



TC06097

Appeal number: TC/2016/03849

National insurance contributions – failure to pay class 3 voluntary contributions within statutory time limit – whether failure attributable to ignorance or error – yes – whether ignorance or error due to failure to exercise due care and diligence – yes – appeal dismissed – regulation 25 Social Security (Contributions) Regulations 1975 and regulation 29 Social Security (Contributions) Regulations 1979.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ABDUL DAWOOD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ROBIN VOS

Sitting in public at Taylor House, London on 4 September 2017

The Appellant did not appear and was not represented

Mrs Linda Gordon, Officer of HM Revenue and Customs, for the Respondents

DECISION

Background

- 5 1. We all like to think that when we retire, after many years' hard work, we will be entitled to a full state pension. However, as the appellant, Mr Dawood, has found out, this depends very much on our national insurance contributions record.
2. In Mr Dawood's case, there are two main problems:
- (1) He only came to the UK part of the way through his working life.
- 10 (2) There are six years (the tax years ended 5 April 1977 – 5 April 1982 inclusive) which do not qualify as Mr Dawood did not make sufficient contributions or receive sufficient national insurance credits.
3. As a result of these issues, Mr Dawood only receives 71% of the full state pension.

15 **Mr Dawood's non-attendance at the hearing**

4. I am satisfied that Mr Dawood received notice of the hearing as he called the Tribunal after receiving the initial email notification to say that he could not open the attachments and the Tribunal subsequently sent him the relevant papers by post.
5. When complying with the Tribunal's directions in May 2017, Mr Dawood
20 indicated that the hearing should proceed without him as he was satisfied that he had put his case forward to his satisfaction in the documents he had provided.
6. The Tribunal clerk also called the appellant on the morning of the hearing and was told by Mr Dawood that he was too ill to attend but that he was content for the hearing to proceed in his absence.
- 25 7. Having reviewed the bundle of documents provided, I am happy that the Tribunal has sufficient information before it in order to make a decision.
8. HMRC have no objection to proceeding with the hearing in the absence of the appellant.
9. Taking all of these factors into account, I have decided that it is in the interests
30 of justice to proceed with the hearing.

Late appeal

10. Mr Dawood's appeal should have been received by the Tribunal no later than 1 July 2016, being 30 days after the date of HMRC's review letter (1 June 2016).

11. In fact, Mr Dawood's notice of appeal was dated 11 July 2016 and was received by the Tribunal on 18 July 2016.

12. Mr Dawood had written to HMRC to request an extension of time for making his appeal to 15 July 2016, being one week after his return from holiday.

5 13. HMRC have no objection to the late appeal.

14. Given that Mr Dawood's appeal was sent only ten days after the deadline and he had explained the reasons for this to HMRC, I have no hesitation in granting permission for the appeal to be notified to the Tribunal outside the statutory deadline.

Scope of the appeal and the Tribunal's jurisdiction

10 15. HMRC have issued a decision under s 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999 refusing to allow Mr Dawood to make any voluntary class 3 national insurance contributions for the period from 1 July 1968 to 5 April 1996. This is on the basis that, although HMRC accept that Mr Dawood's failure to pay contributions on time was attributable to his ignorance or error, the
15 ignorance or error was due to his failure to exercise due care and diligence.

16. This is an appealable decision. In particular, s 11(2)(b) of the Social Security Contributions (Transfer of Functions, etc) Act 1999 gives the taxpayer in question the right to appeal to the Tribunal.

17. Regulation 10 of the Social Security Contributions (Decision and Appeals) Regulations 1999 gives the Tribunal power to vary the decision in question. The
20 Tribunal therefore has a full power to remake the decision and not just a supervisory jurisdiction.

18. Although Mr Dawood also takes issue with the fact that his state pension entitlement is calculated on the basis of his entire working life (including the period
25 before he moved to the UK) and the fact that the years that he spent working before coming to the UK have not been counted as qualifying years, HMRC say that this is not something which is within the jurisdiction of HMRC or of the Tribunal as it relates to the calculation of the pension which is the function of the Pensions Service of the Department for Work and Pensions and not the payment of national insurance
30 contributions (which is what falls within the remit of HMRC).

