TC01700

Appeal number: TC/2009/15303

National Insurance Contributions – Class 1 – employment of Appellant, a Polish resident and citizen, in UK in 1984, 1987 and 1988 under Seasonal Agricultural Workers Scheme (SAWS) – no NICs paid – whether Class 1 NICs should have been payable – on the facts, yes, as Appellant was not in fact eligible for SAWS scheme and amounts paid held to be above the lower earnings limit – whether missing NIC payments should be credited to his contribution record – held no, as the Appellant had connived in his employer's failure to pay NICs due to his misrepresentation to the employer that he was eligible to participate in SAWS; later illegal employments (in breach of entry visa conditions) in which an assumed name had been used and NICs deducted using a temporary NI number – where NICs were deducted, HMRC unable to trace the relevant contributions – held no basis for refusing to credit those contributions to Appellant's NIC contribution record – amounts determined in principle – appeal allowed in part

FIRST-TIER TRIBUNAL

TAX

BOGDAN MACIEJ HUDZIEC **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (National Insurance Contributions) **Respondents**

TRIBUNAL: **KEVIN POOLE (TRIBUNAL JUDGE)**
MOHAMMED FAROOQ

Sitting in public in Birmingham on 14 September 2011

The Appellant appeared in person

Graeme Foster, Senior Officer for the Respondents

DECISION

Introduction

1. This appeal concerns the National Insurance Contributions ("NICs") contribution record of the Appellant. He claims to be entitled to have NICs added to his contribution record in respect of periods of employment with four different employers. HMRC (which term, in this decision, includes its predecessors in administering the NIC system) do not consider that he is so entitled.

2. HMRC say that the first employment (at a "Farm Camp" for overseas student workers during harvest time over three summers in the 1980's) was under a special scheme, the "Seasonal Agricultural Workers Scheme" or "SAWS", which was exempted from NICs. In any event, they say, the Appellant's earnings from that employment would have been below the NIC threshold.

3. HMRC do not accept that the second or third employments (at a public house in 1988-89 and at a cleaning company in 1995) ever took place. The Appellant claims to have worked under an assumed name (in order to circumvent immigration restrictions which would have prevented him from taking up those employments). The Appellant says he pretended to be an EU citizen and was given a temporary NI number. He claims that deductions were made from his earnings under that NI number. HMRC can find no trace of any such contributions being received.

4. The Appellant alleges that the fourth employment (in which he used his own name) was extremely short – partly because he was unable to produce the necessary proof to his employer that he was entitled to work in the UK. HMRC say they have no record of any contributions being received in relation to that employment either, and point out that the only evidence of it that the Appellant has produced shows earnings below the NIC threshold.

The Facts

5. Initially the Appellant was reluctant to go ahead with the hearing without an interpreter being present, but he had a friend with him who was able and willing to explain to him anything which he found difficult to understand. In any event we found that the Appellant had adequate command of English. From the documents produced in evidence to us, and the oral testimony of the Appellant, we find the following facts.

Preliminary matters

6. The Appellant is Polish. He was born on 3 June 1957. In the early 1980's he was a student, studying Economics and Organisation of the Chemical Industry at the Academy of Economics in Wroclaw, Poland. He graduated in June 1985 and ceased full-time study at that time. He was ordinarily resident outside the UK at all material times for the purposes of this appeal.

Working at Friday Bridge International Camp

7. Whilst still a student, in August 1984, he obtained entry to the UK to work at the Friday Bridge International Farm Camp, near Wisbech ("Friday Bridge"). The date stamp in his passport shows he entered the UK on 26 August 1984, and was granted permission to enter the UK for one month, on condition he did not engage in any employment. A further stamp in his passport shows that he left the UK on 28 October 1984, having extended his visa (after its expiry date) on 19 October 1984. HMRC have not disputed the Appellant's assertion that he worked at Friday Bridge, even though the terms of his visa would appear to have prevented it. We therefore accept his evidence on the point.

8. Three years later, the Appellant entered the UK again and for the same purpose. He was by then no longer a student. On 16 August 1987 he was granted permission to enter the UK for one month, on condition that he did not engage in employment with anyone except "International Farm Camp" at Leverington, Wisbech – which we take to be Friday Bridge. There is no departure stamp in his passport, but he claims to have worked at Friday Bridge until he left on 22 November 1987. HMRC do not dispute this, even though he appears to have outstayed his visa. We accept his evidence on the point.

9. The following year, the Appellant again entered the UK for the same purpose. On 11 July 1988 he was granted leave to enter the UK for two months, on condition that he did not enter employment with anyone other than "Fridaybridge Camp", which we take to mean Friday Bridge. According to HMRC's decision letter (referred to at [40] below), he claims to have worked at Friday Bridge from 7 July 1988 (i.e. four days before he entered the UK) until 30 September 1988. His passport contains a further visa, issued in the UK on 16 December 1988, allowing him to remain in the UK until 12 January 1989, on condition that he did not engage in employment. Again, HMRC have not disputed that he was employed at Friday Bridge for the period he claims and we accept his evidence on the point.

