TYNWALD COMMISSIONER FOR ADMINISTRATION

REPORT ON CASE TCA 1903

Complaint

1. Mr B complained that the Social Security Division of the Treasury had declined to pay him the Manx Pension Supplement (MPS) as a consequence of decisions or actions taken by its predecessor, the Department of Health and Social Security from 1988.

2. It is, perhaps, unusual to be looking at events 30 years earlier and it has been difficult at times to piece together a coherent history. Mr B provided me with a number of files and the Treasury have collected a number of documents over the years to which I was given access. Nevertheless, there are omissions and gaps in the documentation which I have done my best to fill from my knowledge of social security law and of the processes and procedures in place in the UK between 1990 and 2000 which I am told were largely mirrored in the Isle of Man. Mr B reached retirement age in 2001.

Background

3. Mr B is a pilot. He and his then wife came to the Isle of Man in 1987 and decided that they wished to settle. They consulted a reputable firm of accountants about the steps they should take and put arrangements in train. A Commencement of Residence form was completed and signed on 1 November 1988, stating an intention to reside from that date. On that form Mr B was described as a self-employed flying instructor. On 4 November 1988 Mr B or his accountants completed an application for a Permit to Enter Self Employment as a flying instructor and a permit was issued from 17 November 1988 by the DHSS, who at the time had responsibility for issuing work permits, but its issue did not equate to agreement that he was to be treated as self-employed for National Insurance contributions. As explained below, he needed to apply separately to be registered as self-employed for contribution purposes.

4. On 20 December 1988, the accountants incorporated a company. The first two directors were members of the accountancy firm and held the shares as nominees, but in January 1990 they both resigned and were replaced as directors by Mr B and his wife, the latter also serving as secretary. In April that year the company's registered office was changed to Mr B's house address, although, surprisingly, the shares were not transferred to a nominee company until 31 December 2003. Mr B explained to me that the company was incorporated so that he did not incur personal liability in the event of a flying accident. He has been insistent that the company is irrelevant and a "red herring" but, as I explain in paragraph 18 below, I considered it to be a necessary element when considering the complaint.

5. Mr B contends that from the time he started as a flying instructor on the Isle of Man, he attempted to pay National Insurance Contributions (NICs) but was unable to do so. He described calling at DHSS several times a year but "they would not let me [pay]". He considers that once the DHSS had issued a work permit, stating that he was self-employed, they could not refuse payment of contributions as a self-employed earner and that was maladministration. I have not found any documentary evidence of attempts to pay but, in view of the effluxion of time, that is not surprising. What is surprising, however, is that throughout this period, Mr B had accountants acting for him and he did not seek their advice.

6. In 1992, the Treasury Minister announced the introduction of the Manx Pension Supplement (MPS) to come into effect in April 1993. In order to qualify, a pensioner had to have 10 qualifying years of Isle of Man NICs. In July 1995 Mr B received his pension forecast. Mr B has provided me with a copy of that letter which indicated a deficiency in contributions and explained how he could pay for some "missing" years. The letter emanated from the Benefits Agency (an Executive Agency of DSS) in Newcastle which dealt with UK pensions. It follows that, in July 1995, Mr B's contribution record was still held in the UK and had not transferred to the Isle of Man, which it would have done had he registered to pay NICs. As a consequence of this letter Mr B and his then wife paid a visit to the Newcastle office where they saw a manager Mr B named but whom I have been unable to further identify, but I think it is unlikely that she was working in the Contributions Agency which at the time had operational responsibility for NICs. It is more likely to have been someone who dealt with pension queries in the Benefits Agency. In any event, her advice was that Mr B should visit the DHSS on the Isle of Man to resolve matters. Mr B told me that she had said that he should "insist" on paying contributions as a self-employed contractor. Again, I think this is unlikely because those employed in the UK DSS would have known that they had no jurisdiction over the Isle of Man Social Security system.

