



Neutral Citation: [2023] UKFTT 903 (TC)

Case Number: TC08971

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/14805

National Insurance Contribution – entitlement to state pension – shortfall in qualifying years of contribution – late payment of voluntary contribution – Regulation 4 of Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001– commencement date of benefit by date of payment of late contribution – Tribunal’s jurisdiction over reg 6 on discretion to treat an earlier date as payment date – appeal dismissed

Heard on: 15 May 2023

Submissions on: 16 & 29 June 2023

Judgment date: 23 October 2023

Before

**TRIBUNAL JUDGE HEIDI POON
JAMES ROBERTSON**

Between

NAVIN JOSHI

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Navin Joshi in person

For the Respondents: Ms Misbah Khan, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. Mr Joshi (the ‘appellant’) appeals against a decision by the respondents (‘HMRC’) as regards the date of commencement of the appellant’s entitlement to the State Pension.
2. The notice of appeal to the Tribunal was lodged in time on 2 December 2021 but was returned to the appellant as it was incomplete. The appellant re-submitted the notice of appeal, and HMRC do not object to the application to make a late appeal.
3. The Tribunal, by its own motion, issued post-hearing directions on 23 May 2023 for HMRC to address the issue as to whether the Tribunal has jurisdiction to hear the appeal, and gave directions in the event that the parties were to settle the appeal on the basis of the amended date of commencement as indicated by HMRC at the hearing which is in the appellant’s favour.
4. On 19 September 2023, the parties’ post-hearing submissions were forwarded by central administration to the Tribunal for consideration. The Tribunal had previously assumed that the parties had settled the appeal in the absence of any earlier referral of the parties’ submissions.
5. Both parties had complied with the issued Directions. The respondents’ submissions were lodged on 16 June 2023, and the appellant’s reply thereto was lodged on 29 June 2023.

LEGISLATIVE FRAMEWORK

6. Legislative provisions relevant to this appeal are the following:
 - (1) Pensions Act 2014, Part 2(3) on State Pension at full or reduced rate.
 - (2) Regulation 4 of Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001 (SI 2001/769) on Treatment for the purposes of any contributory benefit or late paid contributions (the ‘**2001 Regulations**’).
 - (3) Regulation 6(1) of the 2001 Regulations on Treatment for the purpose of any contributory benefit of contributions under the Act paid late through ignorance or error.
 - (4) Regulation 61B of Social Security (Contributions) Regulations 2001 (SI 2001/1004) (the ‘**SSCR 2001**’).
 - (5) Regulation 147 of SSCR Regulations on Class 2 and Class 3 Contributions abroad.
7. The substantive issue in this appeal concerns the interpretation of reg 4(3) of the 2001 Regulations, which provides as follows:

4 Treatment for the purpose of any contributory benefit of late paid contributions

[...]

(3) Subject to the provisions of paragraph (4) below, any relevant Class 2 contribution payable in respect of a contribution week after 5th April 1983 or any relevant Class 3 contribution payable in respect of a year after 5th April 1982 –

- (a) if paid after the end of the sixth year –
 - (i) ... following the year in which liability for that contribution arises, or
 - (ii) following the year in respect of which a person is entitled, but not liable, to pay the contribution,
shall be treated as not paid;

(b) if paid before the end of the said sixth year, shall, subject to paragraphs (7) or (8) below, be treated as paid on the date on which payment of the contribution is made.

8. Sub-paragraph (7) of reg 4 of the 2001 Regulations relevant to this appeal states:

(7) Notwithstanding the provisions of paragraphs (2), (3) and (4) above, in determining whether the relevant contribution conditions are satisfied in whole or in part for the purpose of entitlement to any contributory benefit, any relevant contribution which is paid within the time specified in paragraph 2(b), 3(b), [...] above shall be treated –

(a) for the purpose of entitlement in respect of any period before the date on which the payment of the contribution is made, as not paid; and

(b) subject to the provisions of paragraph (8) below, for the purpose of entitlement in respect of any other period, as paid on the date on which the payment of the contribution is made.

