[2016] UKFTT 667 (TC)

TC05393

Appeal number: TC/2016/01223

National Insurance Contributions – voluntary Class 2 or Class 3 contributions in respect of periods abroad- whether failure to pay was not due to failure to exercise due care and diligence- appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN HOUSTON MCKINNON **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK
SUSAN LOUSADA

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 25 August 2016

The appellant in person

Mrs Lesley Crawford, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against a decision of HMRC dated 9 September 2015 under s 8 Social Security Contributions (Transfer of Functions, etc.) Act 1999, the effect of which was to refuse to permit the appellant to make voluntary Class 2 or 3 National Insurance Contributions ("NICs") in respect of the period from 6 April 1991 to 5 April 1997.

2. The appellant appeared in person and we should pay tribute to the very clear and helpful way in which he put his case, which had obviously involved a great deal of research, thought and preparation. We are also grateful to Mrs Crawford, particularly for the assistance she was able to give us about the historical and administrative aspects.

The statutory rules

3. Mrs Crawford referred us at the hearing to provisions in the Social Security (Contributions) Regulations 1979 ("SSCR 1979") as the relevant provisions governing whether the appellant was entitled to make the disputed contributions. In fact, the whole of SSCR 1979 was repealed by regulation 157 and Part 1 of Schedule 8 to the Social Security (Contributions) Regulations 2001 ("SSCR 2001"). Regulation 157(2) has the effect that anything permitted to be done under SSCR 1979 is to be treated as though it was permitted to be done under SSCR 2001. We therefore consider that the applicable regulations are those found in SSCR 2001. Insofar as relevant to this dispute there is any event no material difference in the language.

4. Regulation 147 SSCR 2001 permits the voluntary payment of Class 2 or Class 3 NICs for periods where the contributor is outside the UK, provided certain conditions are fulfilled regarding prior residence or contribution history. Regulation 148 goes on to provide further conditions which include that the payment is made within the period specified, which in this case is the period ending six years after the end of the year in question.

5. Regulation 50(1) SSCR 2001 provides that if a person was entitled to pay a Class 3 contribution under the provisions of regulation 147 but failed to pay that contribution in the period specified, then if the condition in sub-paragraph (2) is satisfied the contribution may be paid within such further period as an officer of HMRC may direct.

6. Regulation 50(2) provides:

> "The condition is that an officer of the Board is satisfied that:
>
> (a) the failure is attributable to the contributor's ignorance or error; and
>
> (b) that ignorance or error was not the result of the contributor's failure to exercise due care and diligence."

Regulation 61 makes provision in similar terms in respect of Class 2 contributions.

7. Although not referred to in the submissions, regulation 6 of the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001 is also relevant. This permits contributions to be treated as paid on an appropriate earlier date if conditions are satisfied. Those conditions are substantively identical to those set out above, namely that the failure to pay them within the time limit is attributable to ignorance or error which was not the result of failure to exercise due care and diligence.

8. It is worth noting that regulation 50A SSCR 2001 also makes special provision for Class 3 contributions in respect of the tax years 1996-97 to 2001-02 to be paid outside the normal six year time limit.

9. There was no dispute about the first part of the test in regulations 50 and 61, namely whether there was ignorance or error. The sole dispute in this case relates to whether that ignorance or error was the result of the appellant's failure to exercise due care and diligence.

Evidence

10. We heard oral evidence and submissions from the appellant, who also very helpfully provided a written copy of what he had prepared to say. Documentary evidence primarily comprised correspondence between the parties, copies of the appellant's NICs record, and some documents provided by the appellant including letters from his advisers in Italy, copies of some insurance documents (in Italian) and a letter from the Inland Revenue in 1982 which is referred to below.

11. At our request we also received further submissions from both parties following the hearing. What we requested was an explanation of why the appellant's claim related to the period from 1991 to 1997 rather than extending to any earlier period when he was also absent from the UK. The request was made in case the explanation was relevant to our conclusion in respect of the period in dispute. As it turned out we did not find it particularly relevant, but we have recorded the relevant facts for completeness.

The facts

12. The appellant lived in the UK until September 1980, when he left to live and work in Italy. He returned to the UK temporarily in the summers of 1981 and 1982 to work in a language school, but thereafter worked only in Italy. He was initially employed in Italy but became self employed in June 1991, having bought the business owned by his former employer (who also happened to be a UK citizen). Prior to leaving the UK in 1980 the appellant had been in employment for around three years following completion of his university education and teaching qualification. He was 25 years old at the time of his departure.

