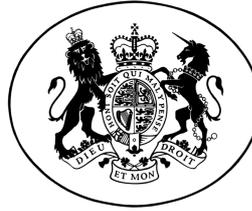


[2015] UKFTT 0396 (TC)



TC04573

Appeal number: TC/2013/05038

NATIONAL INSURANCE CONTRIBUTIONS – what payments had been made to earner and when – liability to NICs of payments on account of earnings – effect of failure by employer to deduct employee’s NICs – earner treated as if employee’s NICs had been paid on due date - regulations 6 and 39 Social Security (Contributions) Regulations 1979 (SI 1979/591)

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JEEVAN SAMPATH KUMAR MEHTA

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ALEKSANDER
JOHN COLES**

Sitting in public in London on 27 January 2014 and 25 November 2014

The Appellant in person

Lesley Crawford, an officer of HM Revenue and Customs, for the Respondents

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DECISION

1. This appeal concerns Mr Mehta's entitlement to the state retirement pension. Mr Mehta represented himself. HMRC were represented by Lesley Crawford. We heard evidence from Mr Mehta. In addition, documentary evidence was produced both by HMRC and by Mr Mehta.
2. The appeal first came before us at a hearing on 27 January 2014 at Bedford Square. At that hearing, we gave directions in relation to a number of issues raised by Mr Mehta and procedural matters, which are discussed in more detail below. We then adjourned the hearing. The hearing resumed on 25 November 2014, the reason for the long delay being caused in part by the fact that Mr Mehta had an operation from which recovery was slow. After the hearing on 25 November 2014, we gave directions for, and received, further written submissions from the parties on a number of legal points.
3. This appeal relates to the amount of national insurance contributions ("NICs") which were paid (or ought to be treated as having been paid) by Mr Mehta in 1994/5. The amount of Mr Mehta's state retirement pension depends upon the answer to this question. Earnings on which NICs have been paid during a tax year only count for state retirement pension purposes if they exceed a specified amount (the qualifying earnings factor).
4. By a decision letter dated 18 April 2012, HMRC held that Mr Mehta had paid NICs on earnings of:
 - (a) £1921.40 in the 1993/4 tax year,
 - (b) £2766.68 in the 1994/5 tax year.
5. As the qualifying earnings factor for 1993/4 was £2912, and the qualifying earnings factor for 1994/5 was £2964, Mr Mehta's earnings for those two tax years did not count for determining the amount of his state retirement pension.
6. This decision was the subject of a review, and by a letter dated 6 August 2012, the reviewing officer upheld the 18 April 2012 decision.
7. Mr Mehta now appeals against HMRC's decision as regards his NICs contributions for 1994/5. The amount of earnings on which NICs were paid for 1993/4 is no longer in dispute.
8. The issue in the appeal relates to national insurance contributions paid or payable in respect of Mr Mehta's salary while he was an employee of the Rugby NHS Trust in 1995.

Case Management Issues

9. In his notice of appeal, Mr Mehta purported to join the University Hospitals Coventry and Warwickshire NHS Trust (“the Trust”) as “second defendants” (the Trust is the successor to the Rugby NHS Trust). Under Rule 9(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the Tribunal has discretion to give a direction to add a person to proceedings as a respondent. At the hearing on 22 January 2014, we decided that there was no good reason to add the Trust as a respondent in this appeal, and declined to do so. The only reason to add them to the proceedings was so that they could produce information about the amount Mr Mehta earned whilst an employee of Rugby NHS Trust in 1995, and the amount of tax, NICs and other deductions made from his earnings. Instead we used our powers under Rule 16 to require the Trust to answer the following questions:

- (1) The date on which Mr Mehta commenced employment at Hospital of St Cross, Rugby and the date on which his employment terminated.
- (2) Details of every payment made by Rugby NHS Trust to Mr Mehta, giving in relation to each payment
 - (a) the date of the payment,
 - (b) the gross amount of the payment (broken down into basic pay and overtime),
 - (c) the deductions made from the payment (showing separately: income tax, national insurance contributions and any other deductions)
 - (d) the method of payment (for example, cheque or direct credit)

and to require the Trust to provide copies of payslips delivered to Mr Mehta.

10. We also gave directions at the 22 January hearing that Mr Mehta should produce copies of his bank statements for the relevant months in 1995. At the time, Mr Mehta had a bank account with NatWest, but this account had long been dormant. Mr Mehta produced copies of correspondence that he had with NatWest’s dormant accounts unit. In NatWest’s letter dated 16 October 2013, they (quite reasonably) requested that the Mr Mehta attend at any branch of the bank with a copy of that letter in order to produce evidence of his identity and proof of his address.

