IN THE UPPER TRIBUNAL **Upper Tribunal case No. CP/1500/2019**
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision:

The decision of the First-tier Tribunal (16 January 2019, Liverpool, file reference *SC068/18/0557*) involved the making of an error on a point of law. It is **SET ASIDE** under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

In accordance with the directions given at the end of the reasons for this decision, under section 12(2)(b)(i) of the 2007 Act the Appellant's case is **REMITTED** to the First-tier Tribunal. The tribunal is first to consider whether it is required by regulation 38A of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 to refer Mr J's appeal to the Secretary of State on the basis that an issue appears to arise that, under section 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999, falls to be decided by an officer of the Inland Revenue.

REASONS FOR DECISION

Introduction

1. For the most part, questions as to a claimant's National Insurance contributions record fall to be determined by HMRC with a right of appeal lying to the Tax Chamber of the First-tier Tribunal rather than to its Social Entitlement Chamber. Other entitlement questions relating to contributory benefits are determined by the Secretary of State for Work & Pensions with a right of appeal lying to the First-tier Tribunal's Social Entitlement Chamber. Supporting this division of responsibility, regulations require the First-tier Tribunal (Social Entitlement Chamber) to refer certain issues relating to National Insurance contributions, that appear to arise in proceedings before that tribunal, to the Secretary of State who, in turn, is required to refer the matter to HMRC.

2. This case illustrates why, despite the division of responsibility just mentioned, the First-tier Tribunal's Social Entitlement Chamber cannot remain entirely detached from the National Insurance legislation. In order to discharge the tribunal's duty to refer certain issues concerning National Insurance contributions that appear to arise in proceedings

before the tribunal, judges of the Social Entitlement Chamber may need to navigate what may be, for that tribunal, the uncharted waters of National Insurance legislation.

Factual background

3. Dated 27 October 2016, the Appellant Mr J's claim for state pension was made about three months before he attained his pensionable age of 65.

4. Shortly before Mr J attained pensionable age, on 10 January 2017 the Secretary of State refused his claim for state pension on the ground that his National Insurance (NI) contributions record supplied only 7 'qualifying years' when the minimum required was ten. The Secretary of State's decision letter also stated:

> "You need to pay a minimum of 3 years of voluntary contributions to get State Pension…The extra contributions count for benefit purposes from the date the department gets payment".

5. The decision letter of 10 January 2017 provided a correspondence address "if you want to know more about this" but did not provide information about how to pay for extra contributions.

6. Mr J resided in Canada when he claimed state pension. On 3 February 2017, he wrote to the Department for Work & Pensions (DWP) arguing that their decision on his pension claim was wrong because they overlooked the UK-Canada Social Security Agreement. Under that Agreement, Mr J contended, his Canadian work history supplied sufficient deemed N.I. contributions for him to satisfy the minimum qualifying years requirement for state pension.

7. On 18 April 2017, the DWP informed Mr J that, in their view, the Canadian agreement was inapplicable because he was not a UK resident. Mr J did not subsequently seek to rely on the UK-Canada Social Security Agreement.

8. On 2 March 2018, the DWP wrote to Mr J stating that, based on his contributions record, he was not entitled to a "retirement pension" but might be if he paid voluntary Class 2 contributions (as I explain below, I think the DWP probably meant Class 3 contributions). An attached table identified the amounts required, against their respective years, and informed Mr J that payment had to be made by 5 April 2018 in order to avoid a 'penalty' (the meaning of which was not explained). The letter added "you must send

your payment so we get it by the 'pay without penalty' date" (emphasis added). Despite this letter having indicated that the DWP had to 'get' payment by a specified date, it went on:

> "Remember, any payment will not count towards State Pension until it gets to Her Majesty's Revenue and Customs National Insurance Contributions Office.
>
> Any increase to your State Pension will only be applied from the date HMRC receive your payment."

9. The letter of 2 March 2018 included a HMRC postal address to which payments were to be sent, and informed Mr J that, once he had paid for additional contributions, he would need to claim retirement pension. Adding to the letter's mixed messages about the correct recipient for payment of additional contributions, the letter's reply slip included, for claimants who wished to pay by cheque, a tick-box section that gave the return address as the DWP's International Pensions Office.

10. On 5 April 2018, the DWP received Mr J's cheque for £821.60, which was sent by letter addressed to the DWP's International Pension Centre, at the address given in the 2 March 2018 letter's reply slip, rather than to the HMRC National Insurance Contributions Office whose postal address was, as just mentioned, also given in that letter.

11. A DWP telephone note dated 1 May 2018 recorded that Mr J's representative had 'applied' to HMRC for payment of additional Class 2 contributions, and, in September 2017, HMRC passed the application to the DWP. The representative expressed concern that 'nothing had happened'.

12. A DWP internal email dated 2 June 2018 stated that 'Banking' received a cheque for £821.60 on 24 April 2018. While this was £15.75 less than the sum required for the last relevant contributions year (2015/16) an official, presumably a HMRC officer, decided to write off that sum so that Mr J was deemed to have met the N.I. qualifying years condition for that year.

