



[2021] UKFTT 121 (TC)

**TC08102**

*NATIONAL INSURANCE CONTRIBUTIONS-contributor mature university student-no contributions made for university years-incomplete contribution record-reduced state pension-out of time to make voluntary Class 3 contributions-whether contributor should be allowed to make late contributions-whether ignorance or error the result of a failure to exercise due care and diligence*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/04721**

**BETWEEN**

**VERONICA LYONS**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE MARILYN MCKEEVER  
MS SUSAN STOTT**

The hearing took place on 30 March 2021. The form of the hearing was V (video). The Tribunal and HMRC's representative attended by video on the CVP platform but Mr Lyons, Ms Lesley Crawford, HMRC's National Insurance technical expert, and Ms Lisa Tedstill, an observer from HMRC attended by telephone. Mrs Lyons, although present with her husband did not participate in the hearing. A face to face hearing was not held because of the Covid-19 restrictions and the suspension of face to face hearings. The documents to which we were referred are a Hearing Bundle of 110 pages and an Authorities Bundle of 103 pages.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

**Mr Michael Lyons, the Appellant's husband, for the Appellant**

**Victoria Halfpenny, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents**

## DECISION

### INTRODUCTION

1. This appeal concerns an application by Mrs Veronica Lyons to make voluntary Class 3 National Insurance Contributions (NICs) out of time in order to improve her contribution record so as to entitle her to an increased state pension.
2. The tax years in question, when Mrs Lyons failed to pay sufficient NICs are 1986-7, 1987-8 and 1988-9 (“the years in dispute”) when she was at university full time studying for a degree. The failure to pay NICs in those years meant that Mrs Lyons’ contribution record was deficient and her state pension, which she took in 2006, was reduced as a result.
3. Mrs Lyons seeks to pay backdated contributions for the years in dispute outside the normal time limits.

### THE LAW

4. A person who has not paid full NICs is entitled to pay voluntary Class 3 contributions in order to complete their record, within a time limit.
5. Regulation 50 of The Social Security (Contributions) Regulations 2001 (The Contribution Regulations) sets out when contributions can be paid outside the time limit.

#### **“Class 3 contributions not paid within prescribed periods**

50.—(1) If—

(a) a person (“the contributor”)—

(i) was entitled to pay a Class 3 contribution under regulation 48, 146(2)(b) or 147; and

(ii) failed to pay that contribution in the appropriate period specified for its payment; and

(b) the condition in paragraph (2) is satisfied, the contributor may pay the contribution within such further period as an officer of the Board may direct.

(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

(b) that ignorance or error was not the result of the contributor’s failure to exercise due care and diligence.”

6. Regulation 6 of The Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001 also allows contributions which satisfy the conditions to be paid late:

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(ii) failed to pay that contribution in the appropriate period specified for its payment; and

(b) the condition in paragraph (2) is satisfied, the contributor may pay the contribution within such further period as an officer of the Board may direct.

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(a) the failure to pay is attributable to the contributor's ignorance or error; and

(b) that ignorance or error was not the result of the contributor's failure to exercise due care and diligence.”

7. The time limits are set out in Regulation 48 of the Contribution Regulations, which so far as material provides:

**Class 3 contributions**

48.—(1) Subject to sections 13(2) and 14(1) of the Act (Class 3 contributions only payable for purposes of satisfying certain contribution conditions and circumstances in which persons shall not be entitled to pay Class 3 contributions) and these Regulations, any person who is over the age of 16 and fulfils the conditions as to residence or presence in Great Britain or in Northern Ireland prescribed in regulation 145, may, if he so wishes, pay Class 3 contributions.

(2) It shall be a condition of a person's right to pay a Class 3 contribution that he—

(a) complies with Part 7 in so far as it applies to persons paying such a contribution, and

(b) complies with either of the two conditions specified in paragraph (3).

(3) The conditions are that the person specified in paragraph (1) shall either—

(a) pay the contribution not later than 42 days after the end of the year in respect of which it is paid; or

(b) ...

(ii) where the year in respect of which it is paid includes a period of at least 6 months throughout which the contributor has been undergoing full-time education, or fulltime apprenticeship or training for which, in either case, any earnings are less than the lower earnings limit, or has been undergoing imprisonment or detention in legal custody, before the end of the sixth year following the year in which the education, or apprenticeship or training, or imprisonment or detention terminated;...”

8. So the time limit where a person was in full time education is six years from the end of the tax year when the education ceased. Mrs Lyons would have left university in the summer of 1989 i.e. in the 1989-90 tax year, which means she would have had a right to pay the missing contributions up to 5 April 1996.

