



Neutral Citation: [2022] UKFTT 00441 (TC)

Case Number: TC08651

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video

Appeal reference: TC/2021/13033

National Insurance contributions – voluntary class 3 contributions – extension of time to pay

Heard on: 14 November 2022

Judgment date: 28 November 2022

Before

**TRIBUNAL JUDGE MCGREGOR
ANN CHRISTIAN**

Between

GEK SIU NG

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

The appellant was not present or represented

For the Respondents: Rose Grainger, presenting officer for HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) VIA Tribunal video hearing system. A face to face hearing was not held because a remote hearing was appropriate. The documents to which we were referred are a bundle containing 195 pages.
2. 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.
3. The hearing was to determine Ms Ng's appeal against a decision of HMRC not to allow an extension of time to pay additional voluntary Class 3 National Insurance Contributions (NICs).
4. Ms Ng indicated in advance of the hearing that she did not intend to participate in the hearing and that she had not appointed a representative to attend on her behalf. Given her express intention, we decided it was in the interests of justice in accordance with the overriding objective under Rule 2 of the Tribunal Procedure Rules to proceed to hear the case in the absence of the Appellant.

EVIDENCE

5. The bundle contained documentary evidence in the form of correspondence between the parties.
6. We heard no witnesses.

LAW

7. Regulation 4(3) Social Security (Crediting and Treatment of Contributions and National Insurance Numbers) Regulations 2001 provides that Voluntary Class 3 NI contributions must be paid before the end of the sixth tax year following the one in which they were due.
8. This deadline for the tax years 1996-97 to 2001-02 was extended to 5 April 2009 for those who reached pensionable age on or after 24 October 2004, by virtue of Regulation 50A of the Social Security (Contributions) Regulations 2001.
9. Regulation 50 Social Security (Contributions) Regulations 2001 states:
 - (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.

FACTS

10. We find the following facts which did not appear to be in dispute. We find further facts in our discussion below.

11. On 17 January 2008 HMRC wrote to Ms Ng setting out, among other things, that if she wished to pay Class 3 NICs for the tax years 1996-97 to 2001-02, then the payment must reach HMRC by 5 April 2009.

12. On 26 March 2008 the Appellant sent a letter to HMRC acknowledging the letter issued on 17 January 2008. The same letter also included a request to allocate the enclosed payment to Class 3 NICs for tax years 2002-03 to 2005-06.

13. On 17 April 2008 HMRC sent a letter to the Appellant confirming the allocation of the payment to tax years 2002-03 to 2005-06 and reminding her of the possibility of making a payment for tax years 1996-97 to 2001-02 and reconfirming the deadline of 5 April 2009.

14. Ms Ng made further payments of Class 3 NICs on the following dates:

- (1) 10 September 2009 in relation to tax years 2007-08 and 2008-09;
- (2) 31 March 2010 in relation to tax years 2006-07 and 2007-08;
- (3) 2 December 2010 in relation to tax year 2009-10;
- (4) 22 March 2012 in relation to tax year 2010-11;
- (5) 22 June 2015 in relation to tax year 2011-12 – 2014-15;
- (6) 14 May 2016 in relation to tax year 2015-16; and
- (7) 22 March 2018 in relation to tax year 2016-17.

15. On 8 October 2018, the Appellant sent a letter to HMRC informing them that she had realised that she had not paid her NICs for the tax years 1996-97 to 2001-02 by the final time limit of 5 April 2009 and that she wished to pay them now.

16. On 7 March 2019, HMRC sent a letter that explained, among other things, that she was too late to make the NICs payments for 1996-97 to 2001-02.

17. After a further exchange of correspondence, on 27 February 2020, HMRC sent a letter indicating that it would refuse Ms Ng permission to make payments out of time. It offered Ms Ng to make further representations and that if agreement could not be reached, HMRC would issue a formal decision, which could then be appealed to the Tribunal.

18. On 27 March 2020 Ms Ng sent a letter stating:

“I must take responsibility and ownership for my oversight, error and ignorance in not paying the above mentioned tax years within the stipulated time limits. Accordingly, I shall not pursue this matter any further...”

19. On 25 May 2021, Ms Ng sent a further letter saying she had changed her mind and did intend to challenge HMRC’s decision.

20. On 17 June 2021, HMRC issued a Notice of Decision refusing her permission to extend time to make Class 3 NIC contributions for the years 1996-97 to 2001-02.

