



TC06062

Appeal number:TC/2016/02888

NATIONAL INSURANCE – contribution record – whether accurate – whether appellant entitled to make late contributions – whether failure to exercise due care and diligence – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KENNETH BRUMBY

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
 MR PHILIP JOLLY**

Sitting in public in Manchester on 15 May 2017

Mr Brumby appeared in person

Ms Ramsay of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. This is an appeal by Mr Brumby against a decision of HMRC dated 18
5 November 2015 in relation to his national insurance (“NI”) contributions for various
contribution years from 1953-54 to 1993-94. The decision was made by HMRC
pursuant to the Social Security Contributions (Transfer of Functions, etc) Act 1999
 (“the Transfer Act”) and was to the effect that Mr Brumby paid NI contributions for
10 those years as set out in a schedule attached to the decision letter. Mr Brumby
appealed that decision. The decision was confirmed in a review dated 27 April 2016.
The effect of the decision is that Mr Brumby does not qualify for a full state pension.

2. Mr Brumby now appeals to this tribunal. His grounds of appeal may be
summarised as follows:

15 (1) The decision fails to record contributions which were paid by Mr Brumby
or which ought to be credited to his contribution record for various reasons
considered below.

(2) HMRC failed to advise Mr Brumby that his contribution record was
deficient and/or that the relevant statutory regime entitled him to make late
payments of contributions.

20 (3) He should be permitted to make late payments of contributions.

3. We deal with each ground of appeal below, making relevant findings of fact and
referring where necessary to relevant statutory provisions. We heard oral evidence
from Mr Brumby and from Ms Lesley Crawford, an officer of HMRC. The burden of
proof is on Mr Brumby to establish the factual matters which go to support his
25 grounds of appeal. Our findings of fact are made by reference to the balance of
probabilities.

Mr Brumby’s Contribution Record

4. There were three classes of contributions that Mr Brumby was liable or entitled
30 to pay in the contribution years relevant to this appeal. Class 1 contributions payable
by employed persons, Class 2 contributions payable by self-employed persons and
Class 3 contributions payable by non-employed persons up to 5 April 1975 which
became voluntary thereafter. The decision recorded that Mr Brumby had paid Class 1
and Class 2 contributions as set out in the Annex to this decision. We have added to
35 the Annex contributions that were not paid but were credited to Mr Brumby’s record,
either for periods when he was a student under 18, unemployed, incapacitated or aged
over 60.

5. Ms Crawford is an experienced officer who has dealt with the collection of
Class 2 contributions since 2000. Ms Crawford has not dealt with Mr Brumby’s
40 contribution record directly but she adduced documents evidencing his record and she

explained the system for recording NI contributions. We are satisfied that the system was intended to operate as set out in the following paragraphs.

5 6. Every insured person under the NI scheme was until 1975 allocated a contribution card. Where a person was employed, the card was given to the employer who would affix a Class 1 contribution stamp to the card each week. The employer and the employee contributed to the cost of each stamp. A person who was self-employed was required to purchase and affix Class 2 stamps to the card himself. A non-employed person was required to purchase and affix Class 3 stamps. Each card covered a specific contribution year and at the end of each year it had to be exchanged
10 for a new card at a local social security office, either by the employer in the case of an employee or by the insured person in other cases. In Mr Brumby's case the contribution year ran from 1 June to 31 May.

15 7. Special provisions applied to insured persons who were students in full time education or training. No contributions were required for such persons. Students under the age of 18 were automatically credited with contributions. For students over the age of 18 there were no credits, but the student could voluntarily pay Class 3 contributions in order to maintain his contribution record for the purposes of entitlement to certain benefits including the state pension. A student who did not pay voluntary contributions during a contribution year could pay them up to 6 contribution
20 years following the end of the year in which the course ended.

25 8. When a contribution card was sent to the local social security office, that office would send the card to the NI Records Branch in Newcastle Upon Tyne. The Records Branch kept a hand written permanent record for each insured person. Details from each contribution card were kept on the permanent record. If a card was not fully stamped, that is with either 52 or 53 stamps depending on the number of Mondays in the contribution year, a letter would be sent to the insured person informing him of the deficiency ("a Deficiency Letter"). The Deficiency Letter explained the effect of the deficiency on entitlement to benefits. It does not appear that Deficiency Letters were retained on file. If no contribution card was received by the Records Branch for a
30 contribution year then a letter would be issued requesting return of the card. In the absence of a response, the local social security office would pursue the matter. There were time limits within which late contributions could be paid so as to retain entitlement to benefits.

