



TC06686

Appeal number: TC/2017/08182

NATIONAL INSURANCE – Class 2 contributions – failure to pay – whether failure to pay attributable to ignorance or error; whether ignorance or error due to failure to exercise due care and diligence – no - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IAN CHILVERS

Appellant

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at North Shields on Friday 3 August 2018

Mr Chilvers, the Appellant

Mr T Chako, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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Decision

The issue

1. This is an appeal against HMRC's decision issued on 26 July 2017 under section 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999. That decision was to the effect that Mr Chilvers' failure to pay Class 2 National Insurance contributions ("NICs") for the period 3 April 1983 to 10 April 2010, within the prescribed time limits, was attributable to his ignorance or error and that such ignorance or error was due to his failure to exercise due care and diligence.
2. Mr Chilvers wishes to pay these contributions now so that he would qualify for a full State Pension on retirement. Paragraph 5A of Schedule 3 to the Social Security (Contributions and Benefits) Act 1992 provides that, in order to receive a full State Pension, Mr Chilvers needed to have paid sufficient Class 1, 2 or 3 contributions in a total of 35 qualifying years.
3. As a result of HMRC's decision any National Insurance contributions paid by Mr Chilvers for that period could not be treated as having been paid for the purposes of any contributory benefit.

Procedural background

4. In 2016, the year in which he would attain State Pension age, Mr Chilvers requested from the Department of Work and Pensions a pension statement, which detailed his entitlement to State Pension, including the number of qualifying years he has that count towards his State Pension.
5. The Statement confirmed that he was entitled to a reduced pension based on 13 qualifying years rather than 35. Mr Chilvers' subsequent enquiry revealed that the reason for the shortfall was that he had not paid any Class 2 NICs since becoming self-employed in 1983.
6. When Mr Chilvers became aware of his problem he wrote to HMRC on 20 May 2016 asking if, in order to enhance his pension entitlement, he could pay the unpaid Class 2 NICs and have them treated as being paid on time.
7. On 17 August 2016, HMRC sent a letter to Mr Chilvers to advise him that not only was he not registered as self-employed for Class 2 NIC purposes, but also the time limits for paying any Class 2 NICs due before 11 April 2010 (to count for State Pension) had expired. He was informed that whilst the liability to pay the Class 2 NICs for that period remained, were they to be paid, they would be treated as not paid for benefit purposes.
8. In fact those arrears have now been waived.
9. On 25 August 2016 the Mr Chilvers requested a formal decision from HMRC.
10. On 11 April 2017, HMRC wrote to Mr Chilvers' accountants seeking details of their advice to Mr Chilvers in regard to Class 2 NICs. On the same day HMRC wrote to Mr Chilvers enclosing that letter and seeking further information. In particular HMRC told Mr Chilvers that when NICs had been the responsibility of the DSS or DHSS (hereinafter DHSS) they sent a notice that the NIC record was not up-to-date

for every tax year from between 1985/86 to 1988/89 inclusive. HMRC asked what he had done with those notices (“Deficiency Notices”).

11. On 20 April 2017, Mr Chilvers replied to HMRC answering those questions. In regard to the Deficiency Notices he stated that he had moved home in 1985 and had never received any such notices. If he had he would have acted on them.

12. His agents responded stating that they had no records of the firm’s dealings with Mr Chilvers prior to 2001 when the present proprietor took over the firm. That proprietor stated that monitoring Class 2 NICs was not part of his terms of engagement.

13. On 14 June 2017, a further informal opinion letter was issued to Mr Chilvers by HMRC who stated:-

(a) He was aware of the UK NIC Scheme.

(b) Deficiency Notices were sent from 1984/85 to 1988/89 pointing out that inadequate NICs had been paid.

(c) The Notes accompanying the tax returns issued each year stated that a self-employed person was liable to pay Class 2 NICs in addition to Class 4 NICs.

(d) He had not made any enquires before May 2016.

(e) It remained his legal responsibility to notify the then Department of Health and Social Security that he was self-employed.

14. On 17 June 2017, Mr Chilvers reiterated his wish for a formal review.

15. On 26 July 2017, the formal Notice of Decision was issued.

16. On 9 August 2017 Mr Chilvers appealed based on the decisions in *Schonfield v HMRC*¹(“Schonfield”) and *Murphy v HMRC*².

17. Mr Chilvers appealed to the Tribunal on 18 October 2017 on the same basis.

18. The onus of proof lies with Mr Chilvers.

Mr Chilvers’ evidence

19. Mr Chilvers was a straightforward and wholly credible witness. I readily accept that recollection of detail after so many years is not possible or likely.

