TC03456

Appeal number: TC/2013/04809

TYPE OF TAX – National Insurance Contributions – voluntary contributions –Appellant enquired about these in 2008 – did not receive reply and did not enquire further until 2010 when out of time for some years - did his ignorance and error about timing result from his failure to exercise due care and diligence – no - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR WILLIAM KAREL FERGUS MCPHERSON **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JUDITH POWELL

Sitting at Bedford Square, London on 6 February 2014

The parties agreed that the case should be considered purely on the basis of the papers because the Appellant was based outside the UK. The Tribunal agreed it was possible for a decision to be reached on this basis. The Appellant had prepared his argument and response to the Respondents' statement of case which latter document had been sent to the Tribunal by Linda Ramsay, Disputes, Decisions and Appeals Team for the Respondents. The Tribunal considered the papers on 6 February 2014 and has now reached its decision. It heard no oral evidence.

DECISION

1. This is an appeal against a decision of the Respondents made under section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 on 7 March 2013. The decision is that the Appellant is not entitled to pay voluntary National Insurance contributions for the period 6 April 1996 to 5 April 2004 ("the disputed period"). Had he been entitled to do so he would have accrued 20 qualifying years in total and would have been able to pay contributions for a further six years. The ability to pay the contributions for a further six years is not available unless a person has at least 20 qualifying years which the Appellant will not have accrued unless he is able to pay contributions for the disputed period.

2. The Appellant complains about the way in which the Respondents dealt with his case; we do not have the jurisdiction to deal with such complaints and the Appellant is aware of how to progress that complaint. Of course the history of the case may be relevant to whether the Appellant did or did not exercise due care and diligence which we shall see is central to the decision which is the subject of this appeal. We deal below with the scope of our jurisdiction in relation to that decision.

Background

3. The circumstances which the Appellant claims entitle him to pay for the disputed period are as follows. Regulation 147(1) Social Security (Contributions) Regulations 2001 ("the Regulations") allows him, if he wishes and if he satisfies conditions set out in Regulation 147(3), Regulation 148 and 148A , to pay Class 2 or Class 3 contributions in respect of periods when he is outside the UK. The Respondents agree that the Appellant satisfies the conditions set out in Regulation 147(3). Regulation 148A is not relevant to the Appellant. Regulation 148 states that the entitlement to pay Class 2 or Class 3 Contributions shall be subject to the following conditions that (a) the payment is made within the period specified in Regulation 48(3)(b)(i) and (b) that the payment is only made to the extent to which it could have been made if the contributor had been present in Great Britain or Northern Ireland (as the case may be) and otherwise entitled to make it. The time limit to which reference is made is the end of the sixth year following the year in respect of which it is made. There are also special rules (to be found in Regulation 50A of the Regulations) for the time limits to pay Class 3 contributions in respect of years 1996 - 7 to 2001 – 02. These special rules allow a person up until 5 April 2009 to pay Class 3 contributions for those years if he reaches State Pension age on or after 24 October 2004 (as the Appellant did). There are additional Regulations allowing an officer of the Board to direct a further period for payment if further conditions are satisfied.

4. The Appellant did not pay voluntary contributions for the disputed period within either the time period allowed by Regulation 148 or that allowed by Regulation 50A. However, the Regulations allow an officer of the Board to direct a further period within which a person can pay contributions provided that the condition in Regulation 50(2) is satisfied. This condition is that the failure to pay in the necessary period was (a) 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 or diligence. The Respondents decided not to direct a further period within which the Appellant might make payment. They say that, whilst the Appellant satisfies (a) above (ignorance or error) this was a result of his failure to exercise due care or diligence and it is this decision which is the subject of this appeal.

Facts

5. The Appellant, an Australian citizen, left the UK in 1991 after a fairly short period of residence here which had commenced in April 1988. Whilst in the UK he was employed by the Red Telephone company in a senior position. He did not reach the age of 65 until December 2011.

6. We accept that, in 2008, the Appellant was alerted for the first time to the possibility of making additional contributions as a result both of reading press articles and a chance encounter with a British National. The British National with whom he spoke seems to have provided him with detailed advice since the Appellant sent a completed Form CA5603 and a pension enquiry to the Respondents. These were the same documents used by his informal adviser. In fact the form used was probably not the correct one for the Appellant and the address to which the letter and form was sent was incorrect. Notwithstanding these errors the letter and form were passed to the appropriate department of HMRC. The Appellant mentions that he also gave details of his phone numbers with this correspondence and this is borne out in the copies we have seen of the forms he completed.

