FTC/10/2010

FTC/11/2010

FTC/39/2009

FTC/08/2010

FTC/09/2010

FTC/34/2010

FTC/30/2010

[2010] UKUT 450 (TCC)

National Insurance contributions – other – whether contributors who voluntarily paid Class 3 contributions to make up their National Insurance contribution records but who then found that they did not need to do this were entitled to refunds of their contributions

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

CLIFFORD BONNER

MICHAEL DOBSON

JOHN GODDEN

MICHAEL PHILLIPS

ANGELA SIMMONS

WILLIAM SWALES

and

HMRC

HMRC

and

ROBERT BRUMPTON

Tribunal: Judge David Williams

Judge Howard Nowlan

Sitting in public on 2 August 2010 in London

Clifford Bonner and Michael Dobson in person for themselves and other appellants in the first appeal; Stanley Simmons for his wife Angela Simmons in the first appeal

David Forsdick of counsel, instructed by the General Counsel and Solicitor to HMRC for the respondents in the first appeal and appellants in the second appeal

Mr Brumpton did not attend and was not represented

DECISION

1 This decision concerns a number of appeals from a series of decisions taken together by Judge Berner in the First-tier Tribunal Tax Chamber. He issued one reasoned decision covering appeals to that tribunal by 13 individuals against similar decisions about each of them by the Respondents ("HMRC"). He allowed two of the appeals but dismissed the other eleven. Six of the unsuccessful appellants below now appeal, with permission, to this tribunal. HMRC appeal, with permission, against one of the two decisions allowing appeals below.

2 Mr Bonner, one of the unsuccessful appellants below, represented himself and others of the appellants before us, accompanied by Mr Dobson, another appellant. Mrs Simmons was represented by her husband. The tribunal is grateful to them for the clear and reasoned statement of their views about their appeals. Mr Brumpton, respondent to the appeal by HMRC, did not appear. But he wrote to the tribunal asking it to go ahead in his absence. In his view Judge Berner had "put my case perfectly" with regard to his claim. Mr Forsdick appeared for HMRC in both appeals. The tribunal considered the appeal against the decision in favour of Mr Brumpton in his absence, as he requested. Mr Forsdick courteously assisted the tribunal's consideration of this after the other appeals had been heard.

The decisions under appeal

3 These appeals are unusual for this jurisdiction as they do not involve compulsory payments of taxation. Rather, they involve demands by each of the appellants below that HMRC refund to them voluntary payments made by them to HMRC. The payments were for Class 3 National Insurance ("NI") contributions. Each appellant took the view that he or she gained nothing from the contributions and that they had paid them in error. They accordingly asked for them to be refunded.

4 Each of the appellants originally paid his or her Class 3 NI contributions freely and under no compulsion. But HMRC is not free either to receive Class 3 contributions simply because they are offered or to refund contributions simply because the payer wants them back. Both the receipt of Class 3 contributions and any refunds are governed by law. There is no discretion available to HMRC or to these tribunals to receive voluntary payments or refund payments other than in accordance with that law. The question for this tribunal is whether Judge Berner correctly applied the law to the appeals before him.

Background

5 The full background to the appeals is set out in the decision of Judge Berner. There were no specific issues of fact in dispute before him, and the tribunal adopts his clear findings of those facts.

6 The problem behind the appeals arises because of the effect on individuals of a change in the rules about the NI contribution requirements for a full basic state retirement pension. Since 1948, a man wishing to claim a full basic state retirement pension had to show that he had paid or been credited with a full NI contribution record for at least 44 years. For a woman, the total was 39 years. From 6 April 2010 this has been reduced to 30 years.