9. The decision under appeal was made pursuant to reg 6(1) of 2001 Regulations, which provides as follows:

6 Treatment for the purpose of any contributory benefit of contributions under the Act paid late through ignorance or error

(1) In the case of a contribution paid by or in respect of a person after the due date, where –

(a) the contribution is paid after the time when it would, under regulation 4 or 5 above, have been treated as paid for the purpose of entitlement to contributory benefit; and

(b) it is shown to the satisfaction of [an officer of] the Inland Revenue that the failure to pay the contribution before that time is attributable to ignorance or error on the part of that person or the person making the payment and that that ignorance or error was not due to any failure on the part of such person to exercise due care and diligence.

an officer of the Inland Revenue *may direct* that, for the purposes of those regulations, the contribution shall be treated as paid on such earlier day as [the officer considers] appropriate in the circumstances, and those regulations shall have effect subject to any such direction. (Emphasis added)

10. Regulation 61B of the SSCR 2001 provides, inter alia, as follow:

61B Voluntary Class 2 contributions: tax years 2006-07 to 2015-16: unavailability of pension statements 2013-14 to 2016-17

(1) This regulation applies to Class 2 contributions which a person (“the contributor”) was entitled, but not liable, to pay in respect of one or more of the tax years 2006-07 to 2015-16 (“the relevant contribution years”).

(2) Paragraph (3) applies if the contributor –

(a) was entitled to pay a Class 2 contribution in respect of one or more of the relevant contribution years;

(b) had not, before the coming into force of this regulation, paid that contribution; and

(c) will reach pensionable age on or after 6th April 2016.

(3) The contributor may pay a Class 2 contribution under this regulation, in respect of any of the relevant contribution years, within the period specified in paragraph (4).

(4) The period within which the contribution may be paid is the period beginning on 6th April 2013 and ending 5 April 2023.

(5) Notwithstanding section 12(3) of the Act, the amount of a Class 2 contribution payable under this regulation shall be –

(a) in respect of contribution years 2006-07 to 2010-11, the amount payable in relation to tax year 2012-13; or

(b) in respect of contribution years 2011-12 to 2015-16, the amount payable in the contribution year to which the payment relates.

Whether the Tribunal has jurisdiction to hear the appeal

11. The decision under appeal originated with a referral by the Department for Work and Pensions (the ‘**DWP**’) as a result of:

(1) A Directions Notice from Judge Wolfenden (Social Entitlement Chamber) dated 24 February 2021 which advised that the decision of the Upper Tribunal (dated 7 January 2021) had set aside the decision of the First-tier Tribunal dated 18 January 2019.

(2) The Notice advised that the SEC appeal needed to be referred to the Respondent (DWP) pending a decision of HMRC in relation to the accuracy of Mr Joshi’s NICs record and whether ‘the exception’ under reg 6 of the 2001 Regulations applies.

(3) The DWP referred the case to HMRC pursuant to reg 38A of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

12. The jurisdictional issue falls to be addressed is summarised in the Directions as follows:

(1) The statutory wording in reg 6(1) of the 2001 Regulations ‘may direct’ connotes the power conferred on HMRC in this respect is discretionary. This Tribunal has no general judicial review jurisdiction to adjudicate on the exercise of discretion by HMRC, and the parties have not specified the statutory provisions under which this Tribunal has jurisdiction to hear the current appeal.

(2) A right of appeal against a decision by HMRC is expressly provided by the statute. It is unclear under which specific statutory provision is the current appeal being entertained by HMRC.

(3) While the appellant has a live appeal against the DWP at the Upper Tribunal of the Social Entitlement Chamber (‘**SEC**’), which is stayed pending on HMRC’s decision on ‘the exception’ under reg 6(1), there is no automatic right of appeal to a referral decision as a satellite appeal to the live appeal in the SEC. Notwithstanding what Judge Wolfenden of the SEC has indicated in the Directions Notice to stay the proceedings, the referral from the SEC does not confer any automatic appeal right against HMRC to this Tribunal in relation to HMRC’s discretionary decision under reg 6(1).