7. Following this visit, Mr B paid 3 years' voluntary contributions, rather than self-employed contributions because the DSS would not permit him to do otherwise. The letter had advised him to pay 5 years. Payment could have gone back 6 years. In 1996 he could have paid contributions for the years 1990/91, 1991/92 and 1992/93. National Insurance contributions for those years were never paid. It was only at this stage that Mr B's contributions record was transferred to the Isle of Man, and he was deemed to be in the Isle of Man for the full 1995/96 tax year. He received a further pension forecast in March 1997 from DHSS (IOM) which informed him that he had no entitlement to MPS because he had paid insufficient qualifying contributions. His records show that he had only paid 2 qualifying years contributions in the Isle of Man and further contributions up to retirement age could not rectify the position. He received a further pension forecast in June 1999 informing him that he could not improve his basic pension by making payments of voluntary contributions. However, he was being credited with 5 years contributions towards his basic pension. Automatic credits were given for up to 5 full years to someone over 60 until reaching retirement age if he or she did no work, or his or her earnings were

very low so that no contributions were payable. Mr B has said that continued working until 2010. If he had been working between 1996 and 2001 in the Isle of Man, unless his earnings were very low, he would not have been entitled to credits.

8. In November 1999, the MPS rules changed. Contributions would count towards MPS without reference to where the payments were made so the contributions paid in August 1995 for the year 89/90 counted but that still only gave him 8 years, including the 5 which had been credited. That was the position when Mr B reached retirement age in March 2001 when he was awarded full rate basic pension but not the MPS. Mr B did not appeal that decision.

9. In August 2004, at around the time of their separation, Mr B's wife resigned as director and secretary of the company and one of the original directors from the firm of accountants took over as a director with Mr B remaining a director but also becoming the secretary. Mr B told me that throughout the period from 1990 to 2004, the accountants continued to advise him and prepared tax returns for him. The company was finally dissolved in February 2012.

10. It was not until March 2007 that Mr B queried his entitlement to MPS. In its response, DHSS replied that he was not entitled because he had only 7 years of qualifying contributions for 1989/90 to 98/99. A manuscript correction, presumably by Mr B, notes that this should be 8 years. There was continuing correspondence, including an attempt by Mr B to appeal the decision, which resulted in a letter explaining that he had been told of his appeal rights in the letter sent prior to his retirement and that he was out of time to exercise them. His accountants then wrote giving formal notice of intention to appeal. I have been shown no further correspondence until 2013, but the accountants do not appear to have lodged an appeal. I stress, at this stage, that any such appeal would have been against the decision on Mr B's pension entitlement, not in respect of the inadequacy of his contribution record.

11. The 2013 correspondence includes a response from the then Minister setting out why he was not entitled to MPS. It alludes to reasons for choosing the years of voluntary Class 3 contributions. Mr B's former wife wrote to the accountants on his behalf confirming his visits to DHSS. The accountants also wrote letters to the Department, which provided answers to a series of questions. Since the accountants had acted for Mr B in respect of his tax affairs throughout the period he was director of his aviation company, I am surprised by some of the questions. In one of his letters dated December 2013, Mr B stated that he had been unaware of MPS before 1999. The Minister responded, explaining that MPS was introduced in 1992 and that guidance was available in October 1992. It took effect in April 1993. Since at that time relevant years could not accrue until his records were transferred from the UK, which only took effect from the 1995/96 tax year, he could not have accrued 10 years prior to retirement. I am not sure if this is correct. The Treasury suggest, in their response to me, that if an insured person with an account held in the UK paid contributions in the Isle of Man, those contributions would be transferred to the UK, but when the record transferred to the Isle of Man, they would be posted to the record as "origin IOM" and so

would count towards the requirements for Manx Pension Supplement.

12. On 1 April 2014, the DHSS became the Department for Health and Social Care (DHSC) and the Social Security functions previously carried out by DHSS transferred to the Treasury[1]. Mr B continued his correspondence with that Department. Having been told that, with his 5 years of credits, he had 8 qualifying years for MPS, he asked if he could pay 2 years voluntary contributions. The request was referred to a person who could make a formal decision on National Insurance, whom I shall refer to as E. He determined that Mr B had reached retirement age in 2000/2001. He could only make contributions for years prior to his date of retirement. The only years where contributions were outstanding were from 1987/88 to 1992/93. Payment of contributions for these years was time-barred and could not be paid more than 6 years after the tax year in which liability arose.[2] His request was, therefore, refused. This was the first appealable decision in respect of Mr B's National Insurance contributions, and he was told that he had a right of appeal within 30 days of the date of the letter. Mr B exercised his right of appeal within the time limit, claiming that in 1987, he had met with DHSS to discuss his pension position and had been told that he had 14 years to prepare for retirement. He stated that this advice had been given to him consistently for the following 8 years.