13. On 17 August 2018, the DWP informed Mr J in writing that, following his payment of voluntary Class 2 contributions, he needed to make a fresh claim for retirement pension. Such a claim was sent to the DWP by letter dated 22 August 2018.

14. On 10 September 2018, the Secretary of State decided that, as from 18 April 2018, Mr J was entitled to a weekly State Retirement Pension of £53.37, rising to £57.81 from 6 June 2018. The DWP's decision letter stated:

> "You have been awarded from the start of the pay week when HMRC allocated your voluntary contributions, which in turn, gave you title to UK State Pension. From 6th June 2018 your award was revised again following another year allocated by HMRC."

15. On 22 October 2018, the Secretary of State, at the mandatory reconsideration stage of the decision-making process, refused to alter her decision of 10 September 2018. The 22 October decision letter recorded that, on 24 April 2018, HMRC received a cheque for £821.60 of which £691.75 satisfied the N.I. contributions requirements for years 2010/11 to 2014/15. As mentioned above, an official waived the shortfall for 2015/16.

16. The 22 October 2018 letter stated that regulation 50C of the Social Security Contributions Regulations 2001 allowed Mr J to make voluntary contributions in order to make up his deficiency in qualifying years. However, regulation 4 of the Social Security (Crediting & Treatment of Contributions, and National Insurance Numbers) Regulations 2001 did not allow such contributions to be treated as paid on any date before the date of actual payment. This explained why Mr J's pension entitlement could not begin before the date in April 2018 on which HMRC received his payment for additional contributions.

17. Mr J's appeal to the First-tier Tribunal, dated 15 November 2018, argued that he would have been able to meet the relevant qualifying years requirement for retirement pension, before he attained pensionable age, but for the DWP's failing. They unreasonably delayed processing his claim and should have provided him with better and more timely information about what he needed to do to meet the qualifying years condition.

First-tier Tribunal's decision

18. On 16 January 2019, the First-tier Tribunal dismissed Mr J's appeal against the Secretary of State's decision. Neither party requested a hearing, and the tribunal decided Mr J's appeal on the papers.

19. Before the First-tier Tribunal, Mr J's sought to obtain a decision that he was entitled to state pension as from the date on which he attained pensionable age. However, the tribunal accepted the Secretary of State's argument that, by virtue of regulation 4 of the Social Security (Crediting & Treatment of Contributions, and National Insurance Numbers) Regulations 2001, Mr J's additional contributions were paid on the date on which payment was received by HMRC, and could not be treated as paid on any earlier date. That was how the N.I. legislation had been constructed and there was nothing the tribunal could do to alter it. The question whether Mr J's case had been mishandled by the DWP or HMRC was not for the tribunal to determine.

20. The First-tier Tribunal granted Mr J permission to appeal against its decision.

Legislative framework

Class 2 and Class 3 contributions

21. The DWP correspondence mainly described Mr J's late-paid contributions as Class 2 contributions. However, I am not sure that was correct. Class 2 contributions are provided for by section 11 of the Social Security Contributions and Benefits Act 1992, and are described by section 1(2)(c) of that Act as "flat-rate, payable under section 11 below by self-employed earners". Class 3 contributions, however, are described by section 1(2)(d) as "payable under section 13 or 13A below by earners and others voluntarily with a view to providing entitlement to benefit, or making up entitlement". It seems to me probable that Mr J paid for additional Class 3 contributions. It is possible, however, that the contributions were the special type of voluntary Class 2 contributions provided for by the Social Security (Contributions) Regulations 2001 ("2001 Contributions Regulations"). For present purposes, I do not think it matters in practice, given the common provision that tends to be made by N.I contributions regulations across Classes, but I shall proceed on the assumption that Mr J's additional contributions were the more commonly encountered Class 3 contributions.

Category A retirement pension or state pension under the Pensions Act 2014?

22. The papers supplied by the DWP to the First-tier Tribunal did not specify whether Mr J's pension was a Category A retirement pension under section 44 of the Social Security Contributions and Benefits Act 1992 (old style state pension) or the state pension created by section 1(1) of the Pensions Act 2014 (new style). I think that Mr J's pension was a state pension under the 2014 Act because he did not attain pensionable age before 6 April

2016 (see the entitlement conditions for a Category A pension in section 44(1)(a) of the 1992 Act).

National Insurance contributions legislation

23. The general rules in regulation 4 of the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001 ("the 2001 Crediting and Treatment Regulations") apply to contributions paid after the "due date" or treated as paid after that date under regulation 7(2). The "due date", in relation to Class 3 contributions, means "the date 42 days after the end of the year in respect of which it is paid" (reg.1(2)).