7. Subsequently his use of Form CA5603 was queried and he was directed to complete a different form CA 83; whether or not the correct form was used by him in 2008 we accept that on 25 July 2008 HMRC issued a state pension forecast on the basis of what the Appellant sent them. For reasons we could not establish the letter containing this forecast was recorded by HMRC as having been returned as "undeliverable". No copy of this forecast was provided and so we could not establish where it was sent nor what it contained but letters from the Respondent to the Appellant (particularly the letter dated 27 May 2011) stated that it quoted arrears of contributions from 1996 -97; the 2011 letter mentions the ability to pay arrears was subject to a 5 April 2009 time limit but does not state in terms whether that was mentioned in the July 2008 forecast. We are surprised the Respondents were able to say with confidence what was in the forecast given they also say they do not keep hard copies of these documents. The Respondents acknowledge they only keep a note of the fact they have been sent out. In view of our finding below that the Appellant probably did not receive this forecast even when it was reissued by HMRC to him in November 2008 the precise content is perhaps irrelevant. The Respondents say their records show that when the July 2008 forecast was returned undelivered it was reissued to the Appellant's Australian address on 13 November 2008.

8. Although the Appellant challenged whether the forecast was issued (or reissued) at all we conclude that it probably was issued; the record of it being returned undelivered and then reissued is sufficiently specific to make that likely. There was no evidence it was returned undelivered on the second occasion. The Appellant says

he did not receive anything from HMRC in response to his July 2008 queries and concluded that this was because (unlike his informal adviser) he was not a British National. He says in his notice requesting a review of the disputed decision that he only followed up the enquiry late in 2010 "when I began contemplating the various income streams that would apply to me when I reached 65 years of age in December 2011". It is perfectly possible that, if the first forecast was returned as undeliverable, the second one apparently sent to the same address was not delivered even if it was not returned to the Respondents. Correspondence written by HMRC to the Appellant after his December 2010 enquiry was sent to the same Australian address but was delayed on a number of occasions. Although the 2010 and subsequent correspondence all does appear to have arrived eventually we conclude it is unlikely the forecast was received by the Appellant and have reached our decision on the basis it probably did not arrive.

9. Nothing further was done by either party until the end of 2010. Apparently because she was in England and thus in a more convenient time zone, on 2 December 2010 the Appellant's daughter telephoned HMRC concerning his 2008 enquiry and was advised that the Appellant should contact them himself. The Appellant sent them a fax on the same day attaching copies of the original application and enquiry. He sent further faxes on 6 December 2010 and on 10 January 2011. The responses he received from the Respondents were neither particularly helpful nor invariably accurate. On 6 January 2011 the Respondents sent a letter to the Appellant inviting him to pay voluntary contributions but not mentioning the state pension forecast issued in 2008. The Appellant took the Respondents' January 2011 letter to be a response to his 2008 application and, although he had completed an application form in 2008, he completed another (different) application form and asked for clarification. On 9 February 2011 the Respondents wrote that the Appellant was not entitled to pay Class 2 voluntary contributions but was entitled to pay Class 3 voluntary contributions whilst abroad and to pay arrears going back to the 2004 – 05 tax year.

10. On 7 March 2011 the Appellant sent a payment of £2301 to the Respondents for Class 2 contributions for 2004 – 05, 2006 – 07, 2007 – 08 and 2008 – 09 tax years. On this occasion he asked about paying for tax years earlier than 2004 - 05 (based on his 2008 enquiry) and also about paying further contributions based on the 20 qualifying year rule. He also queried the accuracy of the statement he did not meet the conditions to pay Class 2 voluntary contributions. On 9 May 2011 the Respondents acknowledged receipt of the March 2011 payment and confirmed they had allocated the payments as mentioned in his letter and stated again that he did not satisfy the requirements to pay voluntary Class 2 contributions. In this letter they also mentioned they had replied to his 2008 enquiry by sending him a state pension forecast on 25 July 2008 and this was the reason why the time limits for the disputed period had expired. This was the first time that the 2008 state pension forecast was mentioned to the Appellant by the Respondents.

