



TC05397

Appeal number: TC/2015/06664

National insurance – evidence of contributions paid – loss of documents – onus of proof – held – taxpayer not displaced burden of proof – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mrs Margaret Foster

Appellant

- and -

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

**TRIBUNAL: JUDGE Rachel Short
Mr William Haarer (Member)**

**Sitting in public at Exeter Magistrates' Court, Heavitree Road, Exeter on 28
April 2016**

Mr Saul Foster, Mrs Foster's son, for the Appellant

**Ms Sandy Connolly, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal by the Appellant, Mrs Foster, against HMRC's decision of 22
5 April 2015 confirmed by a review of 8 July 2015 under s 8 Social Security
Contributions (Transfer of Functions etc) Act 1999 concerning Mrs Foster's national
insurance payments for the periods 1962-3 to 2003-4.

2. HMRC contend that from the beginning of the 1962 – 63 contribution year to
the end of the 1967-68 contribution year Mrs Foster paid a total of 190 Class 1
10 contributions as an employed person. From 1968-9 to the 2003-4 contribution year
(the year when Mrs Foster reached state pension age) HMRC say they have no record
of Mrs Foster paying national insurance contributions of any class. As a result of this
level of contributions, Mrs Foster qualifies for a state pension at a reduced rate of
38%.

3. Mrs Foster contends that she has made national insurance contributions in
15 addition to those for which HMRC hold records for the periods from 1975 – 1999 and
that HMRC have mismanaged her national insurance account, misapplying her
information resulting in her obtaining a lower state pension than she is entitled to.

Preliminary matters

4. At the Tribunal hearing on 28 April 2016 it became apparent that there was a
20 significant discrepancy in the facts relied on by the parties concerning Mrs Foster's
national insurance compliance history for the periods from January 1975 until May
1999. On behalf of Mrs Foster, Mr Saul Foster put forward a number of explanations
for why relevant evidence to support the Appellant's version of the facts was not
25 available. The evidence provided by HMRC to support their version of Mrs Foster's
compliance history was also incomplete in some respects.

5. The Tribunal decided to issue Directions, released on 24 May 2016 to deal with
some of the omissions in the evidence provided by both parties. Further information
was provided by the Appellant in a letter of 19 July 2016 and by HMRC in an email
30 of 22 July 2016. The parties agreed that a further hearing was not required subsequent
to the submission of this additional evidence.

6. Prior to the Tribunal hearing of 28 April 2016 HMRC objected to witness
evidence given by Mrs Foster's husband, Mr Roy Foster, but this objection was
withdrawn at the hearing.

7. Mrs Foster did not attend the tribunal hearing due to her ill-health. She did
35 provide a brief witness statement as requested in the Tribunal's directions of 24 May.

Background

8. Mrs Foster spent several years outside the UK after she was married in 1967, living in Singapore before coming back to the UK in 1974 or 1975. HMRC do not have a record of when she left the UK.

5 9. Mrs Foster was involved in a number of businesses during the period from 1975 to 1999. After her return to the UK Mrs Foster initially worked for the companies of which her husband was the director but also ran her own interior design businesses for some of the years in question.

10. A Tribunal hearing occurred in Durham in 1986 in respect of one of her businesses, Margaret Foster Designs.

10 11. In March 1997 Mr Roy Foster was involved in a car accident. Mrs Foster gave up work to look after her husband.

15 12. Mr and Mrs Foster relocated from Scotland to Henley in 1999 and placed their belongings in storage in May 1999. The goods were brought out of storage in 2002 but the storage company failed to deliver some of the goods or documents which were stored to a value of £100,000 including business documents. Mr and Mrs Foster took civil action against the storage company and came to a settlement with them.

13. Mrs Foster is currently unwell. She has had two heart attacks and triple by-pass surgery. The medication prescribed to her has left her suffering from depression and cognitive dysfunction.