24. Under the general rule in regulation 4(3)(b) of the 2001 Crediting and Treatment Regulations, a Class 3 contribution paid before the end of the sixth year following that in which liability for the contribution arose is "treated as paid on the date on which payment of the contribution is made" (reg.4(3)(b)). This provision should be read with regulation 4(7), which provides:

> "(7) Notwithstanding the provisions of paragraphs…(3)…above, in determining whether the relevant contribution conditions are satisfied in whole or in part for the purpose of entitlement to any contributory benefit [*which includes state pension under the Pensions Act 2014*], any relevant contribution which is paid within the time specified in paragraph…(3)(b)…shall be treated—
>
> (a) for the purpose of entitlement in respect of any period before the date on which the payment of the contribution is made, as not paid; and
>
> (b)…for the purpose of entitlement in respect of any other period, as paid on the date on which the payment of the contribution is made."

25. In other words, it seems that the purpose of regulation 4(7) is to prevent late payment, made before the end of the sixth year following that in respect of which the liability arose, from generating entitlement for any period before the payment was made.

26. Regulation 6 of the 2001 Crediting and Treatment Regulations provides an exception to the general 'date of payment' rules in regulation 4. Regulation 6 applies where the following conditions are satisfied:

(a) a contribution is paid after the due date;

(b) it is paid after the time when it would, under regulation 4, have been treated as paid "for the purposes of entitlement to contributory benefit"; and

(c) "it is shown to the satisfaction of an officer of the Inland Revenue that the failure to pay the contribution before that time is attributable to ignorance or error on the part of that person or the person making the payment and that that ignorance or error was not due to any failure on the part of such person to exercise due care and diligence".

27. I note that the regulation 6 conditions refer to a contribution paid after the time when it would have been treated under regulation 4 as paid for the purposes of entitlement to contributory benefit. I also note that regulation 4, for the purposes of entitlement to contributory benefit, often treats a contribution as not having been paid at all. Despite that, my understanding is that regulation 6 has been taken to encompass cases where payment of a contribution is treated under regulation 4 as not having been paid at all. For example, the Tax Chamber of the First-tier Tribunal in *TC04934: David Taylor* [2016] UKFTT 148 (TC), chaired by Judge J Reid QC, said:

> "This is not in dispute or in doubt. As a self-employed earner, Mr Taylor was liable to pay weekly Class 2 contributions. If they were paid late and after the due date, they were treated as *not* paid for the purpose of entitlement to contributory benefit, here the state retirement pension; the due date was (for contribution weeks between 1979 and 1983) two years after the year in which liability arose.
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> 5. That two year period was extended to six years with effect from 6 April 1983. Thus, even although Class 2 NICs were not paid weekly and were being paid late, as long as those late payments were made by the due date (2 years and subsequently 6 years) they were still treated as paid and counted towards entitlement to contributory benefit such as the state retirement pension.
>
> 6. However, late payments made after the due date may be treated as having been paid timeously if it is *shown to the satisfaction of* HMRC that the failure is attributable to ignorance or error and that ignorance or error was *not* due to a failure by the contributor to *exercise due care and diligence* [*footnote inserted here states: "See…Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001, regulation 6"]".*

28. I make the above observations because, in Mr J's case, it appears that some of his late payments for Class 3 contributions were made after the regulation 4 outer limit of six years from the due date but others were not. In the latter case, regulation 4(7) would appear to treat the relevant contributions as not having been paid for the purposes of his entitlement to contributory benefit for any period before actual payment but, for

subsequent periods, as having been paid on the date of actual payment. In the former case, it would appear that regulation 4 treated the contributions as not having been paid at all. At this point, I should emphasise that in these reasons, in relation to regulations 4 and 6 of the 2001 Crediting and Treatment Regulations and, for that matter, any other part of the contributions legislation in these reasons, I make no more than observations. It is no part of my function, as a judge of the Administrative Appeals Chamber of the Upper Tribunal, to make any finding about the legal meaning of any legislative provision involving contributions decision-making responsibilities that are allocated to HMRC or an officer of the Inland Revenue.

29. Where regulation 6 applies, i.e. where the conditions described in paragraph 26 above are satisfied, an Inland Revenue officer may direct that "the contribution shall be treated as paid on such earlier day as the officer considers appropriate in the circumstances". In other words, satisfaction of the regulation 6 conditions confers on the officer a discretion to direct that a contribution be treated as paid on such earlier date as the officer considers appropriate. The 2001 Crediting and Treatment Regulations appear to make no express provision as to the matters to be taken into account by an officer in deciding whether to direct an earlier deemed payment date nor, if the officer does so direct, in fixing that earlier date save for, in the latter case, providing for the date to be such as the officer considers appropriate in the circumstances.

30. Regulation 48(1) of the 2001 Contributions Regulations provides that, generally, "any person who is over the age of 16 and fulfils the conditions as to residence or presence in Great Britain…prescribed in regulation 145, may, if he so wishes, pay Class 3 contributions".

31. I now come to regulation 50 of the 2001 Contributions Regulations which the Secretary of State now submits should have prompted the First-tier Tribunal to refer Mr J's appeal to the Secretary of State for onward referral to HMRC. I note that, under tax chamber case law, regulation 50 is often considered in conjunction with regulation 6 of the 2001 Crediting and Treatment Regulations. For example, in *Adojutelegan v Clark (Officer of the Board)* [2004] STC (SCD) 52, Special Commissioner Dr John Avery Jones CBE said of the Appellant:

> "4. In order to pay Class 3 contributions out of time she has to satisfy both reg 50 of the Social Security (Contributions) Regulations 2001, S.I. 2001/1004 and reg.6 of the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001, S.I. 2001/769…".