21. Following an HMRC review of that decision, Ms Ng lodged the appeal with this Tribunal on 13 October 2021.

PARTIES ARGUMENTS

Taxpayer’s arguments

22. We derive Ms Ng’s submissions from letters sent to HMRC and the notice of appeal.

23. She submitted that the reason for the failure to make payments was human error, that the payment for the relevant years had simply slipped through the net until 2018.
24. She said that she had not made the payment in 2008 due to financial constraints and so she had made the payment in relation to other years, for which the deadline was 5 April 2008.
25. She had been emotionally overwhelmed in the period because her father died on 9 May 2008 after illness for some months, her dog died around the same time and she had been very unsettled due to changes in her working environment which made her job unstable.
26. While she was aware of the NI regime, she has not lived in the UK for over 40 years and this made it difficult to keep up her knowledge and understanding of the scheme.
27. She had been diligent in all her dealings with HMRC but this one instance fell through the net and she didn't fully understand the consequences of it.
28. She had "obviously did not understand the special concessions relating to payment of NI contributions for the 1996-97 to 2001-02 tax years and probably intended to seek clarifications before making payment".

HMRC arguments

29. HMRC submits first that the voluntary Class 3 NICs have been made outside the statutory time limit under Regulation 4(3) Social Security (Crediting and Treatment of Contributions and National Insurance Numbers) Regulations 2001, as it was extended under Regulation 50A of the Social Security (Contributions) Regulations 2001.
30. HMRC acknowledges that payments of Class 3 NICs may be outside those time limits if the tests in Regulation 50 Social Security (Contributions) Regulations 2001 are met.
31. HMRC's submission is that these conditions are not met.
32. HMRC relies on the High Court's consideration of the meaning of "ignorance or error" in the case of *Revenue and Customs Commissioners v Thompson* [2007] STC 240 at paragraph 15:

"It seems to me that, in order for a taxpayer to be able to demonstrate that a failure to pay national insurance contributions was attributable to ignorance or error, in broad terms he needs to prove one of two things: either he must show that he had a total ignorance of the existence of the national insurance regulations and of his statutory obligation to make payment, or he must be able to point to particular circumstances existing at the time when the payments fell due which in effect robbed him of a knowledge and understanding that the payments fell due at that time. There may of course be cases where that test would be satisfied. One can easily imagine that, in the case of somebody who suffers, for example, a serious mental breakdown or some physical or mental difficulties of that kind, they may be robbed of any real sense or appreciation of the need to make the payments which fall due..."

33. HMRC submit that it was not satisfied that at the time the payment was due, the contributor was either ignorant of the fact that they needed to pay Class 3 NI contributions or that they made an error relating to the payment of the contributions.
34. Further, if Ms Ng can show that she failed to pay Class 3 NI contributions by the time limits due to her ignorance or error, she must then show that the ignorance or error was not due to their failure to exercise due care and diligence. HMRC submit that the error was due to the failure to exercise due care and diligence.
35. HMRC rely on the Court of Appeal decision in *Kearney v HMRC* [2010] EWCA Civ 288, which discussed due care and diligence at paragraph 34:

“...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.”

36. Paragraphs 35 to 37 of the same decision proceed:

“[35] Like the Judge [in the High Court], 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.”

37. HMRC also referenced a First-tier Tribunal decision (*R Goldsack v HMRC* [2010] UKFTT 530 (TC)) which applied *Kearney* as follows:

“To the above list [i.e., the factors in paragraphs 35 - 37 in *Kearney*], we would add “the extent and nature of the action or inaction of the Appellant (particularly in relation to the making of enquiries) at the relevant time or over the relevant period, bearing in mind the extent of his knowledge of the NIC scheme”.

This is because when Lady Justice Arden said (at [36] of *Kearney*):

“... 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”

she was clearly contemplating that in some circumstances, knowledge of “some aspect of the NIC scheme”, combined with a failure to make “further enquiries about his rights or obligations” could amount to a failure to exercise due care and diligence.

It must also be borne in mind that she went on to say:

“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”

and this passage emphasises that the degree of knowledge of the NIC scheme held by the contributor is important, not just in its own right but also (and perhaps more importantly) in determining the extent of any further enquiries which he should have made.”

38. HMRC submit that for Ms Ng to have exercised due care and diligence she must have taken positive actions to establish whether she needed to pay Class 3 NICs.

39. HMRC submit that she made enquiries regarding her Class 3 NICs in 2008 and received from HMRC information that explained which years she would be able to make payments for and the deadlines for making payments.

40. Ms Ng acknowledged receipt of that letter and enclosed a payment for later periods. When that payment was acknowledged by HMRC in March 2008, she was reminded that the Class 3 NICs for periods 1996-97 to 2001-02 were outstanding and that she could make payment for those years, at the original rate, up to 5 April 2009.

41. HMRC submit that Ms Ng continued to engage with her Class 3 NICs position for the period from 2009 until 2018, making several further payments and corresponding with HMRC in relation to other years.

42. HMRC submit that all of this behaviour cements their position that Ms Ng understood the position with regards to Class 3 NICs, including the time limits associated with them.

43. HMRC’s position is that Ms Ng knew about the non-payment of the Class 3 NICs for the relevant period and understood the consequences but did nothing about it for 8 years.

