[2018] UKFTT 362 (TC)

TC06576

Appeal number: TC/2017/05867

NATIONAL INSURANCE CONTRIBUTIONS - Class 1 Employee Contributions - HMRC decision that the appellant made a married woman's election in 1954 – based on entry on form RF1 – appellant denied making it - appellant's evidence accepted - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MRS JOAN SWIFT **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Sitting in public at Exeter on 11 June 2018

The appellant in person

Mrs Gill Carwardine officer of HMRC for the respondents

DECISION

Background

1. This case concerns employee National Insurance Contributions (**"NIC's**) for two periods (1954-1957 and 1971-1974) during which the appellant (or "**Mrs Swift**") was in employment.

2. In each of those periods an employer was obliged to deduct full employee NIC's from an employee's wages unless the employee was a married woman who had made a married woman's election ("**MWE**") (i.e. an election not to pay contributions under regulation 2(1)(a) of the National Insurance (Married Women) Regulations 1948). If that was the case and the employer was notified of that fact by the employee (via her NI Card) then the employer would not deduct employee NIC's from the married woman's wages

3. It is Mrs Swift's case that she made no MWE and accordingly in those periods her employees should have deducted full employee NIC's from her wages and paid them to the National Insurance Office (or its statutory successor). These contributions would (according to Mr Swift) increase the state pension to which she is currently entitled by about £80 per month.

4. HMRC have reviewed the position and come to a decision that Mrs Swift did make an MWE and so was not liable to pay employee NIC's between 1954 and 1975. The financial consequences of that decision is, of course, that she is not entitled to an increased state pension.

5. It is against that decision that Mrs Swift has appealed.

The point at issue

6. The sole point at issue in this case is whether Mrs Swift made an MWE. She says (and her husband also says) that she did not. HMRC say their records show that she did. In simple terms, I have to decide whether Mr & Mrs Swift's recollection is faulty or whether HMRC's record keeping is faulty.

Summary of the law

7. Since there is no dispute about the relevant law, I have summarised it below:

> (1) Before 1948 under section 1(1) of the National Insurance Act 1946 anyone who was over school leaving age and under pensionable age (60 for a woman) and who was resident in Great Britain was liable to make a contribution to the limited insurance scheme then in operation. However, when the National Insurance scheme began on 5 July 1948 a married woman was in a special position in that she could choose whether or not to pay employee class 1 NIC's. In other words she could make an MWE.

(2) For any period(s) she chose not to pay she would not accrue state pension entitlement.

(3) A woman who got married was required to notify the local National Insurance office of her date of marriage and change of surname by submitting her marriage certificate.

(4) From 6 October 1975 the National Insurance scheme was reconstructed and the system was computerised. The law changed and class 1 NIC's were collected differently. The law provided for equal benefits for men and women in return for equal contributions. In line with this a married woman's choice to pay class 1 employee contributions at the reduced rate was abolished from 11 May 1977.

(5) However, a married woman who had previously made an MWE was treated as having elected to pay a married woman's reduced rate of employee NIC's after 1975. That was unless she chose to revoke it.

(6) The authority for an employer to deduct reduced rate contributions took the form of a tear off portion from the 1974/75 stamp card. Tear off portions were exchanged for certificates of election form between 7 May 1979 and 6 April 1980.

(7) A certificate was treated as the authority for a married woman's employer to deduct reduced rate contributions. Unless such a certificate was held the employer was legally bound to deduct full rate contributions.

(8) The category and amount of insurance paid were entered on to the married woman's pay statement and reflected on her end of year statement.

(9) Each time a married woman changed employment she was required to provide her reduced rate liability certificate to her new employer.

(10) Where a married woman had made a valid election she was only allowed to pay at the reduced rate. If she paid full rate contributions and her National Insurance account showed that she had a reduced rate election, in place, the discrepancy was identified by computer programme and corrective action was taken. The woman was given the option of revoking her election or offered a refund of the difference between full rate and reduced rate contributions.

(11) When the law changed in 1975, a married woman who had not previously made an MWE was allowed to make an election to pay reduced rate contributions (an "**actual 1975 election**"). However, no elections could be made after 11 May 1977 (the woman had to have been married on 6 April 1977).