The relevant law

7 The contribution conditions for entitlement to benefit are set out in Schedule 3 to the Social Security Contributions and Benefits Act 1992 ("the 1992 Act") and the equivalent provisions in previous Social Security Acts and National Insurance Acts it replaced. The specific rule about basic state pensions is in paragraph 5 of that Schedule. This provides a common rule for widowed mother's allowance, widowed parent's allowance, bereavement allowance, widow's pension, and Category A and Category B retirement pensions. ("Category A" and "Category B" are the official terms used for pensions claimed by an individual on his or her own NI contributions and for those claimed by a married woman on her husband's contributions.). The basic rule for full entitlement to all these benefits was that the claimant showed contributions paid for a full working life less 5 years. The full working life for a man was 49 years and for a woman 44 years.

8 Where an individual has not met the contribution condition for the full number of years required, entitlement to weekly state retirement pension is reduced. The rules for this are in the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979 (SI 1979/642, as amended), regulation 6. An individual who had an inadequate record but wished to receive the full pension could, in certain circumstances, make up his or her record to the required number of years by voluntary additional Class 3 NI contributions in respect of any shortfall in years. Entitlement to pay these contributions is provided for in sections 13 and 14 of the 1992 Act and regulations made under that Act. The regulations are in the Social Security (Contributions) Regulations 2001 (SI 2001/1004) ("the 2001 Regulations"). The main regulation enabling payment of Class 3 contributions is regulation 48, read with the regulations that immediately follow it.

9 The Pensions Act 2007, section 1, amended Schedule 3 of the 1992 Act from 6 April 2010 by adding a new paragraph 5A to Schedule 3. That Act came into force on 26 September 2007. Paragraph 5A applies to claims for Category A and Category B pensions made by those reaching pensionable age on or after 6 April 2010. It replaces the former rule with the same rule for both men and women. A claimant is required to show NI contributions paid or credited for 30 years only. The new paragraph does not apply to the other social security benefits listed in paragraph 5. But, in practice, the most important aspect of these rules is the requirement for a full basic state pension. There were no relevant changes to the regulations at that time.

10 The result of this change is a considerable benefit to many people reaching retirement age on or after 6 April 2010 with what would previously have been inadequate contribution records. However, as with any change of this sort, there are two sets of problems that arise. The first is that rules of this kind, applying to everyone reaching retirement age, take some time to legislate and implement but only have effect once enacted by the Queen in Parliament. The other is that there are inevitably some cases that arise just one side or the other of the new line. That leaves uncomplaining winners on one side and unhappy losers complaining of unfairness on the other.

The facts

11 The appellants before the First-tier Tribunal were all losers complaining of unfairness. They were all individuals who had been told, under the old rules, that they had deficient NI contribution records if they wanted to claim full state pensions when they reached their retirements in or after 2010. Some of them, if not all, had followed the usual procedure of asking for advice about their pension entitlements ahead of reaching retirement age. Pension forecasts are not given by HMRC. They are the responsibility of the Department for Work

and Pensions. It is not clear to this tribunal what role was played by that Department in the background to these individual appeals, but the role of that Department was advisory only. Whether or not all the appellants were advised to do so, they all decided voluntarily to make additional Class 3 NI contributions. These were received by HMRC and the contributions recorded for them. Then the rules changed. Each of the appellants discovered that, as a result, he or she had not needed to make any Class 3 voluntary contributions to receive a full state pension. All already had full contribution records under the new 30 year rule. In other words, they had given their money to government, and received nothing in return. So they wanted their money back.

12 There are several dates material to the change made to the rule reducing the number of years' contributions required for receipt of a full state pension. As Judge Berner recorded, the first official announcement of the proposed new 30-year rule came with the publication of a White Paper by the government on 25 May 2006. The Pensions Act 2007 giving effect to the 30-year rule was enacted on 26 September 2007. Between those dates HMRC took steps to draw the attention of individuals to the new rules in what the tribunal below termed "flyers". This tribunal was told that these were issued to individuals both by HMRC and by the Department for Work and Pensions from August 2006.