13. In its response, the Treasury denied that Mr B had been given incorrect advice. He was under a duty to manage his contributions and the decision-maker had no discretion to permit late payments where the purpose was to secure entitlement to MPS. There is a handwritten note on the Response, which was supplied to me by Mr B, that indicates that Mr B thought that as he was obliged to pay self-employed contributions rather than voluntary contributions, the discretion could and should have been exercised. In the Department's Statement of Case, the Treasury state that the first recorded contact with Mr B was in July/August 1995 after he received his UK pension forecast. Mr B was advised to pay 3 years of voluntary contributions which were the cheapest as this would secure a full entitlement to a retirement pension. As in 1995, his record was still held in the UK and he was only 6 years off retirement age, he would not be able to secure the 10 years of contributions in the Isle of Man to qualify for MPS. The statement accepted that the qualifying conditions had changed but this was subsequent to the advice given in 1995. Following this submission, Mr B's advocate sought an adjournment and subsequently withdrew the appeal on Mr B's instructions.

14. Simultaneously with the appeal, Mr B wrote to his MHK who made enquiries but failed to provide Mr B with an answer which satisfied him. He also entered into correspondence

[1] See Transfer of Functions (Health and Social Care) Order 2014 (SD 2014/0008). The functions of DHSS in relation to National Insurance Contributions had been transferred by the Transfer of Functions (New Departments) (No. 2) Order 2010 (SD 2010/155).

[2] Reg 4(3)(a)(i) of Social Security (Crediting and Treatment of Contributions and National Insurance Numbers) Regulations 2001 (of Parliament) (S.I. 2001/769). These Regulations were applied to the Island by SD 374/02.

with the then Minister for DHSS. By the time of this correspondence, Mr B was alleging that the Department and E, in particular, were guilty not only of maladministration but also of an "attempted travesty of justice", criminal negligence and fraud. Some of the allegations made are defamatory but I am in no doubt that Mr B believes them to be true.

15. The Chief Executive at the Treasury considered that the best way forward was to commission an Independent Report and the Chief Finance Officer was requested to co-ordinate it. As a consequence, an External Investigator from the list held by Human Resources was appointed. The Terms of Reference anticipated that the Investigation would begin the week commencing 25 June 2018. Its purpose was to consider:

> *"1. Alleged Maladministration in relation to the process in dealing with the issues raised by Mr [B] in relation to the Manx Pension Supplement and his National Insurance Contributions.*
> *The areas to be considered:*
> *(a) Was the matter, when raised, investigated?*
> *(b) Was consideration given to the information presented by Mr [B]?*
> *(c) Was the process followed fair?*
>
> *2. Allegations of persecution of Mr [B] in the last 10 years by [E].*
>
> *3. Allegations of undue influence by [E] over officials considering the issues raised by Mr [B]. This allegation needs to be considered in the context of the timing, how the issue was raised and by whom as the issue has been raised on numerous occasions. "*

There was an express exclusion that:

> *"The investigating officer cannot make a decision on eligibility for the Manx Pension Supplement or matters relating to the payment of additional National Insurance Contributions. "*

16. In the course of investigating, the External Investigating Officer (EIO) had 3 meetings with Mr B and also chaired 2 meetings one attended by both Mr B and E and others, including, on the second occasion, the Solicitor General. As well as interviewing E, he also spoke to Mr B's accountant and a National Insurance Technical Expert and Contributions Decision Maker working in the Treasury. His report is lengthy and thorough. He went through files of papers, mainly provided by Mr B (and most annotated by him) some of which were duplicates, as well as carrying out the interviews referred to above. The EIO concluded that there was insufficient evidence to warrant further action in any area of either the letter of complaint or the Terms of Reference. The Designated Manager for the complaint then wrote to Mr B, informing him that his complaint had not been upheld and in March 2019 Mr B complained to me.