10. We accept the Appellant's evidence that no deductions were made from his earnings at Friday Bridge in 1984, 1987 or 1988 on account of NICs.

11. Included in the papers before us was a copy of an information leaflet issued by Friday Bridge. Its front page, in addition to a picture of a smiling student and the name of Friday Bridge, included the large number "88" and we infer this leaflet related to the year 1988. It summarises the practical arrangements and costs of working at Friday Bridge. It refers to an application form to be filled out by the applicant (though no copy was included in our papers). It makes no mention of SAWS or of NICs. It starts with the following paragraph:

> "Fridaybridge International Farm Camp offers an opportunity for young people of all nationalities to work, live and study together. You will have the chance to meet other young people from different countries, improve your English and at the same time have the possibility to earn money to offset the costs of staying at the camp. There are enough activities at the camp to keep you occupied during your stay."

12. On the question of earnings and costs, it says the following:

> "The work generally consists of fruit picking and market gardening. Normally you will be paid according to how much you pick, so the harder you work the more you earn. Usually you should be able to earn enough money to pay the accommodation costs and to provide some pocket money. However due to the uncertainty of the English climate and in the event of crop-failure WORK CANNOT BE GUARANTEED. It is important therefore to bring enough money with you to insure against all eventualities."
>
> ....
>
> "The weekly charge for accommodation covers breakfast, packed lunch and evening meal; use of all the camp facilities including English lessons...."
>
> "The accommodation charge is £39 per week which you must pay in advance."

13. HMRC contacted Friday Bridge in 2009 in seeking to establish the full facts of the case. They enquired whether Friday Bridge had any records of the Appellant's employment there, and they asked for confirmation that Friday Bridge participated in SAWS at the relevant time.

14. The text of Friday Bridge's reply dated 29 June 2009 was as follows:

> "Dear Mr Dunn,
>
> Further to your letter of 22nd June, I can confirm that unfortunately we no longer have any records relating to Mr Bogdan Hudziek's period of employment at the above address, and specifically to any NI Contributions he or the company may have paid.
>
> I can however confirm that during the periods concerned, Friday Bridge International Farm Camp Ltd was part of the SAW Scheme, and as such Mr Hudziek would have had to comply with criteria that would exempt him from being liable for NIC. I therefore think it extremely unlikely that he would have had any NIC deducted from his earnings.
>
> Should you require any further information, please do not hesitate to contact us.
>
> Yours sincerely"

Working at the Duke of York pub

15. When the seasonal work ended in the autumn of 1988, the Appellant decided to seek employment in London illegally in breach of the terms of his visa. He also enrolled in an English language school. Included in the evidence was a copy of a letter dated 8 December 1988 from that school to the Home Office, confirming that

the Appellant had enrolled on a course running from 2 January 1989 to 24 March 1989. We infer that this letter was written in support of the Appellant's application for permission to remain in the UK, which resulted in the extension of his visa referred to at [9].

16. The Appellant decided to pretend to be Danish, in order to improve his chances of obtaining work. Denmark being a member of the EEC (as it then was), its citizens would not require any permit to work in the UK and he hoped this would enable him to work undetected. He went to an employment agency in Regent Street and, without checking his passport, they accepted his story and placed him in a job.

17. There was included in our bundle of evidence a copy of a form headed "Staff-starter/P46 – Employees Copy" dated 4 October 1988 filled out in the name of "Benny Peterson" with a date of birth of 3 June 1961 (precisely four years later than the Appellant's date of birth). An address in Mortimer Road, Kensal Green, London was given. The form records a starting date of 4 October 1988 at the "Duke of York", doing "catering" work for 39 hours a week, spread over 6 days. Under "ethnic origin", the code is inserted which denotes "UK or other EEC". No National Insurance number was filled in. This is the form which the Appellant says he filled in to obtain the job at the Duke of York, using the false name he had chosen.

18. The only other evidence of this employment was a copy of a single wage slip also in the name of "Benny Peterson", with the address "Duke of York, 66 Mortimer Road, Kensal Green, London". The address is odd, as 66 Mortimer Road Kensal Green is an ordinary mid-terrace Victorian or Edwardian private house, and other correspondence from the Appellant refers to the Duke of York pub as being in London WC1. When referring back to the P46, however, the layout of that form is such that the Mortimer Road address appears immediately opposite the name of the Duke of York pub, which seems to us to establish a further link between the payslip and the P46. In addition, the payslip (which relates to a pay date of 12 November 1988) refers to the employee as having worked 38 hours, very close to the 39 hours recorded on the P46.