11. The Trust wrote to the Tribunal on 24 February 2014 stating that it was unable to provide any information or documents relating to Mr Mehta. In response to a request by the Tribunal to provide an explanation as to why they were unable to provide any information or documents, the Trust replied in an e-mail dated 8 April 2014 that this was because the relevant files had been destroyed, and they gave an explanation for the destruction.

12. Mr Mehta was not satisfied with this response, and made a written application on 1 November 2014 for a witness summons so that a representative from the Trust (Ms

Hyland) could be cross-examined at the hearing on 25 November 2014 as to the circumstances of the destruction of these files. Mr Mehta also applied for an order that NatWest be instructed to provide copies of bank statements from 1 January 1995 to 31 August 1995 in time for the hearing of the appeal on 25 November 2014.

5 13. We declined “on the papers” to issue the witness summons and the order for the production of documents, but gave permission for Mr Mehta to renew his applications orally (coupled with an application to adjourn) at the commencement of the hearing.

14. Mr Mehta renewed his applications at the commencement of the hearing on 25 November 2014.

10 15. The power to issue a witness summons or to make an order for the production of documents is one of a wide range of case management powers that may be exercised by the Tribunal. The Tribunal has a broad measure of discretion in such matters, but must exercise that discretion judicially, and with the overriding objective, as set out in Rule 2, of dealing with cases fairly and justly, in mind. Rule 2 states that dealing with a case
15 fairly and justly includes dealing with matters in ways which are proportionate and which avoid delay. The parties are required to help the Tribunal in achieving these objectives and co-operate generally with the Tribunal.

16. In the case of an application for a witness summons or for an order for the production of documents, the guiding principle is that the Tribunal may issue such a
20 summons or order where it considers that there is a real likelihood that the evidence of the person summonsed (or of the documents to be produced) will materially assist the Tribunal in its determination of an issue or issues in the proceedings. The test is not whether the party making the application hopes that the evidence will assist its case. The test is whether the Tribunal considers that there is a real likelihood that its determination
25 will be assisted. That may be the case where the Tribunal considers that the evidence would be reasonably likely, one way or another, to resolve an area of uncertainty.

17. As regards the witness summons, there was nothing before the Tribunal to suggest that the information given by the Trust in their letter and e-mail was incorrect. Although
30 Ms Hyland might be able to explain in greater detail the background to the destruction of the files, this information would not assist the Tribunal in resolving the issues before it. There was accordingly no likelihood that the oral evidence of Ms Hyland would assist the Tribunal in reaching its determination. We declined both the initial written application, and the renewed application, for this reason.

18. As regards the bank statements, we had seen copies of some correspondence
35 between the Appellant and NatWest Bank, in particular NatWest’s letter to the Appellant dated 16 October 2013 requesting that the Appellant attend at any branch of the bank with a copy of that letter in order to produce evidence of his identity and proof of his address. At the time of the written application, the Appellant had not produced any evidence to show that he had complied with this request, or given any reason why he

could not so comply. We were aware that the Appellant has been in subsequent correspondence with the NatWest, to which they appear not to have responded. But given their reasonable requirement that the Appellant produce evidence of his identity before they given him any information, that was not particularly surprising. In declining the written application, we held that would be disproportionate and inappropriate for the Tribunal to issue an order for NatWest to produce documents in circumstances where it has indicated that it would provide information voluntarily, subject to the reasonable condition that the Appellant provides evidence of his identity and proof of his address.

19. Mr Mehta renewed his application at the hearing on 25 November. At the hearing, Mr Mehta told us that he had in fact produced evidence of his identity to NatWest, but that they had been tardy in dealing with his enquiry. In copy correspondence with Mr Mehta produced at the hearing, NatWest stated that they did not normally keep customer bank statements for more than seven years and that they could not provide any assurance to Mr Mehta that the relevant statements could be found, but they had agreed to look.

20. Notwithstanding that at the hearing Mr Mehta confirmed orally that he had provided evidence of his identity to NatWest, we declined his application for an order for NatWest to produce bank statements. Although NatWest agreed to look for his statements, the chances of them finding anything must be very low, given that nearly 20 years had elapsed since the periods in question, and that they normally destroyed statements after seven years. Nor was it clear what useful evidence would be provided by the bank statements. We already had documentary evidence (which is described later in this decision) that Rugby NHS Trust had made a payment to Mr Mehta in February 1995, what was unclear was the nature of this payment, and whether Rugby NHS Trust had accounted for NICs in respect of the payment. Whilst the bank statements might corroborate the fact that this payment had been made (assuming Mr Mehta had banked the cheque in the NatWest account), it would not give any assistance in determining the nature of the payment, nor whether NICs had been deducted.