National Insurance

17. Before I set out my investigation and the conclusions I have reached, it might be helpful if I set out in some detail how the National Insurance system works and how it worked between 1987 and 2001, being the period in dispute. There were (and are) 4 Classes of Contributions. The most familiar is what was known as Class 1 contributions covering employees. A deduction was made by the employer from the employee's pay packet and that contribution was paid to the DHSS (now the Treasury), in much the same way as the deduction of income tax under ITIP is applied to an employee. In addition, the employer was obliged to make a contribution (known as the employer's contribution, but formally referred to in the legislation as a secondary Class 1 contribution, to distinguish it from the employee's primary Class 1 contribution). The self-employed were liable to pay Class 2 contributions subject to exemptions. The most important of these is that someone whose annual earnings were below a threshold was not required to pay Class 2 contributions. He could seek a certificate of small earnings exception ("SEE"). The other matter of importance is that an individual's declaration of self-employment does not of itself entitle that person to self-employment status. How the person's employment is categorised depends on different factors and has over the years been subject to considerable litigation. In 1987/88, the main cases considered when determining self-employed status were *Addison v London Philharmonic*[3] and *Ready Mix Concrete v Minister of Pensions and National Insurance*[4] . The former case set out a number of factors which could point to employment or self-employment which became known as "The *Addison* Tests". There were further refinements after later cases such as *Hall v Lorimer*,[5] but it meant that the DHSS looked at factors such as the nature of any contract and whether there was mutuality of obligations, the type of work undertaken, the practices in any particular industry and what level of control was exercised over the individual. Some occupations particularly in the building industry might attract additional scrutiny, while it would be accepted that others had the character of self-employment. A person seeking to register as self-employed would be subject to risk assessment, and in some cases a status inspector from DHSS would visit the person to whom services were being provided to find out more about the business and the proposed engagement. For that reason, an application for a work permit expressing an intention to be self-employed was not any indication that the Department would categorise the work as such.

18. A further complication is to be found in the Social Security (Categorisation of Earners) Regulations 1978 (of Parliament) as applied in the Isle of Man[6]. Under these provisions, a company director is deemed to be an employee and is liable to pay Class 1 contributions on

[3] 1981 ICR 261
[4] [1968] 2QB 497
[5] [1993 EWCA (Civ.) 25
[6] See S.I. 1978/1689 as applied to the Island by GC 17/79.

any earnings from that company.

19. Before I leave employed and self-employed contributions I should for completeness, mention Schedule 4 contributions. Self-employed people were required to make payment on profits if they exceeded a sum which was amended annually. As the question of Class 4 contributions does not arise in Mr B's case, I need not discuss it further.

20. That then leaves Class 3 contributions. I have said that the other Classes were assessed on earnings. Class 3 were not. A non-earner below retirement age could make payments, thereby establishing a contribution record sufficient to be entitled to retirement pension. A non-working spouse or partner might pay them to ensure some independent financial security as might an individual living off dividends or capital. There was no obligation to pay, and Class 3 contributions were referred to as voluntary payments. It was Class 3 contributions that Mr B eventually paid. For qualification for MPS, the Class of contributions paid on the Isle of Man was irrelevant. Under the scheme introduced in 1993, what mattered was the number of years during which they were paid.

Investigation

21. I held 3 long meetings with Mr B between May 2019 and December 2020. On each occasion, he was accompanied by his friend Mr I who was also a pilot and aviation examiner, with considerable knowledge of the industry. I found his insights and explanations most helpful. At the first meeting Mr B outlined the background to his complaint. He was adamant that by issuing his work permit, stating that he was self-employed in 1988, the DHSS had accepted that he was self-employed and "the girls in the office" should not have refused to allow him to pay self-employed contributions. Indeed, he went further. In refusing to accept contributions, they had forced him to break the law because he was legally obliged to pay them. Mr B did not accept that he could not be breaking the law if he had been told by the responsible authority that he could not pay. I did establish that the staff he saw were the counter staff responsible for payments. Mr B did not accept that the DHSS would have to satisfy themselves that he was genuinely self-employed and not someone who should be categorised as an employee. Mr I explained that most Flying Clubs would not take on employees and the custom in the industry was for flying instructors to be self-employed. Mr B stated that he had been self-employed when engaged by Flying Clubs in England. Mr B also told me that he had worked in a European country before and after moving to the Isle of Man.

22. It was at this first meeting that Mr B mentioned that he had incorporated a company when he came to the Isle of Man. He had requested his accountants to set up the company to protect himself from personal liability in the event of an accident. He had received this advice from aviation experts. Mr B had brought with him a lever arch file of documents which I was allowed to copy.

23. Following this meeting I saw the person in the Treasury who had originally commissioned the Independent Report. The Solicitor General was also present at this meeting. The Treasury was satisfied that the EIO had spoken to anyone who could assist in understanding what had happened 30 years earlier and the Commissioning Officer had also spoken to retired staff who had been working in 1988 and the years thereafter. None of them recalled visits from Mr B . Given that he had stated that his visits had been frequent, that was surprising. The counter staff had been clear that if someone was attempting to pay contributions, who was not registered, he would have been referred to staff dealing with National Insurance. I was shown a crate of papers which had been found or created during the investigation and I have read all these, some being either duplicates or "clean" copies of the papers provided by Mr B.

