Neutral Citation: [2022] UKFTT 220 (TC)

Case Number: TC08543

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/01425

Coronavirus Job Retention Scheme – clawback of payments – payments made in respect of employees whose employment had commenced before 19 March 2020, but where the first RTI return to include information about them post-dated 19 March 2020 – whether payments to those employees represented "qualifying costs" for the purposes of the Coronavirus Act 2020 Functions of HMRC (Coronavirus Job Retention Scheme) Direction of 15 April 2020, as amended by subsequent directions made on 20 May 2020 and 25 June 2020.

Heard on: 7 July 2022
Judgment date: 14 July 2022

Before

TRIBUNAL JUDGE KEVIN POOLE

Between

CARLICK CONTRACT FURNITURE LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Neil Harrison, Managing Director and Sabin Ali, Finance Director

For the Respondents: Kim Johnson, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appears to be one of the earliest appeals before the Tribunal in relation to the attempted clawing back by HMRC of payments made to employers in respect of the furloughing of employees during the worst phases of the Coronavirus pandemic.

2. The reader may recall that the Coronavirus Job Retention Scheme ("CJRS") was introduced urgently at the start of the pandemic to provide funding for employers who furloughed their employees rather than making them redundant when businesses were effectively forced to shut down as a result of the lockdown announced in March 2020.

3. When the CRJS was introduced, it contained provisions designed to ensure it only applied in relation to employees who were taken on before the emergency started, and to permit HMRC to claw back any payments made in respect of employees who did not satisfy that condition.

4. This appeal concerns the clawing back by HMRC of payments made in respect of two employees from the Appellant's workforce whose employment with it commenced in February 2020 (clearly before the emergency started), but whose commencement date was too late for them to be included in the February payroll (and associated real time information reporting of the Appellant). They were included in the late March payroll run, at which time they were paid their wages from February as well as March. HMRC claimed that this meant that all the payments to them did not count as "qualifying costs" under the CJRS. They have accordingly issued an assessment to income tax to claw back the payments.

THE FACTS

5. We received witness statements from Neil Harrison and Sabin Ali, respectively the Managing Director and Finance Director of the Appellant, and from Malcolm Mayer, the HMRC officer who issued the relevant assessment. Mr Ali answered one supplemental question from Ms Johnson on his witness statement but otherwise the statements were taken as read and accepted as truthful by both the other side and the Tribunal, without the need for further oral testimony. Both Mr Harrison and Mr Ali impressed me as honest and straightforward individuals who have clearly managed the Appellant and its business extremely competently through very difficult times.

6. The Appellant carries on business manufacturing and supplying contract furniture to major high street pub, bar and restaurant groups. It has been established since 1973. At the start of 2020 it employed 130 staff and was a major employer in its geographical area on the outskirts of Manchester. The first full lockdown announced on 23 March 2020 caused it immediate major problems, with the hospitality sector (its core business market) closing down overnight. It was forced to close completely for two months, with all staff except the executive management team being furloughed. In order to survive, even with government support, the Appellant was forced to make 70 redundancies in two phases in June and October 2020.

7. Two individuals, Amanda Coleman and Andrew Boales, had been recruited by employment offer letters dated 18 and 19 February 2020 respectively, with the employment to commence in each case on Monday 24 February 2020. Ms Coleman signed her offer letter by way of agreement on 18 February 2020 and Mr Boales signed his offer letter by way of agreement on 24 February 2020, his first day of work. They were to be paid monthly, on or about the 26th day of each month (meaning that the bulk of their salary would be paid in arrears, but a few days in each calendar month would be paid in advance).

8. The Appellant normally runs its monthly payroll on the 26th of each month, and the payroll approval cut off date is three working days before that date, so in February 2020 it was

Friday 21 February 2020. In the case of Ms Coleman and Mr Boales, their employment commencement date meant that they could not be included in the February payroll and they were therefore first included in the next payroll run, carried out on 26 March 2020. The real time information submitted to HMRC in respect of this payment was actually included in a return made on 25 March 2020.

9. The two employees continued to receive their salary and the Appellant claimed payment in respect of them under the CJRS from its commencement on 1 April 2020 until they were both made redundant on 23 October 2020. Their costs were included in 7 claims under the CJRS in respect of the period up to October 2020.