19. The gross pay for the week shown on the payslip is £89.30 (at an hourly rate of £2.35). It also shows deductions for the week of £9.75 tax and £6.26 NI. It also shows cumulative figures. The cumulative gross pay shown is £378.35, which would equate to a little over four weeks at the weekly rate given, whereas the date of signature of the P46 was around five and a half weeks before this pay date. No explanation was given for this apparent discrepancy. It could possibly be attributable to the Appellant working "a week in hand", or it may be that the Appellant did not actually start working for a week or so after signing the P46. The cumulative total of £25.30 was given for employee's NICs (and the same for employer's NICs).

20. The payslip records a temporary national insurance number TN030661M (this was the method used at the time to deal with employees whose National Insurance number was unknown – "TN" meaning "temporary number", "M" meaning "male" and the digits representing the employee's date of birth) but also includes the message

"Please supply your NI number", so clearly the employer was well aware that it was operating a temporary NI number.

21. The Appellant stated in a letter dated 5 April 2007 to HMRC that his "typical day", once he had started at the language school, started at 7 am, to attend language school from 9 am to 11.45 am. He would then work at the Duke of York from 12 pm to 4.30 pm and then at MacDonalds from 5 pm to 8 pm.

22. The Appellant also produced at the hearing a sweatshirt with the "Duke of York" pub name on it. He said he was given this to wear at work.

23. There was also produced in evidence a copy of what purported to be an undated letter from Spirit Group which read as follows:

"LETTER FROM EMPLOYER

This is to certify, that Mr.Bogdan Hudziec who was born on 3rd.June 1957, living 43-300 Bielsko-Biała,Kierowa 10/51 Poland, his full permanent NiNo: SG 241302 C worked for our company at Pub "Duke of York" in London. He was recognized by former pub manager John Gordon as a Benny Peterson and his insurance contribution was collected under temporary NiNo TN 030661

STATEMENT OF EARNINGS

Duration of work: from 4th October.1988 to 31st March.1989
Position: kitchen assistant
Tax code: 260 LW1
38 hours weekly, rate Pound 2.35

Total earnings in this period: pound 2.143,00
Tax paid 189,00

[Signature]
Ann Stait
Payroll Admin"

24. This letter was sent by the Appellant to HMRC under cover of a letter which they received on 24 December 2007.

25. HMRC were understandably suspicious of this letter. They contacted the owners of Spirit Group, Punch Taverns, to ask about it much later in the course of their enquiries. Punch Taverns replied by letter dated 16 July 2009, stating that they had no record of either the Appellant or Benny Peterson working at the Duke of York in 1988-89. They also said they could not find any copy of the Spirit Group letter that the Appellant had supplied and since Ann Stait had left the company in March 2008 they were unable to confirm whether the signature on the letter was hers. They also said that John Gordon the pub manager mentioned in the letter had left their employment in July 2006.

26. In evidence, the Appellant said that he had gone to the Duke of York pub in December 2007 and someone there advised him to write to Spirit Group to obtain the confirmation he was seeking as to his previous employment there. So he had written to Spirit Group, and received the letter in reply which he had passed on to HMRC.

27. It is obvious to us that the undated letter from Spirit Group is a complete fabrication. We are satisfied that it was produced by or under instruction from the Appellant in a foolish, desperate and misguided attempt to provide some evidence that would satisfy HMRC that he genuinely had been employed at the Duke of York. In doing this, he has very nearly undermined his whole case. He has certainly significantly damaged his credibility on matters for which there is no corroborating evidence.

28. We are however satisfied that he did work as he says for a period of time. We accept the payslip which shows he worked up to 12 November 1988 and we further find that he continued to work 38 hours per week at the hourly rate given in the payslip until 1 January 1989, whereupon he reduced his hours to four and a half hours per day (equating, in a six day week, to 27 hours per week reflecting his time commitment to his English language course) at the same hourly rate.

29. We therefore find that the Appellant was employed under the assumed name of Benny Peterson at the Duke of York pub from an unknown date in October 1988 up to 12 November 1988, during which time his earnings (and associated NIC deductions) were as set out in the payslip. Accordingly his primary class 1 NICs during the period up to 12 November 1988 were £25.30. He continued in employment up to 1 January 1989, during which time he earned £89.30 per week for seven weeks, and deductions were made from his earnings at the appropriate rate. He then continued in employment from 1 January 1989 to 25 March 1989 (the day before Easter Sunday and the day after completing his English Language course), during which time he earned £63.45 per week for a period of exactly 12 weeks, and deductions were made from his earnings at the appropriate rate.

30. We do not accept the Appellant worked right up until the day of his departure for Poland on 3 April 1989 (when his passport shows he left Dover); he withdrew all his savings from his building society (a copy of the final page of his pass book was included in the correspondence) on 30 March 1989 as an obvious preparation for his departure and we consider it most likely he would have finished work at the end of the previous week, when his language course ended. The Appellant said that his reason for departure was that his mother was very ill. We express no view as to whether this is true, but it is not material in any event.