21. We therefore declined to adjourn the 25 November 2014 hearing.

Background Facts

22. We find the background facts to be as follows.

23. Mr Mehta became an employee of Rugby NHS Trust at the beginning of February 1995, and his employment with them continued until 1 August 1995. Produced in evidence before us were copies of Mr Mehta's payslips for April 1995, May 1995, June 1995, July 1995 and August 1995, Mr Mehta's P45 on ceasing employment with Rugby NHS Trust, and a letter dated 22 February 1995 (which is described in more detail below). Also produced was a copy of Mr Mehta's P60 from Rugby NHS Trust for 1994/5 and a print out from HMRC's records showing earnings and NICs paid for various years (including 1994/5).

24. The unchallenged evidence of Mr Mehta was (and we find) that under the NHS terms of service at the time, he was paid his basic salary for each month at the end of the month. Any overtime earned during a month was paid at the end of the following month. So, for example, in March 1995 he would be paid his basic salary for March 1995 and also any overtime earned in February 1995.

25. For reasons which are not wholly clear, the P60 for 1994/5 issued by Rugby NHS Trust reflected only Mr Mehta's earnings with Rugby NHS Trust, and not earnings from other previous employments in that year. The P60 gives the following details:

- (a) Earnings on which employee's NICs were paid: £1864
- (b) Total employee's and employer's NICs: £475.64
- (c) Employee's NICs: £166.64
- (d) Total pay for year: £3029.44
- (e) Tax deducted: £788.05

26. The amounts stated in the P60 are consistent with the amounts in HMRC's own records. In particular, HMRC agree that Mr Mehta's earnings from his employment with Rugby NHS Trust in 1994/5 were £3029.44.

27. Mr Mehta's payslip for 30 April 1995 shows that his annual basic salary was £13930.00 (which corresponds to £1160.83 per month). The amount of earnings shown on the P60 therefore correspond to an amount in excess of two months' basic pay – which is consistent with Mr Mehta having also been paid an amount in respect of overtime in 1994/5.

28. Mr Mehta could not produce his payslips for February and March 1995. He did produce a letter dated 22 February 1995 from the Director of Finance at Rugby NHS Trust headed "Remittance Advice". The body of the letter is as follows:

Cheque No 6421 enclosed for £900.00 in payment of the following:-

Our ref.	Your ref.	Amount
	PAYMENT OF FEBRUARY 1995	900.00

29. We note that the Upper Earnings Limit ("UEL") for 1994/5 was £430 per week and the Lower Earnings Limit ("LEL") was £57 per week (regulation 2, Social Security (Contributions) Amendment Regulations 1994, amending the Social Security (Contributions) Regulations 1979 with effect from 6 April 1994). The LEL corresponds to a monthly amount of £247 and UEL corresponds to a monthly amount of £1864. Under the NICs regime at the time, if an individual's earnings in a pay period exceeded the UEL, he did not pay NICs on the excess. For completeness we note that if an individual's earnings in a pay period is less than the corresponding LEL, then no NICs were payable in that period.

30. We also note that the amount of earnings shown on the P60 for 1994/5 on which Mr Mehta paid NICs is £1864 – the monthly UEL.

31. If Rugby NHS Trust had paid salary to Mr Mehta in both February and March, we would have expected the P60 to show that the amount of earnings on which employee's NICs were paid would be only very slightly less than his gross salary. This is because his monthly basic pay was £1160.83. His basic pay for the two months of February and March would therefore be £2321.66. The difference between this and the gross pay shown on the P60 would represent overtime worked in February, but paid in March (being £707.78). Thus Mr Mehta's gross pay in February would just be his basic pay of £1160.83 (which is more than the LEL but less than the UEL). And his gross pay in March would be £1868.61 (basic pay of £1160.83 plus overtime of £707.78), which is only slightly above the UEL. Accordingly the earnings on which employee's NICs were paid would only be slightly less than his gross pay with Rugby NHS Trust for the tax year.

32. On the other hand, if Rugby NHS Trust had paid both the February and March salary as one payment in March, we would expect (as is the case) that the P60 would show that the amount of earnings on which employee's NICs were paid would equal the UEL. This is because there would have only been one salary payment in March of £3029.44. As this is above the UEL, Mr Mehta would only pay NICs on the salary up to the UEL.