32. Regulation 50 of the 2001 Contributions Regulations applies to a person who was entitled to pay a Class 3 contribution under regulation 48 but "failed to pay that contribution in the appropriate period specified for its payment". If the condition in reg.50(2) is satisfied, the contributor "may pay the contribution within such further period as an officer of the Board may direct". The condition in reg.50(2) is as follows:

> "(2) The condition is that an officer of the Board is satisfied that—
>
> (a) the failure to pay is attributable to the contributor's ignorance or error; and
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> (b) that ignorance or error was not the result of the contributor's failure to exercise due care and diligence."

33. Regulation 50C of the 2001 Contributions Regulations applies to Class 3 contributions payable in respect of years 2006/07 to 2015/6 (all of Mr J's late paid contributions related to these years). Where a person attains pensionable age on or after 6 April 2016, as did Mr J, regulation 50C(3) and (4) permits payment of a Class 3 contribution during the period 6 April 2013 to 5 April 2023.

Decision-making responsibilities and rights of appeal

34. Section 8(1)(a) of the Social Security Act 1998 provides that, generally, it shall be for the Secretary of State to decide any claim for a "relevant benefit", the definition of which includes. state pension under Part 1 of the Pensions Act 2014 (section 8(3)(ab)). Section 8(1)(c) provides that it shall also be for the Secretary of State to make any decision that falls to be made under or by virtue of a "relevant enactment", whose definition includes any enactment contained in the Pensions Act 2014. However, section 8(5) excludes from section 8(1)(c) "any decision which under section 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999 ("the 1999 Transfer Act") falls to be made by an officer of the Inland Revenue".

35. Before turning to the 1999 Transfer Act, I should mention section 8(2) of the Social Security Act 1998 which provides as follows:

> "(2) Where at any time a claim for a relevant benefit is decided by the Secretary of State—
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> (a) the claim shall not be regarded as subsisting after that time; and

> (b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time."

36. Section 8(1) of the 1999 Transfer Act provides as follows:

> "(1) Subject to the provisions of this Part, it shall be for an officer of the Board [of Inland Revenue]—
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> …(d) to decide whether a person is or was entitled to pay contributions of any particular class that he is or was not liable to pay and, if so, the amount that he is or was entitled to pay,
>
> (e) to decide whether contributions of a particular class have been paid in respect of any period,
>
> …(m) to decide such issues relating to contributions, other than the issues specified in paragraphs (a) to (l)…as may be prescribed by regulations made by the Board…".

37. Regulation 155A(2) of the 2001 Contributions Regulations, made under section 8(1)(m) of the 1999 Transfer Act, prescribes certain issues relating to contributions as issues to be decided by an Inland Revenue officer, including "…(d) whether the condition in regulation 50(2) [of the 2001 Contributions Regulations] is satisfied". Regulation 155A(5)(b) further prescribes, for the purposes of section 8 of the 1999 Transfer Act, the following issue as one to be decided by an Inland Revenue officer:

> "whether, in the case of a contribution paid by…a person after the due date, the failure to pay the contribution before that time was attributable to ignorance or error on the part of that person or the person making the payment and if so whether that ignorance or error was due to the failure on the part of such person to exercise due care and diligence, as mentioned in regulation 6 of the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001 (treatment for the purpose of any contributory benefit of contributions under the Act paid late through ignorance or error)."

38. Before turning to rights of appeal, I should also mention section 10A of the Social Security Act 1998. Section 10A authorises regulations to make provision requiring the Secretary of State to refer an issue to the Inland Revenue, where on consideration of any claim or other matter, she is of the opinion that there arises any issue which under section

8 of the 1999 Transfer Act falls to be decided by an Inland Revenue officer. Regulations under section 10A are contained in regulation 11A of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 ("1999 Decisions and Appeals Regulations").

39. I now arrive at rights of appeal and connected matters. Section 11 of the 1999 Transfer Act confers a right of appeal to the First-tier Tribunal against "any decision of an officer of the Board under section 8 of this Act", including therefore a right of appeal against those decisions prescribed in regulation 155A of the 2001 Contributions Regulations.

40. Article 6(c) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 ("2010 Chambers Order") allocates to the Social Entitlement Chamber of the First-tier Tribunal all functions related to appeals regarding entitlement to social security benefits. However, article 6(c)(i) excepts "appeals under section 11 of the [1999 Transfer Act]". Article 6(h) also allocates to the Social Entitlement Chamber all functions related to appeals "regarding entitlement to be credited with…contributions", but this case is not about whether Mr J should be credited with contributions.

41. Article 7(a) of the 2010 Chambers Order allocates to the Tax Chamber of the First-tier Tribunal "all functions, except those functions allocated to the Social Entitlement Chamber by article 6…related to an appeal, application, reference or other proceedings in respect of a function of the Commissioners for Her Majesty's Revenue and Customs or an officer of Revenue and Customs".