19. HMRC are correct on this point. They have not decided (and have no authority to decide) whether the calculation of Mr Dawood's state pension should take account of his working life prior to moving to the UK.

20. This appeal can therefore only deal with HMRC's decision not to allow Mr
35 Dawood to make voluntary class 3 national insurance contributions for the tax years ended 5 April 1977 – 5 April 1982 inclusive.

The evidence and the facts

21. The Tribunal had before it a bundle of documents and correspondence prepared by HMRC together with a witness statement from Ms Lesley Crawford, an officer of HMRC.

5 22. The purpose of the witness statement was however solely to clarify the meaning of certain documents provided by HMRC and did not itself provide any additional evidence.

23. From this information, I find the following relevant facts.

10 24. Mr Dawood was born in Tanzania on 22 January 1941 although he was a British citizen from birth.

25. He worked for the British Colonial Service in Tanzania for approximately nine years before moving to the UK in June 1968, entering the UK national insurance scheme on 1 July 1968.

15 26. During the period from 1968 to 5 April 1975, Mr Dawood did not have a full national insurance contribution record for any contribution year other than the 1971/72 year. As a result of this, the National Insurance Contributions Office wrote to him shortly after the end of each year with his contribution record and explaining that he needed to make up the shortfall. These notices are often referred to as “deficiency notices”. Mr Dawood did not however rectify the shortfall for any of
20 these years.

27. Between 1968 and 1974, Mr Dawood notified the National Insurance Contributions Office of six changes of address.

28. The deficiency notice for the period to 5 April 1975 was returned to the National Insurance Contributions Office as being undelivered.

25 29. Between 1976 and 1982, Mr Dawood was working part-time and his earnings were below the lower earnings level for national insurance contribution purposes.

30 30. Mr Dawood did not make any national insurance contributions or receive any national insurance credits in each of the years ended 5 April 1977 – 5 April 1980 inclusive. The National Insurance Contributions Office did not however send out deficiency notices for those years as they did not have an up to date address for Mr Dawood. They did not take any steps to try to track him down.

31. Mr Dawood lived in Saudi Arabia between 16 May 1979 and 10 March 1980.

35 32. During the tax year ended 5 April 1980, Mr Dawood made a claim for unemployment benefit and, around the same time, provided the National Insurance Contributions Office with an updated address.

33. Mr Dawood notified the National Insurance Contributions Office of a further change of address at some point between November 1981 and June 1982.

34. Mr Dawood received some national insurance credits for each of the years ended 5 April 1981 and 5 April 1982. However, as he did not have a full contribution record for either of these years, the National Insurance Contributions Office issued deficiency notices for both years.

5 35. Mr Dawood also did not have a full contribution record for the tax years ended 5 April 1983 and 5 April 1984. Again, deficiency notices were issued but this time, Mr Dawood did make additional voluntary class 3 national insurance contributions so that he had a full record for each of those two years.

10 36. In his request for a review of HMRC's decision not to allow him to pay voluntary class 3 national insurance contributions for the relevant years, Mr Dawood says that the companies he worked for between 1976 – 1982 told him that he qualified for free pension credits as he was an intern. HMRC suggest that this statement, on its own, is not sufficient evidence that Mr Dawood was in fact told this.

15 37. In a previous letter to HMRC, Mr Dawood says that he suspected that his employers during that period might have paid national insurance contributions for him but that HMRC may just not have tracked down the payments.

20 38. These two statements (made less than three months apart) appear on the face of it to be inconsistent. If Mr Dawood thought that his employer was paying national insurance contributions on his behalf, it seems unlikely that he had, at the same time, been told that he qualified for free pension credits.

39. On the balance of probabilities, I am not therefore persuaded that Mr Dawood was told that he qualified for free pension credits although, as explained below, this would not have changed my decision.

The law

25 40. During the period in question (6 April 1976 – 5 April 1982), voluntary class 3 national insurance contributions had to be paid within two years after the end of the relevant tax year (regulation 24 of the Social Security (Contributions) Regulations 1975 and regulation 27 of the Social Security (Contributions) Regulations 1979).

30 41. In each case, the Secretary of State had power to allow contributions to be made after the statutory time limit had expired if it was shown that the failure was attributable to the individual's ignorance or error and was not due to a failure on his part to exercise due care and diligence (regulation 25 Social Security (Contributions) Regulations 1975 and regulation 29 Social Security (Contributions) Regulations 1979).