10. On 2 November 2020, HMRC wrote to the Appellant informing it that it was carrying out a check into its claims under the CJRS. Information was sought and provided (the detail is not relevant here) but ultimately HMRC reached the view that because information about neither Ms Coleman nor Mr Boales was included in the real time information provided to HMRC for PAYE purposes up to 19 March 2020, the claims in respect of them were invalid and should be repaid. They raised an assessment to income tax under paragraph 9 of Schedule 16, Finance Act 2020 on 25 February 2021 in the sum of £22,018.97, of which £20,504.25 related to the payments which had been made in respect of Ms Coleman and Mr Boales (the remaining £1,514.72 related to another individual, in respect of whom HMRC were subsequently satisfied by the Appellant's explanations).

11. The Appellant appealed this decision, notified its appeal to the Tribunal and that is the matter now before me for adjudication. HMRC ask the Tribunal to confirm their assessment, in the reduced amount of £20,504.25.

THE LAW

12. Section 76 of the Coronavirus Act 2020 provided that "Her Majesty's Revenue and Customs are to have such functions as the Treasury may direct in relation to coronavirus or coronavirus disease." Section 71 of the same Act provided as follows:

> **71 Signatures of Treasury Commissioners**
>
> (1) Section 1 of the Treasury Instruments (Signature) Act 1849 (instruments etc required to be signed by the Commissioners of the Treasury) has effect as if the reference to two or more of the Commissioners of Her Majesty's Treasury were to one or more of the Commissioners.
>
> (2) For the purposes of that reference, a Minister of the Crown in the Treasury who is not a Commissioner of Her Majesty's Treasury is to be treated as if the Minister were a Commissioner of Her Majesty's Treasury.

The First CJRS Direction

13. Pursuant to these powers, on 15 April 2020 the Chancellor of the Exchequer signed a Direction, entitled "The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction" ("the First Direction"). The main body of the First Direction, running to just three paragraphs, provided as follows:

> 1. This direction applies to Her Majesty's Revenue and Customs.
>
> 2. This direction requires Her Majesty's Revenue and Customs to be responsible for the payment and management of amounts to be paid under the scheme set out in the Schedule to this direction (the Coronavirus Job Retention Scheme).
>
> 3. This direction has effect for the duration of the scheme.

14. The substance of the CJRS was then set out in the schedule to the First Direction, running to some 11 pages.

15. After an introduction to the CJRS and its purpose, the schedule specified in paragraph 3 the employers to which it applied (essentially any employer with a PAYE scheme registered on HMRC's real time information system on 19 March 2020). It is agreed that the Appellant meets this requirement.

16. Crucially, paragraph 5 of the schedule, headed "Qualifying costs", set out the costs for which a claim could be made under the CJRS:

> 5. The costs of employment in respect of which an employer may make a claim for payment under CJRS are costs which –
>
> (a) relate to an employee –
>
> (i) to whom the employer made a payment of earnings in the tax year 2019-20 which is shown in a return under Schedule A1 to the PAYE Regulations that is made on or before a day that is a relevant CJRS day,
>
> (ii) in relation to whom the employer has not reported a date of cessation of employment on or before that date, and
>
> (iii) who is a furloughed employee (see paragraph 6), and
>
> (b) meets the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee.

17. It is agreed that paragraphs 5(a)(ii) and (iii) and 5(b) are satisfied. With regard to paragraph 5(a)(i), HMRC refer to the definition of "relevant CJRS day" in paragraph 13.1 of the schedule:

> 13.1 For the purposes of CJRS –
>
> (a) a day is a relevant CJRS day if that day is –
>
> (i) 28 February 2020, or
>
> (ii) 19 March 2020.

18. Paragraph 12 of the schedule to the First Direction made it clear that payments under that Direction could only be made "in relation to amounts of earnings paid or payable by employers to furloughed employees in respect of the period beginning on 1 March 2020 and ending on 31 May 2020…"

19. Therefore, in relation to payments made in respect of later periods, one must look to a further Direction, issued in the same way and under the same authority, on 20 May 2020 ("the Second Direction").

The Second CJRS Direction

20. The Second Direction, pursuant to paragraph 2, "modifies the effect of" the First Direction. According to paragraph 3, "The CJRS direction continues to have effect but is modified so that the scheme to which it relates is that set out in the Schedule to this Direction."