11. On 23 May 2011 the Appellant wrote to HMRC saying he had never received a state pension forecast in 2008 and questioned the time limits on the basis that, as he had never received the forecast, he should be allowed to pay for the disputed period outside the strict time limits. He also asked for them to reconsider whether he

satisfied the conditions to pay voluntary Class 2 contributions since he was registered as unemployed when he departed Great Britain for Australia. On 27 May 2011 HMRC wrote to the Appellant agreeing he met all the conditions to pay Class 2 voluntary contributions, re-allocating his payment at the (lower) Class 2 rate to his account for the 2004 – 05 to 2010 – 11 tax years and calculating the amount of the refund due to him as £1440.60. They enclosed a claim form for him to reclaim £1440.60 and stated that he now had 12 qualifying years towards a basic state pension. They stated that the time limits for years 1996 – 97 to 2003 – 04 had expired and that it had been his responsibility to chase up the forecast if he had not received it. They also stated that he was not eligible to pay further Class 3 contributions under the 20 year rule since their decision in relation to the disputed period meant that he did not have the 20 qualifying years required in order to satisfy that rule.

12. The Appellant completed the claim form for his refund and sent it under cover of a letter dated 15 July 2011; he stated the failure of the state pension forecast to reach him in 2008 should not prevent him paying voluntary contributions for the disputed period and says he did not follow up the original enquiry because he assumed the lack of response was "due to (his) nationality not being British". He also asked about his rights of appeal. The Appellant asked for the amount of the refund to be applied in making further contributions of Class 2 or Class 3 contributions to the maximum extent allowed. Although the Respondents wrote to the Appellant on 18 August 2011 they did not deal directly with his comments but did tell him about conditions for the payment of contributions based on the 20 qualifying year rule.

13. The Appellant wrote again to the Respondents on 9 September 2011 asking them to acknowledge they did not respond on time to his 2008 enquiry, saying he wished to pay additional voluntary contributions for the disputed period and then for the further period based on the 20 qualifying year rule. The matter was passed to HMRC Technical team to consider the route of escalation.

The disputed decision

13. It took nearly 18 months for the disputed decision to be reached after the matter was passed to the Technical team. On 15 November 2011 the Respondents wrote to the Appellant mentioning the undelivered state pension forecast and the Appellant's failure to follow up the enquiry pointing out that they have no control over the delivery of mail. They said his role as managing director and chief executive of the Red Telephone company whilst he was living in the UK should have made him aware of his responsibilities to pay national insurance contributions. At this stage they did not accept that there was either ignorance or error on his part but this was accepted later by the decision officer and the reviewing officer. The Appellant replied to the 15 November letter on 13 December 2011 contending that the Respondents were at fault in not contacting him when the forecast was returned undelivered, that he had made enquiries in July 2008 and this shows he exercised due care and diligence because he sought clarification of (his) pension entitlement, that he assumed the lack of response was due to him being an Australian citizen and that the Respondents failed between 1988 and 1991 to advise him of his right to continue to pay voluntary contributions whilst abroad.

14. In a subsequent letter on 21 December 2011 the Appellant brings the issue of the forecast letter into doubt given the failure by the Respondents to keep copies of such letters but merely a record of the fact of that issue on the work management system. We have said that we find it likely that the Respondents did issue the forecast in July 2008 and again in November 2008 but that it probably was not received by the Appellant.

15. On 7 March 2013 the Respondents reached their formal decision that they did not consider the Appellant satisfied the conditions necessary if they were to extend the time limits for the tax years 1996 – 97 to 2003 – 04. This was the first letter they wrote after the Appellant wrote to them on 21 December 2011. They accepted that the first condition had been satisfied and that the Appellant's failure to pay was attributable to his ignorance or error. He was ignorant as a result of being in the UK for a short time and also because there is no contributory scheme in Australia; he erred because he did not follow up his 2008 application. They did not believe he could show the second condition was satisfied; that the ignorance or error was not the result of the Appellant's failure to exercise due care or diligence. They made the point that the rules do not allow extension of time based on fault by the Respondents. The letter they wrote with their decision focussed only on the law concerning Class 3 contributions. The Appellant requested a review of the decision which was upheld by letter from the reviewing officer dated 29 May 2013. The reviewing officer concluded that the Appellant had failed to show he had demonstrated the necessary degree of due care and diligence but instead had emphasised the shortcomings of the Respondents. There was further correspondence between the Appellant and both the Respondents and the Tribunal Service which is not relevant to the disputed decision but relates to the appeal process and to alternative means of complaint.