35 42. These provisions were considered by the Court of Appeal in *HMRC v Kearney* [2010] EWCA Civ 288. Lady Justice Arden suggested [at 24] that the correct approach to determining whether an individual has exercised due care and diligence:

“is to treat all the relevant circumstances as factors which have to be balanced together to reach an assessment or evaluation on a case by case basis.”

Mr Dawood’s grounds of appeal

5 43. Mr Dawood’s main ground of appeal is that the National Insurance
Contributions Office failed to tell him to pay voluntary contributions. He says that
they should have informed him of all aspects of contributions by letter or by
pamphlets. In this context, Mr Dawood says that he did not receive the deficiency
10 notices which were sent to him for the tax years ended 5 April 1980, 5 April 1981 and
5 April 1982.

44. Mr Dawood suggests that, had he been given full information about the
requirement to pay voluntary contributions, he would have opted for a private
pension.

15 45. As mentioned above, Mr Dawood also explains that he either thought that his
employer was paying national insurance contributions on his behalf or that he had
been told that he qualified for free pension credits as he was working as an intern.

46. Mr Dawood also refers in his grounds of appeal to his work for the British
Colonial Service in Tanzania before coming to the UK. However, as explained
above, this is not something which this Tribunal has any jurisdiction to consider.

20 HMRC’s case

47. HMRC accept that Mr Dawood’s failure to pay voluntary class 3 national
insurance contributions within the relevant time limit was due to his ignorance or
error. However, they say that this failure resulted from his failure to exercise due care
and diligence and that, as a result, they do not have discretion to allow him to pay the
25 contributions late.

48. In support of this, they make a number of points:

30 (1) Mr Dawood received deficiency notices for most of the years between
1968 and 1976 which made it clear that he had gaps in his national insurance
record and that he could make voluntary contributions in order to plug the holes.
However, he did not do so.

(2) The reason why no deficiency notices were sent between 1976 – 1979 was
that Mr Dawood had failed to notify them of his current address and so they
could not send the notices.

35 (3) HMRC do not accept that Mr Dawood did not receive the deficiency
notices for the tax years ended 5 April 1980 – 5 April 1982, as suggested by
him. There is no evidence that the notices were returned undelivered and he
clearly did receive the notices for the years ended 5 April 1983 and 5 April 1984
as he made voluntary payments in respect of each of those years.

(4) In any event, HMRC argue that they have no obligation to remind a taxpayer of his duty/entitlement to make national insurance contributions.

5 (5) HMRC also refer to the fact that Mr Dawood made a claim for unemployment benefit in the year ended 5 April 1980. As the amount of unemployment benefit to which he was entitled would have depended on his national insurance contribution record, HMRC suggest that this would have alerted him to the fact that an incomplete national insurance contribution record would have consequences in relation to the benefits to which he was entitled.

10 (6) As far as Mr Dawood's statement that his employer told him that he was entitled to pension credits is concerned, HMRC's view is that Mr Dawood should have contacted the National Insurance Contributions Office to check if this was correct.

Decision

15 49. In my view, Mr Dawood failed to exercise due care and diligence and his ignorance or error which led to him failing to pay voluntary class 3 national insurance contributions within the relevant time limit resulted from that lack of care and diligence.

50. In *Kearney*, Lady Justice Arden observed [at 36] that:

20 "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."

35 51. In this case, Mr Dawood clearly had knowledge of the way in which national insurance contributions worked. He had been within the national insurance scheme for eight years prior to the period complained about. During that period, he had not made full contributions and had received deficiency notices inviting him to make voluntary contributions. He would therefore have known about the ability to make voluntary contributions and the consequences of not doing so.

40 52. Mr Dawood clearly knew that his earnings were below the lower earnings limit for national insurance after he started working part-time in 1976. He must therefore have known, or at least had reason to suspect, that his national insurance contribution record would be deficient. Although he did not receive any deficiency notices from the National Insurance Contributions Office until 1980, his failure to get in touch with

them to check the position shows a lack of care and diligence given his prior knowledge of the NIC system.

