Neutral Citation: [2024] UKFTT 00546 (TC)

Case Number: TC09216

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/19793

Coronavirus Job Retention Scheme – clawback of payments - the Coronavirus Act 2020 Functions of HMRC (Coronavirus Job Retention Scheme) Direction of 15 April 2020, as amended – first relevant RTI return for relevant employees after 19 March 2020 – whether payments "qualifying costs" – no – whether appellant entitled to rely on public law arguments - no

Heard on: 3 May 2024
Judgment date: 19 June 2024

Before

TRIBUNAL JUDGE IAN HYDE
JOHN ROBINSON

Between

PIPSQUID LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Nicholas Green, director

For the Respondents: Louise Dawson, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns the conditions for funding under the Coronavirus Job Retention Scheme ("CJRS") for employers who furloughed their employees during the coronavirus pandemic.

2. The central issue in this appeal is whether HMRC can clawback CJRS support payments made to the appellant in respect of four employees where the first Real Time Information ("RTI") PAYE returns in respect of those employees were made after 19 March 2020 or whether public law arguments can be relied upon by the appellant to preserve its entitlement to the payments.

THE FACTS

3. Mr Green, the sole director of the appellant, represented the appellant in the hearing. He did not provide a witness statement but gave oral evidence.

4. Ms Tatiana Jagus, an HMRC officer, provided a witness statement and gave oral evidence as to her role in the investigation into the appellant's CJRS claims. Prior to Covid, Ms Jagus worked in Individual and Small Business Compliance until she was redeployed to COVID schemes compliance in September 2020 to work on post payment compliance checks of CJRS grants. On 30 September 2021 the ongoing investigation into the appellant which had been commenced by another officer, Mr Malcolm Weir, was transferred to her. At that point a decision had been made to raise assessments and the appellant had requested a review.

5. We found both witnesses to be truthful and reliable. The facts in this appeal are largely agreed and we find the facts as follows.

The appellant

6. The appellant operates a restaurant and immediately before the Covid pandemic employed a number of staff. In February 2020 Mr Green was in the process of moving employees over to RTI, the online PAYE system introduced in 2013, but had not done so for all employees. Accordingly, at this point RTI returns were being made in respect of some employees but not others.

7. On 10 February 2020 Mr Green's daughter became seriously ill and was hospitalised for some time, including the period during which he was trying to deal with the CJRS claims. During this period Mr Green said, and we accept, that it was very difficult for him to concentrate on the business and the transfer of staff over to RTI did not start again until March 2020.

The making of the claims, HMRC's investigation, the assessment and the appeal

8. Prior to the launch of the CJRS portal on 20 April 2020, Mr Green contacted HMRC on a number of occasions to try and establish whether CJRS claims could be made where there were late RTI returns. According to Mr Green he was not told claims could not be made.

9. On 26 March 2020 HMRC released guidance on claiming under the CJRS scheme. This guidance provided:

> "You can only claim for furloughed employees that were employed on 19 March 2020 and who were on your PAYE payroll on or before 19 March 2020. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 19 March 2020."

10. On 20 April 2020 Mr Green made a number of calls to the CJRS helpline about whether the appellant could make claims and he was advised to make the claims but that invalid claims would be rejected.

11. Between 28 April 2020 to 14 December 2020 the appellant applied for and received 15 CJRS support payments on behalf of four employees, as described below.

12. On 18 September 2020, Mr Weir issued a letter to the appellant, informing them that a compliance check was being undertaken into their CJRS claims.

13. Following that opening letter there followed a series of correspondence between the parties during which the appellant provided HMRC with evidence, including evidence of payment of salaries to the relevant employees prior to March 2020. Mr Green also provided HMRC with calculations showing there had been an error in the CJRS claims and accepted that £10,549.18 should be repaid by the appellant. Mr Green also provided evidence to explain why the RTI was submitted after the relevant date.

14. On 5 March 2021, Mr Weir issued an assessment under Paragraph 9 of Schedule 16 Finance Act 2020, in the amount of £45,361.55.