(12) A married woman who had made an MWE prior to 6 April 1977 was (unless she revoked it) deemed to have made an election (a "**deemed 1975 election**") to pay at the reduced rate.

(13) An actual 1975 election ceases to have effect at the end of the second consecutive year after 6 April 1978 in which the married woman

was (or is) not earning. However, that deemed cessation does not apply to a deemed 1975 election.

(14) Section 8(1)(e) of the Social Security Contributions (Transfer of Functions, etc) Act 1999 gives the authority for officers of the Board to decide whether contributions of a particular class have been paid in respect of any period. Section 11 of that Act gives a right of appeal against such decisions.

(15) The FTT has jurisdiction to decide on decisions made under section 8 of the Transfer of Functions Act 1999.

The process of making, recording and implementing an MWE

8. HMRC in their Statement of Case set out the procedure for making, recording and implementing an MWE. In those submissions, they make a variety of claims about, for example, the contents of various forms (in particular form CF9) and Form RF1, neither of which are currently available, and so were not put in in evidence. I will deal with those issues later. However, what I set out below is a summary of the process:

(1) A married woman was required to notify the National Insurance office of her marriage within 13 weeks of getting married. She would then be given a leaflet NI1 - "National Insurance for Married Women" outlining the eligibility requirements and consequences of making an election.

(2) HMRC say that the leaflet made clear the effect of not paying contributions on benefit entitlement and explaining the contribution conditions which needed to be satisfied to obtain a state pension.

(3) A married woman who did not wish to pay employee NIC's signed form CF9 contained at the back of the leaflet. It is this signed form CF9 which comprises the MWE.

(4) HMRC say that the declaration on form CF9 indicated that the married woman had either read the leaflet NI1 or had it explained to her.

(5) The “official use” box of the CF9 was completed and the form was retained in the local National Insurance office for 6 years and then destroyed.

(6) However, the National Insurance office would complete a machine card (MF15) showing the married woman’s name, national insurance number and details of the election. Before despatch to Records Branch (based in Newcastle) another officer was required to check all the details were correct and sign the card (the MF15 card) as proof of checking.

(7) When the completed MF15 was received by Records Branch the ledger clerk recorded the election and the married woman’s NIC contribution record on form RF1, which was noted accordingly showing the date and type of election. Mrs Swift’s form RF1 is in the bundle of documents and I refer to it in more detail later.

(8) The notation on form RF1 which evidences that a married woman had made an election are the letters MW1 (which apparently indicates a Married Woman in class 1, and the letters NP, representing the words "Not to Pay" flat rate contributions.

(9) Although a married woman was not liable to pay class 1 employee NIC's after she had made her election, she was still required to pay a small contribution toward industrial injuries which amounted to a few pence per week. This was commonly known as the "exempt rate stamp".

(10) If the married woman was working and the election was made part way through a contribution year she was asked to retrieve her national insurance card from her employer (to whom she had given it when she started her employment) and return it to the National Insurance office without delay. If it did not materialise the employer was asked to return the card.

(11) On receipt by the National Insurance office, an adhesive label was affixed to the card and returned to the employer. The label gave the employer the authority to deduct exempt rate instead of full rate contributions. At the end of the contribution year when the National Insurance card expired a special exempt rate card was issued in exchange for the card with the label attached.

(12) Until an employer received a married woman's special stamp card or a label to affix to an ordinary card he was obliged by law to deduct flat rate contributions from a married woman's wages.

9. The foregoing explanation was set out in HMRC's Statement of Case and (largely) replicated in Mrs Carwardine's submissions. She explained that those submissions reflected a conversation she had with a pensions officer of HMRC. That pensions officer did not him or herself give evidence but I am content that Mrs Carwardine is being wholly honest when she says that it reflects that conversation. Furthermore the MWE methodology is not being impugned by the appellant. It is her case that there has been erroneous record keeping which has resulted in a note on the RF1 form indicating that she made an MWE when in fact she had not

The evidence and facts

10. Mrs Swift and her husband, Raymond Swift, were clearly honest witnesses who told me the truth as they believed it to be. Frankly, the only contentious element of their evidence concerns whether Mrs Swift made an MWE. I deal with that separately and later in this decision.