53. I accept that, if Mr Dawood's employer had told him that he was entitled to national insurance credits as he was working as an intern, there is no reason why he should have double-checked this with the National Insurance Contributions Office. Indeed, Lady Justice Arden in *Kearney* specifically states [at 29] that:

10 "... there is at least a general 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."

54. However, even if I had been able to conclude that Mr Dawood's employer had made such a statement, his failure to notify the National Insurance Contributions Office of a new address in 1975 showed a lack of care and diligence. Clearly, if Mr Dawood had kept the National Insurance Contributions Office up to date with his current address, he would have received deficiency notices for each of the relevant years and could have taken appropriate action. At the very least, he would have been alerted to the fact that the employer's statement may not be correct and would have had the opportunity to check this with the National Insurance Contributions Office.

55. Mr Dawood says that the National Insurance Contributions Office should have obtained his up to date address by other means such as by talking to the Inland Revenue. However, given that there is no statutory obligation on the National Insurance Contributions Office to notify Mr Dawood of his entitlement to make voluntary contributions, it seems to me that there cannot be any obligation on them to expend their resources in trying to trace an individual who could have notified them of a change of address but has simply failed to do so.

56. From 1980 – 1982, Mr Dawood says he did not receive the deficiency notices sent to him by HMRC. However, there is clear evidence that these were sent and there is no reason to suppose that they were sent anywhere other than the address which Mr Dawood had provided to the National Insurance Contributions Office when he made his claim for unemployment benefit in 1980 and the subsequent new address notified in 1981/82.

57. In Mr Dawood's request for a review of HMRC's decision he says, in support of his statement that he did not receive the deficiency notices, that he would have been mad to ignore the notices for the tax years ended 5 April 1981 and 5 April 1982 as those years only needed a few contributions to qualify. This is true for the tax year ended 5 April 1982 where he had accumulated credits for 41 weeks and therefore only needed to make payments in respect of the remaining 11 weeks. It is not however true in relation to the year ended 5 April 1981 where he only had credits for seven weeks and so would have had to pay for a further 45 weeks to make the record complete.

58. It might also be said that the fact that Mr Dawood did make voluntary class 3 national insurance contributions in each of the tax years ended 5 April 1983 and 5 April 1984 is another fact from which it might be inferred that he did not receive the deficiency notices for the previous years. However, there may be other explanations for Mr Dawood's change of heart. As mentioned above, Mr Dawood had claimed unemployment benefit in the year ended 5 April 1980. He also claimed unemployment benefit in the years ended 5 April 1982 and 5 April 1983. He may well have discovered that the deficiencies in his contributions record affected the amount of the benefits to which he was entitled and so decided to pay the voluntary contributions in 1983 and 1984.

59. Of course, I have no evidence about this one way or the other and, in the absence of that evidence and, bearing in mind the documentary evidence provided by HMRC showing that the deficiency notices were issued and that Mr Dawood had provided his addresses for the relevant period to the National Insurance Contributions Office, I am not prepared to accept, on the balance of probabilities, that the notices were not received, solely on the basis of a statement to that effect made over 30 years later.

60. Lady Justice Arden concluded her decision in *Kearney* by observing 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.”

61. This is not one of those circumstances where ignorance is an excuse. Mr Dawood should have been aware from his previous experience of the NIC scheme of his entitlement to make voluntary contributions for the years in question. Even if he thought he had been told something different by his employer, he would have been alerted to the fact that this may not have been correct had he kept the National Insurance Contributions Office up to date with his address.

Conclusion

62. Mr Dawood's failure to pay voluntary class 3 national insurance contributions for the tax years ended 5 April 1977 – 5 April 1982 did result from his ignorance or error.

63. However, that ignorance or error resulted from a failure to exercise due care or diligence.

64. As a result, there is no discretion to allow him to make voluntary class 3 national insurance contributions for the relevant years outside the statutory time limit. HMRC's decision therefore stands good.

65. The First Tier Tax Tribunal has no jurisdiction to oversee the Pensions Services' calculation of Mr Dawood's state pension and in particular whether that calculation should only be based on the number of years Mr Dawood has spent in the UK or, if not, whether the years he spent working for the British Colonial Service should be counted as qualifying years. The correct avenue for challenging those decisions is the Pensions Service of the Department of Work and Pensions.

66. 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.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 08 SEPTEMBER 2017