20 *The law*

14. We were referred to the following legislation:

25 (i) *National Insurance Act 1946*. This is the original act which set up the system of national insurance contributions and which provides at s 1 and 2 that “insured persons” should make contributions either as an “employed person” or a “self-employed person”. It is not disputed that Mrs Foster was either employed or self-employed during the relevant periods.

(ii) *Social Security Act 1975*. This legislation includes at s 4 and 7 an exclusion from liability for class 1 or class 2 national insurance contributions for taxpayers whose earnings fall below a stipulated annual amount.

30 (iii) *Social Security Contributions and Benefits Act 1992*. This is the current legislation governing the collection of all classes of national insurance contributions. It sets out the circumstances in which self-employed earners whose earnings fall below a stipulated level are not liable to pay Class 2 national insurance payments (s 11). It also sets out at s 44 and Schedule 3 the basis on which pensions are payable
35 depending on the number of years for which national insurance contributions have been paid.

(iv) We were also directed to a number of regulations concerning the administration of national insurance contributions including *the Social Security (Contributions)*

Regulations 1975 which deal with the application for and custody of “contribution cards” (which were the primary record of national insurance payments made before the system was computerised in 1975) and in particular s 43 stating that custody of a contribution card is the taxpayer’s responsibility once it has been issued.

- 5 (v) We were also referred to the *Social Security (Contributions) Regulations 1979* and the successor regulations, the *Social Security (Contributions) Regulations 2001*, setting out a married woman’s right to elect not to pay class 2 national insurance contributions. Mrs Foster did not suggest that she had made any such election for any of the relevant periods.

10 *Witness evidence*

15 15. Mrs Lesley Crawford, an officer of HMRC gave oral evidence to the Tribunal and provided a written witness statement dated 12 April 2016. Mrs Crawford told us that she had worked on Class 2 national insurance contributions at HMRC since 2000 and had been dealing with national insurance disputes since May 2013. Mrs Crawford said that she had not dealt directly with Mrs Foster’s national insurance contribution record; her evidence related to HMRC’s general administrative procedures and record keeping. Mrs Crawford provided details of how national insurance contributions were recorded and tracked before and after changes were made to the process in April 1975.

20 16. Mrs Crawford explained that prior to computerisation of the national insurance system in 1975 an insured person was allocated a national insurance number and national insurance contribution card. That card was stamped by an employer when an employee was paid or stamped by the taxpayer themselves if they were self-employed. Cards had to be submitted to HMRC in March of each year in exchange for
25 a new one.

30 17. Mrs Crawford provided details of Mrs Foster’s national insurance records from her first registration in 1959 and told us that HMRC had no records of any contributions being made from 1975-6 until 2004-5. HMRC did have a record of Mrs Foster notifying them sometime in 1984 that she had been self-employed since 5 October 1980 as a result of which HMRC issued a contribution card for 1984-5 and made a decision to waive arrears of contributions for the period from October 1980 to October 1984. Mrs Crawford could not provide any information to explain why this waiver had been given but was clear that any such waiver would only have been given after an interview had been carried out with Mrs Foster to establish her level of
35 earnings.

40 18. Mrs Crawford said that no class 2 national insurance contributions had been received from Mrs Foster from 1984 until May 1989 and a further waiver had been given in May 1989 for contributions which should have been made from October 1988. Again, Mrs Crawford said that a waiver could not have been given without an interview having been carried out with Mrs Foster.

19. On both occasions when a waiver was given letter CF169 was recorded by HMRC as issued to Mrs Foster along with a leaflet (N148) which explained the impact of non-payment on later benefit entitlements.

20. Mrs Crawford said that HMRC's records showed that a "no card letter" asking Mrs Foster to return her national insurance contribution card was sent to Mrs Foster asking her to return her 1986-7 contribution card but no response was received. A similar letter was sent to Mrs Foster for the 1987-88, 1988-9 and 1989-90 contributions periods but no response was received. Mrs Crawford said that aside from the "no card letter" for the 1987-1988 which had been returned as undelivered by the Post Office, all other correspondence had been sent to Mrs Foster's correct postal address.