Working at Madonalds Hamburgers Limited ("Macdonalds")

31. The Appellant also held employment under his own name with Macdonalds in the spring of 1989, at the same time as he was working at the Duke of York. He held this employment only for a very short time.

32. He had joined Macdonalds under his own name because they required to see his passport before employing him. He told Macdonalds that he was in the course of obtaining a work permit. Included in the evidence were copies of two items issued by Macdonalds. The first was a form P45, which gave his date of joining as 1 February 1989 and his date of leaving as 19 February 1989. It showed "total pay to date" of £16.05, no deductions and no NI number. The second was a payslip dated 4 March 1989 which showed the payment of £76.33 gross less tax of £19.00 (and no NIC deduction) in respect of "period 25". Tax was deducted at basic rate (25%) under tax code BR W1 – which is consistent with the Appellant having received his pay after leaving employment – we infer this was on the basis, as the Appellant said, that Macdonalds refused to continue to employ him when he was unable to produce his work permit, and the payslip represented the balance of his unpaid salary up to termination, which was paid after he left. If he worked (as the P45 says) from 1 February (which was a Wednesday) until 19 February (which was a Sunday) and his normal payday was a Saturday (as 4 March was) then his total earnings of £92.38 would have been spread across three weeks and we are satisfied that his earnings in none of those three weeks would have exceeded the NIC threshold of £41 per week which was in force at that time.

33. We therefore find that the Appellant was employed by Macdonalds for between two and three weeks in February 1989, but no deductions were made from his wages on account of NICs.

Working at J Simons Cleaning

34. The Appellant provided copies of some wage slips purporting to show that he had worked from some time in June 1995 until 11 August 1995 for a cleaning company in Putney called J Simons Cleaning Limited.

35. The payslips show the name "Benny Peterson" and the same temporary NI number as on the earlier payslip.

36. The wage slips, on close examination, show total taxable pay over a period of some 7 weeks (including one week with no pay) of £373.74. During the tax year 1995-96, the lower earnings limit was £58 per week. Below that level, no NICs would have been payable in any event. The amounts of deductions shown on the payslips for NICs total £9.29 (shared amongst just four of the payslips).

37. We also saw a copy of a page from the Appellant's passport showing a stamp dated 12 June 1995 when the Appellant entered the UK at Dover and was granted a six month visa but with a prohibition on employment.

38. We accept that the Appellant held the employment he claimed with J Simons Cleaning Limited under the alias "Benny Peterson" and that £9.29 of deductions were appropriately made from his earnings on account of NICs.

The Appeal

39. The Appellant applied to HMRC for a certificate in form E205 addressed to the Polish authorities setting out his UK NIC history, and the present dispute initially arose from HMRC's unwillingness to reflect the above periods of employment and/or contributions on their records and, accordingly, in the certificate provided to the Polish authorities. There also appears to be an outstanding claim of some sort for invalidity benefit, but we have no details of that and are not concerned with it.

40. This dispute culminated in a formal decision being issued by HMRC dated 20 November 2008 in which they stated that "you have only paid National Insurance Contributions as shown in the attached schedule". In the schedule, nothing was included in respect of any of the four employments referred to above.

41. That is the decision against which the Appellant formally appeals. We should say that we have also taken the appeal to extend to the question of whether the Appellant should be credited with further NICs beyond those shown on the schedule – that was certainly the basis upon which both the Appellant and HMRC argued the appeal.

The law

Introduction

42. The provisions set out in the Social Security Act 1975 ("SSA 75") which set out the basic structure of National Insurance Contributions are not disputed. Both parties are agreed that in the absence of some exclusion, primary (employee's) and secondary (employer's) class 1 NICs would have been payable in respect of all the earnings of the Appellant.

43. HMRC were unfortunately unable to provide proper copies of the legislation and, whilst we accept the extracts which they quoted as accurate (with one slightly concerning exception – see [49] below), we note that in some cases they have quoted the 1992 legislation and merely asserted that the previous legislation was the same, or simply glossed over the point.

44. We think it is important to make the point that if a dispute were to arise in some other case as to the exact content and meaning of those long-repealed provisions, we would expect HMRC to provide full and accurate copies of them as they stood at any relevant date. This point has arisen before, and HMRC need to address it. When dealing with a field such as NICs, where the precise terms of legislation in force at any time in a worker's working life may be crucial to assessing the correctness of his contribution record (thus potentially going back fifty years or more) it is incumbent upon HMRC to be able to produce the relevant legislation (of which they and their predecessor bodies have been the guardians) to the Tribunal when necessary. The legislative sources available to the Tribunal do not include such long-repealed provisions. It is unfortunate that in this case HMRC do not appear to be able to provide comprehensive and accurate copies of relevant legislation going back

only some 24 years – a much shorter period than in many other NIC appeals heard by this Tribunal.