13. The appellant contacted the Inland Revenue in 1982, explaining that he was living and working in Italy and sending all his payslips from the UK and Italy for a two year period. The Inland Revenue stamped and returned these to the Italian address

provided with a covering letter which made reference to whether or not a tax refund might be due but made no mention of NICs. The letter sent to the Inland Revenue is not available.

14. At the relevant time NICs, with the exception of Class 4 contributions, were dealt with by the Department of Health and Social Security ("DHSS"). There was no general exchange of information between the Inland Revenue and DHSS, and the DHSS was accordingly not informed about the appellant's communication. The appellant did not contact the DHSS or its successor the Department of Social Security about the fact that he had left the UK or to provide an Italian address. His only direct experience of the DHSS was in relation to claims for unemployment benefit which it seems were made at some point during the appellant's temporary return visits in 1981 and 1982.

15. If the appellant had contacted the DHSS and informed them that he had left or was leaving the UK then he would have been sent two leaflets, NI38 and SA29. Mrs Crawford showed us the versions of these published in March and July 1982 respectively. Both of these leaflets contained sections covering the possibility of paying NICs voluntarily whilst abroad. As it was, the only address the DHSS had on record was the appellant's parents' address in England, from which they had moved by January 1983. The DHSS did attempt to issue "Class 1 statements" in respect of 1981-82 and 1982-83 to that address, but the second one at least was returned undelivered. These statements tended to be issued where the contributions record indicated insufficient contributions to count as a qualifying year for pensions purposes. They could be issued some time after the relevant year end, so the most likely explanation is that the appellant's parents had moved by the time that the first letter was sent out. In any event such letters were not in practice sent to non UK addresses.

16. The appellant's father (now deceased) had been the head of pensions and salaries at a large UK company, and appellant relied heavily on him for advice. The appellant was advised by his father to take out endowment policies to supplement his income in retirement. The appellant followed his father's advice and took out endowment policies in the early 1990s. The possibility of paying NICs voluntarily was never mentioned to the appellant by his father.

17. The appellant also took other advice. Two Italian firms have been advising him since 1991, an accounting firm on tax and pension issues and another firm of payroll consultants on work and social security matters. (The accounting firm may also have advised the appellant prior to that date.) There was no suggestion, however, that this extended to any advice about UK matters, including NICs.

18. At some point between 2006 and 2008 the appellant discovered the possibility of paying voluntary NICs. He took up the opportunity in 2008 and was permitted, under the normal rules, to make contributions for all periods from 1996-97 onwards. These comprised Class 3 NICs made under regulation 50A SSCR 2001 for 1996-97 to 2001-02 and Class 2 NICs thereafter (the Class 2 rate being lower than Class 3 by that point). The Class 2 contributions for 2002-03 onwards were made within the normal

six year time limit. The appellant was informed that it was not possible to pay NICs for any earlier periods.

19. In January 2015 the appellant wrote to HMRC to say that he had recently discovered that it was in fact possible to make contributions for earlier periods if his ignorance of the opportunity was not a result of failure to exercise due care and diligence, and setting out why he thought the conditions were satisfied in his case. He also explained that he had been self employed in Italy since 1991.

20. HMRC refused to accept that the appellant had exercised due care and diligence and, following an initial refusal letter dated 14 April 2015 and a further letter from the appellant, they issued a formal decision to that effect on 9 September 2015. The decision issued referred to the period from 6 April 1991 to 5 April 1997. The end date appears to be a mistake since the appellant had already made contributions for 1996-97. As regards the start date, the letters from the appellant had not expressly specified the period in respect of which he was seeking to make contributions but, as mentioned, the initial letter did say that he had been self employed in Italy since 1991. It appears from the initial refusal letter from HMRC that the decision maker was under the impression that the appellant had left the UK in 1991 at the time he became self employed, rather than around 11 years earlier when he had actually left, and this probably explains the reference to 6 April 1991.

21. In submissions following the hearing HMRC stated that, in fact, they had been aware since 2008 that the appellant had left the UK before 1991. This suggests that the decision maker either did not know that or made a mistake. (Indeed HMRC's predecessor the Inland Revenue was made aware in 1982, as discussed above.) In any event the appellant did not take any steps to correct the decision maker's apparent misunderstanding, and did not and does not seek to extend his claim to any year earlier than 1991, even though in principle the question of voluntary NICs would also be relevant to earlier years.