Respondents’ submissions

13. In accordance with the Directions, HMRC lodged written submissions in relation to the jurisdictional issue raised by the Tribunal. In their submissions, HMRC refer to the following statutory provisions as relevant to the jurisdictional issue:

(1) Sections 8(1)(m), 11 and 13 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (The ‘**SSC 1999 Act**’);

(2) Regulation 155A(5)(b) of the Social Security (Contributions) Regulations 2001 (SI 2001/1004) (i.e. the SSCR 2001);

- (3) Schedule 1 paragraphs 268 to 275 of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009;
 - (4) Schedule 2 paragraphs 59 to 67 of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009;
 - (5) The Social Security Contributions (Decisions and Appeals) Regulations 1999 (SI 1999 No 1027) (the ‘**1999 Regulations**’);
 - (6) Sections 49A to 49I of the Taxes Management Act 1970 (‘**TMA 1970**’).
14. HMRC submit that the Tribunal has jurisdiction to hear the appeal on the basis that:
- (1) The SSC 1999 Act introduced new decision and appeal procedures for National Insurance issues.
 - (a) Section 8 of the Act gives the authority for officers of the Board to give decisions on certain National Insurance matters;
 - (b) Section 11 of the Act gives the right of appeal against such decisions;
 - (c) Section 13 of the Act provides that the Board, with the agreement of the Lord Chancellor and the Lord Advocate, can make regulations to make provision to take such appeals to the Tax Appeal Commissioners. The Tribunal reform introduced legislation to transfer the power of the Commissioners to the Tribunal.
 - (2) The authority to give a decision under s 8(1)(m) of the 1999 Act concerning ignorance or error and due care and diligence is provided by reg 155A(b) of SSCR 2001. This regulation provides that in the case of a contribution paid by or in respect of a person after the due date, the failure to pay the contribution before that time was attributable to ignorance or error on the part of that person or the person making the payment and if so whether that ignorance or error was due to the failure on the part of such person to exercise due care and diligence, as mentioned in reg 6 of the 2001 Regulations.
 - (3) Sections 268 to 275 of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (the ‘**2009 Order**’) amended the 1999 Act mainly by substituting ‘Tax Commissioners’ with ‘Tribunal’ (the First-Tier and the Upper-Tier as appropriate).
 - (4) The Social Security Contributions (Decisions and Appeals) Regulations 1999 set out the powers conferred on the Commissioners of the Inland Revenue to deal with decisions and appeals made under the Transfer of Functions, etc. Act 1999.
 - (5) Schedule 2, paragraphs 59 to 67 of the 2009 Order amended regulation 7 of The Social Security Contributions (Decisions and Appeals) Regulations 1999 by insertion of sections 49A to 49I of TMA 1970, which provide the jurisdiction for the Tribunal to decide on decisions made under section 8 of the 1999 Act.
15. The respondents submit that the appeal falls into the category of a decision made by HMRC under section 8 of the Transfer of Functions, etc. Act 1999, and that the Tribunal has jurisdiction to hearing the appeal in accordance with sections 49A to 49I of TMA 1970.
16. We accept the respondents’ submissions on the jurisdictional issue and have determined the appeal in relation to the substantive issue accordingly.

EVIDENCE

17. The Tribunal is provided with a core bundle of documents of 135 pages. The respondents called the evidence of Officer Lesley Crawford, who has also provided a witness statement. Officer Crawford was not the decision maker on the case, but was asked to give evidence based

on her technical knowledge of the National Insurance Scheme. Mr Joshi also provided a witness statement and gave oral evidence. We find both witnesses to be credible and accept their evidence as to matters of fact.

FINDINGS OF FACT

Background

18. Mr Joshi worked in the United Kingdom from April 1971 to August 1977 before he emigrated to Canada where he continues to reside. The appeal is concerned with his entitlement to the UK State Pension arising from those years when Mr Joshi had paid National Insurance Contributions ('NICs') through his employment in electronic servicing and repairs, mainly of television sets, at a time when it was still common for television sets to be hired by households.

