



Neutral Citation: [2024] UKFTT 00541 (TC)

Case Number: TC09211

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2023/00541

INCOME TAX – Coronavirus Job Retention Scheme – whether reference salary calculated correctly – whether figures on Real Time Information returns must be used in preference to actual salary – no – appeal allowed in part

Heard on: 21 March 2024
Judgment date: 19 June 2024

Before

**TRIBUNAL JUDGE MALCOLM FROST
IAN SHEARER**

Between

FARSHAD KHALILI-MOTLAGH T/A BORGE RESTAURANT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant did not appear and was not represented

For the Respondents: Sophia Taj, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is an appeal against two assessments seeking to recover overpayments made pursuant to the Coronavirus Job Retention Scheme (“CJRS”) (often referred to as furlough payments).
2. The Appellant, Farshad Khalili-Motlagh (“FKM”), had indicated that he wished to withdraw his appeal, save in relation to £2,810.08 of the assessments.
3. For the reasons set out below, we allow the appeal to the extent of the £2,810.08 and dismiss the remainder of the appeal.
4. With the consent of the parties, the form of the hearing was V (video), using the Tribunal video hearing system.
5. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

PRELIMINARY ISSUE

6. FKM sent an email to the Tribunal on the day before the hearing indicating that he was not able to attend and asking that the Tribunal consider his application on the submissions provided so far.
7. On that basis, the Tribunal were content that FKM had been notified of the hearing and that it would be in the interests of justice to proceed in his absence. Accordingly, pursuant to rule 33 of the Tribunal Rules, the hearing proceeded in FKM’s absence.

BACKGROUND FACTS

8. FKM is a sole trader and sole owner of Borge Restaurant – a small Italian restaurant that he has had an interest in since 1984 when it opened.
9. FKM made CJRS claims on behalf of his employees during the coronavirus pandemic.
10. On 10 November 2021, following correspondence between FKM and HMRC, HMRC issued two notices of assessment (one for tax year ending 5 April 2021 and one for tax year ending 5 April 2022) to FKM under paragraph 9 of Schedule 16 Finance Act 2020. The assessments were in the total sum of £8,534.40.
11. On 30 December 2021, FKM appealed the assessments.
12. FKM only maintains his appeal in relation to one aspect of the assessments. This relates to three employees who FKM maintains were in fact paid more than was shown on Real Time Information (“RTI”) returns. We have referred to these employees as LE, WR, and LB (collectively the “Relevant Employees”).

THE LAW

13. Section 76 of the Coronavirus Act 2020 provides that HMRC are to have such functions as the Treasury may direct in relation to coronavirus.
14. Pursuant to these powers, the Treasury introduced the Coronavirus Direction dated 15 April 2020 (“the Coronavirus Direction”). This was subsequently followed by a number of updated directions in relation to CJRS during the pandemic. The subsequent directions do not differ materially and we simply set out the first direction below.

15. Under paragraph 2.1 of the Schedule to the Coronavirus Direction, the CJRS was established to provide support payments to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus. The scheme allowed a qualifying employer to apply for reimbursement of the expenditure incurred by the employer in respect of the employees entitled to be furloughed under the scheme.

16. Under paragraph 3 of the Schedule to the Coronavirus Direction, an employer can make a claim for Support Payments under the CJRS if they had a PAYE scheme registered on HMRC's Real Time Information ("RTI") system for PAYE by 19 March 2020.

17. Paragraph 5 of the Schedule to the Coronavirus Direction details the 'Qualifying Costs' an employer is entitled to claim for under the CJRS. These are costs which:

- (1) relate to an employee
 - (a) 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,
 - (b) in relation to whom the employer has not reported a date of cessation of employment on or before that date, and
 - (c) who is a furloughed employee (as defined).
- (2) meet the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee.

18. Paragraph 5 of the Schedule to the Coronavirus Direction refers to Schedule A1 to the PAYE Regulations. Paragraph 67B of the PAYE Regulations states that "on or before making a relevant payment to an employee, a Real Time Information employer must deliver to HMRC the information specified in Schedule A1 in accordance with this regulation".

19. Schedule A1 details what information regarding payments to employees must be given to HMRC. This information includes the date of the payment made and the employee's pay frequency.

20. "Relevant CJRS day" is defined by paragraph 13.1 of the Coronavirus Direction as 28 February 2020 or 19 March 2020.

21. Paragraph 8 of the Schedule to the Coronavirus Direction sets out what expenditure can be reimbursed in a CJRS claim. The reimbursement is the lower of £2500 per month and an amount equal to 80% of the employee's "reference salary".

22. Paragraph 7 of the Schedule to the Coronavirus Direction provides more detail as to how to determine the reference salary. Paragraph 7.1 states:

7.1 Costs of employment meet the conditions in this paragraph if-

- (a) they relate to the payment of earnings to an employee during a period in which the employee is furloughed, and
- (b) the employee is being paid-
 - (i) £2500 or more per month (or, if the employee is paid daily or on some other periodic basis, the appropriate pro-rata), or

(ii) where the employee is being paid less than the amounts set out in paragraph 7.1(b)(i), the employee is being paid an amount equal to at least 80% of the employee's reference salary.

