TC02030

Appeal number: TC/2011/05584

National Insurance contributions. Regulation 60 **Social Security (Contributions) Regulations 2001**

FIRST-TIER TRIBUNAL
TAX CHAMBER

FREDERICK WOOD **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q.C.
ANTHONY HUGHES ESQ

Sitting in public at 45 Bedford Square, London WC1 on 02 May 2012

Mr. Moran, counsel for the Appellant

Mrs Storey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Although we were not given his precise date of birth, the appellant, Mr Wood, told us that he is now 71 years of age. When he attained retirement age, at 65 years, he had expected to receive a full retirement pension. He has not received a full pension but something approximating to 41% of the usual maximum state pension. The appellant was and is aggrieved at that position and since 2008 has corresponded first with the National Insurance Office and latterly with HMRC, which now deals with such matters. The appellant has been awarded only a partial pension on the basis that he has not made sufficient national insurance contributions in a sufficient number of years prior to retirement.

2. The appellant contends that since leaving school at the age of 15 years, apart from a period of two years when he was in borstal, he has never been out of work and has always been in employment as an employee or self employed.

3. It is common ground that this appeal concerns numerous years 1952 – 1998 and the amount of national insurance contributions paid by the appellant during those several years, with some exceptions where the respondent accept that a given number of contributions were paid. After a protracted period of dispute about this matter the respondent issued its decision on the 10 February 2011. The respondent has proceeded on the basis that as its own records do not record that appropriate National Insurance contributions were paid by or on the half of the appellant, it must follow that they were not paid.

4. The appellant has appealed and we must now consider the available evidence to determine whether, in respect of any of the years 1952 – 1999, contributions were paid or are to be treated as having been paid. If we so find, in respect of a sufficient number of years, the appellant's retirement pension entitlement will be enhanced and he may be due a significant back payment.

5. Before passing to the facts relevant in this case it is important that I should record that the respondent called no witnesses. The respondent has sought to rely solely upon written records in circumstances where it knows that the accuracy of those written records is disputed. The documents produced by the respondent are not agreed documents in the sense that the accuracy and reliability of the content of the several documents adduced is agreed.

6. It was accepted on behalf of the appellant's that he bears the onus of proof, on the balance of probabilities, of demonstrating that various National Insurance contributions had been paid.

7. At this stage it is appropriate to record that the appellant places reliance upon regulation 60 of the Social Security (Contributions) Regulations 2001. The relevant part of regulation 60 is as follows :

"If a primary class one contribution payable on a primary contributor's behalf by a secondary contributor is not paid, and the failure to pay that contribution is shown to

the satisfaction of the Board not to have been with the consent or connivance of, or attributable to any negligence on the part of the primary contributor, that contribution shall be treated ..... for any other purpose of entitlement to contributory benefit, as paid on the due date."

8. Mr Moran places reliance upon that Regulation in respect of the periods during which the appellant says he was an employee of various employers.

9. It was common ground at the hearing before us that by reason of the various statutory provisions and regulations helpfully summarised by the respondent in its Case Statement, this Tribunal is competent to hear and determine the appellant's appeal against the decision to treat him as not having a National Insurance contributions in the various years to which we will now turn.

10. We approach this appeal mindful of the fact that the appellant has been giving evidence of a history spreading back over a period of 50 years. That is an unenviable task and it is entirely understandable that he has few surviving documents to adduce in evidence. The reality is that this case turns upon the reliability of the appellant and his wife as witnesses of fact and thus, in large measure, upon their veracity.

11. I should record that the appellant's national insurance contributions year does not accord with the usual fiscal year; it runs from December – December in respect of each contribution year.

12. The appellant gave evidence on oath. He referred to the Decision Letter dated 10 February 2011, pages 37 – 39 in the respondent's bundle, and told us that notwithstanding the content thereof, which is based upon the respondent's internal records, he had made full National Insurance contributions over the entire 37 year period between 1953 – 1990. At the hearing the appellant produced an "Updated Approximate Period of Employment" schedule in which he, with the support of his wife, has attempted to recall, with reasonable accuracy, the various firms or companies by which he was employed and the periods of time throughout which he was employed by any such employer. We have already indicated that such a feat of memory, largely unaided by documents, is an unenviable task and it was quite unsurprising to us that they needed to be approximations given to the best of Mr Wood's recollection.