19. After he emigrated to Canada, Mr Joshi continued to work in similar capacity in electronic servicing and repairs until the mid-1990s when he went to university and did a degree in finance. He then worked in banking in Canada from 2006 to 2010, before becoming self-employed as a financial consultant in Canada, from 2010 to 2016, when he retired.

20. Apart from a brief period from October 2005 to February 2006 when Mr Joshi was working in the UK for a mortgage corporation based in Bournemouth, there had been no other periods of UK employment since 1977.

21. On 27 January 2017, Mr Joshi reached the State Pension age for UK purposes. At some point prior to reaching pensionable age, Mr Joshi had applied to the DWP to establish his entitlement to a UK State Pension.

Correspondence to establish entitlement

22. The correspondence that ensued in relation to Mr Joshi's claim for entitlement to a State Pension included the following:

(1) On 10 January 2017, Mr Joshi was informed by the DWP that he had 7 qualifying years towards State Pension entitlement, but that a minimum of 10 years is required to qualify for the entitlement.

(2) On 3 February 2017, Mr Joshi contended the DWP decision, and an explanation was sent by the DWP to Mr Joshi on 18 April 2017.

23. Following the receipt of the explanation from the DWP, it would appear that Mr Joshi decided to pay a voluntary contribution to make up for the shortfall in the number of qualifying years. From HMRC's records, it is noted that:

(1) Mr Joshi submitted a form CF83 (an application to pay NICs abroad) which was dated 27 June 2017, (with the original date of 15 May 2017 being scored through).

(2) On 5 July 2017, Mr Joshi's form CF83 was received by HMRC.

(3) On 5 September 2017, the CF83 was sent to the International Pension Centre of the DWP for consideration; this was as directed by HMRC internal guidance when the applicant is over State Pension age, and to send a letter (INSL35) to advise the applicant.

(4) On 2 March 2018, the DWP responded to HMRC's referral and set out the amount of voluntary Class 3 NICs Mr Joshi could pay. The letter also advised that Class 2 NICs became cheaper than Class 3 NICs and if Mr Joshi wished to pay at the Class 2 rate, then he would have to provide further information.

(5) On 24 March 2018, Mr Joshi replied to the International Pension Centre ('IPC'), and on 5 April 2018, Mr Joshi's UK agent wrote to IPC enclosing a cheque for £821.60.

(6) On 1 May 2018, the cheque for £821.60 was processed by HMRC, since it had been sent to the IPC and was re-directed to HMRC. There was a small discrepancy of £15.75, as the correct amount advised as payable should have been £837.35 instead of £821.60. HMRC accepted the discrepancy, as it was not material.

(7) On 21 August 2018, Mr Joshi made a claim to the DWP for his State Pension from 23 January 2017, the date when he reached pensionable age.

Dispute over the commencement date of entitlement

24. Mr Joshi's claim in August 2018 for his State Pension to commence from 27 January 2017 was not agreed by the DWP.

(1) On 10 September 2018, the DWP wrote to Mr Joshi advising him that he was entitled to a UK State Pension at the weekly amount of £53.37 from 18 April 2018.

(2) Mr Joshi requested a Mandatory Reconsideration of the decision, on the basis that his State Pension was payable from 23 January 2017 when he reached pensionable age.

(3) On 22 October 2018, the DWP sent Mr Joshi a Mandatory Reconsideration Notice upholding its decision that pension was payable from 18 April 2018.

25. There was no referral to HMRC at this stage in October 2018 under reg 11A of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 to request if the voluntary contribution paid by Mr Joshi could be treated as paid on an earlier date.

Review by HMRC after SEC Directions Notice

26. Following the Directions Notice from Judge Wolfenden of 24 February 2021, the DWP referred Mr Joshi's case to HMRC on 4 March 2021. HMRC reviewed the evidence provided and considered that the delays caused by both HMRC and DWP were unreasonable.

(1) On 17 June 2021, HMRC wrote to Mr Joshi and advised him that HMRC would treat the Class 2 NICs paid for the tax years 2010-11 to 2015-16 as paid on 19 July 2017 (being 2 weeks after his CF85 application was received by HMRC).