9. As she did not do so, she can only do so now if she can persuade this Tribunal that her failure to pay was due to ignorance or error (which is accepted) *and* the ignorance or error was *not* the result of a failure to exercise due care and diligence. To put it positively, Mrs Lyons has to show that she remained unaware of the need to pay the additional NICs despite her exercising due care and diligence.

**THE FACTS**

10. Mrs Lyons was born on 20 December 1946. She entered the National Insurance system in 1961. She married in 1967. In December 1968 she made a married women's election to pay reduced NICs which she continued to do until she cancelled the election on 5 April 1978. She had confirmed the election in 1976. She then paid full contributions until, at the age of 38, she went to university and completed a four year degree course. Before going to university, she opted out of the SERPS regime. The period when she was not working or paying NICs spanned

the tax years 1986-7, 1987-8 and 1988-9. She obtained a first class degree and spent the rest of her career teaching in deprived areas. During the university holidays in the years in dispute she claimed unemployment benefit. In the third year, 1988-9, her claim was disallowed as she had made insufficient contributions and the Department of Work and Pensions (“DWP”) would have informed her of this at the time. As a result of her claims she received 14 NIC credits in the first year, 11 in the second and none in the third year. The credits were not sufficient to make the years count towards Mrs Lyons’ State Retirement Pension.

11. Although there was no obligation on the DWP/HMRC to inform contributors about the fact that they had made insufficient contributions, “deficiency notices” were sent to Mrs Lyons. HMRC’s records show that deficiency notices were sent to Mrs Lyons at her correct address in 1986-7 and 1987-8. The notices would have been generated by computer and there is no copy of the actual notice on file, but the bundle contained a pro-forma of the notice and the accompanying leaflet. Although this might not have been the exact document which was sent to Mrs Lyons, Ms Crawford gave evidence, and we accept, that the information provided was essentially the same over the years. A notice provided information about the contributions for the year, that they were insufficient to count towards the retirement pension and would have stated the amount which needed to be paid in order for the year to count. The accompanying leaflet provided more information and details of where further help could be found.

12. Ms Crawford said that the computer generated notices would be sent out for two consecutive years, but if no response was received, no further notice would be sent. This explains why no notice was sent to Mrs Lyons in 1988-9.

13. Mr Lyons argued that there was no evidence that the notices had actually been sent or delivered and denied that either notice had been received. Ms Halfpenny stated that the notices had been sent to the right address and nothing had been returned as undelivered. If a communication had been returned, this would have been recorded on HMRC’s records.

14. We do not find it credible that both letters failed to be issued or both correctly addressed letters failed to arrive and on the balance of probabilities, we find as a fact that Mrs Lyons had been notified, within the time limit, that her contribution record was deficient and that she needed to pay Class 3 contributions in order to receive her full pension.

15. HMRC’s records also show that on 24 April 1995 and on 6 October 1995 retirement pension forecasts were sent to Mrs Lyons. These would also have stated the deficiency and would have showed that Mrs Lyons would not be entitled to the full pension.

16. HMRC’s review letter and other correspondence refers to pension forecast statements being sent to Mrs Lyons and they are also referred to in the Notice of Appeal. Mr Lyons appears to have said that the statements were sent out of time and HMRC accepted this. However, if Mrs Lyons claimed unemployment benefit in the university holidays in 1988-9, that must have been in the summer of 1988, so her four year course would have finished in the summer of 1989 which is in the tax year 1989-90 and the six year time limit would have expired on 5 April 1996, after the pension forecasts had been sent. Even if Mrs Lyons left university earlier and the forecasts were sent after the time limit, they still contained information which would have enabled Mrs Lyons to make enquiries and seek to do something about it.

17. At the hearing, Mr Lyons said the pension forecasts were to do with his pension which he had asked for as he was changing jobs, and not that of Mrs Lyons. This point was not raised earlier, in the correspondence with HMRC, and, on the balance of probabilities, we find that the record correctly refers to statements sent to Mrs Lyons. It may, of course, be that Mr Lyons also received statements at those times.

18. Mrs Lyons' retirement pension commenced in 2006 although she continued to work part time.

19. It was only when Mr Lyons retired, in 2016, and he reviewed the various components of his and his wife's pensions that he realised there was a shortfall in Mrs Lyons' basic pension.

20. He then took positive steps to request that Mrs Lyons be allowed to make up the shortfall in her contributions by making Class 3 contributions for the years in dispute. HMRC's decision letter of 12 December 2018 refused the claim on the basis that Mrs Lyons had not shown that her ignorance or error was not the result of a failure to exercise due care and diligence. This decision was upheld on review on 28 June 2019. Mrs Lyons then appealed to this Tribunal on 3 July 2019.