20. After graduation at the age of 20 Mr Chilvers was employed by the Department of the Environment as a contracted employee through an agency. The agency attended to both tax and NIC.

21. When he was approximately 22 he returned to academia for approximately three years as a student.

¹ 2013 UKFTT 244 (TC)

² 2014 UKFTT 734 (TC)

22. In or about 1978 he obtained a full-time job with Mitchell Beazley until he was made redundant with effect from January 1983. For several months he applied for many jobs but was unable to secure employment. At some point in 1983 he concluded that he would be unable to obtain a job and decided that being self-employed was his only and best option. Since that time he has been self-employed in publishing, which has involved writing, editing, proof reading and indexing. From time to time he has done small jobs for, for example, the University of Northumbria and that gave rise to Class 1 NICs.

23. His earnings have always been modest and his financial affairs uncomplicated but he feels intimidated by tax and anything to do with it so he considered it essential to employ the services of an accountant.

24. He asked other colleagues for a recommendation for an accountant and Berwyn Associates in Surbiton in Surrey was recommended. The owner of that firm was one Linda Francis who had previously been employed by Mitchell Beazley as a book designer before she trained as an accountant. The firm actively sought customers in publishing.

25. He met with her, told her what he was doing and sought advice but cannot recall the details. He relied on her to tell him what he needed to do and then he did it. He had confidence in her.

26. He met Ms Francis only once or possibly twice. In the years since 2001 he has never met his current accountant albeit he is in regular contact with him. Although he moved from his bedsit/flat in London to Newcastle in 1985 he has seen no need to change his accountant.

27. He was quite clear that Berwyn Associates registered him as self-employed with the then Inland Revenue since he did not know how to do so. All details of both self-employed and employed earnings were given to Berwyn Associates who prepared his accounts, submitted them to him and provided him with details of the amounts he should pay. Those annual statements showed Class 4 NICs. They have prepared for his approval and thereafter filed his tax returns each year since 1983/84. Mr Chilvers forwarded, and forwards to Berwyn Associates, his income tax returns and any other financial correspondence.

28. He did not read the accompanying Notes. He relied on the accountants to tell him what was required and when.

29. He is absolutely adamant that he had never been told that he needed to register separately with the DHSS. Had he been told to do so, he would have done so. He states that he has "... always scrupulously maintained ..." his financial records and since 1995 he has observed the guidelines in the three booklets from HMRC which had been given to him then. He produced them and they were the Self-Assessment Guide for the self-employed and two booklets relating to record keeping for self-employed people. There is no reference to Class 2 NICs in those booklets.

30. The only engagement letter he has received from the accountants was one issued in the last five years.

31. He had been wholly unaware of any publicity campaigns about NICs in 2001 and 2005. In his circle of friends, none of them had been aware of it. It has been a topic of conversation since two years ago when he discovered that at least one of his friends who employed Berwyn Associates had encountered exactly the same problem as he has done with Class 2 NICs.

32. Mr Chilvers has always known that he had to pay NICs but he was not aware that there were two different types that were collected separately.

HMRC's arguments

33. Mr Chako argued that:

(a) It is not disputed that Mr Chilvers was ignorant of the requirement to pay Class 2 NICs.

(b) There is no evidence of what Ms Francis did or did not say in 1983 and Mr Chilvers cannot recall asking for an explanation of the NIC position. Any competent accountant would have told him to register with the DHSS.

(c) It is not disputed that Mr Chilvers had not read the Notes attached to his income tax returns and perhaps he should have done so.

(d) It is clear that Mr Chilvers had not checked the NIC position at any time until 2016 and it might have been appropriate for him to have done so, for example, when self-assessment was introduced.

(e) Mr Chilvers had failed in his obligation to tell the DHSS about his change of address.

34. He relied on *Porter v HMRC*³ at paragraph 151 which reads:-

“An intelligent and capable person who is aware that they have financial obligations but who devolves all responsibility onto others, assumes that they are doing what they are supposed to do and makes no checks or enquiries as to whether the right things are being done cannot be said to be exercising due care and diligence ...”.

That case is not binding on me and turns on different facts.

Discussion

35. There is no dispute about the applicable legislation which is to be found in the various cases cited to me. There is no need to rehearse that here.

36. Since HMRC accept that the failure to pay Class 2 NICs arose because of Mr Chilvers' ignorance, the issue for me to decide is whether Mr Chilvers exercised due care and diligence in relation to NIC.