24. I have spoken to E, whom Mr B believes is largely responsible for his predicament. In 1988, E was a clerical officer. He was a junior member of staff. He made some decisions but if there was any dispute, he would refer it to a more senior officer. He himself had no recollection of ever having dealt with Mr B before his complaint, but had spoken to him whilst trying to resolve it. He confirmed that he might well have told him that he would have made the decision not to permit him to pay Class 2 contributions. This did not mean that he had. If he had been asked, he would have reached that decision because it was correct. Mr B could make no payment until he registered in the Isle of Man which triggered the transfer of his record.

25. By the time of my next meeting with Mr B, I had gone through the papers I had received. These included, in particular, the Report of the EIO with the notes of interviews, Mr B's various papers and two sworn statements by his former wife. The evidence of Mr B's former accountant was that the purpose of the company which was formed and of which he was initially a Director was solely to own the aircraft for personal protection of assets and to facilitate a fuel card for aviation gasoline. He believed that Mr B's flying instruction on the Isle of Man was very occasional and ceased in the 1990s, although the company was not dissolved until much later. The accountant produced from his records information which showed that Mr B's earnings between 1988 and 1992 had been minimal and that he had paid no contributions. He stated that Mr B had spent a good deal of time in the European country during this period. He recalled that Mr B had been counting days to ensure that he was not held to be resident there for tax purposes. The accountant who dealt with Mr B's and the company's tax affairs until his retirement in 2010 recalled that Mr B had sold a company in the UK prior to moving to the Isle of Man and could maintain his lifestyle from personal assets, without working.

26. When I put these points to Mr B, he was dismissive, stating that the accountant did not know what he was talking about. He remained insistent that officers in the DHSS had *made* him break the law and that he was obliged to pay Class 2 National Insurance. He also suggested that the reason he had been prevented from paying was to deprive him of

entitlement to MPS. He and Mr I left the meeting with nothing resolved.

27. In March 2020 I was about to start drafting the Report when I received a long email from Mr B enquiring how he could "appeal" my decision. I replied, explaining that I had not yet drafted the Report and he would see it in draft before it was laid before Tynwald. He asked to see me again and I agreed. Because of lockdown and my period spent in hospital, I did not see Mr B until December, on which occasion I was accompanied by Mrs Kent who had recently been appointed Assistant Tynwald Commissioner. Mr I also attended.

28. As Mr B had raised a number of matters in the email, which concerned me, I sought to correct certain statements. For instance, the MHK, whom he had named, could not have attended meetings he had referred to in the late 1980s and 90s. He was not an MHK then and was probably still at school. Further someone he had referred to as a Minister was in fact a civil servant. These were examples of Mr B's inaccurate statements which has led me to treat some of his later evidence with caution.

29. I talked to Mr B about his arrival on the Isle of Man and his setting up a company in 1988. Mr B was adamant that the company was a red herring. It was irrelevant to the legal requirement that he pay Class 2 National Insurance Contributions as a self-employed flying instructor. As I explained why the company could be relevant, Mr B confirmed that he had been advised to set one up. He confirmed that the purpose of the company was to limit personal liability. I suggested that in order to succeed in this objective the trainees would need to contract with the company rather than Mr B personally. It was also likely that the Flying Club would wish to protect its liability by introducing potential trainees to the company rather than itself entering into a contract with the trainees. Mr B said he could recall exactly the arrangement and did not agree with me but was unable to describe the actual agreement. Mr I said that he understood what I had said and could see how it would protect Mr B from liability. He also said that he had previously been unaware of the existence of the company and could understand how it might alter the position.

30. At this point Mr B stated that he had a company when in the UK and it had not prevented him from being self-employed. Mrs Kent asked him the name of the company and was told it had the same name as the Isle of Man company. She carried out a Companies House search and found no such company in the years prior to Mr B's move to the Isle of Man. She also searched for similar names without success. Mr B then conceded that he might have been wrong and that perhaps he had not registered a company in England.