45. In refusing to accept that NICs would have been paid by the Appellant, HMRC rely on two exemptions from NIC. They also rely on the provisions concerning the crediting to a worker's NIC contribution record of contributions not actually received by them from an employer.

First exemption claimed by HMRC – the Seasonal Agricultural Workers Scheme

46. The first is that embodied within the "Seasonal Agricultural Workers Scheme" or "SAWS". This title is an umbrella name for a scheme which encompasses both the immigration law aspects and the NIC aspects of allowing UK farmers to employ cheap temporary foreign workers to help with seasonal peaks of work in the agricultural sector. It has been in existence for many years, and has changed much over that time. We are concerned only with the NIC aspects of the scheme as it existed in 1984 to 1988.

47. In the case of individuals who work under a contract of service (ie employees), NICs are essentially payable by any person who is "gainfully employed in Great Britain". However, this is subject to certain requirements as to "residence or presence in Great Britain". These basic rules have been unchanged since before August 1984.

48. From 1984 to 1988 (covering all periods of the Appellant's employment at Friday Bridge), the relevant legislation on "residence or presence in Great Britain" was contained in Regulation 119 of the Social Security (Contributions) Regulations 1979 ("the 1979 Regulations") which, so far as relevant, provided as follows:

> "(1) Subject to the following provisions of this regulation, for the purposes of section 1(6) of the Act (conditions as to residence or presence in Great Britain for liability or entitlement to pay Class 1 or Class 2 contributions or entitlement to pay Class 3 contributions) the conditions as to residence or presence in Great Britain shall be—
>
> > (a) as respects liability of an employed earner to pay primary Class 1 contributions in respect of earnings for an employed earner's employment, that the employed earner is resident or present in Great Britain (or but for any temporary absence therefrom would be present therein) at the time of that employment or is then ordinarily resident in Great Britain;
> >
> > (b) as respects liability for secondary Class 1 contributions, that the person who, but for any conditions as to residence or presence in Great Britain (including the having of a place of business therein), would be the secondary contributor (in the following provisions of this Case referred to as "the employer") is resident or present in Great Britain when such contributions become payable or then has a place of business in Great Britain, so however that nothing in this provision shall prevent the employer paying the said contributions if he so wishes;

....

(2) Where a person is ordinarily neither resident not employed in the United Kingdom and, in pursuance of employment which is mainly employment outside the United Kingdom by an employer whose place of business is outside the United Kingdom (whether or not he also has a place of business therein) that person is employed for a time in Great Britain as an employed earner and but for the provisions of this paragraph the provisions of sub-paragraph (a) of the last preceding paragraph would apply, the conditions prescribed in that sub-paragraph and in sub-paragraph (b) of that paragraph shall apply subject to the proviso that no primary or secondary Class 1 contribution shall be payable in respect of the earnings of the employed earner for such employment after the date of the earner's last entry into Great Britain and before he has been resident in Great Britain for a continuous period of 52 contribution weeks from the beginning of the contribution week following that in which that date falls.

(3) Where a person to whom the said sub-paragraph (a) would otherwise apply is not ordinarily resident in the United Kingdom and is not a person to whom the provisions of the last preceding paragraph apply, the proviso specified in that paragraph shall nevertheless apply if either—

(a) during a vacation occurring in a course of full-time studies which that person is pursuing outside the United Kingdom, that person is gainfully employed under a contract of service in Great Britain in temporary employment of a nature similar or related to that course of studies; or

(b) there exists between him and some other person outside the United Kingdom a relationship comparable with the relationship between an apprentice and his master in Great Britain and that person is gainfully employed under a contract of service in Great Britain in employment which began before he attained the age of 25 and which is of a nature similar or related to the employment under the said relationship outside the United Kingdom."

49. The text of Regulation 119 of the 1979 Regulations is slightly different from its current replacement (in Regulation 145 of the Social Security (Contribution) 2001 Regulations ("the 2001 Regulations")). HMRC in their written submission to the Tribunal set out the current Regulation 145 in full and stated that "Regulation 119(3) of the Social Security (Contributions) Regulations 1979 preceeded Regulation 145(3) of the Social Security (Contributions) Regulations 2001 and the text is the same." Fortunately, the Tribunal was able to obtain independently a copy of Regulation 119 of the 1979 Regulations and establish the inaccuracy of this assertion. This emphasises the point that HMRC must produce proper copies of relevant repealed legislation rather than rely on careless assertion as to its content. It is for the Tribunal, not for HMRC, to assess the significance of any change of wording that may have taken place, however apparently minor.

50. Regulation 119 of the 1979 Regulations, as set out above, is the legislation (in particular sub-paragraph (3)) upon which HMRC rely in relation to the Appellant's employment with Friday Bridge.