21. In paragraph 5 of the schedule to the Second Direction, the "Qualifying costs" were specified in almost identical terms to those set out at [16] above (the differences are not material for present purposes, but essentially they represented an expansion of the scheme). An identical definition of "relevant CJRS day" was included at paragraph 13.1, and the duration of the scheme was extended by paragraph 12 from 31 May to 30 June 2020 (that is to say, to cover earnings paid or payable to furloughed employees in respect of the period beginning 1

March 2020 and ending on 30 June 2020, and associated employer's NI and pension contributions).

The Third CJRS Direction

22. A further Direction ("the Third Direction") was issued on 25 June 2020, which was expressed to further modify the scheme created by the First Direction and modified by the Second Direction. Those Directions were again stated as continuing in effect, but "modified as set out in the Schedule to this direction".

23. The schedule was divided into two parts. Part 1 was very short, and essentially simply imposed a deadline of 31 July 2020 for making claims under the First and Second Directions (covering the period up to 30 June 2020). Part 2 introduced the concept of "flexible furlough", and was stated to apply in respect of amounts of earnings paid or payable to flexibly furloughed employees in respect of the period beginning on 1 July 2020 and ending on 31 October 2020 (and associated employer's NI and pension contributions in respect of the shorter period from 1 to 31 July 2020).

24. Part 2 of the schedule provided that payments to (or in respect of) an employee under the new flexible furlough scheme could only qualify for a CJRS claim by the employer if the employee in question was subject to a claim under the original scheme:

> 10.3 This paragraph applies in relation to an employee if-
>
> (a) on or before 31 July 2020, the employee's employer makes a CJRS claim in accordance with the original CJRS directions in respect of the employee for a period ending on or before 30 June 2020, and
>
> (b) the employee ceased all work (whether directly or indirectly) for the employer (or a person connected with the employer) for a period of 21 calendar days or more beginning on or before 10 June 2020.

The Fourth CJRS Direction

25. A further Direction ("the Fourth Direction") was issued on 1 October 2020. Part 1 of the schedule to the Fourth Direction simply imposed a deadline of 30 November 2020 for the making of CJRS claims under the Third Direction. Part 2 of the schedule set out the terms of the "Coronavirus Job Retention Scheme (Job Retention) Bonus", a scheme which was subsequently withdrawn before any payments fell due under it.

Fifth and subsequent CJRS Directions

26. Further Directions were issued on 12 November 2020, 25 January 2021 and 15 April 2021. None of these are relevant for the purposes of the present appeal.

Liability and appeal provisions

27. Paragraphs 8 and 9 of Schedule 16 to the Finance Act 2020 provides, so far as relevant, as follows:

> **Charge if person not entitled to coronavirus support payment**
>
> **8**
>
> (1) A recipient of an amount of a coronavirus support payment is liable to income tax under this paragraph if the recipient is not entitled to the amount in accordance with the scheme under which the payment was made.
>
> …
>
> (5) The amount of income tax chargeable under this paragraph is the amount equal to so much of the coronavirus support payment
>
> (a) as the recipient is not entitled to, and

(b) as has not been repaid to the person who made the coronavirus support payment.

Assessments of income tax chargeable under paragraph 8

9

(1) If an officer of Revenue and Customs considers (whether on the basis of information or documents obtained by virtue of the exercise of powers under Schedule 36 to FA 2008 or otherwise) that a person has received an amount of a coronavirus support payment to which the person is not entitled, the officer may make an assessment in the amount which ought in the officer's opinion to be charged under paragraph 8.

(2) An assessment under sub-paragraph (1) may be made at any time, but this is subject to sections 34 and 36 of TMA 1970.

(3) Parts 4 to 6 of TMA 1970 contain other provisions that are relevant to an assessment under sub-paragraph (1) (for example, section 31 makes provision about appeals and section 59B(6) makes provision about the time to pay income tax payable by virtue of an assessment).

28. There was no suggestion that the assessment made by HMRC had been made outside the relevant time limits as provided for in sections 34 and 36 Taxes Management Act 1970 ("TMA"), so I consider the point no further.

29. As HMRC gave their "view of the matter" and offered a statutory review but the Appellant did not accept the offer, the Appellant's notification of its appeal to the Tribunal was made under section 49H TMA, as a result of which the Tribunal "is to determine the matter in question" (see section 49H(4) TMA). Accordingly, subsections 50(6) and (7) set out the jurisdiction of the Tribunal:

(6) If, on an appeal notified to the tribunal, the tribunal decides –

…

(c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment … shall be reduced accordingly, but otherwise the assessment… shall stand good.