13 In the case of the individuals Appellants, whose claims for refunds had been dismissed by Judge Berner, the contributions had all been made even before the issue of the White Paper on 25 May 2006. At the times they made their contributions, it was probable that some civil servants within either or both of HMRC and the Department for Work and Pensions knew of the preliminary consideration of the proposed rule change. But there was no indication in the public domain to the effect that fewer years of contributions than 44 and 39 might be required for entitlement to a full state pension.

14 In the case of Mr. Brumpton, his contribution had been made both after the issue of the White Paper and after Mr. Brumpton acknowledged that he had received a copy of the type of "flyer" to which we have just referred.

15 Judge Berner accepted, in making formal findings of fact, that:

> (1) Mr. Brumpton received the flyer in September 2006 but, when he received it, he had retained the formal payment request for a further contribution and had thrown away the rest of the paperwork. Then, much later, he dealt with the payment request that he had retained, and paid the further contribution at the Post Office;
>
> (2) when he made that payment, he was unaware of the rule change;
>
> (3) when he made the payment, his only concern was to secure the entitlement to a full state pension and that he was totally unconcerned with those other minor benefits that we referred to in paragraph 7 above that were still only available in full with 44 and 39 years of contributions; and that
>
> (4) Mr. Brumpton would not have made the further contribution that he did make if he had been aware of the proposed rule change.

The issues of law

16 Two questions of law arise:

(a) Were the Class 3 contributions properly paid and received when made?

(b) If they were properly paid and received, were there any circumstances in which HMRC was required or entitled to refund those contributions?

17 Provision is made for Class 3 NI contributions in section 1(2) of the 1992 Act. The main section creating this class of contribution is section 13. Section 13(2) of the 1992 Act provides that "payment of Class 3 contributions shall be allowed only" for the purpose of making additional contributions as defined in that section. That right is limited further by section 14 (restriction on right to pay Class 3 contributions). Section 14(1) provides that "no person shall be entitled to pay a Class 3 contribution in respect of any tax year" if the conditions in that section are not met.

18 Although little attention was paid to it in the tribunal below, the first question in these appeals must therefore be whether the payments were within the allowable payments under section 13, read with the restrictions on rights imposed by section 14 and any further relevant provisions in the 2001 Regulations. This tribunal raised the issue expressly with the parties in the preliminary stages of this appeal. In its view this first question is not subsumed entirely, as the parties appeared to have assumed, in the second, separate question set out above. Nonetheless, this tribunal is satisfied that on the undisputed facts none of the appellants was restricted from making Class 3 contributions under section 14 at the time he or she made them, and that payments were made within the defined scope of section 13. The point therefore does not need extended analysis here. We are satisfied in respect of each of these appeals that the payments were properly made and received at the times they were made and received and that no material error by the tribunal arises from any inadequacy below in not considering the point.

19 The second question is whether there were circumstances in which HMRC is required to refund the payments on application being made. It was common ground that proper applications were made.

20 The liability of HMRC to return contributions is a general liability applying to all classes of NI contributions other than Class 4. It is in regulation 52 of the 2001 Regulations. It provides, in part:

"(1) This regulation applies if a contribution other than a Class 4 contribution has been paid in error.

...

(2) If this regulation applies, an application may be made to [HMRC] for the return of the contribution paid in error.

...

(4) On the making of an application under paragraph (2) [HMRC] shall return the contribution paid in error.

...

(9) In this regulation "error" means, and means only, and error which –

(a) is made at the time of the payment; and

(b) relates to some past or present matter."

21 The central question argued before Judge Berner in the tribunal below was whether, as a matter of law or fact, any of the appellants had paid their contributions in error. This was also the central question argued before Richards J in a similar appeal from a decision of the former General Commissioners decided in the Chancery Division in *Fenton v HMRC* , 17 June 2010.

The decision under appeal

22 Judge Berner decided in the cases of the individual Appellants now before us that as no official announcement had been made at the time when each of them had made their contributions, those contributions could not be said to have been made in error".