15. On 31 March 2021, the appellant requested a review of the decision to assess and in further correspondence provided additional information to HMRC.

16. On 5 October 2021, Ms Jagus issued a view of the matter letter upholding the assessment and notifying the appellant that a statutory review would be taking place.

17. On 2 December 2021, following further correspondence HMRC issued its review conclusion letter, upholding the original decision.

18. On 28 December 2021, the appellant appealed the review conclusions to the Tribunal.

The CJRS claims and the relevant employees

19. This appeal is concerned with the 15 CJRS claims totalling £45,361.55 made in the period 28 April 2020 to 14 December 2020 and related to four employees.

20. The four employees and the date on which a payment to them was first reported under RTI are as follows:

(1)	J Reynolds	26 March 2020
(2)	A Hernandez	26 March 2020
(3)	N Green	27 March 2020
(4)	P Whiten	15 April 2020

21. These claims can be conveniently broken down as follows:

(1) £39,785.74 of CJRS claims were made under the First Direction, as described below

(2) £5,575.81 of CJRS claims was made under the Fifth Direction, as described below, in the months of November and December 2020 in respect of Mr Green and Mr Reynolds.

Issues in this appeal

22. HMRC's position is that the appellant did not meet the conditions for claiming CJRS support payments under the First Direction. Specifically, to make a CJRS claim under the First Direction the employment costs must relate to an employee to whom an employer has made a payment of earnings which have been reported to HMRC under RTI on or before 28

February or 19 March 2020. This was not the case and it is irrelevant that the employees were paid or on the appellant's payroll by those dates. The First Direction does not include any grace period or reasonable excuse type of defence and this Tribunal does not have jurisdiction to consider public law arguments.

23. The appellant accepts that the first RTI returns for the four employees were made after 19 March 2020 and so were late, however Mr Green argued that the appellant should nevertheless be entitled to keep the CJRS payments. The appellant should therefore only have to repay £10,575.33 being an overpayment due to their incorrect calculation of the relevant employees' pay over the relevant period.

24. HMRC have also accepted that the CJRS claims totalling £5,575.81 made in the months of November and December 2020 in respect of Mr Green and Mr Reynolds and under the Fifth CJRS Direction were valid and requests that the Tribunal exercise its powers under section 50(6) Taxes Management Act 1970 ("TMA") to reduce the assessment to £39,785.74.

THE CJRS REGIME

25. 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."

The First CJRS Direction

26. Pursuant to the powers under Section 76, on 15 April 2020 the Chancellor of the Exchequer signed a Direction, "The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction" ("the First Direction") which provided:

> "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."

27. The substance of the CJRS was then set out in the schedule to the First Direction.

28. At paragraph 3 the schedule specified that CJRS applied in principle to any employer with a PAYE scheme registered on HMRC's RTI system on 19 March 2020. It is agreed that the appellant meets this requirement.

29. Paragraph 5 of the schedule, headed "Qualifying costs", set out the costs for which a claim could be made by an employer 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.

30. For the purposes of paragraph 5(a)(i), the reference to a return under Schedule A1 to the PAYE Regulations is to a return under the RTI system and "relevant CJRS day" is defined 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"

The Second, Third and Fourth CJRS Direction

31. The First Direction only applied 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 (paragraph 12 of the First Direction).

32. Further Directions were issued to modify the effect of the First Direction on 20 May 2020 ("the Second Direction"), 25 June 2020 ("the Third Direction"), 1 October 2020 ("the Fourth Direction") but nothing in those Directions impacts on this appeal.

The Fifth CJRS Direction

33. A further Direction ("the Fifth Direction") was issued on 12 November 2020, which was expressed to modify further the CJRS scheme created by the First Direction and as already modified by the later Directions. Paragraph 2 of the Fifth Direction modifies the effect of the First Direction in accordance with the terms of the schedule to the Fifth Direction (paragraphs 2 and 3 of the Fifth Direction) extending CJRS to cover earnings paid or payable to employees in the period 1 November 2020 to 31 January 2021.