Second exemption claimed by HMRC – earnings too low to qualify

51. Section 5 of the Social Security Contributions and Benefits Act 1992 ("SSCBA 92") (apparently re-enacting without change section 4 SSA 75) provided as follows:

> "Earnings limits for Class 1 contributions
>
> (1) For the purposes of this Act there shall for every tax year be –
>
> (a) a lower earnings limit for Class 1 contributions, being the level of weekly earnings at which employed earners become liable for such contributions in respect of the earnings from their employments;"

52. It is not disputed that the legislation then went on to set out how Class 1 contributions were to be calculated on earnings above the lower earnings limit.

53. These provisions remained unchanged in any material respect until after August 1995.

54. The lower earnings limit for the tax year 1984-85 was £34 per week. For 1987-88 it was £39 per week. For the tax year 1988-89 it was £41 per week. For the tax year 1995-96 it was £58 per week.

Crediting of NICs which have not been received by HMRC

55. Regulation 60 of the 2001 Regulations is headed "Treatment for the purpose of contributory benefit of unpaid primary Class 1 contributions where no consent, connivance or negligence on the part of the primary contributor" and paragraph (1) of that Regulation provides as follows:

> "(1) If a primary Class 1 contribution payable on a primary contributor's behalf by a secondary contributor is not paid, and the failure to pay that contribution is shown to the satisfaction of an officer of the Board not to have been with the consent or connivance of, or attributable to any negligence on the part of the primary contributor, that contribution shall be treated—
>
> (a) for the purpose of the first contribution condition of entitlement to a contribution-based jobseeker's allowance or short term incapacity benefit as paid on the date on which payment is made of the earnings in respect of which the contribution is payable; and
>
> (b) for any other purpose of entitlement to contributory benefit, as paid on the due date."

56. HMRC submit (and we accept) that it is appropriate to apply the current version of this regulation (rather than the version which was current at the time when the contributions in question should have been paid).

57. HMRC have not disputed that the Tribunal has power to overrule HMRC's tacit decision not to operate Regulation 60 for the benefit of the Appellant. We take them as accepting that the Tribunal has such power.

Submissions and our findings

The SAWS exemption claimed by HMRC

58. HRMC did not refine their submissions on the point, simply asserting that the Appellant was a participant in SAWS and therefore he was exempt from NICs under this provision.

59. The Appellant asserted that he was simply a worker and therefore should have been subject to NICs like any other employed earner in the UK.

60. We have already found that, as required under Regulation 119(3) of the 1979 Regulations, the Appellant was not ordinarily resident in the United Kingdom (see [6]). It is also clear from the facts that (as also required by Regulation 119(3)) the provisions of Regulation 119(2) did not apply to the Appellant. It can readily be seen therefore that in the Appellant's case, the key requirements are those in Regulation 119(3)(a) at [48] above, which require (i) the Appellant to have been working at Friday Bridge "during a vacation occurring in a course of full-time studies" which he was pursuing outside the United Kingdom, and (ii) that his contract of service in Great Britain was "in temporary employment of a nature similar to or related to that course of studies."

61. The Appellant's first period of employment at Friday Bridge in 1984 clearly took place during a vacation in his full-time studies, but although it was obviously temporary in nature, it could not be said to be employment which was "of a nature similar to or related to" his course of studies – he was studying Economics and Organisation of the Chemical Industry (see [6])..

62. During his further periods at Friday Bridge in 1987 and 1988, he was also not working during a vacation in his full-time studies, as he had graduated in June 1985.

63. It follows that, as a matter of fact, we find the Appellant did not satisfy the requirements for exemption from NICs on the basis of Regulation 119(3) of the 1979 Regulations in relation to his periods of employment at Friday Bridge. This exemption therefore did not, as a matter of law, apply to those periods of employment.

64. The Appellant also argues that the SAWS provisions exempting him from NICs are invalid under the European Convention on Human Rights, on the basis that they discriminate against him on grounds of nationality. We disagree. The SAWS arrangements seem to us to be designed as a very simple and straightforward

easement of NIC rules to cover a period of temporary casual work in the UK and apply equally to non-resident UK citizens as they do to non-UK citizens. We also doubt whether the Human Rights Act 1998 could be called upon to question the validity of rules in place at least ten years before the commencement of that Act. In any event, this point is not relevant in view of our finding at [63] to the effect that the Appellant did not fall within SAWS even whilst working at Friday Bridge.

65. The SAWS provisions are not relevant to the other employments held by the Appellant.

Were the Appellant's earnings below the lower earnings limit?

Earnings at Friday Bridge

66. HMRC argued that, whatever the position under SAWS, on a balance of probabilities the Appellant would only have earned enough to "provide some pocket money" after paying his accommodation costs (as set out in the Friday Bridge leaflet mentioned above) and therefore his earnings would have been below the lower earnings limit.