Submissions

16. The Appellant says that he showed sufficient due care and diligence in meeting the requirements of the Respondents after his errors arising from ignorance were remedied and indeed showed sufficient due care and diligence to correct manifest errors in interpretation by HMRC staff – in particular in relation to his eligibility to pay Class 2 contributions. He says he was ignorant of the position from the time he left the United Kingdom in 1991 until that ignorance was remedied in January 2011; he was then sufficiently informed to exercise due care and diligence to make good earlier omissions that flowed from his ignorance. He says that the Respondents' failures perpetuated his ignorance. He says that on 10 July 2008 he requested a pension forecast and lodged an application to pay voluntary National Insurance contributions and, having chased this up at the end of 2010 he received a reply dated 6 January 2011 in response and then followed the advice provided to him. He also says that the Respondents should have made him aware of his contributory rights and that their failure to do that supports his view that he showed the necessary due care and diligence.

17. He maintains it is for this Tribunal (or other independent authority) to adjudicate the degree to which the Respondents are culpable for its actions and lack of action in 2008 which caused the Appellant to miss the crucial deadline of 5 April

2009. (We do not have the jurisdiction to deal with the Appellant's complaints purely about the Respondent's handling of his case and so we have not referred further to those parts of his submissions that deal with this aspect).

18. The Respondents say that the Appellant's failure to inform himself about the nature of the UK NI scheme show that any ignorance was a result of his failure to exercise due care and diligence and if he had made enquiries he would have been given a leaflet containing the relevant information. They do acknowledge he showed concern for his NI record when he wrote to them in July 2008 and whilst they acknowledge he did not receive replies they say that his failure to follow up his enquiry was an error which shows a significant failure to exercise due care and diligence in handling his affairs and even if the Respondents were negligent in failing to follow up the delivery of their reply in 2008 this does not reduce the level of due care and diligence that the Appellant should have shown in handling his affairs.

19. The Respondents referred the Tribunal to three authorities where the concept of due care and diligence were discussed. The first is *Bernard David James Walsh v Secretary for State for Social Security* (we were provided with a copy of this decision but not with a reference) and the Respondents referred us to the judgement of Mr Justice Owen where, having referred to the Appellant in that case having said that he was entitled to rely upon the fact he was not chased up, he said "It was easy enough to ask". The second authority is a decision of Dr Avery Jones in *Mrs Adelolapo Fehinola Adojutelegan v Derek Clark (Officer of the Board) SpC430* where Dr Avery Jones said "exercising due diligence involves the positive step of making enquiries…..The Appellant had failed to make any enquiries and therefore had not exercised due care and diligence". Finally in *Philip Langley Rose v The Commissioners for Her Majesty's Revenue and Customs* (again we were provided with a copy of the decision but no reference) Dr David Williams said in his judgement "The evidence is that Dr Rose was aware at the time of his choices, or at least he would have been aware of them had he read the leaflets he was sent and had he made the reasonable enquiries that those leaflets should have prompted. He chose at that time not to enquire or not to pay. In the current context of the current question of protecting his NI record, he chose not to exercise due care and diligence in protecting his contribution record."

20. The Appellant says that the factual circumstances of these cases differ significantly from the facts of his case. He says in relation to the *Walsh* case first that the Respondents knew their advice was not delivered to the Appellant and, secondly, in contrast to Mr Walsh who was a barrister living in the UK, it was far from easy for the Appellant "to ask" in his case and, thirdly, the fault in Mr Walsh's case was his failure to pay amounts due rather than pay voluntarily. In relation to the *Adolujutelegen* case he acknowledges similarities in the "tyranny of national differences and distance" but says that, by contrast, he did apply for information (he "did ask") and his daughter did follow up when in the UK. And in relation to the *Rose* case the Appellant there was informed whereas the Appellant here was not.

Our decision

21. We shall start by dealing with our jurisdiction. The Appellant referred to what Dr Avery Jones said about this matter in the *Adolujutelegen* case. We agree that what Dr Avery Jones said is relevant here. Dr Avery Jones said in relation to Regulation 50 "I agree that I can decide whether I am satisfied in place of the officer of the Board in regulation 50 …. I am not merely reviewing whether the officer's (or the Inland Revenue's) decision was reasonable. The burden of proof is on the Appellant". We respectfully agree with what Dr Avery Jones said and have proceeded accordingly. We will only add that the regulation dealing with extending the period for payment of Class 2 contributions is identical in all relevant respects to Regulation 50 which deals with the possibility of an officer extending the period for payment of Class 3 contributions.

