



Neutral Citation: [2023] UKFTT 75 (TC)

Case Number: TC08710

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video

Appeal reference: TC/2022/01701

NATIONAL INSURANCE – voluntary class 3 contributions – impact on state pension – contributor's death within few days of reaching state pension age – claim for refund – was there an "error" when contributions were paid – no – appeal dismissed – Regulation 52, Social Security (Contributions) Regulations 2001 (2001/1004)

Heard on: 18 January 2023

Judgment date: 23 January 2023

Before

**TRIBUNAL JUDGE ALEKSANDER
IAN SHEARER**

Between

**STEPHEN GARWOOD as executor of
ROSEMARY GARWOOD**

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

The Appellant: in person

For the Respondents: Beverley Levy, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The form of the hearing was V (video) using the HMCTS video hearing service. The documents to which we were referred were an electronic bundle of 144 pages, and two other documents produced by Professor Garwood, being a report by the Parliamentary Ombudsman into the changes to the women's state pension age, and one page from a statement of Mrs Garwood's teacher's pension.

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.

BACKGROUND

3. Professor Garwood is the executor of his late wife's estate. He appeals against a decision of HMRC issued on 9 August 2021 not to return the class 3 National Insurance contributions (NICs) which she paid for the periods 2016/17, 2017/18 and 2018/19, amounting to a total of £2,236.00.

4. The background facts are not in dispute.

5. Mrs Garwood was born on 15 May 1954. She was a teacher and was in employment from 1975 until 2008 – with some gaps when she took career breaks to bring up her children. She retired from teaching in 2008, but briefly returned to work in 2015/16.

6. In 2015 she made an online request for an estimate of her state pension from the Department for Work and Pensions ("DWP"). On 24 April 2015 the DWP wrote stating that she had 34 qualifying years of NICs up until 2013/14 and would be entitled to an estimated state pension of £119.45 per week on reaching state pension age on 6 January 2020. We note that this is less than the then full rate of state pension (which was £151.25 at the time). The estimate stated that it was based upon her NIC record to date and also that a deduction had been applied because she had been contracted out of the additional State Pension at some time.

7. In December 2017 Mrs Garwood was diagnosed with breast cancer. She underwent treatment for the cancer. She was told in January 2019 that a clear mammogram showed that she had a favourable prognosis for the time being. However, given her personal circumstances, she had become clinically depressed.

8. As she approached state retirement age, she was unsure of her entitlement to the state pension, and so she telephoned the DWP's pensions helpline at the beginning of March 2019. Because of the state of her mental health, she asked her husband, Professor Garwood, to listen-in to the call on her speakerphone.

9. The DWP helpdesk advisor told her that under the new pension rules she was not entitled to a full state pension. However, if she made voluntary contributions for three years (2016/17, 2017/18 and 2018/19), she would become entitled to the new state pension in full.

10. She enquired whether making voluntary contributions for 2015/16 (when she had worked for part of the year) to bring it up to a full qualifying year would give her a full entitlement – as she would then have 35 qualifying years of contributions (the requirement to receive the new state pension in full). The DWP advisor told her that making contributions in respect of any period prior to April 2016 would make no difference to her entitlement.

11. The DWP advisor was not able to explain why making three years of voluntary contributions were required (meaning that she would have 37 qualifying years of contributions). He told Mrs Garwood that it was too complicated to explain.

12. He also said that the economic return from the voluntary contributions would be recovered by Mrs Garwood after five years – in other words, in economic terms, it was probably worth making the voluntary contributions if she expected to survive for five years after reaching state pension age.

13. He did not tell Mrs Garwood the deadline by which the contributions had to be paid, rather he said that they should be paid soon. He did say that the rate of contribution was increasing in April, and therefore it would be advantageous to make the contributions before the end of March.

14. There are two further points to be made in relation to this call. First, Mrs Garwood did not tell the DWP advisor that she was recovering from cancer. Second, the DWP advisor did not tell Mrs Garwood that voluntary contributions were not refundable.

15. Professor Garwood told us that his late wife was in some doubt about whether to pay the voluntary NICs, as she was not sure whether she would survive five years from the state pension age. But on 8 March 2019, Mrs Garwood transferred £2236 to HMRC as payment of the voluntary NICs.

16. Professor Garwood told us that his late wife had not appreciated that she was making a payment of NICs, and thought it was some kind of "additional voluntary contribution" to the state pensions scheme, in other words in an analogous way to contributions made to occupational pensions. We are not persuaded of this, not least because the description she gave to the payment for the purposes of her internet banking (as shown by the print-out from her bank account included in the evidence bundle) was "Voluntary NICs".