13. By reference to that schedule the appellant said that after leaving school at the age of 15, he undertook a one year apprenticeship in painting and decorating with Arnold Sharrocks, earning £3.16s.10d per week. He recalls that his apprenticeship involved attending the Brixton School of Building on one day in each week. The appellant said that after completing his apprenticeship he went to work for Gilmores Limited in Tottenham Court Road as a delivery boy delivering material to and collecting clothing from those engaged in the rag trade. He said that he was in that employment for some 18 months, earning around £4 per week. The respondent's schedule shows 49 National Insurance contribution credits for the year 1953 – 1954, which, we remind ourselves, means December 1953 – December 1954. It showed only 13 for the preceding year.

14. After or whilst working for Gilmores, for reasons not relevant to this Decision, the appellant managed to get himself sentenced to a period of borstal training and he was in custody November 1955 – October 1957.

15. The appellant said that the respondent's manuscript record at pages 97 – 98 in the respondent's bundle is wrong when it records that he was in custody November 1955 – October 1959. We take the view that the appellant has simply mis-read the manuscript entry because it appears to us to refer to his release from custody on 3 October 1957, not 3 October 1959. We can well understand why the appellant may have thought that it referred to 1959 as the manuscript is not entirely clear or easy to read. Nonetheless, even in the 1950s, it would have been unusual for a period of borstal training to last a period of four years.

16. The appellant's evidence is that after being released from custody he worked as a drayman for Trumans Brewery. He says that he undertook that employment for a period of 10 months in 1958 and possibly into 1959. He says that this is particularly memorable to him because it was whilst he was working at Trumans that he met the lady who is now his wife. He said that he left because he needed the accrued holiday pay due to him to be paid immediately so that he had funds with which to pay for his wedding. We note that in the contribution year 1957 – 1958 the appellant was credited with 49 class one contributions.

17. The appellant's evidence is that after leaving Trumans and marrying on 28 February 1959, he started working as a self employed window cleaner. On his behalf Mr Moran relies heavily upon that aspect of the appellant's case because it is accepted by the respondent that in 1959 – 1960 and then 1960 – 1961 the appellant did pay regular class two (self-employed) National Insurance contributions. He particularly prays that in aid as being indicative of the fact that the appellant, notwithstanding that he was engaged in self employment of a type that generated mainly cash income on a fairly informal basis, nonetheless paid his class two contributions. They are duly recorded.

18. The appellant said that he spent 18 months as a self-employed window cleaner, which is entirely consistent with the class two contributions record produced by the respondent. He says that he then went to work for Williams, Smith and Evans, a roofing firm, sometime in 1960. It is possible that this was actually 1961 because in the period December 1960 – December 1961 the appellant is recorded as having paid 31 class two contributions in addition to 12 class one contributions. For the next four years full class one contributions are recorded; that being the period of time during which the appellant says that he was employed by Baker's Meat (at Smithfield Market), Neville's Bread, the producers of the inappropriately named Wonderloaf and then Lyons Bread in Tottenham. According to the respondent they were then no class one or class two contributions paid December 1965 – December 1975. On the face of the respondent's documents that is perhaps surprising because at page 38 of the respondent's bundle the respondent sets out what it says were the appellant's "Employment Details", which showed the appellant as employed by various employers probably up until December 1966. It would seem strange that large

employers, engaged in the food production business, should fail to make the appropriate contributions.

19. The poor quality photocopy document at page 77 in the respondent's bundle, which seems to have been generated by J. Lyons & Company Ltd seems to record that the appellant left its employ in June 1965. That is consistent with an entry of 50 class one contributions for the contribution year 1964 – 1965. However, it is not consistent with the appellant's evidence that he also worked for G Brazil & Co Ltd for about one year around 1966, being employment which overlapped with him and his wife purchasing the lease of a property from which they ran a grocery business.

20. The appellant's evidence is that from 1966 he was self-employed for a period of four years whilst running the grocery business with his brother. It emerged in evidence that his brother also receives a reduced pension. The appellant gave evidence to the effect that he was responsible for purchasing the national insurance stamps from the post office in Brixton and then affixing the appropriate stamps to the stamp cards for his employees (class one) and to his own card (class two). He said that at the end of each tax year the card would be taken to the Brixton tax office and surrendered for a new card. His evidence was that he was well aware that National Insurance inspectors could arrive at the business at any time and demand to see the stamp cards which had to be kept up to date. The appellant was adamant that he stamped all appropriate cards as required.

21. Perhaps because the opening of the grocery stores, initially in Stockwell, and thereafter at other locations coincided with the arrival of larger stores which have come to be called supermarkets, the appellant and his brother ceased their involvement in the grocery store business by around 1972. The appellant said that he then went to work for Apex Motors, a business owned and operated by Ronnie Verier. He said that by that stage he could earn up to £700 per week if sales were buoyant, because a large part of his earnings came from commission. He said that he was paid in cash by Jean Verier who attended to the payroll. The appellant's schedule then refers to him working for Berenmead Autos, a business also owned by Mr Verier.