35 9. With effect from 6 April 1975 the system including the record of contributions was computerised. Certain changes were also made to the way in which contributions were paid and recorded. Contributions generally became payable by reference to tax years. Class 1 contributions of employed earners were collected through the PAYE system. Class 3 contributions became voluntary. In the present appeal for the period after 1975 we are only concerned with Class 2 contributions paid by Mr Brumby.
40 Class 2 contributions continued to be payable at a flat rate and could be paid either by stamped card or by direct debit. The use of stamped cards was abolished with effect from 11 April 1993 and was replaced by a system of quarterly billing. Class 4 contributions for self-employed earners were also introduced but they do not affect benefits and we are not concerned with them in this appeal.

10. We turn now to consider the evidence as to contributions made by Mr Brumby. It is convenient to do so by reference to various periods as follows.

1951-52 to 1960-61

11. Mr Brumby was born on 23 February 1937. His permanent record (“the Record”) shows his date of entry to the NI scheme as 23 February 1952, which was his 15th birthday. We assume that is because at that time school leaving age was 15 and the scheme was mandatory for all persons over school leaving age. The Annex to this decision is effectively a summary of the Record and shows that Mr Brumby was credited with Class 3 contributions for 1951-52, 1952-53 and 1953-54. The Record shows that in 1953-54 Mr Brumby commenced paying Class 1 contributions as an employee up to and including 1959-60. The Record indicates a deficiency of contributions in 1957-58, 1958-59 and 1959-60.

12. It is not disputed that for part of these periods Mr Brumby was employed in the RAF for his national service and for part of the periods he was a student. The Record indicates that Mr Brumby enlisted in the RAF on 4 October 1955 and was discharged on 27 October 1957. Mr Brumby took issue with the date of discharge. His oral evidence was that he was discharged some 3 weeks earlier on 5 October 1957 and that he started work in the sales office of a paper manufacturer called John Rostron on 8 October 1957. One possibility is that the difference is explained by Mr Brumby’s entitlement to annual leave at the end of his national service. There was no documentary evidence other than the Record and we find that it is likely that Mr Brumby left employment with the RAF on 27 October 1957. We accept that Mr Brumby started employment with John Rostron at about the same time but we cannot say when. It may be that there was a short period during which Mr Brumby was not in employment during the 1957-58 contribution year.

13. The Respondents contend that Mr Brumby was sent a Deficiency Letter for 1957-58. Mr Brumby denies receiving any Deficiency Letter for any period. The Record for 1957-58 contains a narrative for that year of “D 18/8”. We are satisfied on the basis of Ms Crawford’s evidence that this indicates a Deficiency Letter was sent to Mr Brumby on 18 August 1958 relating to the 1957-58 contribution year. The Respondents were unable to produce a copy of the actual letter sent because their system did not retain such correspondence.

14. The Record indicates that Mr Brumby was a student during the following periods:

26 April 1958 – 4 July 1958
1 February 1959 – July 1959
6 October 1959 – 30 June 1960

15. The period from 26 April 1958 to 31 May 1958 fell within contribution year 1957-58 and that could explain the absence of 5 stamps in that year. The remaining deficiency of 2 stamps may be explained by the period between discharge from the

RAF and commencing employment with John Rostron but that is speculation. We cannot say why there was a deficiency in 1957-58.

16. The Record shows weekly contribution stamps of 26, 11 and 35 in years 1958-59, 1959-60 and 1960-61 respectively. If Mr Brumby was a full-time student for the periods appearing in the Record then that would explain the absence of 22 stamps in 1958-59, up to 41 stamps in 1959-60 and 4 stamps in 1960-61.

17. Mr Brumby accepts that when he was a full-time student he did not pay Class 3 contributions, either at the time or in the 6 years following the end of his course. In that regard he relies on his second and third grounds of appeal which we consider below. In evidence, Mr Brumby stated that he was a full-time student at Manchester University for about one year in 1958. He left the course because of illness and difficulties at home. Prior to becoming a student and following his employment with John Rostron he said that he had worked as a teacher in Salford for about a year. We accept Mr Brumby's evidence in this regard, although understandably there was some vagueness as to dates and we cannot make findings of fact as to the precise dates and periods.

18. In 1960-61 Mr Brumby first started paying Class 2 contributions, reflecting the fact that in that year he became self-employed as a partner in an insurance broking business he set up.