(2) On 6 July 2021, Mr Joshi replied to disagree on the basis that:

‘[HMRC’s] refusal to accept the Class 2 voluntary NIC paid on the retirement date defies Regulation 6(1) of the [2001 Regulations] ... your decision also fails to consider the fact that the Social Security agreement between the UK and Canada does not provide specific details of how and when the Canadian contributions can be used to meet the minimum ten-year NIC qualifying.’

(3) HMRC replied to say that as no evidence was provided to enable the Class 2 NICs to be treated as paid on an earlier date than 19 July 2017, a Formal Notice of Decision was issued on 28 July 2021, upholding the date of 19 July 2017 as the commencement date of entitlement. The Formal Notice of Decision also advised that HMRC have no jurisdiction over the calculation of a State Pension.

(4) On 2 August 2021, Mr Joshi appealed to HMRC against the Notice of Decision.

(5) On 21 October 2021, HMRC responded with the offer of a review, but it would appear that Mr Joshi appealed direct to the Tribunal at this point.

The dates on Form CF83

27. In cross-examination, Mr Joshi was asked about the dates that are shown on the form CF83 submitted. Mr Joshi explained that his brother, who is an accountant in the UK, submitted the form on his behalf as his agent; that there were enquiry phone calls made to HMRC at the time of completing the form (although HMRC could not trace these calls); that the enquiry was

in the nature of checking whether reliance on cross-border provisions between the UK and Canada could be placed in Mr Joshi's case to rectify the shortfall in qualifying years; that between 15 May 2017 when the form was first completed and 5 July 2017 when the form was received by HMRC, Mr Joshi was awaiting a possible response that might address the shortfall other than by way of a voluntary contribution and form CF83.

HMRC'S CASE

28. At the hearing, Ms Khan for HMRC indicated that 15 May 2017 would be 'the earliest date' for which HMRC can exercise their discretion and that Mr Joshi had not exercised due diligence and care between 23 January 2017 and 15 May 2017.

29. It is submitted the NIC contributions were voluntary in nature, and the burden lies with the appellant to make the necessary enquiry to establish his entitlement.

30. Mr Joshi has a degree in finance, is 'literate in legislation', had made a claim for State Pension, but incorrectly relied on the possibility that cross-border provisions between Canada and United Kingdom might breach the gap in his contribution shortfall.

31. Pursuant to reg 6(1)(b), the only discretion that HMRC could exercise was to treat the payment as having been made from the earliest possible date of 15 May 2017 that was scored through on form CF85, notwithstanding the receipt of the application by HMRC being in July 2017, and the actual payment of the contribution being in April 2018.

APPELLANT'S CASE

32. Mr Joshi 'objects to the respondents' assertion that the effective date for the commencement of State Pension be 15 May 2017'. In his submissions, Mr Joshi stated:

(1) In making 'that assertion' the respondents have 'disregarded, omitted or simply misunderstood Regulation 4(3) of the Social Security Regulations 2001', which defines the due date for payment of contributions as the date before the end of the sixth year following the year in which liability for that contribution arises.

(2) The appellant had paid the contributions well before the end of the sixth year following the year in which the liability for the contributions arose for the years 2011-2012 to 2015-2016.

(3) In fact, by September 2018, the appellant had paid all the contributions for the respective years except for the year 2010-2011, which was delayed due to the DWP's 'reckless conduct and lax attitude'.

(4) Regulation 6(1) of the 2001 Regulations provides an exception for the late payment of a contribution attributable to ignorance or error on the part of the contributor which HMRC accepted but failed to comply with it with respect to the due date.

(5) Regulation 4 is not intended to deprive a pensioner of State Pension from the retirement date. The appellant's situation 'became dire due to the 10-year rule', which Parliament recognised and enacted Regulation 61B of the SSCR 2001 to protect pensioners retiring on or after 2016, as in the appellant's case.

(6) The appellant should therefore be paid State Pension from the retirement date 23 January 2017 pursuant to the Pensions Act.