31. I then discussed with Mr B the reasons for his not paying voluntary or Class 3 National Insurance after he was alerted to the shortfall by DSS in Newcastle. I did not receive an explanation, other than he was prevented from paying Class 2 and that was illegal. I did state that I would be willing to talk to his accountant, if he agreed. He was not complimentary about the accountant and the information he had already provided but said that he would think about it and let me know within 14 days if he wished me to pursue this

option. I heard nothing further from Mr B. However, in responding to the draft Report, Mr B referred me to two letters in which he maintained that the Department had stated that anyone who has registered as self-employed must pay Class 2 National Insurance and this is mandatory. That is not in dispute, but Mr B was never so registered and so was allowed to pay Class 3 voluntary contributions.

Discussion

32. This complaint has been difficult to investigate not least because of the passage of time. It has been impossible to obtain much first hand evidence of events which took place more than 30 years ago and this complaint only came within my jurisdiction because of the Treasury's decision in 2018 to obtain a Report from an External Investigating Officer. Mr B has produced a great deal of historic documents, particularly in respect of pension forecasts. There are, however, substantial gaps in the chronology and Mr B who is now in his mid 80s cannot recall details with sufficient accuracy to supplement the documents. Indeed, over the course of 3 interviews conducted over 20 months, there have been contradictory statements and inconsistencies which make some of the information provided unreliable.

33. That Mr B came to reside permanently on the Isle of Man in 1988 is not in dispute nor that he obtained a work permit on 21 November 1988. The form entitled "Commencement of Residence" required by the Assessor of Income Tax is dated 1 November 1988, so he was resident from that date. Mr B regards the work permit as proof that he was self-employed. It is not. It is evidence that Mr B believed that he would be categorised as self-employed, but he did not take the necessary steps to register himself with the Manx National Insurance system and his Contribution Record remained in the UK as is evidenced by the pension quote and a letter from the Benefits Agency (an Executive Agency of the Department of Social Security) in Newcastle dated 17 July 1995 which informed him of a deficiency in that Record.

34. After his visit to the Contributions Agency in Newcastle, he paid 3 years Class 3 (voluntary) contributions and his Contribution Record was transferred to the Isle of Man and he was informed that the transfer of records was backdated to the beginning of financial year 1995/96. He made no subsequent payments. By that time, according to the accountant, Mr B was not providing flying instruction. If that is correct, then there could have been no question of paying Class 2 contributions.

35. Before I deal with the consequences of the transfer, I should mention that although Mr B was treated as self-employed in England, he had not paid Class 2 (self-employed) contributions in tax years 1982-1985. The records show that he was granted Small Earnings Exception (SEE) for those years. This can be claimed where the self-employed earnings are below a level set annually. In 1982/83 the exemption threshold for SEE was £1600, which increased to £1775 for 1983/84 and £1850 for 1983/84. Whilst this would appear to be inconsistent with Mr B's statements that he had been working full time as a self-employed flying instructor, he

was also working outside the UK which would have reduced his income from Flying Clubs in England. In one of Mr B's documents, he states that, after he came to the Isle of Man, he worked about 2 hours a week as a self-employed flying instructor. If that is an accurate estimate, it is likely that he would have qualified for SEE on arrival and during his first year on the Isle of Man, so would not have been required to pay contributions. From 1989 to 1993 his flying hours exceeded 200 in each year, which might still have been insufficient to require the payment of Class 2 contributions. Certainly, the current advice is for the self-employed to pay the relevant contributions, even if entitled to SEE, in order to preserve their full entitlement to retirement pension, but they are not obliged to do so.

36. In the light of the searches made, I do not believe Mr B ever registered a company in respect of his flying instruction in England in the way he did on arrival in the Isle of Man. The reason that he gave for doing so while operating on the Island is plausible. During the first year of operation, two members of the accountancy firm acted as directors, but once Mr B took over as director with his wife as secretary, the position changed. Under the legislation, Mr B as director could no longer be self-employed and was treated for contributions purposes as though he were an employee on any earnings from the company. The company would be required to pay employer's contributions and deduct contributions from Mr B's *earnings.* I emphasise *earnings* because National Insurance is chargeable only on earnings. If a director who is also a shareholder, even though through a nominee, chooses to be paid a low salary (below the lower earnings level ("LEL")) and take a substantial dividend, the latter does not attract Contributions. This is a well-known means of mitigating liability for payment of National Insurance. The accountants could have so arranged matters, but there is no evidence that they did so. Indeed, the evidence is that Mr B was a director, but not a shareholder. Furthermore, the level of earnings from his business as a flying instructor would not have justified the cost of such an arrangement. Mr B told me that the accountants continued looking after his tax affairs when he and his wife took over as directors. There is nothing that suggests they questioned why National Insurance payments had not been made, which might indicate that they had not expected them to be paid. In 1989/90 the LEL was £43 per week, rising to £57 in 1994/95. From the evidence provided by the accountants to the independent investigator, it appears that Mr B's earnings as a flying instructor in the Isle of Man were such that he would have qualified for SEE and that he would also have been below the LEL. I conclude that the accountant is right and that the purpose of the company was to facilitate the transfer of ownership of the plane. If that were the case, Mr B might have received payments for flying instruction direct. That would have attracted a liability for Class 2 contributions, subject to SEE, but once again they could not be paid in the Isle of Man until Mr B took the required steps to notify the relevant UK authorities (the Inland Revenue, the Contributions Agency or the Benefits Agency, depending on when the notification was given) of his move to the Isle of Man and arranged for his contributions record to be transferred. Having analysed the other possibilities, this seems by far the simplest and most likely explanation. By the time his records were transferred, the evidence of the accountant is that Mr B had ceased to operate as a flying instructor. Mr B disputes