## DISCUSSION

21. Mr Lyons, on behalf of Mrs Lyons, contends that the DWP/HMRC were under a duty of care to inform Mrs Lyons about the fact that no NICs were being paid whilst she was at university and the impact that would have on her pension.

22. He also argues that there is no proof that the deficiency notices were sent or received and denies receiving them.

23. He says the statements for the retirement pension forecasts, discussed in the correspondence with HMRC, which were sent in 1995 related to his pension, not Mrs Lyons' pension.

24. Mr Lyons submitted that as Mrs Lyons was unaware of the need to pay Class 3 contributions to maintain her record, she had exercised due care and diligence under the circumstances. She could not ask questions because she did not know that she needed to ask questions, or what questions to ask.

25. Mr Lyons agreed that no positive steps were taken to query the position until 2016, some ten years after Mrs Lyons retired and started to receive her pension.

26. HMRC took us to several cases which considered what constitutes "due care and diligence". We refer to two in particular.

27. The argument that a person who is unaware of certain matters cannot logically be expected to make enquiries about them was considered in the case of *Mrs Adedolapa Adojutelegan v Derek Clark (Officer of the Board)* (2004) SpC 430 at paragraph 6 onwards. The Special Commissioner, Dr John Avery-Jones said:

"6. Mr Adojutelegan in an elegant argument contended that it was not possible for an ignorant person to exercise due care and diligence over something of which he was ignorant. To quote a passage from his skeleton argument: '...it is impossible for an ignorant person to exercise due care and diligence. To expect an ignorant person to exercise due diligence is tantamount to requiring an illiterate who is unable to read to exercise due diligence in reading properly or a blind person to see properly. The illiterate or blind person cannot read or see. End of story; they cannot be expected to show due care and diligence.'

7. Mr Williams relied on *Walsh v Secretary of State for Social Security* (unreported, 28 March 1994) in which the appellant contended that he was entitled to rely on the fact that he was not chased-up for payment of contributions. Owen J said that the appellant had no right to make that assumption: 'It was easy enough to ask. In any event, there would have no demand until January 1976. He should have enquired then, or before, and he would have done if he had been exercising due diligence.' Exercising due diligence involves the positive step of making enquiries. Mr Williams

contended that while the National Insurance authorities try to keep a contributor informed of what he needs to know to maintain his contribution record, it can do this effectively only if a contributor personally contacts them. The Appellant had failed to make any enquiries and therefore had not exercised due care and diligence.

8. ... I do not accept Mr Adojutelegan's argument that an ignorant person cannot be expected to exercise due diligence in relation to that of which they are ignorant any more than an illiterate person cannot exercise due diligence in reading properly. It depends on what one is ignorant about. If she had never heard of National Insurance I would readily agree that it could not be said that she had failed to exercise due care and diligence if she had made no inquiries about it. However, she was not ignorant about the existence of the National Insurance Scheme and must have known the basic principle that benefits were in some way related to contributions. She had some dealings with National Insurance while she was in the United Kingdom, although her employer would have done all the work in deducting Contributions. She did know enough to make a married woman's election not to pay contributions on two occasions, and to make various claims to benefits."

28. In other words, Dr Avery-Jones held that a person who is aware of the NIC system and who must be aware that contributions are linked to benefits need not know all the details, but can be expected to make enquiries.

29. In the same case, Dr Avery-Jones considered what was meant by exercising due care and diligence and referred to the unreported High Court case of David James *Walsh v Secretary of State for Social Security*. He said:

"10. I follow the principle in *Walsh* that she should have made some enquiries. ... Doing nothing is not the exercise of due care and diligence. Had she made an enquiry she would have been told that there was a six-year time limit for paying Contributions. Her ignorance of this was due to her failure to make enquiries, which is a failure to exercise due care and diligence."

30. The Court of Appeal case of *The Commissioners for Her Majesty's Revenue and Customs v John Kearney* [2010] EWCA Civ 288 sets out the factors which must be considered in deciding whether an individual has exercised due care and diligence.

31. At paragraph 24, the Court commented that there was no duty on the authorities to chase contributors for contributions, and continued at paragraphs 34-37 to set out the multi-factorial approach which is to be applied to the circumstances of each individual case. The Court said:

"34. In my judgment, this guidance reflects the correct approach, which is to treat all relevant circumstances as factors which have to be balanced together to reach an assessment or evaluation on a case-by-case basis as to whether due care and diligence was exercised and, if not, whether the failure was the cause of the contributor's ignorance of his obligation to pay contributions when he was bound or entitled to pay them. ...