22. We agree with the Appellant that the facts of his case are different from those of the appellants who were the subject of each of the three authorities to which the Respondents referred us. The Appellant behaved proactively and (despite possibly using the wrong form) properly when he made his June 2008 enquiry at which time he would have been in time to make the payments for the disputed period. If the Respondents' description of the information contained in the July pension forecast is correct and if the Appellant had received it then he would not have been in ignorance of the position. If, having been informed of the position, ("having asked"), he had erred by failing to make payment before 5 April 2009 then (assuming the vagaries of the post meant he received it some reasonable time after it was reissued in November 2008) he would have erred as a result of failing to exercise due care and diligence. (It is not absolutely clear to us that the Respondents accept he did not receive the reissued forecast but we have found as a fact that the Appellant probably did not receive it).

23. The question we have to answer is whether the Appellant (who it is accepted was ignorant and also in error for not making payment on time) was ignorant and in error because of his failure to exercise due care and diligence or whether he has shown us that this was not the case. In Adolujutelegen Dr Avery Jones said "exercising due diligence involves the positive step of making enquiries". The Appellant certainly did this in 2008. However he did not follow up these enquiries until the end of 2010. He says in correspondence he did not follow things up until the end of 2010 when he was nearing his retirement age and was considering the various sources of income available to him in retirement. The situation is one where the Respondents sent out information and the Appellant had no idea that this had been done. It is relevant here that the Appellant lived in Australia and it was far from straightforward to "just ask". Dr Avery Jones also said in *Adolujutelegen* "Although [the Appellant] was in Nigeria she could have made enquiries by post and I presume her son was in the United Kingdom and she could have asked him to make enquiries on her behalf. Doing nothing is not the exercise of due care and diligence. Had she made an enquiry she would have been told that there was a six year time limit for making contributions. Her ignorance of this was due to her failure to make enquiries which is a failure to exercise due care and diligence". In the case under appeal the Appellant had done what it was suggested that the Appellant in that case should do;

unfortunately he was not informed as Dr Avery Jones assumed he would be. After December 2010 the Appellant became aware that the post sent by the Respondents seldom arrived on time but there was no evidence that correspondence prior to 2008 should have alerted him to this. Similarly, there is no evidence of the time scale within which he could reasonably have expected a reply so as to chase up the July 2008 correspondence. The Respondents say he should have done so before December 2010; in fact he would have been out of time if he had failed to chase up the enquiry in time to pay before 5 April 2009. In this context we note that a letter written by him to the Respondents in December 2011 did not receive a reply from the Respondents until March 2013. We mention this not because we wish to dwell on the Respondents' conduct of this case which we have already said is outside our jurisdiction but merely to point out that the Respondents did take a very long time to reply to an enquiry. With the benefit of hindsight there was an important deadline to meet but if the Appellant had made the same enquiry a couple of years earlier and chased it up within the same time scale then (assuming he paid the contributions in a timely fashion) this appeal would not have been brought. The Respondents make the point that time limits are necessary to ensure that people do not unnecessarily delay in making contributions but there is no evidence here that the Appellant delayed for cash flow reasons; the evidence is that he did not know about the requirement to meet deadlines. Ideally the Appellant would have chased up the Respondents apparent failure to respond during 2008 but he did not do so. Does this failure mean that he has not shown us that he exercised due care and diligence? We believe that he has shown the exercise of due care and diligence. He submitted a form which whilst it might not have been exactly correct was (according to the Respondents) sufficient indication of the nature of his query for them to issue a forecast which they say contained the relevant information allowing him to make timely additional contributions. He did not receive a reply and failed to chase it up for 17 months. This is a lengthy period but he was acknowledged to be in ignorance of the NI system and his short career as an employee is unlikely to have made him aware of the time limits for payment of additional voluntary contributions. We find that in the circumstances of this case his ignorance and error was not caused by his failure to exercise due care and diligence. We therefore allow his appeal. It is not clear to us whether we can direct what extended time period (during which additional contributions can be made) shall apply but it would be curious if the result of his successful appeal meant that the Appellant was deprived of a sensible opportunity to make payments. Of course he nominated the surplus amount already paid by him in 2011 for this purpose but there may be a shortfall and we hope that he will be given a sensible opportunity to remedy that shortfall.

24. 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.

JUDITH POWELL
TRIBUNAL JUDGE

RELEASE DATE: 3 April 2014