37. As I indicate at paragraph 19 above I found Mr Chilvers to be a credible and straightforward witness.

38. Mr Chako argued that Mr Chilvers had failed to prove what advice had been given by Ms Francis. This is a specialist Tribunal. I have been a tax practitioner. Exceptionally few personal tax clients take notes at meetings with their advisors. That

³ 2016 UKFTT 0792 (TC)

is precisely why it is good practice for the advisor to write follow-up letters setting out the advice given. I am wholly unsurprised that 35 years later Mr Chilvers is unable to produce such evidence.

39. I accept his repeated and very clear assertion that if Ms Francis had told him to register with the DHSS then he would have done so. Therefore I accept that she did not tell him.

40. Since he did not register with the DHSS it is a natural *sequitur* that he would not intimate his change of address to the DHSS since he had no involvement with them.

41. Whilst a competent accountant should have told Mr Chilvers about the need to register with the DHSS, I do not accept the argument that it is inherently unlikely that a competent accountant would fail to do so. Sadly there are numerous examples of such failures and a good example, in a different context, is to be found in *Barrett v HMRC*⁴.

42. Since I accept Mr Chilvers' assertion that he was not told, then I must address the argument that he did not exercise due care and diligence in that he did not ask specifically about Class 2 NICs. That is a chicken and egg situation. He knew about NICs, he was told by Ms Francis that he had to pay Class 4 NIC and he did do so. He was patently ignorant of the existence of Class 2 NIC and therefore he could not ask her about it.

43. I accepted his explanation in the letter to HMRC dated 18 October 2017 that the property in which he had lived in London until 1985 was "... a run-down house divided into about 8 flats and bedsits ... tenants came and went ... Any mail sent to me there after I had moved to Newcastle would almost certainly have been binned without a second thought".

44. Mr Chilvers was very clear that he had never received any Deficiency Notices and I accept that.

45. I do accept that it does not suffice to simply appoint an agent and leave matters to that agent.

46. However, it is evident that Mr Chilvers had limited knowledge of the tax and social security system. He had no financial or legal expertise, and was aware of those limitations, and that was precisely why he had employed an accountant.

47. I find that he did take due care and diligence in finding an accountant who was recommended to him and was conversant with his profession and who purported to be competent.

48. I see no reason for him to have researched NICs or the tax calculations any further himself.

49. On a similar line I see no reason why he should have read the Notes attached to his self-assessment returns. As Judge Reid pointed out in *Thacker v HMRC*⁵ at paragraphs 16 and 17 the Notes provided with tax assessments from 5 April 1990

⁴ 2015 UKFTT 329 (TC)

⁵ 2012 UKFTT 698 (TC)

referred to Class 2 contributions and the Notes attached to the self-assessment returns from 1996/1997 did so too. However, in this instance, Berwyn Associates had been preparing his tax returns for six years before the introduction of the first of these Notes. As he pointed out, he was paying the accountant for her, and later his, expertise because he felt unable to deal with these matters himself.

50. Unlike Mr Arens in *Arens v HMRC*⁶, Mr Chilvers was very clear that he certainly did read the tax returns and the letters from the accountant accompanying them and he made every effort to understand the position. He frankly admitted that he found it difficult as tax, in his words, went above his head. I do not accept that he should have had to read the Notes because that is precisely why he employed an accountant.

51. Having employed Berwyn Associates to ensure that his tax and NIC position was up to date, Mr Chilvers would have been entitled to believe that he was paying all that he was required to pay. He has met all his tax and Class 4 liabilities and as soon as he was aware of the shortfall in his contributions record he took steps to attempt to rectify the position.

52. I am wholly unsurprised that Mr Chilvers did not check on his NIC position at any point between 1983 and 2016. In my experience very few taxpayers do so. Indeed I am aware from my experience in the Social Entitlement FTT that a surprising number do not even claim their pension timeously and are shocked to find that they cannot backdate a claim by more than three months.

53. I have weighed in the balance all of the various factors in this case and Mr Chako is entirely correct in saying that no other First-tier Tribunal decision is exactly in point. It cannot be. There are similarities with *Schonfield* but the circumstances are certainly not exactly the same and nor are the attributes and experience of the taxpayers.

Decision

54. In the particular circumstances of this case I have decided to allow the appeal. I accept the evidence of Mr Chilvers and find that he has discharged the onus of proof. For the reasons set out above I find that, although he was undoubtedly ignorant about Class 2 NICs, in the circumstances he acted with due care and diligence.

55. 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.

**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 28 August 2018

⁶ 2017 UKFTT 79 (TC)