this, maintaining that he continued working until 2010 when he would have been 74.

37. When I began this investigation Mr B was so adamant that he had been prevented from paying Class 2 contributions that I thought that, for the purpose of MPS, the Class of contribution was important. Having read the Scheme and documentation, I am satisfied that the type of contribution was immaterial and payment over 10 years of Class 3 contributions in the Isle of Man would have given entitlement. At the time Mr B triggered the transfer of his National Insurance record to the Isle of Man, it was not too late to accumulate 10 years. If he had paid the full 6 years identified in the deficiency notice as voluntary class 3 contributions to which the 5 years' worth of auto-credits would have been added, he would have had the required 10 years of contributions in the Isle of Man. This is perhaps the classic case that shows that the Contribution Scheme does operate like insurance. You have to pay in to take out the benefit. Mr B did not make the payments. He was not unlawfully prevented from making payments prior to 1995. He had failed to inform the DSS in England that as a consequence of his move to another jurisdiction his record should be transferred.

38. I have commented on Mr B's inconsistent statements. I propose to highlight just one. In his letter to the Minister dated 16 December 2013, he stated that he had been unaware of MPS until 1999. He has produced documents, including a pension forecast from the DHSS (Isle of Man) dated 17 March 1997 in which he was told that he could not qualify for MPS because of insufficient contributions which could not be made up before retirement age.

39. Mr B was resident in the Isle of Man when MPS was announced. It was well-publicised and, if he had acted in 1992, and asked DSS to transfer his record to the Isle of Man and made payments of Contributions for the previous year, he could have paid sufficient to qualify.

Conclusion

40. I have concluded that Mr B is mistaken. He was not required by law to pay Class 2 contributions. If he had arranged for his records to be transferred to the Isle of Man, he might well have been categorised as a self-employed earner initially but, given the payments he received as a flying instructor on the Isle of Man it is likely that in 1988/89 and in subsequent contribution years he was entitled to a certificate of SEE. His previous UK National Insurance record suggests that he would have continued claiming SEE. He could have paid voluntary Class 3 National Insurance Contributions, thereby ensuring a full record for pension purposes and an entitlement to MPS, when it was introduced. I therefore reject his complaint.

41. I should state for completeness, that Mr B has made serious allegations of a criminal nature against E. They are simply not true. E played no part in Mr B's problems, as a very junior member of the Department at the time prior to 1995, when Mr B states that he tried to pay Class 2 contributions. Similarly, the counter staff could not accept payments from someone

who had not registered to pay contributions in the Isle of Man and in respect of whom there was no record, and no account to which such contributions could be credited.

42. For the reasons set out in this Report, I reject Mr B's complaint.

Addendum

43. In accordance with my usual practice, I sent this Report in draft to Mr B. I received a response from Mr I. He accepted the conclusions, but was critical of the Treasury for not providing cogent explanations in the meetings which he had attended, He considered that the customer care offered was somewhat lacking. I have seen correspondence from 1995 onwards and particularly in 1997 and 2007 from the Department. The language used is technical, and I am aware that the letters are now written in a simpler and more straightforward style, but answers were being provided. I also bear in mind that Mr B had available to him professional advice from his accountants. I do not consider it necessary to make recommendations on the basis of procedures which were in operation 25 years ago.