21. HMRC had assumed that Mrs Crawford was self-employed and liable to pay class 2 national insurance contributions for all of the periods in question. HMRC had had no notification that Mrs Foster was employed for any of the relevant periods.

15 *Mr Roy Foster*

22. We also heard oral evidence from Mr Roy Foster, Mrs Foster's husband. He told us that he was a director of all the companies which his wife worked for either as a personal assistant or a director. To his knowledge all of those companies had paid all the tax and national insurance contributions which were due.

20 23. Mr Foster told us that for the period when his wife was self-employed from April 1980 to April 1985 tax would have been paid through direct debit payments direct to HMRC. External "local accountants" (whose details he could not recall) were employed to deal with the tax affairs of her business at that time, Margaret Foster Designs.

25 24. Mr Foster also said that he was not aware of HMRC's decision to investigate his wife's national insurance contributions or give her a waiver. He queried whether correspondence sent by HMRC at that time had been sent to the correct address.

30 25. Mr Foster said that he could not find any details of the class 1 national insurance payments which would have been made for Mrs Foster when she was employed from 1985 to 1991 and had no information about how his wife dealt with her tax affairs for the later period from 1991 to 1996 when she was self-employed.

26. He did tell us that for the period from 1996 to 1999 when Mrs Foster was employed, all end of year tax returns would have been done by him. National insurance payments would have been paid by cheque, signed by him.

35 27. He also referred to issues which he had had with HMRC, his tax file had shown no tax payments at all and it had taken HMRC two years to find his file.

Other evidence

28. We saw copies of HMRC's national insurance manually entered record sheets for Mrs Foster for the periods from June 1959 until 1973 and copies of HMRC's computerised national insurance record for Mrs Foster the periods from 1973 to 1998 and Mrs Foster's RD18 "Statement of Account".

5 29. Mr Foster provided us with details of Mrs Foster's residential addresses from 1975 until 1999.

30. We saw the particulars of claim made by Mr and Mrs Foster against a storage firm, Wilkins (Henley) Limited in Reading County Court for damages arising from the loss or damage to property held in storage and the Tomlin Order dated December 10 2006 relating to this claim.

31. We also saw a statement from Mrs Foster of 19 July 2016 that "*standard book keeping procedures were carried out during the periods when I was a sole trader. I maintained the requisite accounts and relevant tax and national insurance contributions were paid. The accounts and documents were lost in the theft with the removers*". 15

Mrs Foster's arguments

32. On behalf of Mrs Foster, Mr Foster said that he believed that HMRC had mismanaged Mrs Foster's insurance record and had lost or misapplied information about payments which had been made, leading to an incorrect assessment of the level 20 of pension payment for which Mrs Foster was eligible.

33. Mr Foster referred to a tribunal hearing in Durham in 1986 which had clearly stated that all Mrs Foster's tax affairs were in order, paid and up to date from 1975 to 1986.

34. Mrs Foster had not been able to provide evidence to HMRC because her 25 personal records were stolen from a storage facility. When Mr and Mrs Foster moved from Scotland to Henley in 1999 they put their possessions in storage. When the time came to retrieve these items, they had been lost, destroyed or stolen by the storage firm. Mr and Mrs Foster took legal action against the storage firm and received a payment in compensation for their loss. The inventory of documents lost included 30 business documents from 1980 and personal documents and letters from 1964.

35. Mr Foster also referred to issues which he had had with HMRC who had mismanaged and muddled his personal information. This led him to believe that the same had happened in his mother's case.

36. Mr Foster suggested that Mrs Foster had not received the letters which HMRC 35 said they had sent her telling her about her national insurance payments.