DISCUSSION

33. The issue for determination is whether the appellant's entitlement to the State Pension accrued from the date he attained pensionable age on 27 January 2017, or from the date that HMRC deemed the voluntary payment as having been made to qualify for State Pension

entitlement. In the light of the relevant statutory provisions, we make the relevant findings of fact as follows to determine the appeal.

(1) As matter stood on 27 January 2017, the appellant's NI record showed that he had made 7 years of qualifying contributions and as such, he did not qualify to receive the State Pension, as the statutory minimum qualifying period to be entitled to the UK State Pension is 10 years.

(2) The appellant was therefore not eligible for the State Pension as at 27 January 2017.

(3) On 15 May 2017, the appellant's application form on CF85 was first signed with the intention of making a voluntary Class 2 NI contribution to make up the shortfall to become eligible for the UK State Pension.

(4) On 5 July 2017, the application was received by HMRC.

(5) On 5 April 2018, the appellant's agent sent a cheque to make the payment of voluntary contribution as directed by IPC to make up the ten minimum qualifying years.

(6) Based on the date of 5 April 2018 when the cheque payment was sent to IPC, the DWP had advised that from 18 April 2018, State Pension would be payable to Mr Joshi.

(7) It is accepted that the voluntary contribution payment of £821.60 was 'paid before the end of the said sixth year' for purposes of reg 4 (3)(b) of the 2001 Regulations.

(8) The date of 18 April 2018 as advised by the DWP 'for the purpose of entitlement' was therefore correctly established by reference to reg 4(3)(b) of the 2001 Regulations, which provides specifically that:

[4(3)](b) if paid before the end of the said sixth year, shall, subject to paragraphs (7) or (8) below, ***be treated as paid on the date on which payment of the contribution is made.*** (Emphasis added)

(9) For the avoidance of doubt, reg 4(3)(b) is engaged because the appellant's Class 2 contribution towards qualifying for the State Pension benefit was voluntary and paid 'late' for the purposes of the relevant statute.

(10) By virtue of reg 4(3)(b) being engaged, paragraph (7) of reg 4 applies to determine the date of entitlement as specified, and as highlighted below in the wording of reg 4(7):

... in determining whether the relevant contribution conditions are satisfied in whole or in part ***for the purpose of entitlement*** to any contributory benefit, any relevant contribution which is paid within the time specified in paragraph 2(b), 3(b), [...] above ***shall be treated*** –

(a) for the purpose of entitlement in respect of ***any period before the date*** on which the payment of the contribution is made, ***as not paid***; and

(b) subject to the provisions of paragraph (8) below, for the purpose of entitlement in respect of ***any other period, as paid on the date on which the payment of the contribution is made.***

(11) Applying reg 4(7)(a) to the facts of the case, we find that the period from 27 January 2017 to 18 April 2018 falls into the definition of 'any period before the date on which the payment of the contribution is made'. Consequently, for the purpose of entitlement, the period from 27 January 2017 to 18 April 2018 ***shall be treated as not paid.***

(12) By the operation of reg 4(7)(b), and for the purpose of entitlement in respect of 'any other period as paid on the date on which the payment of the contribution is made', namely from 18 April 2018, when the appellant's benefit entitlement commenced.

The significance of reg 4(7)(b)

34. In the present case, the determination of the date from which the pension benefit entitlement accrues is by the application of reg 4(7)(b), which means ‘the date on which the payment of the contribution is made’. We find as a fact that the voluntary payment was made by a cheque enclosed with the appellant’s agent’s letter to the IPC dated 5 April 2018, and was considered to have been processed as paid on 18 April 2018 – *the date on which the payment of the contribution is made* – thereby making it the date of entitlement by virtue of reg 4(7)(b).

Relevance of reg 6(1) discretionary powers

35. By the operation of reg 4(7)(b), the DWP therefore advised that the commencement date of the appellant’s pension entitlement was 18 April 2018, and that would have been the end of the matter but for the discretionary power under reg 6(1), which enables HMRC to exercise their discretion to treat an earlier date as the payment date for the purposes of the Regulations.