19. The Record also contains a narrative for 1958-59 of "29/7" which appears beneath the narrative for 1957-58 identified above. On the basis of Ms Crawford's evidence we are satisfied that it indicates a Deficiency Letter was sent to Mr Brumby on 29 July 1959 in connection with the 1958-59 contribution year. Similar narratives appear for 1959/60 and 1960-61 indicating that Deficiency Letters were sent for those years on 29 November 1960 and 20 July 1961 respectively.

20. We are satisfied on the basis of the evidence as a whole, including evidence referred to in the following sections, that Deficiency Letters were sent to Mr Brumby as indicated in the Record.

21. Mr Brumby did not challenge the accuracy of the recorded contributions in these periods. We find as a fact in relation to the contribution years covered by this section of our decision that the Record was an accurate record of Mr Brumby's contributions.

22. Mr Brumby contended that for his period of national service between October 1955 and October 1957 he ought to have been credited with "double stamps". That contention was disputed by the Respondents. We are not aware of any legal basis to support Mr Brumby's case in this regard and he put forward no material to support his contention which we must therefore reject.

1961-62 to 1987-88

23. Mr Brumby's insurance business partnership was successful and eventually it conducted business from 6 branches. Accountants looked after all the books and

records and Mr Brumby relied on them to advise him in relation to his NI position. The partnership ceased in 1968 at which time Mr Brumby bought a garage with a British Leyland franchise. He looked after the insurance side and a partner looked after the garage. The garage was sold in 1973, following which Mr Brumby continued a car hire business until that was sold in 1988

24. The Record indicates that Mr Brumby's Class 2 contributions for this period were deficient for several contribution years from 1979-80 onwards. The deficiency was in respect of a relatively small number of weekly contributions, up to 3 in any one year. Mr Brumby did not challenge the contributions recorded for these years. The Record shows that Deficiency Letters were sent to Mr Brumby for these years and in relation to two years, 1981-82 and 1986-87, it shows that he paid one or two additional cash contributions to make good his record. Mr Brumby said that he could not be sure why he paid additional contributions in cash for these years. We are satisfied that Deficiency Letters were sent. It seems likely and we find that Mr Brumby received them and acted on them to make good his contribution record.

25. It is understandable given the passage of time that Mr Brumby should have no recollection of receiving Deficiency Letters. We find however that it is likely that he received all Deficiency Letters that were sent.

1988-89 to 1993-94

26. During this period Mr Brumby had sold his business and was unwell. He was unemployed for a short period, but otherwise he was doing a little work and receiving some "trail commissions" from his previous businesses. Mr Brumby was also the victim of a fraud which caused significant losses and led to him entering an Individual Voluntary Arrangement for part of this period. The Record shows no contributions in these periods until 1992-93. In the period from 1992 to 1994 Mr Brumby told us that he was not working although he did have contribution cards and was putting stamps on them. That is consistent with the Record for 1992-93 and 1993-94 which shows 33 and 30 weekly contributions for those years and to that extent we accept Mr Brumby's evidence.

27. The Record shows and we accept that for years 1989-90, 1990-91 and 1991-92 letters were sent to Mr Brumby stating that no contribution cards had been received for those years. The letters in relation to the first two of those years were returned undelivered. Mr Brumby acknowledged that there were difficulties with postal deliveries at his address at that time.

28. Mr Brumby told us that at some stage between 1991 and 1993 he found 2 complete contribution cards for 1989-90 and 1990-91. He did not recall how he came to have two cards given that the system involved exchanging a contribution card for one year for a new card for the following year. He did not recall where he had found these cards, but thought he had found them in a draw. Mr Brumby said that he sent them to the Records Office when he found them. Mr Brumby also referred in correspondence to sending a contribution card to the Records Office in 2006 covering 1988-89 and showing contributions from 6 April 1988 to the end of July 1988.

29. There is no evidence that these contribution cards were ever received at the Records Office and no evidence that they were sent, other than Mr Brumby's recollections which were understandably vague given the passage of time. The burden of proof is on Mr Brumby and we are not satisfied on the basis of the evidence adduced that Mr Brumby made any contributions for 1988-89, 1989-90 or 1990-91. We are not satisfied therefore that the Record is inaccurate.

1994-95 to 2000-01

30. In these periods no contributions were paid by Mr Brumby but he did receive credits for contributions. There was no dispute about the contributions credited in these years. Further, we accept that statements were sent to Mr Brumby for 1994-95 and 1995-96 which showed deficiencies in Mr Brumby's record but he did not make good his contributions for those years.