33. Without the March payslip or Rugby NHS Trust's pay records, it is difficult to surmise exactly what has happened. We note that Mr Mehta must have exercised great care to have kept (and be able to find) all of his monthly payslips and other pay records for his employment some 20 years ago with Rugby NHS Trust, with the exception of the March 1995 payslip. It does seem odd to us that this one alone should have gone missing.

34. But on the basis of the evidence before us, we consider that it is more likely than not that what happened (and we so find) was that Rugby NHS Trust were not able to add Mr Mehta to their payroll processing system in time for the February 1995 payroll payments. Mr Mehta only became an employee of the Trust at the beginning of February 1995, and it is likely that Mr Mehta did not provide the Trust with all the information they needed to set him up on their payroll database by the cut-off time for the February 1995 payment "run". So the Trust made a payment of £900 to Mr Mehta on 22 February 1995 on account of his salary. At the end of March he was paid his basic pay for both February and March 1995 (together with his February overtime), but subject to a deduction for the £900 previously paid on account.

Issues for the Tribunal

35. The questions we therefore have to answer are:

(1) whether Rugby NHS Trust ought to have accounted for (and deducted) NICs in respect of the £900 payment made on 22 February, and

(2) if the answer to (1) is “yes”, what are the consequences of their failure to so do?

5 36. We have found that the payment of £900 made in February 1995 was made on account of the pay due to Mr Mehta. We distinguish this payment from a “sub” or an “advance” of pay. It is not the case that Mr Mehta was being loaned money by his employer (to be repaid out of his next pay packet). Nor was it the case that he was paid in advance for work that he had yet to perform (with the advance or sub being recouped from the next regular payment). Rather, Mr Mehta had worked for Rugby NHS Trust for February 1995, and at the end of the month Rugby NHS Trust owed him his basic pay for that month. For the reasons we have surmised, Rugby NHS Trust were unable to process the pay due to him through their payroll system, and instead paid him £900 on account of the pay that he was owed.

15 37. Section 6 of the Social Security Contributions and Benefits Act 1992 (“SSCBA”) provides that Class 1 NICs are payable where earnings are paid to or for the benefit of an earner. Section 3(1) defines “earnings” to include “any remuneration or profit derived from an employment”, and for “earner” to be construed accordingly.

20 38. We find that the payment of £900 made by Rugby NHS Trust to Mr Mehta on 22 February 1995 was remuneration or profit derived from his employment with Rugby NHS Trust, and was therefore “earnings” for the purposes of the SSCBA. Unless a relevant exemption applies, employee’s NICs should have been deducted from the payment by Rugby NHS Trust, and Rugby NHS Trust should have accounted for those employee’s NICs to the Contributions Agency (being the predecessor to HMRC which was responsible for the administration of NICs at the time).

39. HMRC submitted that the February 1995 payment would have come within the scope of regulation 6(1) of the Social Security (Contributions) Regulations 1979 (SI 1979/591), which deals with advance payments. As this was a “one off” payment, Rugby NHS Trust were not required to deduct NICs from the payment.

30 40. The relevant paragraphs of Regulation 6 of the Social Security (Contributions) Regulations 1979 (SI 1979/591) (as in force for the tax year 1994/5) (“SSCR 1979”) provided as follows:

Treatment of earnings paid otherwise than at regular intervals

35 6(1). Subject to the provisions of regulation 3(4) of these regulations and paragraph (2) and (3) of this regulation, for the purposes of assessing earnings-related contributions -

(a) if on any occasion a payment of earnings which would normally fall to be made at a regular interval is made otherwise than at that

regular interval, it shall be treated as if it were a payment made at that regular interval;

5 (b) where payments of earnings are made at irregular intervals which secure that one and only one payment is made in each succession of periods consisting of the same number of days, weeks, or calendar months, those payments shall be treated as if they were payments made at the regular interval of one of those periods of days, weeks or, as the case may be, calendar months;

10 (c) were payments of earnings, other than such as are specified in the last preceding sub-paragraph, are made in respect of regular intervals, but otherwise than at regular intervals, each such payment shall be treated as made at the regular interval in respect of which it is due.

15 (2) Where under the foregoing provisions of this regulation a payment of earnings is treated as made at a regular interval, it shall for the purposes of assessment under these regulations of earnings-related contributions also be treated as paid –

(a) in a case falling within the provisions of paragraph (1)(a) of this regulation, on the date on which it would normally have fallen to be made;

20 (b) in any other case, on the last day of the regular interval at which it is treated as paid.