11. But that apart, I find the following relevant facts.

(1) The appellant was born Joan Hopkins on 28 March 1932 and entered the National Insurance scheme on 28 March 1948. She was allocated National Insurance number LR458438A.

(2) Prior to entry into the NI scheme on 5 July 1948, she had been issued with a National Amalgamated Approved Society membership number: 9458438 and had been given 66 credits for the period from 7 April 1947 when she started work until 4 July 1948.

(3) Between then and the contribution year 1954-1955 the appellant made full contributions for 314 weeks of employment. These, plus the 66 previously mentioned, gave a total of 380. These weeks were then divided by 50 to give total years rounded up to the next whole figure and so in the case of this appellant, the number of qualifying years is 8.

(4) HMRC had previously made a miscalculation of these contribution weeks, considering them to be 279 rather than 380. This miscalculation has now been resolved and HMRC have paid compensation to Mrs Swift for that miscalculation.

(5) The appellant married Raymond Swift on 26 June 1954.

(6) Following their marriage Mr & Mrs Swift went on honeymoon.

(7) The form RF1 shows the following entries:

(a) The date of Mr & Mrs Swift's wedding as being 26/6/1954.

(b) That this wedding date was verified.

(c) Under "Notes", the notation "MARRIED MW1/NP 12.7.54".

(d) A change of address in 1954 (it appears to be 17/7/54).

(8) The appellant worked for a London agency from late 1954-1957 whilst her husband was doing his compulsory national service. She worked for a time at The Times Bookshop, but for the rest of the time for an agency at HT Downs (a rag trade company then situated in Great Portland Street, London). During the early part of this time she was earning about £12 a week, but that went up (in 1957) to £15 per week.

(9) HMRC have no record of that employment nor of any contributions (either employer or employee contributions) made by either The Times or HT Downs, in respect of, or on behalf of, Mrs Swift.

(10) Mr & Mrs Swift have three children born in 1958, 1961 and 1964. On or about 5 November 1957 and 26 September 1961 Mrs Swift claimed maternity benefit. Such claims were rejected.

(11) Mrs Swift was not in employment again until approximately 1971. Between 1971 and 1974, she worked for Staffordshire County Council. HMRC have records of this employment and those records show that no employee contributions for Mrs Swift were made by Staffordshire County Council during those years.

(12) After leaving employment with Staffordshire County Council the appellant studied as a mature student at Madeley College of Education, training to be a teacher. She believed that she would be credited with

contributions for this period. But she has not been. There is nothing in law which either permits or obliges such contributions to be made.

(13) Mrs Swift worked as a qualified teacher following that teacher training between 1975 until she retired in 1991. She has been credited with 15 qualifying NI years. This, together with the 8 years previously mentioned, means that she has a total of 23 qualifying years for the purposes of calculating her state pension.

(14) On 19 May 2017 HMRC issued a notice of decision in relation to NIC's and statutory payments which stated:

> "You are not liable to pay class National Insurance contributions as a married woman in the period from 12 July 1954 to 5 April 1975".

(15) The appellant appealed the notice of decision on 3 June 2017 and asked for her case to be considered by an independent adjudicating tribunal.

(16) HMRC replied to that letter on 30 June 2017 explaining the reasons why the decision had been made and explaining to the appellant how she could appeal that decision further. On 1 August 2017 HMCTS acknowledged receipt of Mrs Swift's notification of an appeal to the FTT dated 21 July 2017.

Burden and standard of proof

12. The burden of demonstrating that the decision which HMRC issued on 19 May 2017 that she was not liable to pay National Insurance contributions as a married woman in the period from 12 July 1954 to 5 April 1975 rests with Mrs Swift. She must demonstrate to me that, on the balance of probabilities (or that it is more likely than not) that the decision is wrong i.e. that she was liable to pay National Insurance contributions at the full rate for that period. This means that it is for her to establish that it is more likely than not that she did not make an MWE.

Appellants grounds of appeal

13. Mrs Swift appealed on the following grounds:

(1) She did not sign the form CF9 (the MWE). Mr Swift also said that his wife had not made an MWE. Various officers have said that she "would have done" but nobody can say that she actually did. Mr Swift has always been prudent about money and would not have advised her to make an MWE.