2002 onwards

31. Mr Brumby turned 65 in February 2002. He received a reduced state pension because of deficiencies in his contribution record. We understand that Mr Brumby's pension amounted to some 80% of a full pension. Mr Brumby told us that he did not challenge his contribution record in 2002 because he was working and doing well as a mortgage broker. It was only in 2010 when Mr Brumby became aware that he was receiving a reduced pension that he challenged the contribution record. In fact it appears from the correspondence that Mr Brumby did challenge his reduced pension in 2002 but nothing turns on that for present purposes.

Ground 1 – Accuracy of the Contribution Record

32. For the reasons given above we are not satisfied that the Record, as set out in the decision letter, is inaccurate for any of the reasons relied on by Mr Brumby.

Ground 2 – Breach of Duty by HMRC

33. Mr Brumby's case is that he was never told about the possibility of paying Class 3 contributions whilst he was a student and that he never received any notification of any deficiencies in his contribution record for any year. Further, prior to reaching the age of 65 in 2002, Mr Brumby considered that he ought to have received a letter setting out any deficiencies in his contribution record and giving him an opportunity to make good his record. His wife had received such a letter when she approached the state pension age.

34. Mr Brumby alleges that HMRC thereby breached their duty of care to him and that they have a moral responsibility to credit him with contributions to the extent of any deficiencies in his record.

35. Mr Brumby stated that at the time he was a student, if he had been told of the possibility of making voluntary contributions he probably would not have made them. Later on, he would have made up his contributions if he had been aware of the deficiencies and that he could do so.

36. We are satisfied that Mr Brumby ought to have known about the possibility of paying Class 3 contributions whilst he was a student. The contributions card at that time included reference to special provisions for students and referred to Leaflet NI 30. We were provided with a copy of that leaflet from 1961 and it is likely that similar information would have been available in 1958 and 1959. The leaflet set out in detail the relevant rules in relation to contributions for students, including the possibility and advantages of paying Class 3 contributions and the 6 year time limit to do so after the end of a course.

37. We can sympathise with the position Mr Brumby finds himself in. For some of the years in question he was only one contribution short. However, we are satisfied that the onus is on the individual to ensure that all necessary contributions are paid for any particular year. We have also found that Deficiency Letters were sent to Mr Brumby as identified above. At one stage in his evidence Mr Brumby said that he did not recall receiving those letters. There is no record of the letters being returned undelivered, save in relation to 1989-90 and 1990-91 where letters informing Mr Brumby that no cards had been received for those years were returned undelivered. Even taking into account problems encountered by Mr Brumby in receiving post we are satisfied that the Deficiency Letters will have reached Mr Brumby. Receipt of a Deficiency Letter ought to have prompted Mr Brumby to check his contribution record, for that year and generally.

38. We are not satisfied that any legal duty of care is owed by HMRC to insured persons to notify the existence of deficiencies in a person's contribution record. In any event, this Tribunal would have no jurisdiction in relation to breach of any such duty. Our jurisdiction is governed by the Transfer Act and regulations made under that Act. The relevant provisions of the Transfer Act provide as follows:

“ 8(1) Subject to the provisions of this Part, it shall be for an officer of the Board—

...
(e) to decide whether contributions of a particular class have been paid in respect of any period ...

11(1) This section applies to any decision of an officer of the Board under section 8...

(2) In the case of a decision to which this section applies –

(a) ...

(b) ... the person in respect of whom the decision is made ... shall have a right of appeal to the tribunal.”

39. Section 13 empowers the making of regulations with respect to such appeals. Those regulations include the Social Security Contributions (Decisions and Appeals) Regulations, SI 1999/1027. Regulation 10 provides:

“ If, on an appeal ... that is notified to the tribunal it appears to the tribunal that the decision should be varied in a particular manner, the decision shall be varied in that manner, but otherwise shall stand good.”

5 40. The decision presently under appeal is whether contributions of a particular class have been paid in respect of certain periods. The only basis on which the Tribunal can vary that decision is if the Tribunal considers that it is wrong in the sense that it fails to recognise contributions that have been paid. The Tribunal has no jurisdiction to vary a decision merely because the Tribunal considers that it is otherwise unfair or unjust (See *Commissioners for HM Revenue & Customs v Hok Ltd* 10 [2012] UKUT 363 (TCC)).