37. Mr Foster took us through the details of Mrs Foster employment history from 1975 to 2004, explaining that:

(i) From 1975 to March 1980 she was employed as a personal assistant in companies of which her husband was the director.

(ii) From April 1980 to October 1985 she was self-employed, running her own business, Margaret Foster Design.

5 (iii) From the end of 1985 until October 1991 she was employed as a designer firstly by Ergon Technic Limited and then by Fosse and Foss Limited.

(iv) From October 1991 until January 1996 she was again self-employed, running her own interior design businesses (Foss Ecosse, Gagi Design and Fosberry Barns), and finally

10 (v) From February 1996 until she stopped work to look after her husband in May 1999 she was employed as a designer by The Company of Design Mongers and as general manager at Gean House Scotland.

HMRC arguments

15 38. On behalf of HMRC Ms Connelly said that Mrs Foster had not supplied any evidence to show that she paid national insurance contributions other than those recorded by HMRC and pointed out that the onus of proof is on Mrs Foster to demonstrate that these payments have been made.

20 39. Despite a meeting with HMRC in Glasgow in 1986 and letters sent to her by HMRC asking for her contributions cards for each of the 1986-7 to 1989-90 tax years, HMRC had no records of contribution cards being received.

25 40. Mrs Foster has not indicated in the information provided to HMRC for which of her business activities she was employed or self-employed. In any event, no employer returns have been received in respect of payments made to Mrs Foster for these periods either.

30 41. The Tribunal hearing of 1986 in Durham referred to by Mr Foster could not have given any statements about Mrs Foster's class 2 national insurance payments since at that time (and until 1999) responsibility for these payments was not with HMRC (or the Inland Revenue as they then were) but with the Department of Social Security.

35 42. The waivers given to Mrs Foster for the periods from October 1980 – April 1984 and October 1988-May 1989 would have been granted on the basis of information provided by Mrs Foster and on the basis that Mrs Foster was unable to pay the arrears due as a result of her financial circumstances. A waiver was an “administrative easement” and did not remove Mrs Foster's liability to pay the national insurance contributions which were due.

43. When a waiver was given HMRC would have been obliged to point out that it may be advantageous for the person concerned to pay the contributions due to protect their benefits.

5 44. It is now too late for Mrs Foster to pay any arrears of her class 2 national insurance contributions.

10 45. HMRC have records of letters sent to Mrs Foster informing her that her national insurance contributions were insufficient for each of the years from 1961 to 1973 other than 1967, 1972 and 1974. Their record of Mrs Foster's national insurance payments from 1975 to 2004 shows that no national insurance payments were made and that Mrs Foster told HMRC in Durham in 1986 when her contribution record was investigated that she was self-employed from 1980 to 1984 and a later investigation for the period from October 1988 to May 1989 also found that she was liable for arrears of Class 2 national insurance contributions.

15 46. HMRC's records also show that "no card notices" were sent to Mrs Foster for the years 1986-7 to 1989-90 and a "deficiency notice" for the 1987-88 year. The "no card notice" for 1987-88 was returned as undelivered by the Post Office.

20 47. Prior to the information which was provided at the Tribunal about the dates when Mrs Foster was employed and self-employed, HMRC had no knowledge or record of Mrs Foster being employed. If she had been employed, class 1 national insurance contributions should have been paid by her employer. HMRC have not found records of any class 1 contributions being paid for Mrs Foster during these periods.

25 48. The fact that the Pension Service does not hold a record of Mrs Foster's correct marriage date does not indicate that HMRC's records are also incomplete. It is unlikely that HMRC could have lost or misplaced Mrs Foster's national insurance cards or records over such an extensive period.

Findings of fact

49. It is not disputed that Mrs Foster was self-employed while she was working for:

- 30 (i) Margaret Foster Design from April 1980 to October 1985
(ii) Fosse Ecosse from October 1991 to December 1993
(iii) Gagi Design from January 1993 to March 1995
(iv) Fosberry Barns from April 1995 to January 1996.