(2) The CF9 form was ostensibly signed only days after she returned from honeymoon.

(3) HMRC cannot provide the originals or copies of the CF9 as proof that she did make the MWE's. They say the originals were destroyed.

(4) Mr Swift thinks that with the very large amounts of records involved someone had made a genuine cross referencing or mis-transcribing mistake as a result of which the form RF1 appears to indicate that she did make an MWE when in fact she did not.

(5) If an MWE had been made, then it would have fallen away after two years of not having employment. Since she would not have been employed for the two years prior to her employment with Staffordshire in 1971, any MWE would have fallen away and full contribution should have been made during that period of employment.

Respondents submissions

14. HMRC submit as follows:

(1) HMRC cannot provide copies of the signed CF9 since it was destroyed after six years. However the entries on the form RF1 "MARRIED MW1/NP 12.7.54" are consistent only with the appellant having made an MWE on form CF9.

(2) The CF9 information was transcribed onto the RF1 via the form MF15 by a real officer and then checked by another. It is highly unlikely that they have made a mistake.

(3) Regular further checks were made by other officers.

(4) The form CF9 contained a declaration by the married woman that she read and understood the consequences of making an MWE set out in leaflet NI1.

(5) HMRC have no records of any contributions having been made between 1954 and 1957.

(6) Staffordshire deducted no employee contribution since Mrs Swift had made an MWE.

(7) The two year "fall way" does not apply to a deemed 1975 election (Mrs Swift's position); only to an actual 1975 election.

Discussion

15. I can deal with four points in short order.

(1) The two year fall away does not apply to a deemed 1975 election; it only applies to an actual 1975 election. So Staffordshire County Council were still subject to that deemed election when Mrs Swift was employed by them between 1971 and 1974.

(2) HMRC's point that by signing the CF9 on the back of the leaflet NI1 Mrs Swift self-declared that she understood the consequences of making an MWE. That is neither here or there. The issue is whether she signed the CF9, not whether she understood the consequences of doing so.

(3) Staffordshire County Council deducted no employees NIC's for the appellant between 1971 and 1974. I am not certain why this was (it might have been an error, or it might, correctly, have been because they had been notified that an MWE was in place for Mrs Swift). But even if they did so correctly, that sheds no light on whether Mrs Swift made the election in the first place. The form RF1 records that she made an MWE. The issue is whether that record is accurate and reflects Mrs Swift actually making an MWE or whether it is a clerical error.

(4) The fact that HMRC have no records of any contributions being made by The Times Bookshop or HT Downs also sheds no light on whether HMRC made a clerical error or whether Mrs Swift made an MWE. We shall never know why no contributions were made by those two employers between 1954 and 1957.

16. The appellant's primary submission is that HMRC have made a clerical error and she did not make an MWE. Mr Swift's evidence is that his wife made no MWE.

17. I am conscious that it could be suggested that Mr & Mrs Swift "would say that wouldn't they".

18. I hasten to add that this has not been suggested by any HMRC officer or by Mrs Carwardine, all of whom have behaved in an exemplary manner towards Mr & Mrs Swift.

19. It is my view, having seen them give evidence, on oath, that Mr & Mrs Swift are honest and honourable people. They've always trusted those in authority including government departments. They have only recently become interested in Mrs Swift's state pension position and have questioned HMRC's initial view that she had only 279 rather than 380 contribution weeks. They wished they had done in 1991 when Mrs Swift finished work. But they took, at face value, the information they were given by the relevant statutory authority.

20. Of course it is in Mr & Mrs Swift's interest now to say that she made no MWE, and that HMRC have made a clerical error (an honest and genuine one). They stand to benefit considerably in relative terms (not by much in absolute ones).

21. But I don't believe that they would say that Mrs Swift had not made an MWE unless they genuinely believed it.

22. So the issue is whether that genuine belief reflects reality. It is not uncommon for people to convince themselves that something has or hasn't happened when in fact it hasn't or has. Their honest belief does not reflect the real position.

23. HMRC clearly had a system of checks in place to ensure that insofar as is possible, the fact of making an MWE on form CF9 and the information on it were accurately transcribed firstly onto machine card MF15 and then to form RF1.