42. Article 10(a) of the 2010 Chambers Order allocates to the Administrative Appeals Chamber of the Upper Tribunal all functions related to an appeal against a decision made by the First-tier Tribunal except (amongst others) "an appeal allocated to the Tax and Chancery Chamber by article 13(a)" (I think that the Order must have intended to refer to article 13(1)(a)). Article 13(1)(a) of the Order allocates to the Tax and Chancery Chamber all functions related to an appeal against a decision made by the Tax Chamber of the First-tier Tribunal.

43. Section 24A of the Social Security Act 1998 authorises regulations to make provision, where on any appeal there arises any issue which under section 8 of the 1999 Transfer Act falls to be decided by the Inland Revenue, for the First-tier Tribunal or Upper Tribunal to require the Secretary of State to refer the issue to the Inland Revenue.

44. Regulation 38A of the 1999 Decisions and Appeals Regulations is made under section 24A of the Social Security Act 1998. Given its central importance to this case, I set it out here in full:

> "(1) Where a person has appealed to the First-tier Tribunal and it appears to the First-tier Tribunal, that an issue arises which, by virtue of section 8 of the Transfer Act, falls to be decided by an officer of the Board, that tribunal shall—
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> (a) refer the appeal to the Secretary of State pending the decision of that issue by an officer of the Board; and
>
> (b) require the Secretary of State to refer that issue to the Board;
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> and the Secretary of State shall refer that issue accordingly.
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> (2) Pending the final decision of any issue which has been referred to the Board in accordance with paragraph (1) above, the Secretary of State may revise the decision under appeal, or make a further decision superseding that decision, in accordance with his determination of any issue other than one which has been so referred.
>
> (3) On receipt by the Secretary of State of the final decision of an issue which has been referred in accordance with paragraph (1) above, he shall consider whether the decision under appeal ought to be revised under section 9 or superseded under section 10 [of the Social Security Act 1998], and—
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> (a) if so, revise it or, as the case may be, make a further decision which supersedes it; or
>
> (b) if not, forward the appeal to the First-tier Tribunal which shall determine the appeal in accordance with the final decision of the issue so referred.
>
> (4) In paragraphs (2) and (3) above, "final decision" has the same meaning as in regulation 11A(3) and (4)."

45. It is to be noted that regulation 38A confers no discretion on the First-tier Tribunal. Where it appears to the tribunal that an issue arises which, by virtue of section 8 of the 1999 Transfer Act, falls to be decided by an officer of the Board, the tribunal must refer the appeal to the Secretary of State, and must, at the same time, also require the Secretary of State to refer the relevant issue to the Board of the Inland Revenue.

46. To sum matters up, it is for an officer of the Inland Revenue to decide whether regulation 6 of the 2001 Crediting and Treatment Regulations applies to a contributor and, if so, whether to exercise in the contributor's favour the discretion to fix a payment

date earlier than that of actual payment (it is also for an officer of the Inland Revenue to make decisions under regulation 50 of the 2001 Contributions Regulations). As prescribed by regulation 155A of the 2001 Contributions Regulations, appeals against such decisions lie to the Tax Chamber of the First-tier Tribunal rather than the Social Entitlement Chamber. If an appeal comes before the Social Entitlement Chamber in which it appears to the tribunal that an issue arises which falls to be decided under regulation 6 of the 2001 Crediting and Treatment Regulations (or regulation 50C), as prescribed by regulation 155A, the tribunal must refer the appeal to the Secretary of State for onward referral of the issue to the Inland Revenue. The First-tier Tribunal's Social Entitlement Chamber has no discretion here. If it appears to the tribunal that an issue as just described arises, it must cease its consideration of an appeal and make the required reference to the Secretary of State.

The arguments

47. Mr J's notice of appeal to the Upper Tribunal repeated the arguments that he put before the First-tier Tribunal. In summary, but for the Secretary of State's tardiness in dealing with his pension claim, including the failure timeously to inform him that the UK-Canada Agreement did not assist him, he would have been able to pay in time the additional contributions necessary for his state pension to be put in payment as from the date on which he attained pensionable age. His 2016 pension claim should have been determined taking into account the additional contributions paid in 2018 which, but for the Secretary of State's failings, would have been paid before he attained pensionable age.

48. The Secretary of State supports this appeal but not on any ground relied on by Mr J. The Secretary of State argues that the First-tier Tribunal acted outside its jurisdiction by purporting to make a decision as to Mr J's N.I. contributions record. While section 8 of the 1999 Transfer Act is not referred to in the Secretary of State's written response, her argument must be that the First-tier Tribunal made a decision of a type specified in or under section 8 that is a decision to be taken by an Inland Revenue officer or, on appeal, the Tax Chamber of the First-tier Tribunal. The response also refers to regulation 50 of the 2001 Contributions Regulations and submits that, in Mr J's case, an issue arose as to whether Mr J's failure to pay additional contributions before he did was attributable to his ignorance or error and that was not due to his failure to exercise due care and diligence. On that basis, the tribunal also erred in law by failing to refer the appeal to the Secretary of State under regulation 38A of the 1999 Decisions and Appeals Regulations.