50. At all other times during the relevant periods Mrs Foster was employed by one of the companies of which her husband, Mr Roy Foster was a director.

35 51. Local accountants dealt with the tax affairs of Margaret Foster Design, the business which Mrs Foster worked for from 1980 to 1985.

52. A waiver of the obligation to pay Class 2 national insurance contributions was given to Mrs Foster for the 1980 – 1984 period and October 1988 to May 1989 period.

5 53. HMRC sent a “no card notice” and a deficiency leaflet to Mrs Foster for the 1987-8 tax year in 1988 to her address in South Street, Durham. The deficiency notice and no card notice were returned by the Post Office as undelivered. Similar notices were sent for the previous year, 1986-7 to the same address. Mrs Foster’s correct residential address from 1986 until 1988 was Cassillis House, Maybole.

10 54. HMRC sent a “no card notice” to Mrs Foster for 1988-9 and 1989-90 to her correct address, Riverview Gardens, the Waterfront, Glasgow.

Discussion

15 55. The onus is on the taxpayer, Mrs Foster to demonstrate on the balance of probabilities that national insurance payments have been made for the relevant periods.

56. It is not sufficient for a taxpayer to argue that records are lost or destroyed and rely on this to suggest that payments which HMRC say have not been received have actually been made.

20 57. The Appellant concentrated on the likelihood of HMRC having issues with its record keeping based on the experience of Mr Foster and on HMRC’s issues with other taxpayers. The question for this Tribunal is not whether it is likely that HMRC have mislaid Mrs Foster’s records, but whether Mrs Foster has provided evidence on which we can conclude that the disputed payments were in fact made.

25 58. It is unfortunate that none of the primary sources of evidence which might have demonstrated that these payments had been made were available; the Tribunal did not hear any oral evidence from Mrs Foster due to her state of health and the written evidence provided by her was brief. None of the accountants who had been involved with any of the companies for which she had worked had been able to provide any evidence; other documentary evidence had been lost as a result of the issues with the
30 storage firm used by Mr and Mrs Foster in 1999.

35 59. The only evidence provided to the Tribunal that these missing payments were made was (i) the statements by Mr Roy Foster that he had made Class 1 national insurance payments on behalf of the companies who employed Mrs Foster (ii) the reference to the Tribunal decision in 1986 which confirmed that all taxes had been paid from 1975 to 1986 and (iii) the brief statement by Mrs Foster that she had made all relevant national insurance payments for the time when she was a sole trader.

Period 1975 to 1980

60. During this period Mrs Foster was working for her husband's companies. He has told us that he paid all relevant national insurance for these companies, but we have not seen any evidence that these payments were made. HMRC have no record of those Class 1 payments having been received.

5 *Period 1980 to October 1985*

61. It is agreed that Mrs Foster was self-employed for this period and a waiver of the obligation to pay Class 2 national insurance contributions was given for most of this period (until April 1984). No evidence of voluntary payments being made for the period of waiver or of any contributions for the remaining period has been provided.

10 62. The conclusion of the Durham Tribunal hearing in 1986, to the extent that it did consider Class 2 national insurance contributions, is not necessarily inconsistent with this conclusion since Mrs Foster had been given a waiver of contributions at least for the period from 1980 – 1984.

Period November 1985 to October 1991

15 63. It is agreed that Mrs Foster was an employee of companies of which her husband was a director for this period. Mr Roy Foster told us that he would have managed all tax payments for these companies. Mr Roy Foster has not been able to provide any evidence that Class 1 national insurance payments were made for this period. HMRC issued a waiver to Mrs Foster for some part of this period, believing
20 that she was self-employed and sent letters explaining her national insurance position to her correct address concerning the 1988- 89 and 1989-90 years.