24. But in this case it is my view that a clerical error has been made. I say this not simply because of the assertions by Mr & Mrs Swift that she made no MWE, but

because their stories are corroborated by the timing which the RF1 evidences about the MWE.

25. Mr & Mrs Swift were married on 26 June 1954. That was a Saturday. They then went on honeymoon. The MWE was noted on form RF1 as dated 12 July 1954. I do not know whether this is the date on which it was notified to HMRC or whether it was the date on the form CF9. But in either case, that day (a Monday) is only 16 days after their wedding day. I very much doubt that Mrs Swift's NIC situation and the effect that an MWE might have on her future pension was uppermost in their minds in those 16 days. I think it is almost inconceivable that Mr & Mrs Swift would have failed to have remembered either posting or taking their marriage certificate to the local NIC office either during or immediately after their return from honeymoon. Remember Mrs Swift had 13 weeks to do so. If the date of 12 July 1954 is right, then in those 16 days she must have done so (either by post or in person) and must have received (again, either in person or in post) the form NF1. She would then have had to sign form CF9 at the back of that document and given it to the NIO.

26. They are, as I say, honest and honourable people. If they had rushed around in this way at that time I would have no doubt that they would have remembered doing so. Indeed had they done so, I think it is unlikely that they would have brought the case. They would have realised that such activities militated towards Mrs Swift having made the MWE.

27. If there was a duty on a married woman to send a copy of her marriage certificate to the local NIO, I have no doubt that Mrs Swift would have done so. And would have done so within the 13 week period. The fact that their wedding date was verified on form RF1 simply reflects that. It casts no light on whether she made an MWE.

28. I take note of the fact that Mrs Swift had made a claim for maternity benefit which was rejected. Her view and evidence is that it did not (as HMRC suggest) put her on notice that there was an issue with her contribution record, which she should have investigated then. They were young and "daft" (her description, not mine) at that time and drew no conclusion from the rejection of her claim about her contribution records. I see nothing wrong with this.

29. I am aware of the legal principle of the presumption of regularity. Paraphrased this is that where a public or official act has been shown to have been performed it is rebuttably presumed to have been so performed regularly and properly. The implications for this appeal are that the prima facie evidence of the MWE on form RF1 is rebuttably presumed to reflect a regular and proper recording regime for information initially contained on form CF9, which was then transcribed to the MF15 card and thence to form RF1. But this is a rebuttable presumption, and in the circumstances of this case I find that presumption rebutted by Mrs Swift's evidence as corroborated by the timing matters mentioned above.

30. Mr & Mrs Swift say that Mrs Swift signed no MWE. I believe them. Their testomony is corroborated by what I consider to be the unlikelihood of making the MWE within 16 days of getting married and going on honeymoon.

31. I do not have to say with 100% certainty whether the appellant or HMRC are correct in their respective submissions. Only that one party's submissions are more likely than not to be correct.

32. It is my view that it is more likely than not that HMRC made a clerical error in Mrs Swift's case. On the balance of probabilities I do not think that Mrs Swift made an MWE.

Conclusion and decision

33. Accordingly, it is my decision that HMRC's decision issued by notice on 19 May 2017 that "you are not liable to pay class National Insurance contributions as a married women in the period from 12 July 1954 to 5 April 1975" is wrong and I allow this appeal.

Consequences

34. One consequence of this decision might be that Mrs Swift does rather better than she should. No employee contributions were made certainly for the period 1971-1974 and, I strongly suspect, for the period 1954-1957. But if she is now given credit for those weeks for the purposes of her state pension, she has done well. No employee's NIC's were deducted from her wages, but her pension would be computed as if they had been.

35. Mrs Carwardine explained that it is HMRC's policy that if an employer has erroneously failed to make employee contributions, then HMRC policy is to credit the taxpayer with those contributions and then, if it is possible to do so, seek reimbursement from the recalcitrant employer. There is no evidence that I have seen which suggests that either The Times Bookshop nor HT Downs nor Staffordshire County Council have incorrectly operated the contributions system.

36. So although I have made this decision in favour of the appellant, I am not at all sure what financial consequences flow from it. Fortunately, I do not have to consider or conclude on those.

Appeal rights

37. 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.

JUDGE NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 28 JUNE 2018