The Secretary of State's response does not mention regulation 6 of the 2001 Crediting and Treatment Regulations.

49. The Secretary of State's response relied on one piece of case law, which I believe to be an unpublished decision of Social Security Commissioner Williams about a failure to make a reference to the High Court, under section 18(1) of the Social Security Administration Act 1992, of a question as to whether a person satisfied the contribution conditions for retirement pension. Such referrals have not been possible since 6 September 1999, when the relevant provisions of section 18(1) were repealed in relation to the contributory benefits provided for by Part 2 of the Social Security Contributions and Benefits Act 1992 (references to the High Court under section 18(1) have never been possible in relation to state pension under the Pensions Act 2014). However, there is no hint in the Secretary of State's response that some twenty years have elapsed since the abolition of section 18(1) references. It unfortunate that, in Mr J's written reply, he was led to waste his time seeking to deal with the application of section 18(1) to his case.

50. The Secretary of State's response also makes no attempt to explain the complex legislation that delineates the responsibilities of the Secretary of State and HMRC where a state pension dispute has a N.I. contributions element. The response simply records that this is an issue with which the Upper Tribunal Judge will be familiar. That may be so but it hardly aids Mr J's participation in these proceedings.

51. In the light of the above observations, I must remind the Secretary of State that, under the Tribunal Procedure (Upper Tribunal) Rules 2008, she has an obligation to help the Upper Tribunal to further the Rules' overriding objective (rule 2(4)(a)). That objective is to enable the Upper Tribunal to deal with cases fairly and justly (rule 2(1)), which includes "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings" (rule 2(2)(c)). In relying on out-of-date case law, without seeking to explain how it might be of continuing relevance, and failing to deal with the boundary between Secretary of State and HMRC functions in relation to N.I. contributions, the Secretary of State did not help to ensure that Mr J was able to participate fully in these proceedings. In fact, the Secretary of State's response to Mr J's appeal probably had the opposite effect.

Case law

52. In my view, other decisions of Social Security Commissioner Williams are of greater relevance than that relied on in the Secretary of State's response, since these other

decisions were decided after legislative changes conferred on HMRC responsibility for most N.I. contributions functions and/or abolished references to the High Court under section 18(1) of the Social Security Administration Act 1992. These other decisions do, however, illustrate the Secretary of State's point that certain N.I. matters fall outside the powers of the Secretary of State and, in turn, the jurisdiction of the Social Entitlement Chamber of the First-tier Tribunal, and emphasise that the function of referring to the Secretary of State certain appeals raising contributions issues is a matter of obligation not discretion.

53. *CP 1792 2007* held that a tribunal erred in law by overlooking its duty under regulation 38A of the 1999 Decisions and Appeals Regulations, to "refer the [N.I. contributions] matter to the Secretary of State for onward reference to HMRC".

54. In *R(P) 1/04*, Commissioner Williams said:

> "43…If the appeal involves a dispute about the claimant's contribution record…the Secretary of State must refer the matter to the Revenue for formal decision: Social Security and Child Support (Decisions and Appeals) Regulations 1999, regulation 11A. If the matter gets to an appeal tribunal without a reference, then the appeal tribunal must direct the Secretary of State to make it: Social Security and Child Support (Decisions and Appeals) Regulations 1999, regulation 38A…
>
> On a reference from the Secretary of State…the Revenue must issue a formal decision on the contribution question…if it has not previously done so: Transfer of Functions Act, section 8(1); Social Security and Child Support (Decisions and Appeals) Regulations 1999, regulation 28. Any appeal against a formal decision on a contribution question…is decided in the absence of agreement by a tax appeal tribunal: Transfer of Functions Act, section 11; Social Security Contributions (Decisions and Appeals) Regulations 1999…
>
> The Secretary of State must calculate the weekly rate of retirement pension…based on any contribution decision by the Revenue (or, on appeal, by a tax appeal tribunal)…An appeal is decided by a (social security) appeal tribunal: 1998 Act section 12."

55. These words of Commissioner Williams' remain relevant, although "appeal tribunal" should now be read as "First-tier Tribunal (Social Entitlement Chamber)" and "tax appeal tribunal" as "First-tier Tribunal (Tax Chamber)".

Conclusions

Why Mr J's 2016 claim cannot be determined taking account of the Class 3 contributions paid in 2018

56. Mr J's argument that his October 2016 pension claim should have been treated as extant, and determined taking account of the Class 3 contributions paid subsequently in 2018, cannot succeed. By virtue of section 8(2) of the Social Security Act 1998, the 2016 claim ceased to subsist once it was determined by the Secretary of State.