(7) If, on an appeal notified to the tribunal, the tribunal decides –

…

(c) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment … shall be increased accordingly, but otherwise the assessment… shall stand good.

ARGUMENTS

For the Appellant

30. Mr Harrison and Mr Ali argued that the Appellant had followed the various guidelines as best it could in a rapidly moving commercial and legislative environment. The original announcement of the furlough scheme had been on the basis that employees had to be employed on 28 February 2020 for the scheme to apply to them, but this had been changed to 19 March 2020, they submitted, "to prevent people that recently changed jobs falling through the net".

31. In the light of the headline coverage at the time, which they said simply reported that "the employment dates had changed", they argued that the Appellant had acted reasonably in including these two employees in its claims.

32. The text of the original guidance referred to in the press release to which they referred was not before us. It appears to have been amended many times since then.

33. In any event, in all the circumstances, they argued that the Appellant's claims had been "in the spirit that the support was intended", having enabled the Appellant not to make the two employees redundant at the outset of the pandemic, accordingly the Tribunal should allow the appeal.

For HMRC

34. Ms Johnson submitted that the terms of both the First Direction and the Second Direction (and specifically paragraph 5(a)(i) in each case) were clear. Since no payments to Ms Coleman and Mr Boales were shown in the Appellant's real time information PAYE returns until the return that was submitted on 25 March 2020, the costs of employment, insofar as they relate to those two employees, were not costs which were permitted to be included in the Appellant's claim for payment under the CJRS; only employees for whom payments were reported by RTI no later than 19 March 2020 could be included in a claim.

35. In the unfortunate circumstances of this case, whilst it was fully accepted that the employees had actually been employed by the Appellant from 24 February 2020, payments to them did not qualify as costs which could be included in a CJRS claim.

36. Ms Johnson also referred to the Treasury Press Release published on 15 April 2020 (upon which the press coverage referred to by the Appellant had presumably been based), in which it was announced that "following a review of the delivery system and to ensure the scheme helps as many people as possible, new guidance published today has confirmed the eligibility date has been extended to March 19 2020 – the day before the scheme was announced." Whilst this text might, on its own, have supported the Appellant's case, she referred to the additional paragraph immediately following it, as follows:

> Employers can claim for furloughed employees that were employed and on their PAYE payroll on or before 19 March 2020. **This means that the employee must have been notified to HMRC through an RTI submission notifying payment in respect of that employee on or before 19 March 2020**. *[Emphasis added]*

This, she submitted, made it clear how the cut-off operated.

DISCUSSION AND DECISION

37. The First and Second Directions covered amounts paid or payable to employees for the period up to 30 June 2020 (and associated NI and pension costs). In respect of that period, I agree with Ms Johnson. Whilst I have every sympathy with the Appellant's position, the legislation is quite clear: for payments to (or in respect of) an employee to qualify under the CJRS, payment of earnings to that employee must have been included in an RTI PAYE submission not later than 19 March 2022, and unfortunately payments to Ms Coleman and Mr Boales were not.

38. As regards payments made in respect of the period from 1 July to 30 October 2020, one must look to the Third Direction. As set out above, that Direction did not repeat the eligibility criteria from the First and Second Directions, it simply "piggy backed" on the earlier Directions by providing that a claim could only be made in respect of employees in relation to whom a claim had been made under the First and Second Directions in respect of a period ending on or before 30 June 2022. Whilst the Appellant had certainly included the two employees in its

previous claims, it must be the case that only valid claims under the previous Directions could count for this purpose – otherwise completely fictitious claims in the earlier period could provide a basis for subsequent valid claims, which cannot have been the intention behind the Third Direction.

39. As to the Appellant's argument that the claims were in line with the "spirit" of the CJRS, and it would be unreasonable to exclude them on a technicality such as this, it is clear that this Tribunal has no jurisdiction to entertain such an argument. Its role is to adjudicate on the law and whilst there is some debate about the extent to which "public law" arguments on reasonableness and fairness can properly form part of the Tribunal's decision-making process in some circumstances, there does not seem to me to be any scope for such arguments here, where the Directions draw such a clear bright line to determine eligibility for the scheme.

40. It follows that the appeal should be ALLOWED IN PART, to the extent of reducing the assessment, as requested by HMRC, from £22,018.97 to £20,504.25. I therefore reduce the assessment accordingly. Save to this extent, the appeal is DISMISSED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

41. 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.

KEVIN POOLE
TRIBUNAL JUDGE

Release date: 15 JULY 2022