44. Mr B provided me with a long letter in which he disputed much of the draft Report. He also annotated the draft Report itself, and highlighted passages in documents which he had already provided. He also sent me copies of letters he had recently written to the Lieutenant Governor and the Ministry of Justice in London. I have read all of these, and have in consequence made some minor amendments, but I have not been provided with any new material which could lead me to a different conclusion. However, I do think that it might help if I summarise the basis for my conclusion.

45. The key points are set out below.

a. Mr B was a self-employed pilot and flying instructor in the UK and in a European country.

b. Between 1982 and 1988 Mr B did not pay any National Insurance contributions, because he had been granted Small Earnings Exception as a self-employed earner.

c. In 1988 Mr B and his then wife moved to the Isle of Man. Mr B instructed an accountant whom he engaged until 2010 to look after his tax and company affairs.

d. The accountant registered him for tax on the Isle of Man, and assisted him in acquiring a work permit as a "self-employed flying instructor", but did not register him for National Insurance.

e. According to Mr B he attempted to pay Class 2 National Insurance contributions, but because he was not registered for National Insurance, was unable to do so. His accountant is clear that he was unaware that he was trying to pay Class 2 contributions. He had not expected him to do so, but in any event, Mr B did not tell him that there was a problem or seek his assistance. He took no steps until 1995 to

transfer his Contribution record and never sought to have his employment status determined.

f. In February 1992, the Treasury Minister announced a new scheme, the Manx Pension Supplement, to take effect from April 1993. In order to qualify for this, it was necessary to have paid or been credited with an aggregate of at least 10 years National Insurance contributions on the Isle of Man. In the autumn of 1992, the scheme was the subject of considerable publicity. There is no evidence (and I consider it inherently unlikely) that cashiers and other junior operational staff could have known of the possibility of such a scheme in 1988 or indeed at any time prior to 1992.

g. In July 1995, Mr B received a pension forecast from the Benefits Agency in the UK, which indicated a deficiency in his contributions and provided options for payments for the year 1989/90 to 1994/95. He was out of time to pay for any earlier years, but one of the options was to make payments of Class 3 contributions for those years. As a result of this letter, Mr B and his then wife visited Newcastle and subsequently, on 23 August 1995, Mr B made voluntary contributions for the years 1989/90, 1993/94 and 1995/95. Although advised to pay 6 years' contributions, he did not pay for 1990/91, 1991/92 and 1992/93 and he has provided no satisfactory explanation for this omission. As a consequence of the payment, his National Insurance record was transferred to the Isle of Man from the UK.

h. On 17 March 1997, Mr B received a pension forecast from the Isle of Man DHSS in which he was told that he had no entitlement to MPS as he had insufficient contributions. He was advised to contact DHSS if he wanted help or advice about his pension. He did not do so. He received a further letter dated 15 June 1999, explaining that, as he was receiving 5 years' worth of National Insurance contribution credits, he could not improve his basic pension entitlement by paying Class 3 contributions. He was also told, again, that he would have no entitlement to MPS, and that he had 3 months in which to appeal the decision.

i. On 1 November 1999, changes were made to the rules for MPS. All contributions would count towards entitlement, whenever paid, in determining whether the 10 year requirement was met. From this it follows that had Mr B paid Class 3 contributions in 1995 for all six years, as he was advised to do, he would, with the 5 years credits which he had been awarded, have qualified for MPS.

j. In 2001, Mr B reached state retirement age and received a basic pension. He did not appeal this award. He first queried his entitlement to MPS by a letter dated 8 March 2007. He received a reply explaining that he had insufficient qualifying years. In the subsequent correspondence Mr B was reminded that he had failed to inform DHSS of his change of circumstances following his divorce and remarriage. He was also

told that he was out of time to appeal the 2001 pension decision. Mr B's accountants then entered into correspondence with DHSS without success.

k. In March 2014, Mr B requested permission to pay the missing Class 3 contributions, in order to satisfy the conditions for MPS. Mr E was the decision-maker, and refused the application because the Regulations do not permit the making of payments more than six years after the liability arose. In 2013/14, the years for which he was seeking to make the payments were more than six year earlier and payment could not be accepted.

l. Mr B appealed the decision to the SSAT on 23 May 2014. After the DHSS put in its statement of case, Mr B's advocate withdrew the appeal.

46. None of these facts supports Mr B's case that he was under a legal duty to pay Class 2 contributions or that he could not have paid Class 3 voluntary contributions in 1995/96. Had he made those payments timeously, he would have satisfied the qualifying conditions for MPS

Angela Main Thompson OBE
Tynwald Commissioner for Administration
30 June 2021