34. Paragraph 6 of the schedule defines a qualifying employee:

> "6.2 An employee is a qualifying employee for the purposes of CJRS if-
>
> (a) the employer making the CJRS claim made a payment ("the payment") to the employee, and
>
> (b) the payment was reported to HMRC pursuant to paragraph 22 of Schedule A1 to the PAYE Regulations in a return that the employer is required to deliver in accordance with regulations 67B or 67D of those Regulations,
>
> (c) the return mentioned in paragraph 6.2(b) was delivered to HMRC-
>
> (i) after 19 March 2020, and
>
> (ii) before 31 October 2020, and
>
> (d) the employer has not reported to HMRC a cessation of the employee's employment after the payment (or the latest of such payments if more than one has been made)."

Later CJRS Directions

35. Further CJRS Directions were issued but they are not relevant to this appeal.

Reclaim and appeal mechanism

36. The mechanism under which wrongly paid CJRS support payments are recovered is by the imposition of a charge to income tax equal to the wrongly claimed payment.

37. 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)."

38. The Taxes Management Act 1970 ("TMA") therefore applies to determine the procedure for an appeal against an assessment under paragraph 9. No procedural point arises in this appeal except it is relevant to note the jurisdiction of the Tribunal as set out in subsections 50(6) and (7) TMA:

> "(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"

PAYMENTS UNDER THE FIRST DIRECTION

the First Direction conditions

39. HMRC argue that the appellant is liable to repay the £39,785.74 of CJRS support payments made under the First CJRS Direction because the appellant did not meet the conditions under the CJRS scheme.

40. HMRC accept that the appellant meets all the conditions to claim CJRS support payments under the First Direction, except the requirement in paragraph 5(a)(i):

> "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

…"

41. For this purpose, "relevant CJRS day" is defined in paragraph 13.:

"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"

42. In effect to make a CJRS claim under the First Direction the employment costs must relate to an employee to whom an employee has made a payment of earnings which have been reported to HMRC under RTI on or before 28 February or 19 March 2020.

43. HMRC noted that it was an agreed fact in this appeal that the appellant had not migrated the four employees to RTI in time and so the first RTI returns showing them were submitted between 26 March 2020 and 15 April 2020, after the relevant CJRS day. The First Direction does not include any grace period or reasonable excuse type of defence. Accordingly, the appellant was not entitled to the CJRS support payments.

44. This approach has been taken in other decisions of this Tribunal (*Carlick Contract Furniture Limited v HMRC [2022] UKFTT 00220, (TC) Oral Healthcare Limited v HMRC* [2023] UKFTT 00357 (TC), *Top- Notch Accountants Limited v HMRC* [2023] UKFTT 00473 (TC) *Raystra Healthcare Limited v HMRC* [2023] UKFTT 496 (TC), *Sentinel Fire and Security Systems Limited v HMRC* [2023] UKFTT 00550 (TC) and *Luca Delivery Limited v HMRC* [2023] UKFTT 00278 (TC)).

45. The appellant does not challenge or dispute that the condition as set out in paragraph 5(a)(i) was not met.

46. We agree with HMRC and the previous decisions of this Tribunal. The First Direction is very clear in the conditions for making a claim and find that, subject to any public law points as discussed below, the appellant was not entitled to make the CJRS claims.

The appellant's arguments

47. The appellant accepts that the first RTI returns for the four employees were made after 19 March 2020 and so were late, however the appellant should be entitled to retain the CJRS support payments for the following reasons:

(1) Mr Green was not able to move all of his employees across to RTI in part because his daughter was in hospital;

(2) The appellant has provided sufficient evidence that the employees claimed for were on the payroll prior to 19 March 2020 and so the claims should be accepted;

(3) The appellant should not be liable to repay the CJRS support payments as it had sought advice from HMRC on many occasions and they could not advise whether the claims would be accepted or not;

(4) As the payments were made by HMRC, the appellant assumed that the late submissions had been accepted and it is entirely disproportionate and damaging to have to pay the money back;

(5) Once the inquiry was opened Mr Green was anxious about the risk of a penalty being raised and HMRC did not tell him no penalty would be raised until 18 March 2021. This could have been done sooner; and

(6) There was a significant delay in HMRC's enquiry specifically between the request for a review on 31 March and HMRC's issue of the view of the matter letter on 5 October 2021

48. The appellant should therefore only have to repay £10,575.33 being an overpayment due to their incorrect calculation of the relevant employees' pay over the relevant period.