[...]

25 41. HMRC provided the Tribunal with an extract from the Field Operations Manual of the Contributions Agency that was in use during the 1990s. Paragraphs 6450-6451 give instructions for dealing with advance payments, which are as follows:

Advance Payments

Regulation 6 of the Social Security (Contributions) Regulations 1979

“Subs”

30 6450 If an employer occasionally pays an employee part of their regular pay before it is due, there is no liability for NICs until the normal pay day, ie as if the employer paid the whole wage at the normal time.

6451 If, however, the employer makes advance payments regularly:

- 35 1. treat them like other regular payments according to the time the employer make them, and
2. take them into account when determining the earnings period.

42. However we find that Regulation 6(1) is not on point. This is because the payment made to Mr Mehta on 22 February 1995 was not made before it was due, it was made at the time Mr Mehta was due to be paid his basic pay for February 1995. Even if we are wrong in this analysis, the effect of Regulation 6 would be that the payment made on 22

February 1995 would be treated as having been made on the “regular” date on which it was due (presumably 28 February 1995), but not 31 March 1995.

43. We considered whether regulation 17A or regulation 19, SSCR 1979 might be in point.

5 44. Regulation 17A(2) deals with payments made on account, or by way of an advance, by a company to or for the benefit of any of its directors. As Mr Mehta was never a director, this regulation is not relevant.

10 45. Regulation 19 provides for certain payments to be disregarded. In particular Regulation 19(1)(a) deals with “a payment on account of a person’s earnings in respect of such employment and comprises or represents, and does not exceed in amount, sums which have previously been included in his earnings of the purposes of his assessment of earnings-related contributions”. However we find that this regulation does not apply, as there were no sums which would have previously been included in Mr Mehta’s earnings, as the February payment was his first payment of salary for this employment.

15 46. There are no other exemptions which are relevant to the payment, and we therefore find that the February 1995 payment should have been made under deduction of employee’s NICs.

47. Regulation 39 SSCR 1979 addresses the consequences arising from Rugby NHS Trust’s failure to deduct NICs. Regulation 39 provides as follows:

20 39. Where a primary Class 1 contribution which is payable on a primary contributor’s behalf by a secondary contributor is paid after the due date or is not paid, or in relation to any claim for unemployment benefit, sickness benefit, maternity grant or allowance, is not paid before the relevant time for such benefit, and the delay or failure in making
25 payment thereof is shown to the satisfaction of the Secretary of State not to have been with the consent or connivance of, or attributable to any negligence on the part of, the primary contributor, the primary contribution shall be treated –

30 (a) for the purposes of the first contribution condition of entitlement to unemployment benefit, sickness benefit, maternity grant or maternity allowance – as paid on the day on which payment is made of the earnings in respect of which the contribution is payable; and

(b) save as aforesaid, for the purpose of any entitlement to contributory benefit – as paid on the due date.

35 48. For completeness we note that Regulation 60, Social Security (Contribution) Regulations 2001 (SI 2001/1004) (which is currently in force) is drafted in very similar terms.

49. For the purposes of these regulations, the “primary contributor” was Mr Mehta and the “secondary contributor” was Rugby NHS Trust.

50. There is nothing in the evidence before us to suggest that Rugby NHS Trust’s failure to deduct employee’s NICs from the February payment was done with the consent or connivance of, or attributable to any negligence on the part of, Mr Mehta. Accordingly, for the purposes of determining Mr Mehta’s entitlement to any contributory benefit (which would include the state retirement pension), we find that the employee’s NICs that ought to have been deducted from the February payment are treated as if they had been deducted and paid on the relevant due date.

51. As £900 exceeds the LEL but is less than the UEL, we find that Mr Mehta should therefore be treated as having received in February 1995 earnings on which employee’s NICs were paid of £900.

52. It therefore follows that the balance of his 1994/5 gross pay from Rugby NHS Trust would have been received in March 1995, and this amounts to £2129.44 (being £3029.44 less £900). As this exceeds the UEL, we find that Mr Mehta should therefore be treated as having received in March 1995 earnings on which employee’s NICs were paid of £1864.

Conclusion

53. Therefore Mr Mehta should be treated as having received in 1994/5 from Rugby NHS Trust earnings on which employee’s NICs were paid of £2764.

54. We leave it to the parties to reach agreement on the impact of this decision on the amount of state retirement payment that is payable to Mr Mehta. In the event that they are unable to reach agreement, we give leave for them to apply to the Tribunal to make any necessary consequential determination.

55. 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: 18 AUGUST 2015