17. On 6 September 2019, the DWP pension service wrote to Mrs Garwood inviting her to claim her state pension with effect from 6 January 2020 (when she would reach state pension age). She was advised that she would be entitled to £148.46 per week and that this was the most which she could get by way of state pension. On 13 September 2019, Mrs Garwood applied online for the state pension. On 27 November 2019 the DWP pension service wrote to Mrs Garwood confirming that the first payment of her pension of £381.76 would be made on 23 January 2020 in respect of the period from 6 January 2020 to 23 January 2020. The letter included the following section:

Paying Class 2 or voluntary Class 3 National Insurance Contributions

If you have gaps in your National Insurance contributions (NICs) for one or more tax years between 2006/2007 and 2015/2016, depending upon your circumstances, you may be able to increase the amount of your State Pension by paying voluntary NICs.

HMRC have extended the normal time limits for paying. You have until 5 April 2023 to make payment for the years shown above but if you make payment after 5 April 2019 you may have to pay at a higher rate.

More information about how to check your National Insurance record and paying voluntary NICs can be found at www.gov.uk/voluntary-national-insurance-contributions

- Important information – if you are considering paying Voluntary National Insurance contributions for deficient years, please contact DWP first to check any impact on your State Pension

18. There was some confusion about the meaning of these paragraphs (not assisted by the page breaking between the first and second paragraphs of this section). Professor Garwood believed that the effect of this section of the letter meant that Mrs Garwood would have had until 5 April 2023 to make her voluntary class 3 contributions. But when the section is read as

a whole, it appears to be a reference to regulation 50C, Social Security (Contributions) Regulations 2001 (2001/1004) (which was inserted into the regulations by the Social Security (Contributions) (Amendment and Application of Schedule 38 to the Finance Act 2012) Regulations 2013 (2013/622)). Regulation 50C gives an extended deadline for the payment of NICs in respect only of the years 2006-07 to 2015-16. The reason for this extended deadline was because the DWP had been unable to provide pension statements between 2013/14 and 2016/17 inclusive, meaning that individuals were not able to make informed decisions regarding the payment of voluntary class 3 contributions for the tax years 2006/07 to 2016/17.

19. Regulation 50C would not, therefore, have extended the deadline for the payment of any of the class 3 voluntary NICs under appeal. However, in practice, 5 April 2023 would still be the applicable deadline for payment of class 3 NICs for 2016/17, as this would be the date on which the normal 6-year time limit would expire (and the deadlines for class 3 contributions in respect of 2017/18 and 2018/19 would be 5 April 2024 and 5 April 2025 respectively),

20. On 15 December 2019, Mrs Garwood was taken ill and admitted to hospital. Tests showed that the cancer had spread to her kidneys and bowel, and that she had only a few days to live. She was sent home for palliative care, then re-admitted to hospital on 13 January 2020 and died on 15 January 2020.

21. Mrs Garwood reached state pension age on 6 January 2020. The first instalment of Mrs Garwood's state pension was paid into her bank account on 23 January 2020.

22. On 25 February 2020, after Professor Garwood had reported the death to the DWP, their Debt Management unit wrote to him, apologising for having to do so, but requesting a refund of £169.67 of overpaid state pension for the period from 16 January 2020 to 23 January 2020 (namely for the period from the date after Mrs Garwood's death to the date of payment).

CLAIM

23. A great deal of confusion has arisen because of the split in responsibility relating to state pensions between HMRC (who are responsible for collecting NICs) and the DWP (who are responsible for administering the state pension). At one point Professor Garwood was advised that he could not make a claim for a return of Mrs Garwood's voluntary contributions, as any such claim could only be made by the person who made the contributions – namely Mrs Garwood – and that as she was dead, no claim could now be made. This is plainly nonsense, but it was only after Professor Garwood raised the matter with the Revenue Adjudicator that HMRC recognised Professor Garwood's right, as executor of his late wife's estate, to make a claim on behalf of the estate.

24. The claim for a refund is made under Regulation 52, Social Security (Contributions) Regulations 2001, the relevant provisions of which are as follows:

52 Return of contributions paid in error

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

This regulation is subject to regulations 51 and 57.

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

[...]

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

This is subject to paragraphs (5) and (6).

[...]

- (9) In this regulation “error” means, and means only, an error which—
- (a) is made at the time of the payment; and
 - (b) relates to some past or present matter.

25. Professor Garwood submits that there were two errors for the purpose of Regulation 52 which gave rise to an entitlement to claim a return of the contributions.

26. The first error was that the advisor on the DWP's helpdesk did not tell Mrs Garwood that the deadline for making the payment of the class 3 contributions was 5 April 2023. The second error was that the advisor on the DWP helpdesk did not tell Mrs Garwood that class 3 contributions were not refundable.