35. Like the Judge, I do not think it is possible to produce a definitive list of relevant factors. However, they would include the contributor's age and any relevant physical disability or incapacitation. Thus Mr Nawbatt accepted that a 19-year-old student might be in a stronger position to show that he had exercised due care and diligence when he took no action to pay contributions than an older person already in employment. Moreover, a person may have known about the NIC scheme and gone abroad, leaving, like the Good Samaritan with the innkeeper, a sum of money with another person, whom he thought reliable. He may have instructed that person to make payments of

NICs. If that person fails to pay NICs on time, the contributor may be able to show that his ignorance of the failure to pay was not due to lack of due care or diligence. In some circumstances, therefore, doing nothing in terms of contacting the NICO may (as the Judge accepted) not be fatal. However, as I see it, a person need not be induced to take no action by a positive misrepresentation. To take an obvious example, a person may be incapacitated by illness during the relevant period. A person may also have language difficulties which may require to be taken into account.

36. Knowledge of the NIC scheme is also likely to be a very important factor, but it may have to be established what the source of his knowledge was and generally the degree of knowledge. Moreover, there cannot logically be an absolute rule that, if the contributor has knowledge of the existence of some aspect of the NIC scheme, he can never show that he exercised due care and diligence unless he made further enquiries about his rights or obligations. It must, as the Judge recognised, all depend on the circumstances. Nonetheless, it will be an unusual case in which a person is able to show that, while he made no contributions even after learning the basic features of the NIC scheme, he nonetheless exercised due care and diligence

37. The decision-maker also has to look at the circumstances as they stood at the time. People can now be expected in many parts of the world to have access to the internet or to mobile phones, but that would not have been the position in the 1960s.”

32. We now apply these principles to the present case.

33. In order for Mrs Lyons to be permitted to make contributions for the years in dispute she must show first that she was ignorant of the need to make the contributions and secondly that that ignorance was not the result of her failure to exercise due care and diligence.

34. It is accepted that Mrs Lyons did not pay the contributions because she did not know that she needed to. The question is whether that failure to pay was or was not the result of a failure to exercise due care and diligence.

35. The cases show that doing nothing will not (except in exceptional circumstances) be regarded as exercising due care and diligence. Care and diligence requires positive steps; asking questions and making enquiries.

36. The cases also show that there is no hard and fast rule; one has to take account of all the circumstances of the particular case.

37. It is also important to emphasise that there was no duty on HMRC or anyone else to tell Mrs Lyons that she needed to make contributions. The onus was on her to ask about it.

38. Mrs Lyons was well aware of the existence of the National Insurance system. She had been working and paying contributions for many years before she went to university. She made, confirmed and subsequently cancelled a married women’s election to pay reduced NICs. The information she would have been given in that context would have alerted her to the fact that the payment or non-payment of benefits is linked to the level of NICs, if she did not already know that.

39. When her claim for unemployment benefit was rejected in 1988-9, she would have been told that the reason was that she had not paid enough contributions.

40. Despite the fact that HMRC had no obligation to tell Mrs Lyons about the shortfall in contributions they did so twice through the deficiency notices which set out what she needed to pay and the impact of not paying it and told her where to get further help if she needed it.

41. All these communications were within the six year time limit for making the Class 3 contributions.
42. Mrs Lyons did nothing in response to this information.
43. There was a further opportunity to make enquiries on receiving the retirement pension forecasts in 1995. Our reasoning indicates she would still have been in time to make the additional payments, but even if this is wrong, she would only just have been out of time, and could have made a claim at that point. Again, she did nothing.
44. Even when Mrs Lyons started to receive her pension in 2006 she did not notice there was a shortfall and make enquiries about it.
45. Nothing was done for a further ten years.
46. We turn to Mrs Lyons' personal circumstances. She obtained a first class university degree: she was clearly an intelligent woman. She went to university when she was nearly 40 and taught in deprived areas after that. We infer that she was a confident woman who would not have had difficulties in asking questions of the authorities. She was a mature person who had been in the NIC system for many years and had some knowledge of it. There is no suggestion of language difficulties or that she had ever gone abroad or that there was any other reason why she might not have been able to make the necessary enquiries. On the contrary, there is evidence that her shortfall in contributions was brought to her attention within the time limit, or after it, on several occasions but she did nothing about it and did not even notice that she was receiving a reduced pension for many years.
47. Having taken account of all the circumstances of Mrs Lyons' case, we find that her ignorance of the need to make additional NICs was the result of her failure to exercise due care and diligence and she does not therefore satisfy the conditions for making the contributions outside the six year statutory time limit.

#### **DECISION**

48. For the reasons set out above, we have concluded that Mrs Lyons' ignorance of the need to pay Class 3 NICs, was the result of her failure to exercise due care and diligence.
49. Accordingly we dismiss the appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

50. 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.

**MARILYN MCKEEVER  
TRIBUNAL JUDGE**

**RELEASE DATE: 27 APRIL 2021**