Ground 3 – Entitlement to pay late Contributions

15 41. There are various time limits for payment of NI depending on when liability to pay the contribution arose. For example, prior to 6 April 1975 a contribution paid before the end of the sixth contribution year following the year in respect of which it was payable is treated as paid on the due date. If paid any later than that it is treated as not paid (see for example Reg 27 National Insurance (Contributions) Regulations 1969). Regulations provide that NI contributions paid outside those time limits will still be treated as having been paid on the due date where the failure to pay on time is because of ignorance or error, and that ignorance or error was not the result of 20 contributor’s failure to exercise due care and diligence (see for example Reg 50 Social Security (Contributions) Regulations 2001).

25 42. In a letter dated 23 December 2016, HMRC told Mr Brumby that he could not pay contributions outside the normal time limits because whilst non-payment resulted from error or ignorance, it was due to a failure on the part of Mr Brumby to exercise due care and diligence.

43. We accept that Mr Brumby is in his own words “a layman”. He assumed for periods when he was self-employed that his accountants would have ensured that the stamps were paid.

30 44. We are satisfied that the deficiencies in Mr Brumby’s contribution record were due to error or ignorance on the part of Mr Brumby. Even though he received the Deficiency Letters we accept that he did not appreciate that there were deficiencies in his contribution record. However that ignorance or error was due to a failure on the part of Mr Brumby to exercise due care and diligence. In all the circumstances he ought to have been aware of the need to make Class 2 contributions, and the 35 opportunity to make Class 3 contributions for periods when he was not employed or self-employed.

40 45. For periods up to and including 1959-60 the Appellant’s failure to make voluntary Class 3 contributions as a student caused his record to be deficient. The contribution card and leaflet NI 30 explained the position and if he had exercised due care and diligence he would have been aware of the implications of not paying Class 3 contributions.

46. For periods from 1960-61 to 1995-96 the Appellant's failure to make Class 2 contributions or voluntary Class 3 contributions caused his record to be deficient. He was aware of the need to make contributions as a self-employed person and he ought to have been aware of the opportunity to make voluntary Class 3 contributions in periods where he was not employed. He cannot simply rely on his accountants to make the necessary payments on his behalf.

47. In all the circumstances, we do not consider that Mr Brumby is entitled to make contributions outside the normal time limits.

Conclusion

48. For all the reasons given above Mr Brumby has not satisfied us that the decision confirming his contributions record should be varied. We must therefore dismiss the appeal.

49. 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.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 11 AUGUST 2017

ANNEX

| Contribution Year | Class 1 Paid | Class 2 Paid | Class 3 Credited |
|------------------------------|-------------------------|-------------------------|-----------------------------|
| 1951-52 | | | 15 |
| 1952-53 | | | 52 |
| 1953-54 | 40 | | 13 |
| 1954-55 | 48 | | 4 |
| 1955-56 | 52 | | |
| 1956-57 | 52 | | |
| 1957-58 | 45 | | |
| 1958-59 | 25 | | 1 |
| 1959-60 | 11 | | |
| 1960-61 | | 35 | |
| 1961-62 | | 52 | |
| 1962-63 | | 52 | |
| 1963-64 | | 52 | |
| 1964-65 | | 53 | |
| 1965-66 | | 52 | |
| 1966-67 | | 51 | 1 |
| 1967-68 | | 52 | |
| 1968-69 | | 52 | |
| 1969-70 | | 52 | |
| 1970-71 | | 53 | |
| 1971-72 | | 52 | |
| 1972-73 | | 52 | |
| 1973-74 | | 52 | |
| 1974-75 | | 44 | |
| 1975-76 | | 53 | |
| 1976-77 | | 52 | |
| 1977-78 | | 52 | |
| 1978-79 | | 52 | |
| 1979-80 | | 49 | |
| 1980-81 | | 50 | |
| 1981-82 | | 52 | |
| 1982-83 | | 50 | |
| 1983-84 | | 50 | |
| 1984-85 | | 51 | |
| 1985-86 | | 51 | |
| 1986-87 | | 53 | |
| 1987-88 | | 52 | |
| 1988-89 | | | |
| 1989-90 | | | |
| 1990-91 | | | |
| 1991-92 | | | |
| 1992-93 | | 33 | |

| | | | |
|---------|--|----|----|
| 1993-94 | | 30 | 5 |
| 1994-95 | | | 15 |
| 1995-96 | | | 16 |
| 1996-97 | | | 52 |
| 1997-98 | | | 53 |
| 1998-99 | | | 52 |
| 1999-00 | | | 52 |
| 2000-01 | | | 52 |