment in lieu of notice' clause like that found in *EMI* (and also in *Richardson*). We do not think so. We find ourselves in agreement with the FTT. For the reasons we have already given in the course of our treatment of the authorities, we think that the true distinction for which the tribunal is looking is between cases where the entire contract of employment is abrogated in exchange for the termination payment (as in *Henley*), and cases where the payment is made in pursuance of a pre-existing obligation to make such a payment arising under a contract of employment.

62. As Chadwick LJ explained in *EMI*, the bargain made (even if the actual payment is fixed at the time of termination) is "that the employee should have the security of employment—or the security of a right to continue receiving salary—for a given period; or that, in the alternative and at the option of the employer, the employee should receive an additional payment on termination". We understand that it could be argued that a fixed term contract by itself gives the employee this kind of security, so that it can be regarded as immaterial whether the contract includes a clause requiring either a 'payment

in lieu of notice' or a similar provision. But *Henley* was a case where the employee had the benefit of a fixed term contract, and when he agreed a termination payment to bring the fixed term to an end, the payment was not held to be taxable. We accept that Somervell LJ expressly said that he was not deciding what should happen in a simple mutual agreement case, and that Sir Raymond Evershed MR thought the case to be far removed from "the case of an amiable arrangement for the mutual convenience of the parties". But we are unable to understand why it should matter that one or both parties are under pressure to agree a termination. That will always be the case to a greater or lesser extent, and cannot affect the nature of the payment that is agreed.

63. Rather, we think that the cases, properly understood, clearly demonstrate that the relevant distinction is the one already mentioned, namely between cases where the entire contract of employment is abrogated in exchange for the termination payment (as in *Henley*), and cases where the payment is made in pursuance of a pre-existing obligation to make such a payment arising under a contract of employment (as in *Dale* and *EMI*). Once one puts the proposition in this way, we do not think any of the decisions made in the authorities is actually inconsistent. There are some loose *dicta*, but the principles are clear.

64. If HMRC were right that any contractual provision allowing early consensual agreement for a termination is sufficient to make the termination payment made under the resulting agreement "from an employment", that would cover almost every termination payment agreed in respect of a fixed term contract, because there is nearly always going to be an express or implied right to *agree* an early termination. In any event, it is somewhat counter-intuitive to say that a payment agreed to terminate an employment contract absolutely is an emolument "from an employment". Although the background to the payment may be the employment contract, the payment itself is not from the employment, but rather in consideration of the termination of the employment. If the payment is an agreed payment in lieu of notice paid in pursuance of an express term, that is a different matter, as was held in *Dale* and *EMI*.

65. Even if it is a little hard to see the logical distinction between a situation in which an employee is paid the wages due for the remaining period of a fixed term contract in return for the abrogation of that contract, and a situation in which the same sum is paid in pursuance of an express clause providing for such a payment in such a situation, that distinction is, as it seems to us, too clearly established by the authorities for us to depart from it.

66. Accordingly, we cannot accede to HMRC's first and primary ground of appeal. In our judgment, as we have said, the FTT was right.

Ground 2: The FTT was wrong to follow *Henley*, because there the abrogation of the employee's rights was imposed upon him, and the court left open the question of a termination by mutual consent

67. We have already dealt above with the suggestion that the *ratio* of *Henley* was that the payment was made under pressure. In our view, that was not the *ratio* of the decision. In any event, here both Players were under pressure to agree the payments so as to avoid being left on the bench or having their careers impaired. We do not, as we have said, think that the tax treatment of a termination payment agreed pursuant to a mutual consent clause was really left open by *Henley*. The waters were slightly muddied by considerations of the treatment of damages for wrongful dismissal, but ultimately the decision made in *Henley* was, as we have explained, clear. As Jenkins LJ put it: "the necessary inference is that the bargain was to the effect that [Mr Henley] should resign and that in consideration of his so resigning the company should make him this payment". As Sir Raymond Evershed MR put it in describing his second class of case: "the contract itself goes altogether and some sum becomes payable for the consideration of the total abandonment of all the contractual rights which the other party had under the contract". Those formulations describe exactly the situation in this case.

68. We cannot, therefore, accept HMRC's second ground of appeal.

Ground 3: The FTT wrongly interpreted *Martin*, because Warren J had found that the payments were taxable as they flowed from an amended employment contract, which had been agreed as a first stage, before the parties acted in accordance with that amended contract

69. We have dealt briefly above with *Martin*. When Warren J decided *Martin*, we do not think the point was open. It was already circumscribed by the three Court of Appeal cases we have mentioned in detail. In these circumstances, this ground of appeal cannot succeed, and we see no benefit in engaging in a detailed analysis of what was a rather different and more complex case.

Ground 4: The FTT wrongly failed in paragraphs 101 and 102 of its decision to follow the bindings decisions of *Richardson* and *Hofman*, where agreed termination payments were held to be taxable

70. We have already explained each of *Hofman* and *Richardson*. Neither can change the position as explained in the Court of Appeal cases for the reasons already given.

Ground 5: The FTT failed to attach sufficient importance to FA Rule C.1(k)(v) and Premier League Rule L.27 which provide that termination of a player's contract will result in termination of the player's registration, and to FIFA Rule 17.4 which imposes sanctions on clubs that terminate a player's contract without cause or consent. Tottenham Hotspur would not have breached these rules

71. As was explained in argument, this ground of appeal really formed the premise to ground 1, and we have dealt with it under that heading. We do not think that the difficulty of terminating the Players' contracts can affect the question that needs to be asked in order to determine whether the termination payments were or were not "from an employment".

Conclusions

72. For the reasons we have given, we reject each of the grounds of appeal raised by HMRC and have decided that this appeal should be dismissed. In our view, the authorities show that the relevant distinction is between cases where the entire contract of employment is abrogated in exchange for the termination payment (as in *Henley*), and cases where the payment is made in pursuance of a pre-existing obligation to make such a payment arising under a contract of employment (as in *Dale* and *EMI*). This case fell squarely into the first category.

Sir Geoffrey Vos, Chancellor of the High Court, Judge of the Upper Tribunal
Upper Tribunal Judge Tim Herrington

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