67. The Appellant argued that he had earned £2 per hour on average, for an eight hour day and six day week, equating to £96 per week. This would have placed him well above the lower earnings limit in each of the three years he worked there (see [53])..

68. We find that on a balance of probabilities the Appellant would have earned somewhat more than the cost of his accommodation while he worked at Friday Bridge, and accordingly would have earned above the lower earnings limit. To cover his accommodation costs alone, he would have needed to earn £39 per week (in 1988) and we note that the lower earnings limit that year was £41 per week. We do not accept that his earnings would have been as high as £96 per week, but because of the view we take on the "Regulation 60" argument (below), it is not necessary for us to reach a decision on what the level of earnings actually was. We note that the Appellant has disclosed a copy only of the last page of a building society savings book, and the earlier pages of that book would have been potentially significant evidential material if this issue had been relevant.

Earnings at Duke of York

69. Given our findings as to the levels of earnings by the Appellant while he was working at the Duke of York under the name Benny Peterson, which were well in excess of the lower earnings limit of £41 per week (see [29]), there is no question of his earnings during that period from the Duke of York falling below the lower earnings limit. We find that they did not.

Earnings at Macdonalds

70. Given our findings as to the level of earnings by the Appellant whilst he was working at Macdonalds (see [33]), we find that he was clearly earning less than the lower earnings limit for each week in the very short period he was employed by them.

Earnings at J Simons Cleaning Limited

71. Given our findings in relation to his earnings at J Simons Cleaning Limited in 1995 (see [38]), and given that the lower earnings limit at that time was £58 per week, we find that (save in relation to the one week where the earnings were £40 and the other week where there were no earnings) the Appellant did earn above the lower earnings limit, and the aggregate Class 1 contributions made by him totalled £9.29 during that employment.

Should the Appellant be credited with contributions under Regulation 60?

72. Regulation 60 of the 2001 Regulations provides that if certain conditions are met, HMRC must (and not, as they maintained both at the hearing and in their subsequent written submissions, "may") treat the relevant Class 1 contributions as having been made.

73. HMRC do not dispute that, as a general proposition, the main obligation to pay over the primary (ie employee's) Class 1 contributions falls on the employer (who is entitled to recoup that cost by deduction from the employee's earnings). In addition, of course, the employer is also directly obliged to pay over the secondary (ie employer's) contribution.

74. In terms of Regulation 60, this means that whatever the underlying reason for the failure to pay (i.e. because the employer has failed to deduct the employee's contribution from his earnings, or because the employer has simply retained any deduction so made), an employee is entitled (if the conditions of Regulation 60 are satisfied) to be credited with the contributions which the employer should have made on his behalf.

75. The Appellant maintains that he did suffer NIC deductions in two of his employments (which his employers wrongfully failed to pay to HMRC), and his employers in the other two employments wrongfully failed either to deduct NICs or to pay them to HMRC.

76. HMRC cannot trace receipt of any contributions from any of the Appellant's employers. Either they have been received by HMRC but "lost" or they were never received. HMRC say (and we accept) that their normal tracing processes to find the right home for unallocated contributions received by them are robust but have not unearthed any contributions by the Appellant's employers. We therefore find, on a balance of probabilities, that they were never paid. Regulation 60 is therefore engaged. The question we must therefore decide is whether any failure on the Appellant's employers' part to pay primary Class 1 contributions of the Appellant

over to HMRC (or its predecessor body) can be shown to have been "with the consent or connivance of, or attributable to any negligence on the part of" the Appellant.

77. That question must be decided separately in relation to each of the employments.

Employments at Friday Bridge

78. It is unfortunate that we have not been supplied with a copy of the application form which the Appellant would have had to fill in to apply for work at Friday Bridge. That might have clarified matters greatly.

79. The reason why Friday Bridge did not account for NICs on the Appellant's earnings was clearly because they considered him to fall within the SAWS exemption. As we have found above, he did not in fact qualify for that exemption. The question is whether their failure to pay was with the Appellant's "consent" or "connivance", or was "attributable to any negligence" on his part.

80. Not having seen the application forms which the Appellant submitted to Friday Bridge (or to the Home Office or British Consulate or Embassy) in connection with his three employments with Friday Bridge, there is no direct evidence as to what the Appellant told them or what information he was given about NICs. This point was not touched upon at the hearing, so we have no evidence from the Appellant on the point (though in view of our findings in relation to the "Spirit Group letter", we would have treated any uncorroborated statements from him with great caution in any event).

81. We consider it highly likely, however, that an application form for a post falling within a special scheme such as SAWS would have required the prospective employee to confirm the personal circumstances which made him eligible for that scheme. Friday Bridge were clearly significant operators of the SAWS and well aware of its requirements; as such we find on a balance of probabilities that they would not have employed anyone to work under SAWS unless they obtained confirmation from the individual in question that (i) he was a full-time student overseas, applying for temporary work during his vacation and (ii) his prospective employment in the UK was "of a nature similar or related" to his overseas studies.