N.I. contributions determinations and regulation 38A references: general points

57. I am not persuaded that the First-tier Tribunal erred in law in that it purported to determine the N.I. contributions paid by Mr J. Had it done so it would indeed have acted outside its jurisdiction since it was constituted as a tribunal within the Social Entitlement Chamber of the First-tier Tribunal rather than the Tax Chamber. In my judgment, however, the First-tier Tribunal's statement that Mr J's N.I. contributions record was that determined by HMRC did not amount to the tribunal purporting to determine Mr J's contributions record for itself. But that is not the end of the matter.

58. Regulation 38A of the 1999 Decisions and Appeals Regulations imposes a duty on the First-tier Tribunal to refer an appeal to the Secretary of State where it appears to the tribunal that an issue arises which, by virtue of section 8 of the 1999 Transfer Act, falls to be decided by an officer of the Inland Revenue. Section 8 is not confined to the typical N.I. issue that is resolved by interrogating departmental contribution records. As the legislative framework set out above illustrates, section 8 extends to determinations under regulation 6 of the 2001 Crediting and Treatment Regulations as to whether a contributor's late payment was attributable to ignorance or error and, if so, whether that was due to a failure to exercise due care and diligence as well as the determinations of a similar nature provided for by regulation 50 of the 2001 Contributions Regulations.

59. The Secretary of State submits that, on Mr J's appeal to the First-tier Tribunal, an issue arose as to whether he might benefit from regulation 50 of the 2001 Contributions Regulations. To my admittedly inexpert mind regarding N.I. matters, the argument might more forcefully be made in relation to regulation 6 of the 2001 Crediting and Treatment Regulations.

60. The question for the First-tier Tribunal under regulation 38A of the 1999 Decisions and Appeals Regulations is whether there "appears" to be an issue which, under section 8 of the 1999 Transfer Act, falls to be decided by an officer of Inland Revenue. In my judgment, in relation to regulation 6 of the 2001 Crediting and Treatment Regulations, regulation 38A requires the tribunal to refer an appeal to the Secretary of State if it

appears to the tribunal that there is a possibility, which is not fanciful, that the contributor's late payment of N.I. contributions, as specified in regulation 6, was attributable to his ignorance or error and, if so, the ignorance or error was not due to a failure to exercise due care and diligence (similar considerations arise in relation to regulation 50 of the 2001 Contributions Regulations).

61. It should be emphasised that the (Social Entitlement Chamber) tribunal must not seek to determine for itself the applicability of either regulation 6 or regulation 50. The tribunal is also precluded from seeking to exercise the discretions vested in an Inland Revenue officer under those regulations (those discretions arising once the officer has determined that either regulation applies). However, a tribunal may need to turn its mind to the regulations' concepts of ignorance or error, and failing to exercise due care or diligence, to avoid failing to discharge its referral duty under regulation 38A of the 1999 Decisions and Appeals Regulations although, as I have said, in my judgment no reference would be required if the prospects of either regulation applying were fanciful. In those circumstances, a tribunal would be entitled to find that no relevant issue genuinely arises. The tribunal would not be purporting to determine the applicability of either regulation; it would merely be finding that no issue genuinely arises under either regulation.

62. It must often be the case that neither party to proceedings before the Social Entitlement Chamber argues for a regulation 38A reference. If the Secretary of State thought a reference to HMRC was called for, she should already have made one under regulation 11A of the 1999 Decisions and Appeals Regulations. And I very much doubt that an unrepresented appellant would be aware of the possibility of a regulation 38A reference. The question therefore arises whether the absence of a submission contending for a regulation 38A reference prevents it from 'appearing' to a tribunal that an issue arises which, under section 8 of the 1999 Transfer Act, falls to be decided by an Inland Revenue officer. The answer is 'not necessarily'. Each case turns on its own facts, but it is possible to envisage a case where, despite the absence of a submission contending for a regulation 38A reference, the evidence is such that, in the light of the tribunal's inquisitorial function, it is required to consider of its own motion whether regulation 38A requires a reference to be made. That, however, is not quite the reason why I now go on to allow Mr J's appeal.

Why the First-tier Tribunal erred in law

63. Turning now to the First-tier Tribunal's decision in Mr J's case, its statement of reasons included a finding that Mr J's state pension could not be put into payment on any date before that on which HMRC received payment for the additional contributions necessary for him to satisfy the ten qualifying years entitlement condition. According to the tribunal, this was a legal impossibility because the N.I. legislation preventing Mr J's

contributions payment from being treated as made on any date other than that on which payment was received by HMRC.

64. The above finding was mistaken in law. Regulation 6 of the 2001 Crediting and Treatment Regulations provides an exception to the general payment date rules in regulation 4 of the regulations. Where regulation 6 applies, an Inland Revenue officer may direct that "the contribution shall be treated as paid on such earlier day as the officer considers appropriate in the circumstances".

65. The tribunal's flawed assumption that the payment date rule in regulation 4 of the Crediting and Treatment Regulations was, in all cases, absolute led it to err on a point of law. Decisions under regulation 6 of those Regulations fall within the scope of the referral duty in regulation 38A of the 1999 Decisions and Appeals Regulations. The question for the First-tier Tribunal under regulation 38A was whether there appeared to be an issue which, under section 8 of the Transfer Act, fell to be decided by an officer of HMRC. Since the tribunal overlooked regulation 6, I am satisfied that it erred in law. The tribunal's mistake of law rendered it incapable of complying with its referral duty under regulation 38A to the extent that it related to regulation 6 at least.