23 The same issue came before Richards J in *Fenton*. In that case the appellant had been paying additional Class 3 contributions by instalments. It became clear, with the benefit of hindsight, that he need not have paid any of the instalments. HMRC refunded him instalments he had paid after the start of the tax year 2006-2007, but refused to refund earlier instalments on the ground that they had not been paid in error. Richards J agreed that the pre-2006-2007 instalments were not payments in error under regulation 52. That decision is technically not binding on this tribunal but is to be followed unless there is good reason not to do so.

24 We fully agree with the decisions of both Richards J and Judge Berner about the application of regulation 52 to this group of cases. The definition of "error" in regulation 52(9) is wide in terms of the material scope of the term but it is entirely clear about its temporal effect. It can apply only to errors made at the time of payment, and then only to errors about some then present or past matter. A future change of law, as yet unannounced, cannot be the cause of an "error" within that temporal rule.

25 Different considerations arise once the government had announced the prospective change. There is inevitably a period of uncertainty between the initial formal announcement of the prospective change and its formal enactment, and that uncertainty generates scope for error by individuals. In this case that period lasted 18 months. Further, the White Paper was published by the Secretary of State for Work and Pensions and not HMRC, who had the task of collecting the contributions, so there were risks of divided responsibility. It is within that context that the appeal made to the tribunal below by Mr Brumpton is to be viewed.

26 Mr. Forsdick acknowledged that he was advancing his contention in relation to Mr. Brumpton's case in a slightly different, and narrower, manner before us than he had done before Judge Berner. Before Judge Berner, he had essentially argued that the test as to whether Mr. Brumpton had made his contribution in error was an objective one, that Mr. Brumpton had acknowledged that he had received the flyer, so that he must be judged objectively to have made an informed decision. Judge Berner's decision in relation to Mr. Brumpton's case was that his contribution was made in error. Since the proposed rule change was a matter in the public domain, but that he was nevertheless ignorant of it, he did not make a legitimate choice to make his payment at the Post Office. He made the payment on account of a "present error" in relation to a "present matter", and so was entitled to a refund.

27 Before us, Mr. Forsdick changed his contention in the following way. Referring first to the situation with which we were not strictly concerned, namely the possible case where a person may have received and understood the flyer, but still made a payment, he argued that in that situation the contribution would have been made not "in error", but as a result of "a deliberate choice". If the payer later changed his mind, his earlier error of judgment would

simply mean that he had made the wrong choice, not that there had been any error about any past or present matter. Accordingly he would not be entitled to recover his contribution.

28 Mr. Forsdick advanced his contention in relation to Mr. Brumpton's case on an extension of that reasoning. In the case of Mr. Brumpton, however, the choice that he made was not an informed choice in full knowledge of the content of the flyer, but the choice to read or throw away the flyer. When he threw it away, Mr. Forsdick contended that he had thereby made a choice, so that although he was accepted to have been ignorant of the proposed rule change, when he made his contribution, his contribution could still not be said to have been made in error.

Error

29 The "error" provision in regulation 52 is one of long standing and wide application in the context of social security contributions. It is not restricted in any way simply to voluntary payments. But it has not been found necessary to define it beyond the temporal rule set out above either in legislation or judicially. This tribunal therefore approaches "error" as an ordinary word to be given an ordinary meaning subject to the temporal limits in regulation 52(9). The *New Oxford Dictionary of English* takes further definition as far as it can be taken usefully, in the view of the tribunal, in defining an error as "a mistake". (*The Chambers Dictionary* and the larger Oxford dictionaries refer the reader to the many meanings of "err", and that does not assist here.) The error or mistake can be of as to matters of fact or of judgment or on matters of law - subject to the temporal limitation. But the test is no more nor less than whether ordinary users of English would consider what happened to be an error or mistake.