23. Paragraph 7.2 states:

7.2 Except in relation to a fixed rate employee, the reference salary of an employee or a person treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership) is the greater of-

(a) the average monthly (or daily or other appropriate pro-rata) amount paid to the employee for the period comprising the tax year 2019-20 (or, if less, the period of employment) before the period of furlough began, and

(b) the actual amount paid to the employee in the corresponding calendar period in the previous year.

24. It is common ground between the parties that none of the employees in question were fixed rate employees.

25. Paragraph 8 of Schedule 16 to Finance Act 2020 makes a recipient of Support Payments under CJRS liable to income tax where a claim is made incorrectly. Paragraph 8(5) details the amount of income tax chargeable as being equal to the amount of support payment to which the applicant was not entitled and has not been repaid. In addition, and as regards Corporation Tax computations, no deduction is allowed in respect of the payment of income tax under paragraph 8(8).

26. Paragraph 9 affords HMRC the power to make assessments to income tax as chargeable under paragraph 8. An Officer, under paragraph 9(1), may make an assessment where he considers that a person has received an amount of Support Payment to which he was not entitled in an amount which ought in the Officer's opinion to be charged under paragraph 8.

27. The assessment may be made at any time under paragraph 9(2), but subject to the statutory assessing time limits pursuant to sections 34 and 36 of the Taxes Management Act 1970 ("TMA"). Parts 4 to 6 of the TMA also apply to this appeal, particularly those relating to the appeal provisions.

THE ISSUES

28. As a result of FKM withdrawing his appeal in relation to most aspects of the relevant assessments, the sole issue remaining before this Tribunal is whether the assessments have been correctly computed in relation to the Relevant Employees. This depends on the Tribunal's determination of the reference salary as defined in paragraph 7.2 of the Schedule to the Coronavirus Direction.

29. The assessments were calculated using figures obtained from RTI returns. FKM maintains that the RTI figures were incorrect and did not reflect the amounts actually paid to the Relevant Employees. HMRC submit that the RTI figures must be taken to be definitive.

30. This results in two questions falling to be determined:

(1) What was the average weekly amount actually paid to the relevant employees for the purposes of paragraph 7.2 of the Schedule to the Coronavirus Direction;

(2) In the event of a conflict between the average amount actually paid, and the figures reported to HMRC via the RTI system, are the RTI figures to be taken to be definitive.

31. The documents to which we were referred were a hearing bundle of 1098 pages and a supplementary bundle of 26 pages. We also had the benefit of skeleton arguments from both parties. Officer Paul Heaney gave evidence in person. On the basis of that evidence and submissions, we make our detailed findings below.

32. HMRC also made submissions to the effect that case law indicated that there was no scope for the Tribunal to alter the conditions of the CJRS on any compassionate grounds. We understand that such submissions may have been relevant to grounds of appeal that FKM had withdrawn prior to the hearing. For the avoidance of doubt, our decision below is based on the strict reading of the statutory requirements of CJRS.

What was the average weekly amount actually paid to the Relevant Employees?

33. The difference between the usual pay figures relied on by HMRC and FKM are as follows:

Name	Usual Pay Figure (Provided by FKM)	Usual Pay Figure (From RTI returns)
LE	£145	£70
LB	£70	£50
WR	£150	£90

34. FKM submitted that the Relevant Employees were mistakenly being paid more than the amount recorded in RTI submissions. FKM had stated in written pleadings that:

“The majority of the waiting staff are students, they work part-time and in my business nearly always receive pay below both the national insurance and tax thresholds due to their part time hours.

Prior to Covid, most employees were paid cash and the payments recorded on an RTI submission.

Unfortunately, mistakes have been made where some employees had increased their routine shifts and this has not been recorded in the RTI submission.”

35. FKM maintained that the inaccuracies on the RTI returns did not alter the tax position as the staff earnings were below any tax threshold.

36. Instead, FKM submitted, the only tax effect of the inaccuracies is that FKM’s overall wage bill for the year has been understated. The result of this would be FKM paying higher income tax (presumably because of reduced deductions being made from his taxable profits). FKM put this as: “my mistake was HMRC’s gain”.

37. In support of his contentions as to the correct wages, FKM provided witness statements from each of the Relevant Employees. The witness statements were signed, but the witnesses did not attend the hearing and so were not cross examined.

38. The relevant paragraphs from the witness statement of LE state:

“2. I usually worked at least 5 shifts per week; 4 evenings and one lunchtime. I was paid on average £35 per evening shift and £20 for the lunchtime shift. Therefore, my usual weekly wage was £160.

3. The restaurant closed in March 2020 due to the pandemic and I was placed on furlough.

4. When I received the first furlough payment I queried the amount paid, via a text exchange on the 30th March 2020 (Exhibit LE1) as I was expecting to be paid 80% of my usual weekly wage of £160.

5. Following my query my furlough pay was amended to be £116 per week being 80% of £145. This was confirmed to me by text on the 31st March 2020 and I accepted this as being reflective of my average earnings in the period prior to lockdown.”