66. The tribunal's mistake cannot be considered immaterial because, on the case presented by Mr J, it was not fanciful to think that an Inland Revenue officer acting under regulation 6 of the 2001 Crediting and Treatment Regulations might (a) decide that Mr J's late payment was attributable to ignorance or error; and, if so, (b) that ignorance or error was not due to a failure to exercise due care or diligence. Those are the conditions which, if shown to an Inland Revenue officer's satisfaction, permit the officer then to decide to treat contributions as paid on a date other than that of payment. While it is not for me, nor was it for the First-tier Tribunal, to predict the likely outcome were an Inland Revenue officer to consider Mr J's case under regulation 6, I am satisfied that there was a prospect, that was not fanciful, of an officer concluding that his late payment of Class 3 contributions was attributable to his error or ignorance and that this was not due to a failure to exercise due care or diligence. I am so satisfied in relation to the ignorance or error question because the evidence before the tribunal could reasonably have supported a finding that, once Mr J appreciated the need to pay Class 3 contributions, he did so without delay. I am so satisfied in relation to the 'due care and diligence' question because the evidence could reasonably have supported a finding that the information provided by the DWP to Mr J about how to make a payment was inconsistent and liable to confuse. But I should stress that I make no actual finding about the application of regulation 6 (or regulation 50 of the 2001 Contributions Regulations) nor do I say that no other considerations than those just mentioned might be relevant in Mr J's case. My point

is simply that, on the evidence, the prospects of regulation 6 applying to Mr J were not fanciful.

67. I am not without sympathy for the First-tier Tribunal since the existence of regulation 6 of the 2001 Crediting and Treatment Regulations was not apparent from DWP's written tribunal submissions. In fact, the impression given was of a fixed legal rule that the date on which payment of Class 3 contributions was made could only ever be the date on which the contributor's payment was received by HMRC. This did not, however, absolve the tribunal of its responsibility to satisfy itself as to the applicable legal environment in which it was operating.

Disposal of this appeal

68. The First-tier Tribunal's decision involved an error on a point of law. I set aside the First-tier Tribunal's decision.

69. As noted above, the regulations authorised by section 24A of the Social Security Act 1998 may require the Upper Tribunal to make referrals in respect of issues arising under section 8 of the 1999 Transfer Act. While regulations have been made in respect of the First-tier Tribunal (regulation 38A of the 1999 Decisions and Appeals Regulations), they have not to my knowledge been made in respect of the Upper Tribunal. It might be argued that the Upper Tribunal's powers of disposal, once it has set aside a decision of the First-tier Tribunal, rendered such regulations unnecessary. The Upper Tribunal's power to re-make a First-tier Tribunal's decision includes power to "make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision" (section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007). If "any decision" included a referral under regulation 38A, it would arguably have been unnecessary for Parliament to make express provision for the Upper Tribunal in section 24A of the 1998 Act, which tends to suggest that the power in section 12(4)(a) does not permit the Upper Tribunal to make a reference of the type provided for by regulation 38A. As was held in *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC, express powers contained in a statutory scheme viewed as a whole, may delimit the scope for implied powers, and the mere fact that an implied power would be convenient or desirable is not sufficient

70. A further (practical) consideration militating against the Upper Tribunal re-making the First-tier Tribunal's decision and, in so doing, considering whether a regulation 38A reference is required, arises from the fact that such a reference would be but a stepping-stone towards a final entitlement decision. The First-tier Tribunal is generally better placed than the Upper Tribunal to make final entitlement decisions, having been

established for that purpose, and, when it does make such decisions, there is a right of appeal to the Upper Tribunal which is not of course the case in respect of a decision taken by the Upper Tribunal itself.

71. For the above reasons, I remit this matter to the First-tier Tribunal. It should first consider whether it is required by regulation 38A of the 1999 Decisions and Appeals Regulations to refer the appeal to the Secretary of State for onward referral to HMRC.

Directions

The First-tier Tribunal's decision of 16 January 2019 is set aside, and the Upper Tribunal now directs as follows:

1. Mr J's appeal against the Secretary of State's decision of 10 September 2018 is remitted to the First-tier Tribunal for re-determination.

2. The tribunal that re-determines Mr J's appeal must not be constituted so as to include the tribunal judge whose decision has been set aside in the present proceedings.

3. The tribunal that re-determines Mr J's appeal must first consider whether it is required to refer the appeal to the Secretary of State under regulation 38A of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

4. If Mr J wants the First-tier Tribunal to hold a hearing before re-determining his appeal, he must inform the tribunal in writing so that his request is received by the First-tier Tribunal within **one month** of the date on which this decision is issued.

Direction (4) above may be varied by direction of the First-tier Tribunal.

E Mitchell
Judge of the Upper Tribunal
Authorised for issue on 7 January 2021