44. While HMRC has sympathy with the taxpayer’s mental health and the impact of the loss of her father in May 2008, there was a period of almost a year after that point in which to regularise her affairs before the April 2009 time limit and Ms Ng did not get in touch with HMRC to discuss her position at the time or at any time until 2018.

45. HMRC submit that Ms Ng has not shown on the balance of probabilities that the error was not due to her failure to take due care and diligence and that therefore she is not entitled to make payment outside the normal time limits.

DISCUSSION

46. The scope of our decision is limited.

47. There was no dispute that the Class 3 NICs for the period 1996-7 to 2001-02 were not paid by the time limit of 5 April 2009.

48. There also appeared to be no dispute that the non-payment was due to the error of Ms Ng, since she described it as having been down to “Human error”.

49. The question for us to decide whether the error “was not the result of the contributor’s failure to exercise due care and diligence”.

50. As required by the Court of Appeal decision in *Kearney*, we must first balance together “all relevant circumstances” in order to assess whether Ms Ng exercised due care and diligence.
51. If we find that she did not exercise due care and diligence, we must then decide whether the failure was the cause of the error in not paying the contributions.
52. In identifying all the relevant factors for Ms Ng, we bear in mind the Court of Appeal’s conclusion that “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”.
53. We find that Ms Ng had a reasonable understanding of the principles of the NICs regime, by which we mean that, from the correspondence we have seen, she understood what Class 3 NICs were for and that not paying them would result in a lower state pension when she reached pensionable age. We also find that she had an understanding of time limits. Her express instruction to allocate the payment made in early 2008 to the years which had an earlier time limit shows this very clearly.
54. We do accept, as she submitted, that she did not keep abreast of all the technical changes to the state pension and NICs regime as they happened, since she had been away from the UK for many years. However, this did not affect her understanding of the underlying principles.
55. We also find that she continued throughout the period from 2008 through to 2018 to enter into regular correspondence with HMRC and to make payments of voluntary Class 3 NICs in respect of other years.
56. She was informed twice in written correspondence of the unpaid years 1996-97 to 2001-02 and therefore was not under any misunderstanding that the years had been paid.
57. Although not binding on us, we agree with the First-tier Tribunal’s decision in *Goldsack* that the degree of knowledge of the NICs regime is important in determining the extent of any further enquiries that should have been made.
58. Ms Ng continued to meet voluntary Class 3 NICs payment through the ensuing 9 year period, starting from as early as 10 September 2009. HMRC submit that this continued due care and diligence in relation to later years weighs against Ms Ng, whereas Ms Ng submits that it supports her case. She submits that all the other diligence she has taken shows that this one error was just that, an error that cannot be attributed to a lack of care and diligence because she continued to show due care and diligence throughout the period.
59. We must consider whether the actions that Ms Ng took (or did not take) showed that she took due care and diligence in her specific circumstances, which include her level of understanding of the NICs regime. We find that doing nothing with regards to the 1996-97 – 2001-02 period from the March 2008 letter through to 2018, in spite of knowledge and understanding of the consequences of that inaction was not the behaviour of a person taking due care and diligence.
60. Therefore we must move onto the question of whether that lack of care and diligence was the cause of the error.
61. The burden of showing that the lack of care and diligence was not the cause of her error is on Ms Ng.
62. She provided no evidence at all of financial constraints in 2008 or at any other time.
63. The concept of the need to seek clarification was made in a letter to HMRC in 2021 in which she said she “probably intended” to do so. There is no evidence that she actually sought

or indeed needed any clarification with regards what needed to be paid either in 2008-09 or subsequently.

64. Ms Ng did provide evidence of the date of her father's death, but no other detail was provided about the impact this and other events during the period, such as the death of the dog and uncertain employment issues, had on her and her ability to manage her affairs.

65. As noted above, Ms Ng asserts that her continued diligent attention to other payments of Class 3 NICs is evidence that it cannot have been a lack of diligence that caused her error in relation to 1996-08 – 2001-02. We are not able to accept this position. She has conceded on a number of occasions in correspondence that the failure to pay in relation to these years “slipped through the net” and was picked up by her in 2018 when she started looking through her paperwork as she became entitled to receive her state pension. The failure to check her paperwork before that was the cause of her error of non-payment.

66. We therefore find that Ms Ng has failed to show that her lack of due diligence and care in dealing with her voluntary Class 3 NICs was not the cause of her error.

67. As a result, we find that the conditions for allowing an extension of time to make the payments under Regulation 50 Social Security (Contributions) Regulations 2001 are not met.

68. HMRC's decision not to allow an extension of time stands.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. 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.

**ABIGAIL MCGREGOR
TRIBUNAL JUDGE**

Release date: 28th NOVEMBER 2022