30 There are a limited number of possible situations during the relevant period that could give rise to a claim such as that by Mr Brumpton. There will be those who through absence, illness or other reason received no official guidance and were not aware of the proposed changes at all and had no personal reason to be aware. There will be those who received official guidance from HMRC or the Department and failed to look at it, or failed to read it. And there will be those who received the official guidance and either understood it and chose to ignore it or misunderstood it.

31 We can base our decision in this case on one or other of two approaches. The first is a wider approach. Indeed, it would apply even in the case with which we are not presently concerned, namely that (presumably rare) case of the person who read and understood the flyer but nevertheless decided to make the contribution. We will deal with this wider approach first. We then address a more specific approach that would not necessarily entitle the person just considered to a refund, but which we say entitles Mr. Brumpton to a refund. That, of course, is all that we are now strictly concerned with.

32 The tribunal has some difficulty in applying either a dichotomy between objective and subjective approaches or Mr Forsdick's analysis of choices to these possible situations. Someone who received the HMRC guidance, read it, understood it, and decided then to pay notwithstanding the warning would be generally considered to have made a mistake or error in making the payment. So, in a different way, would someone who read the guidance but misunderstood it, or failed to understand it, to his or her detriment.

33 There is no need to overelaborate this. Mr Brumpton made his payment before the law had changed. So the formal position was that the 44 year rule still applied to him in law. But there had been specific notification to him, and general notification to claimants, that the rule would probably change. He had kept the official bill he had been sent about the amount he had to pay to make good the deficiencies in his NI record, but not the accompanying information. So he was not aware of the warning when he paid that bill. He first learnt of it after he paid. Those are clear findings of fact by Judge Berner. It is, in the view of this tribunal, a straightforward question of fact whether, in that context and in the ordinary meaning of the word, Mr Brumpton made an error or mistake when he paid the money shown on the bill into the Post Office in March 2007.

34 This tribunal finds it difficult to draw any meaningful distinction in this case between the position of someone who receives official guidance and reads it but having done so misunderstands it, later forgets it, or wrongly chooses to ignore it on the one hand and the position of someone who receives official guidance but does not realise its importance and so does not read it on the other. They are all mistakes on the part of the recipient. There is no presumption or specific rule of law that operates here to require the information to be read or that assumes the recipient to know of the contents. On that broad basis, this tribunal sees no error of law in the decision of the tribunal below in allowing Mr Brumpton's appeal on the basis of the facts it found.

35 There is, however, an alternative and narrower basis on which the tribunal can arrive at the same conclusion in Mr. Brumpton's case. Even if the tribunal accepts that the person who read and understood the flyer, and made a wrong choice when making an unnecessary contribution, would not be entitled to claim that the contribution had been made in error, it is unrealistic to extend that reasoning to the facts in relation to Mr. Brumpton. In the case of the person who understands the flyer and comes to the wrong decision, it might be said that that payment is not made in error of any present matter. The payer knows of the proposed rule change, and simply chooses to make a contribution nevertheless. The tribunal accepts that as arguable, although it does not agree with it. But in Mr. Brumpton's case, the extension of Mr. Forsdick's contention about "choice" to the situation of choosing to throw away part of the letter is untenable. On the findings of the tribunal below, Mr. Brumpton did make his payment in ignorance of the proposed rule change. He did make it "in error" as to whether or not he actually needed to make the contribution to earn the benefits that he was intent on securing. He may arguably have been at fault in deciding to throw away part of the letter unread. This, however, does not change the plain fact that, on this narrower issue, Mr. Brumpton still made his payment in ignorance of the then announced rule change. Keeping the timing rule in mind, Judge Berner's findings are that he made a present error in relation to a present fact. That is within the rule. On that basis, the tribunal can identify no material error in Judge Berner's decision about Mr Brumpton's contributions.

36 It follows that the tribunal dismisses all the appeals.

TRIBUNAL JUDGES

DAVID WILLIAMS

HOWARD NOWLAN

RELEASE DATE: 14 DECEMBER 2010