27. Professor Garwood submits that if his late wife had been made aware that (a) contributions were not refundable; and (b) that the deadline for making payment of the voluntary contributions for 2016/17 was 5 April 2023, then she would not have made payment of the contributions in March 2019. Instead, she would have waited until just before reaching state pension age before making payment – by which time she would have been aware that the cancer had spread and become terminal, and that there was no point in making the contributions.

DISCUSSION

28. In its decision in *Bonner et al v HMRC* [2010] UKUT 450 (TCC) at [29] the Upper Tribunal held that "error" is an ordinary word to be given its ordinary meaning, namely "a mistake". It went on to say:

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.

29. We note that Regulation 52(9) requires the error to have been made at the time the voluntary class 3 contributions were paid and must relate to some past or present matter.

30. In our view, whilst we have some sympathy with the position in which Professor Garwood finds himself, we find that there has been no error or mistake which would give rise to a right to a return of the class 3 NICs paid by Mrs Garwood.

31. There was no error or mistake in the advice given to Mrs Garwood by the DWP pensions helpline advisor. Nothing said by the advisor was wrong. Professor Garwood's complaint is that the advice was incomplete, because the advisor omitted to say that class 3 contributions were not refundable, and he did not tell Mrs Garwood that the deadline for payments for class 3 NICs for 2016/17 was 5 April 2023. There is no suggestion by Professor Garwood that the advisor was asked by his late wife for the payment deadlines or whether the contributions were refundable. As Mrs Garwood did not tell the advisor of her cancer diagnosis, he would have been unaware of her concerns about her prognosis, and the risk that she might die within five years of reaching state pension age. In these circumstances, find that these omissions were not an "error" for Regulation 52 purposes.

32. Nor do we consider that there was any error or mistake made by Mrs Garwood. She made the payment of the voluntary contributions with the intention of increasing the amount of her state pension. She benefited from that increase – admittedly only for the few days between reaching state pension age and her death. It was (to say the least) unfortunate that she died only a few days after she reached state pension age, and so did not live long enough to accrue the full economic benefit of the voluntary payments that she made.

33. It is a matter of speculation whether Mrs Garwood would have deferred making the voluntary class 3 NICs if she had been made aware that they were non-refundable, and that the payment deadline was in 2023. We are aware that one of the reasons that she made the payment in March 2019 was in order to avoid the increase that would occur if payment was made after 5 April 2019. Mr Garwood's evidence was that she asked him "Why pay the money in March when she could wait?" This suggests that she must have been aware that the payments were not refundable – otherwise she would not have been concerned about making the payment in March 2019, and it supports our finding that she made no error when paying the contributions.

34. The diagnosis in December 2019 that Mrs Garwood's cancer had spread cannot give rise to an error for Regulation 52 purposes because of the limitation in paragraph (9).

35. For these reasons, we dismiss the appeal.

OTHER MATTERS

36. A number of other matters arose during the course of the hearing, which, for completeness, we address here.

37. First, in the course of correspondence, HMRC asserted that they had no discretionary power to make refunds of class 3 NICs. Whilst there is no express discretion to make refunds conferred in the social security contributions legislation, s5 Commissioners for Revenue and Customs Act 2005 confers wide discretion on HMRC in respect of their responsibility for the collection and management of national insurance contributions. As the operation of HMRC's discretion under s5 is not justiciable before this Tribunal, we make no findings as to whether HMRC would have discretion to make a refund under their s5 powers in the circumstances of this case.

38. Secondly, Mrs Garwood was given no explanation as to why she had to make voluntary contributions for three years in order to entitle her to the new state pension in full. This appears to arise because of the operation of the transitional provisions that apply when an individual (such as Mrs Garwood) has paid NICs both before and after 6 April 2016. In these cases, the NICs paid before 6 April 2016 are used to calculate the "starting amount". This is the higher of the amount to which she would have been entitled under the old pension rules, and the amount to which she would have been entitled if the new pension rules had been in place at the start of her working life. The DWP's letter of 24 April 2015 effectively confirms that Mrs Garwood's starting amount must have been less than the full new state pension as at 6 April 2016. In these circumstances, the relevant regulations provide that the new state pension will be increased (up to a maximum corresponding to the full new state pension) to the extent that qualifying years are added to her NICs record *after* 5 April 2016. This is why she had to make voluntary contributions for periods after 5 April 2016 to increase the amount of her state pension.

CONCLUSION

39. For the reasons given above, we dismiss this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

40. 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.

**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

Release date: 23rd JANAURY 2023