22. The appellant's explanation of this in further submissions following the hearing was that he had initially been under the mistaken impression that he could only make contributions in respect of years when he was self employed. He also confirmed that he had benefitted from employer contributions to the Italian State pension system for the period between 1980 and 1991. (This is consistent with the fact that the appellant only took out additional endowment protection in the early 1990s, after he became self employed.) It is not clear exactly when the appellant appreciated that he could make contributions for earlier years, and it may have been only on the date of the hearing. However, the appellant confirmed following the hearing that he believes that he does not need to pay contributions for any period prior to 1991 in order to qualify for a full State pension. He also candidly mentioned that paying contributions for 1991 to 1997 might result in further benefits to his Italian pension position, but that this was not certain.

23. In any event the decision issued in respect of the period from 6 April 1991 to 5 April 1997 is the only decision that is the subject of this appeal.

The appellant's submissions

24. The appellant submitted that the reason he had not made contributions at an earlier date was that he was ignorant of the possibility of paying NICs voluntarily. If he had been aware of the opportunity he would have taken it up. In his view he had also exercised due care and diligence. The appellant relied in particular on the following:

(1) He had (voluntarily) contacted the Inland Revenue in 1982, going out of his way to explain his tax and insurance position in both the UK and Italy by sending all his payslips.

(2) When he left the UK he had no experience of being self employed. He had been an employee for about three years but his employer had dealt with all aspects of tax and NICs and he had relied on his employer to do that. His knowledge of NICs was very superficial, and non-existent in the case of voluntary contributions. He thought the Inland Revenue was the responsible body in respect of payroll deductions, including NICs. As far as he was concerned what was then the DHSS was relevant for matters such as unemployment benefit but not payroll deductions. He had no idea, and no reason to know, that at the time there was no relevant communication between the two departments.

(3) He had relied heavily on his (now deceased) father for advice, in whom he had absolute trust. Given his father's occupation it was reasonable to rely on that advice and not to seek other advice. His father's expertise meant that the appellant's situation was highly unusual.

(4) The fact that the appellant had followed his father's advice and taken out endowment policies in the early 1990s, and the fact that the appellant also took other professional advice from firms in Italy, showed the level of care and diligence he exercised. He was extremely careful about financial matters generally, relying on these advisers, his former employer and also on bank managers and investment consultants. If he had been alerted by any of his advisers to the possibility of making modest voluntary contributions of the order of £250 a year to secure a State pension income of around £6,000 he would definitely have taken up the opportunity rather than rely on expensive endowment policies. But he never imagined the possibility of that opportunity being available. The reaction that he should have asked was not acceptable because it assumed an unusual level of imagination. He expected to be informed or warned of something of this nature. The test was "due" care and diligence, which means what was appropriate in the circumstances. Asking questions would not have been appropriate.

(5) The appellant was not alone in his ignorance. He had noticed that there was reference on the internet to voluntary NICs being HMRC's "Best Kept Secret". A better job should have been done to promote the opportunity. At the relevant time there was no internet available and the appellant had no means of knowing about the possibility of paying voluntary NICs.

25. The appellant relied on a number of cases to support his arguments. These are discussed further below.

HMRC's submissions

26. Mrs Crawford submitted that:

(1) The appellant had not informed the DHSS of his departure for Italy. Informing the Inland Revenue was not sufficient. The relevant information would have been provided by the DHSS if they had been contacted, but it was the appellant's responsibility to get in touch. The contributor has, and has always had, responsibility for his own insurance record, without reminder from the authorities.

(2) The appellant had not shown due care and diligence by relying on his father, Italian accountant or former employer. He should have made further enquiries. The cases relied on by the appellant did not support his case.

The case law

27. The leading case that discusses the test of "due care and diligence" in this context is *HMRC v Kearney* [2010] EWCA Civ 288. Mr Kearney worked for only a couple of months in the UK in 1948 when he was 19 years old, at the time the NICs scheme was introduced. Before that he had grown up in Ireland, then worked for the Palestine police force and then after that, from October 1948, for the Kenyan police force, for whom he worked for many years. He did not receive the contributions record card that was issued under the NICs scheme at that time, and although it was the practice of the Colonial Office to send employees going abroad a copy of a circular telegram and explanatory leaflets which explained the entitlement to pay voluntary NICs and advised that officers who appeared eligible and might wish to contribute should contact the relevant Newcastle NICs office, that was not done in Mr Kearney's case.