82. It follows that we consider, on a balance of probabilities, that the Appellant misled Friday Bridge as to his eligibility for employment under SAWS.

83. The Oxford English Dictionary defines "connivance" as follows:

> "The action of conniving; the action of winking at, overlooking or ignoring (an offence, fault, etc.); often implying secret sympathy or approval: tacit permission or sanction; encouragement by forbearing to condemn."

84. It seems to us that this is a fair description of the Appellant's actions in misrepresenting his personal eligibility for SAWS to Friday Bridge. His objective

was to visit the UK and obtain casual work. He could only do so by misrepresenting his eligibility for SAWS. He therefore chose to do so and must be regarded as "conniving" in Friday Bridge's consequent wrongful failure to account for NICs on his behalf.

85. Even if the Appellant were not guilty of connivance in this way (eg because he simply did not understand that the question of his personal eligibility for SAWS was crucial), we consider that he must at the very least have been negligent in giving the "SAWS eligibility" confirmations which we find were required from him.

86. It therefore follows that we find that any failure of Friday Bridge to account for NICs on the Appellant's behalf was either "with the connivance of" the Appellant or was attributable to his negligence. Accordingly, there is no basis upon which he can be credited with such contributions under Regulation 60.

Employment at the Duke of York

87. There is no "SAWS" aspect to this employment. It was certainly in breach of the terms of the Appellant's entry visa, but HMRC have not argued that this illegality takes the employment outside the scope of NICs. Indeed, they have specifically accepted that the legality or otherwise of the employment has no bearing on the question of whether NICs arise from it.

88. HMRC's only objection in relation to this employment was that they could simply find no trace of any contributions from the Appellant's alleged employer for it.

89. We can only speculate as to the reasons for this, but since HMRC said they have robust processes for tracking down "unallocated" NIC payments from employers, we can only assume that the employer never paid over to HMRC the contributions which were referable to the Appellant's employment with them.

90. Having found that the contributions were due, we must therefore consider whether the Appellant gave "consent or connivance" to his employer's non-payment of them, or whether such non-payment was "attributable to any negligence" on his part.

91. All that the Appellant appears to have done is to tell his employer that he did not have a National Insurance number. This resulted in them allocating a temporary NI number to him in line with what we understand to have been the usual procedure at that time. He then saw deductions being made from his earnings on account of NICs and he had no reason to believe those contributions were not being paid over to HMRC (along with the employer's secondary contributions). We do not therefore consider that his employer's failure to pay over the contributions could be regarded as having happened with his consent or connivance, or as being attributable to his negligence.

92. It follows that we can see no basis upon which HMRC can now refuse to credit the appropriate contributions to his NIC record under Regulation 60 for the tax year 1988-89.

Employment by Macdonalds

93. As already mentioned (see [33] and [70]), we see no basis for any NICs to have arisen from this employment. Therefore the question of crediting such contributions to the Appellant's record does not arise.

Employment by J Simons Cleaning Limited

94. Similar observations apply here as in the case of the employment at the Duke of York (above). We therefore consider there is no basis upon which HMRC can refuse to credit £9.29 of primary contributions to the Appellant's record for the year 1995-96 (see [71]).

Decision

95. We find that the Appellant neither paid nor is he entitled under Regulation 60 to be credited with, Class 1 National Insurance contributions in respect of:

(1) his periods of employment with Friday Bridge in 1984, 1987 and 1988 (see [10] and [86]); or

(2) his short period of employment with Macdonalds Hamburgers Limited in 1989 (see [33], [70] and [93]).

96. The appeal is therefore dismissed insofar as it relates to those matters.

97. We find that the Appellant paid (and is entitled to be credited under Regulation 60 with):

(1) Class 1 National Insurance contributions during the year 1988-89 in respect of his employment with Spirit Group at the Duke of York pub in London, as follows:

(a) £25.30 in respect of the period up to 12 November 1988;

(b) the appropriate amount which would have accrued on weekly earnings of £89.30 per week for the following seven weeks; and

(c) the appropriate amount which would have accrued on weekly earnings of £63.45 for the following twelve weeks.

(See [29] and [91]).

(2) £9.29 of Class 1 National Insurance contributions during the tax year 1995-96 with J Simons Cleaning Limited (see [38] and [94]).

98. The appeal is therefore allowed in principle to that extent.

99. Once HMRC have calculated the precise amounts to be credited under [97(1)(b) & (c)] and notified them to the Appellant, the parties are at liberty to apply

to the Tribunal for a final determination of those amounts in the event of any disagreement.

100. 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.

KEVIN POOLE
TRIBUNAL JUDGE
RELEASE DATE: 30 December 2011