39. The witness statement is supported by screenshots of a text message exchange between FKM and LE in which LE queries whether the income figure is correct and FKM agrees to check the figures.

40. The witness statements from the other two Relevant Employees are in similar terms. The witness statement for LB is supported by text message extracts, the statement for WR is not.

41. HMRC provided evidence from Officer Heaney who carried out the investigation and issued the assessments. Officer Heaney of course had no first-hand knowledge of the amounts actually paid to the staff, but explained how he had sought further information from FKM during his investigation and when such information was not forthcoming he had relied on RTI figures. Officer Heaney stated that the witness statements did not change his view as to the correct figures.

42. Ms Taj, from HMRC submitted that the witness statements should not be given weight as they were “uncorroborated and after the fact”.

43. Ms Taj also drew our attention to references in the text messages to “recent” working patterns rather than the historic averages required by the Coronavirus Direction. However, we consider this is a misreading of the relevant messages as, although there is discussion of more recent patterns, the figures under consideration are clearly those relating to historic pay. For example, LE states “i’ve always done 3 [shifts] and a morning for more than a year now”.

44. We appreciate that the statements were not provided in the course of HMRC’s investigation. We also take into account the fact that the witnesses themselves were not available for cross examination. We also bear in mind the further evidence that could have been made available but was not made available – such as detailed records of shift patterns or full payslips.

45. However, we are also mindful that these are relatively small sums paid to relatively casual staff. We can well accept that in relation to such staff there may be inaccuracies in RTI information – particularly where the inaccuracies have no tax impact due to the staff being below relevant tax thresholds.

46. The provision of signed witness statements supported (in two cases) by contemporaneous messages leads us to find, on the balance of probabilities, that the figures provided by FKM were the correct average weekly amounts for the purposes of the Coronavirus Direction.

Are RTI figures to be taken to be definitive

47. Ms Taj submitted that, even if the Tribunal were to accept FKM’s position that the RTI records were inaccurate (which we do), the relevant legislation nonetheless required the RTI figures to be followed.

48. This submission derives from the construction of paragraph 7.2 of the Schedule to the Coronavirus Direction in the context of paragraph 5 to that schedule.

49. Paragraph 5 is set out earlier in this decision. It requires that only employees to whom the employer has made a payment of earnings shown in an RTI return can be the subject of a CJRS claim.

50. Paragraph 7, and particularly 7.2, then sets out how to determine the amount to be paid. It is worth reproducing the wording here:

7.2 Except in relation to a fixed rate employee, the reference salary of an employee or a person treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership) is the greater of-

(a) the average monthly (or daily or other appropriate pro-rata) amount paid to the employee for the period comprising the tax year 2019-20 (or, if less, the period of employment) before the period of furlough began, and

(b) the actual amount paid to the employee in the corresponding calendar period in the previous year.

51. Paragraph 7.2 provides that the reference salary is the greater of two amounts, either the average amount paid in the period leading up to the furlough period, or the amount paid in the corresponding period in the previous year.

52. It is notable that paragraph 7.2 does not state on its face that the figures from RTI reports are to be used, but refers to ‘the amount paid to the employee’.

53. Ms Taj submitted that paragraph 7 must be seen as following from paragraph 5, and that therefore references to amounts paid should be read as ‘amounts reported as paid under RTI’.

54. Ms Taj suggested that to allow non-RTI figures to be accepted would open up the scheme to fraudulent and abusive claims.

55. We reject that suggestion. RTI is a means by which an employer reports earnings figures to HMRC. It is perfectly possible for such figures to be incorrect and subject to later adjustment. A fraudulent claimant could just as easily amend RTI figures as make a fraudulent claim by any other means.

56. Ms Taj also referred to *Bandstream Media and Corporate Communications Ltd v HMRC* [2024] UKFTT 00011, in which the Tribunal at [26] referred to the legislation as being “designed to fix an employee’s salary to that recorded on the latest RTI submission prior to 19 March 2020.”

57. We do not consider that the Tribunal in that case was intending to say that HMRC and taxpayers were bound by errors in RTI returns, rather that it was not open to an employer to retrospectively increase the salaries paid in order to inflate CJRS payments. There is no suggestion in the present case of any retrospective modification, the RTI returns were (as we have found) simply incorrect.

58. Overall, Ms Taj’s argument does not in our view have any merit. If the legislative draftsman had intended for RTI figures to be the definitive source of information it would have been simple to state as much, and obviate the need for much of the drafting of paragraph 7 aimed at determining the correct figure.

59. We prefer the argument put forward by FKM that, although paragraph 5 determines who can receive CJRS payments by reference to inclusion on RTI, paragraph 7 does not constrain the quantification of CJRS payments solely to amounts included on RTI returns.

60. As a result, we find that the reference salary for each the Relevant Employees was the figure put forward by FKM, as set out in the table above. The CJRS figures in relation to those employees were therefore calculated correctly.

CONCLUSION

61. For the reasons set out above, we allow the appeal to the extent of the £2,810.08 figure disputed by FKM and dismiss the remainder of the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

**MALCOLM FROST
TRIBUNAL JUDGE**

Release date: 19th JUNE 2024