28. Arden LJ, who gave the only judgment, confirmed at [24] that there was no duty on the authorities to chase contributors, or explain the consequences of going abroad unless asked to do so. After going on to confirm that the burden of proof was on the contributor to show that he exercised due care and diligence, she then explained at [26] and [27] that the question posed was a focused one: whether the contributor could show that his ignorance (of the possibility of paying voluntary NICs) was not caused by a lack of due care and diligence. Lack of care meant lack of concern and diligence referred to failure to apply oneself to the issue. The judgment went on as follows at [29]:

> "In my judgment, the statutory question assumes that there is at least in general a duty to make some enquiries and in appropriate circumstances to follow them up. I agree with the Judge that those enquiries need not necessarily be made of the NICO. The enquiries might be sufficiently made if they were made of the employer or trade union."

29. Arden LJ went on to confirm that the correct approach, reflected in the published guidance, was to consider and balance all relevant factors. These would include the contributor's age, any relevant disability and whether he had been employed in the UK or eg left whilst a student. As to knowledge of the scheme, the following comments at [36] and [37] are worth setting out in full:

> "[36] Knowledge of the NIC scheme is also likely to be a very important factor, but it may have to be established what the source of his knowledge was and generally the degree of knowledge. Moreover, there cannot logically be an absolute rule that, if the contributor has knowledge of the existence of some aspect of the NIC scheme, he can never show that he exercised due care and diligence unless he made further enquiries about his rights or obligations. It must, as the Judge recognised, all depend on the circumstances. Nonetheless, it will be an unusual case in which a person is able to show that, while he made no contributions even after learning the basic features of the NIC scheme, he nonetheless exercised due care and diligence.
>
> [37] The decision-maker also has to look at the circumstances as they stood at the time. People can now be expected in many parts of the world to have access to the internet or to mobile phones, but that would not have been the position in the 1960s."

30. The conclusion reached was that the Commissioners' decision that Mr Kearney had shown that his ignorance was not due to lack of due care and diligence was one they could properly reach, taking account of his brief stay in the UK, his young age, the difficult work that occupied him in Kenya, the unfamiliarity of the NICs scheme at the time of its introduction and the failure to receive the circular telegram, which gave some indication that overseas service personnel should be informed about voluntary NICs. The final comment, at [54], is as follows:

> "I would observe that the result in this case should not be thought to reduce the importance of the duties imposed on those who are liable to pay NICs or who have the option to do so. Ignorance is not an excuse save in limited circumstances. It is a person's own responsibility to pay NICs, and, if he or she fails to do so at the right time, he or she may lose the chance to pay them later on the basis of ignorance at the appropriate time of the need to pay. The facts of this case are unusual, and, while of course this judgment deals only with this appeal, I would observe that facts like these may not often occur."

31. It is also worth pointing out that it is accepted that the Tribunal's jurisdiction is not limited to reviewing the reasonableness of otherwise of HMRC's decision, despite the language of the rules which refers to whether an officer of the Board "is satisfied". This was clearly the approach taken in *Kearney* and is also referred to in *Adojutelegan v Clark (Officer of the Board)* [2004] STC (SCD) 524 at [5], where Dr Avery Jones commented that he could decide whether he was satisfied in place of the Inland Revenue.

32. The appellant referred to *Dr Jeremy Schonfield v HMRC* [2013] UKFTT 244 (TC). In that case a UK based self-employed academic who had relied on an apparently competent accountant who had been recommended to him was found to

have exercised due care and diligence in circumstances where he had been paying Class 4 contributions, there was insufficient information to alert him to his failure to pay Class 2 contributions and HMRC sent no reminders due to faulty records. The appellant contrasted the case of *Rose v Revenue and Customs Commissioners* [2007] STC (SCD) 129 at [48]. In that case the contributor had been sent the relevant leaflets and either was aware of his choices or would have been if he had read the leaflets, and the Special Commissioner held that he had chosen not to exercise due care and diligence.

33. The appellant also referred to *Mr William Karel Fergus Mcpherson v HMRC* [2014] UKFTT 322 (TC), which related to an Australian citizen who had worked in the UK in a senior position for about three years. His appeal was allowed because he had made a specific enquiry of HMRC within the relevant time limit but had not received the response. He had taken the positive step of making enquiries, and it was not fatal that he had not followed up for 17 months by which time the deadline had expired.

34. *Adojutelegan* concerned a Nigerian citizen who worked in the UK during the 1960s. In dismissing the appeal Dr Avery Jones said the following at [9]:

> "If she had never heard of National Insurance I would readily agree that it could not be said that she had failed to exercise due care and diligence if she had made no inquiries about it. However, she was not ignorant about the existence of the National Insurance Scheme and must have known the basic principle that benefits were in some way related to contributions. She had some dealings with National Insurance while she was in the United Kingdom, although her employer would have done all the work in deducting Contributions. She did know enough to make a married woman's election not to pay contributions on two occasions, and to make various claims to benefits."