36. The effect of reg 6(1) is to vest HMRC with the discretion to *deem* an earlier date as the date of payment of the late contribution for the purpose of determining the commencement date of the benefit entitlement to which the late payment relates. For the avoidance of doubt, it is not mandatory for HMRC to exercise their discretionary power under reg 6(1) as indicated by the express statutory wording ‘*may direct*’ that ‘the contribution shall be treated as paid on such earlier day as the officer considers appropriate in the circumstances’.

37. In the present case, HMRC did choose to exercise their discretionary power on referral from the DWP following the Directions Notice from the SEC. The review officer had considered it appropriate to exercise the discretionary power vested on HMRC to treat the payment as having been made on 5 July 2017 when the form CF38 was received by HMRC, notwithstanding the fact that no actual payment of voluntary contribution had actually been made at that juncture in July 2017.

38. At the hearing, HMRC have indicated that the earlier date of 15 May 2017 that was scored through would be accepted as an earlier date that the CF38 were intended to be submitted, and this concession to adopt the earlier date of 15 May 2017 is confirmed in writing post-hearing.

Tribunal’s jurisdiction over reg 6(1)

39. HMRC have set out the basis whereby this Tribunal has jurisdiction over a discretionary decision by HMRC pursuant to reg 6(1) of the 2001 Regulations. When the appealable decision concerns a discretionary decision, the Tribunal should be slow to interfere with the executive body’s exercise of discretion unless it can be shown to be ‘flawed’ in the judicial review sense. The normal grounds of challenge in a judicial review action include: (a) illegality (where a decision has involved an error/errors of law or fact), (b) irrationality (*Wednesbury* unreasonableness from the Court of Appeal precedent in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223), (c) procedural impropriety, (d) fettering of discretion, and (e) proportionality.

40. We have considered the facts and the related statutory provisions in detail. We are satisfied that HMRC’s exercise of discretion under reg 6(1) has gone as far as the evidence allows to treat 15 May 2017 as the earliest possible date of the contribution payment for the purposes of the 2001 Regulations to set the commencement date of entitlement. There is no evidence upon which HMRC could have exercised their discretion to deem the payment date of the voluntary contribution as 27 January 2017.

No entitlement as at pensionable age

41. The appellant’s argument that the effective date of the benefit entitlement should be the date when he reached pensionable age on 27 January 2017 has no factual or statutory basis.

42. As a matter of fact, the appellant had *no entitlement* to the State Pension at the point in time on 27 January 2017, due to the shortfall in the number of qualifying years. When there was insufficient contribution for the claimant to qualify at the date of reaching pensionable age, the determination of the commencement date of entitlement is *no longer* by reference to the date a claimant reaches pensionable age.

43. The remedy for the appellant was to make a payment of voluntary contribution to make up the shortfall – but the statute does not provide for the remedy of a late payment to effect a commencement date for the entitlement by backdating it automatically to the date when the claimant reaches pensionable age, as argued by the appellant.

44. Instead, the late payment remedy brings into force the operation of Regulation 4, and the date of commencement of the benefit entitlement is set by the statute as the date of the payment of the late contribution.

45. The application of reg 4 means that the date of commencement of the appellant’s entitlement should have been 18 April 2018, as originally advised by the DWP, and that decision was in accordance with reg 4. It was by HMRC’s exercise of discretion under reg 6(1) that the date of commencement of the appellant’s entitlement is brought forward by 11 months to 15 May 2017, and is a decision that the Tribunal is fully satisfied to uphold.

CONCLUSION

46. For the reasons stated, the appeal is dismissed, save for the amendment noted below.

47. The respondents’ Formal Notice of Decision issued on 28 July 2021 is upheld with an amendment to the date from 19 July 2017 to 15 May 2017, in the light of the verbal representations made by the appellant during the hearing of 15 May 2023.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

48. 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.

**DR HEIDI POON
TRIBUNAL JUDGE**

Release Date: 23rd OCTOBER 2023