22. Between 1979 – 1989 the appellant was a director of European Yacht Cruises Limited. That company ran cruises on various European canals and rivers. The appellant said that he attended to the national insurance payments on behalf of the company and produced a copy of that company's accounts for its year ended 31 October 1988. Those accounts do not demonstrate that National Insurance contributions were paid, but reliance is placed upon numbered paragraph 4 on the first page thereof, which reads *"The Directors salaries, including employer's NIC for the year, were as follows: ....."* The appellant said that the accounts were prepared by accountants, Spurling & Co. Notwithstanding that there has been ample time within which enquiries could have been made, neither side has adduced evidence to show that National Insurance contributions were or were not paid by the company in respect of all or any of its employees (excluding its directors).

23. So far as the period 1979 – 1989 is concerned there are reasons for us to doubt whether or not the financial affairs of the company were being operated entirely satisfactorily. That is because several documents relating to the tax affairs of the company demonstrate that tax was paid late, sometimes by several years. The document at page 12 in the respondent's bundle shows that income tax and national insurance contributions for the fiscal year 1980 – 1981 were only finally paid by the company on 10 August 1987. That letter is but an example of others that appear at pages 10 – 14 in the respondent's bundle.

24. In that context we return to regulation 60 of the 2001 Regulations, cited above. The appellant was employed by the company of which he was a director and he has told us that he was the person responsible for the national insurance contributions and tax matters with the assistance and guidance of the company's accountants. Whilst we do not consider that any defaults occurred with the consent of, or based upon the connivance of, the appellant, we find it difficult to avoid the inference that the appellant, being the director responsible for such matters, was negligent in and about causing the tax and national insurance affairs of the company to be kept up-to-date and regularised after the summer of 1987 given the correspondence referred to above. This is insufficient evidence to justify a finding of such negligence prior to the summer 1987 when, we accept, Spurling & Co was dealing with the tax and national insurance matters, as there is nothing to gainsay the appellant's evidence that he placed reliance on that firm and was unaware of any default. The same cannot be said beyond the summer of 1987.

25. Our conclusion is that regulation 60 of the 2001 Regulations operates in favour of the appellant throughout the various years that he was in employment other than the employment of European Yacht Cruises Limited. We exclude the period of employment with European Yacht as a result of the conclusion that we have reached in paragraph 26 above.

26. We accept the appellant's evidence that he was employed in the various employments to which he has referred during the course of his oral evidence. In that regard he was supported by his wife, Mrs Wood, who also gave oral evidence on oath. She was a careful witness and did not pretend to remember things that she did not remember or attempt to speak about matters outside her knowledge or memory. On one matter she was firm: that is, that her husband was always in work and that there was no time during which he was out of work and/or claiming state benefits.

27. We have to do the best we can on the basis of what is a reconstruction exercise going back to 1953. We do not pretend that our analysis can be precise or accurate so far as dates are concerned. However, our task is to decide this matter on the balance of probabilities, doing the best we can on the available evidence. In our judgement, the most important finding we make is that both Mr and Mrs Wood were, in our judgement, honest witnesses doing the best they could to give as accurate and reliable an account as the passage of time now permits.

28. Based upon the evidence that we have heard, we find as a fact that the appellant either paid, or by reason of regulation 60 of the 2001 Regulations is to be treated as

having paid, class one contributions, in respect of each of the contribution period December 1953 – 18 November 1955 (when the appellant was sent borstal). We make the same finding in respect of the period 1 December 1958 – 30 November 1959. We find that in respect of the appellant's period of self-employment as a window cleaner, 1 December 1961 – 30 November 1963, the appellant paid all due self-employed class two contributions. There is no issue in respect of the contributions for December 1961 – December 1965.

29. In respect of the period when the appellant was working as a self-employed grocer (at different locations), we find that he did pay class two contributions, as required, for each of the years December 1966 – December 1972.

30. In respect of the years when the appellant was employed by Apex and/or Berenmead we find that the appellant is again entitled to rely upon Regulation 60 of the 2001 Regulations which means that we find that he has either paid or is to be treated as having paid class one contributions December 1972 – December 1978.

31. For the reasons set out in paragraph 26 above we make a finding favourable to Mr Wood, in respect of his period of employment with European Yacht Cruises Ltd for the period 1979 – 1986 only (December 1979 – December 1986).

32. It follows that the appellant must be credited with the appropriate contributions for the several years mentioned above. It will be for others to calculate the back payment of pension (with interest) due and payable to the appellant.

33. This contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

GERAINT JONES Q.C.
TRIBUNAL JUDGE

RELEASE DATE: 17 May 2012