Discussion

35. As *Kearney* makes clear, it is important to weigh up all relevant factors. In this case they include the fact that the appellant grew up in the UK, that he worked here as a full time employee for three years and that he worked here again during visits in 1981 and 1982, when he also claimed unemployment benefit. He clearly knew of the existence of the NICs system, the concept of contributory benefits and the DHSS.

36. We do not accept that it was reasonable in the circumstances for the appellant to have assumed that the Inland Revenue dealt with all NICs matters and that contacting the Inland Revenue sufficed. The appellant is an educated person and we consider that, at the time, an educated person exercising due care and diligence would have, or certainly should have, appreciated the separate roles of the Inland Revenue and DHSS.

37. We infer that the appellant contacted the Inland Revenue to check his tax position, possibly to check whether he owed anything but also to check whether he was due a tax refund. The approach was not made with NICs in mind. We appreciate

that the payslips sent would have included some NICs details but there is no indication that the appellant raised any particular query in respect of NICs.

38. The appellant relied on the reference in *Kearney* at [29] to enquiries not necessarily needing to be made of the relevant government department (NICO in that case) and that they might sufficiently be made of an employer or trade union. In this case the appellant said he consulted his father who was a pensions manager, his employer in Italy and accountant, none of whom mentioned voluntary NICs.

39. There is no indication that the appellant made any NICs or UK State pension related enquiry of any employer, whether in the UK or Italy. Whilst the appellant had accounting and other advisers in Italy there is also no suggestion that their role extended to advising on any UK related matters, or that the appellant had asked them for advice about any UK aspects.

40. The appellant clearly did rely on his father, who given his occupation clearly had some pensions related expertise. It is unclear whether this extended beyond company pension schemes and commercial pension products. But in any event there is no suggestion that the appellant actually asked his father about the appellant's NICs or UK State pension position, or the options available to him under UK rules. We think this is distinguishable from reliance on an accountant as in the *Schonfield* case, where the accountant was specifically instructed to handle all matters connected with self employment, which clearly included his NICs position.

41. We also do not think that the *McPherson* case referred to at [33] above particularly assists the appellant. The appellant relied on a comment at [23] in that case that the appellant had delayed chasing for a response because he was not aware of the deadlines. However, we think that the key point in that case was that the appellant had made a positive enquiry about his NICs position to HMRC when he was still in time to make contributions.

42. We have not found this a straightforward decision. If no regard were paid to the case law and the policy of the rules then we could see that the appellant might be regarded as having reasonably relied on his father. However, that is not the test, and *Kearney* makes it clear that the test that we need to apply is a strict one.

43. It is clear that the concept of due care and diligence will in most cases require some kind of positive step to be taken to make enquiries: that is what diligence entails. This is consistent with the general approach that ignorance is no excuse and with the principle that the contributor is responsible for his contribution record and there is no duty on the authorities to chase contributors (*Kearney* at [24]and [54]). The cases where no specific enquiries were found to have been required, *Kearney* and *Schonfield*, involved specific circumstances- in the former case the extreme youth of the contributor and his unfamiliarity with the UK, the fact that the NICs scheme was new and the fact that the colonial service appeared to have assumed some responsibility for informing personnel of the position, and in the latter the fact that the contributor had instructed an apparently competent accountant to deal with all aspects of his self employment.

44. In this case the appellant had some knowledge and experience of the system, and left the UK after both completing university level education and working for three years. He also instructed no UK accountant. We accept that he relied on his father but the reliance appears to have been somewhat passive: he assumed that his father would have told him anything he needed to know in relation to his pensions position. We do not think that this goes quite as far as what the statute requires. As Arden LJ said at [29] in *Kearney*, there is at least in general a duty to make some enquiries and (at [36]) it will be "an unusual case in which a person is able to show that, while he made no contributions even after learning the basic features of the NIC scheme, he nonetheless exercised due care and diligence".

45. Overall, balancing all the relevant factors and applying the principles laid down in Kearney, we have concluded that the appellant has not shown that his ignorance or error was not due to a failure to exercise due care and diligence.

Disposition

46. Accordingly we dismiss the appeal.

47. This document 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.

SARAH FALK

TRIBUNAL JUDGE
RELEASE DATE: 30 SEPTEMBER 2016