64. HMRC appear not to have been aware of Mrs Foster's correct employment status during this period, but Mrs Foster was aware, as a result of the letters sent to her correct address by HMRC that they believed that Class 2 national insurance
25 contributions were due. Mrs Foster must also have had some contact with HMRC at this time which, as Mrs Crawford told us, was necessary for them to be able to issue a waiver and in order for HMRC to establish her correct address.

65. The Durham Tribunal hearing is not relevant to our conclusions for this period since it was concerned with Mrs Foster's own business and with events prior to 1986.

30

Period November 1991 to January 1996

66. It is not disputed that Mrs Foster was self-employed for these periods. Mrs Foster told us that she kept all records and paid all relevant taxes. Mr Foster told us that local accountants dealt with the businesses' tax affairs. We have not been
35 provided with any evidence other than the brief statement from Mrs Foster that Class 2 national insurance contributions were paid for this period.

Period February 1996 to May 1999

67. It is not disputed that Mrs Foster was an employee of companies of which Mr Foster was the director for these periods. We have not been provided with any evidence other than Mr Foster's statements, that Class 1 national insurance contributions were paid on behalf of Mrs Foster for this period.

5 *The impact of the theft of documents in storage*

68. The information which we have been given about the theft of Mr and Mrs Foster's possessions while held by a storage firm in 1999 (the particulars of claim and Tomlin Order) make clear that (i) some possessions were returned to Mr and Mrs Foster in 1999, (ii) other possessions were lost, damaged or converted and not
10 returned or returned in a damaged condition.

69. The court documents which we saw did not refer in any detail to business documents so it is impossible to be sure to what extent the actions of the storage company have actually prevented Mrs Foster from providing evidence of payment of national insurance contributions.

15 70. On the assumption that all relevant information was lost, destroyed or stolen, we accept that this would make it more difficult than it might otherwise have been to substantiate the Appellant's claims that these national insurance payments have been made. However in our view the theft or destruction of the documents originally held
20 by Mr and Mrs Foster did not make it impossible for the Appellant to provide some evidence of payment: Mr Foster told us that he paid national insurance payments by cheque and direct debit. We were also told that external accountants were involved in some of the relevant businesses for these periods. Despite these potential sources of third party information about how and when any national insurance payments were made, no further evidence was provided to the Tribunal to substantiate Mrs Foster's
25 claims.

Conclusion

71. The Appellant referred to HMRC losing or mismanaging information, but this is not a case in which HMRC do not have information about Mrs Fosters or about her national insurance contributions, it is a case in which the Appellant is alleging that the
30 information which HMRC do have is incorrect or incomplete.

72. Our conclusion, taking account of the evidence provided, is that on the balance of probabilities it is unlikely that HMRC would have incorrectly compiled records for Mrs Foster over such an extended period and that both self-employed and employer records have not been properly recorded. If no records had existed at all about this
35 particular taxpayer we would have been more willing to accept Mrs Foster's contentions about HMRC's mismanaging of her records. But HMRC do have records relating to Mrs Foster and those which we saw demonstrated that at least some information was correctly recorded for Mrs Foster, including for example Mrs Foster's changed residential addresses and the waivers which were given to her. It is
40 harder to explain information which has been incorrectly recorded than information which is not recorded at all.

73. The onus is on the taxpayer to demonstrate that the national insurance contributions which she says were made were paid to HMRC. The theft and destruction of Mrs Foster's personal and business documents in 1999 cannot completely exonerate the Appellant from this responsibility, particularly when there are other sources of information on which the Appellant could have relied on to fill the gaps.

74. We have concluded that Mrs Foster has failed to discharge the burden of proof and demonstrate that national insurance contributions other than those recorded by HMRC were actually made for the relevant periods.

75. For these reasons this appeal is dismissed and HMRC's decision of 22 April 2015 is confirmed.

76. 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.

Rachel Short
TRIBUNAL JUDGE

RELEASE DATE: 3 October 2016