49. Mr Green recognised that the case law on the Tribunal's jurisdiction to consider public law principles was against him but referred in the hearing to the decision of the Upper Tribunal in *KSM Henryk Zeman* (2021) UKUT 0182 where the Upper Tribunal decided that public law principles were relevant.

50. HMRC argued that this Tribunal does not have jurisdiction to consider public law arguments such as those being raised by the appellant in this appeal. There is a clear line of authority provided by the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) (paragraphs 54-58), *Abdul Noor v HMRC* (paragraph 95) and in the direct tax context by the Court of Appeal in *Trustees of the BT Pension Scheme v HMRC* (paragraphs 142-143).

51. The Upper Tribunal and Court of Appeal in those appeals concluded that the better view regarding the jurisdiction of this Tribunal is that the Tribunal has no general jurisdiction to determine matters which are amenable to an action for judicial review in the Administrative Court, including matters of fairness and/or legitimate expectation. This Tribunal has a purely statutory jurisdiction given to it by the Tribunals, Courts & Enforcement Act 2007 and the relevant taxing statute which provides for a right of appeal.

52. This point had been considered previously by this Tribunal in the context of CJRS claims in the appeals listed above. The Tribunal has decided in HMRC's favour in all cases, and confirmed they did not have any jurisdiction to consider the fairness of the CJRS regime.

53. For example, Judge Scott in *Oral Healthcare Limited* said:

> [57] "Lastly, for completeness, as we confirmed to Mr Patel in the course of the hearing, whilst we note his argument that the claims were in line with the spirit of the CJRS, in that the employees kept their jobs, nevertheless the Tribunal has no jurisdiction to entertain such an argument. The Tribunal is a creature of statute and has only the powers given to it by statute and must apply the law to the facts. In a similar vein, as the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) made clear, the Tribunal has no jurisdiction to consider whether or not the law is fair."

54. Whilst the Tribunal decisions are not binding, HMRC argued they are correct and highly persuasive.

55. Finally, Ms Dawson for HMRC objected to the appellant relying on the Upper Tribunal's decision in *Zeman.* The appellant only referred to the decision part way through the hearing. In accordance with the Tribunal's directions, HMRC and the Tribunal should have been notified 14 days before the hearing of any authorities that it intended to rely upon.

56. Whilst there may be debates in other contexts about the relevance of public law arguments to appeals in this Tribunal, in the context of the CJRS regime, we agree with HMRC and accept that this Tribunal does not have jurisdiction to consider the appellant's arguments. The CJRS regime has very clear conditions and no provision, as found in other parts of the tax legislation, for relief if there is a reasonable excuse or other mitigating circumstances. Whether the First Direction should have included such provisions is not an

issue for this Tribunal and we cannot add such protections into the statutory regime. That being the case the appellant's arguments are a matter of public law and outside the jurisdiction of this Tribunal.

57. In reaching this conclusion we agree with HMRC that the decision in *Zeman* was produced by the appellant far too late and to admit it would be to prejudice HMRC and we do not do so. In any event we note that the decision concerned the application of public law principles in the context of the requirement in Section 73(1) Value Added Tax Act 1994 for HMRC to issue VAT assessments to best judgment, a wholly different context to the mechanical conditions in the CJRS regime and it would not have changed our view on the Tribunal's jurisdiction.

THE £10,575.33 OVERPAYMENT

58. The appellant argues that the only repayment it should make is £10,575.33 being an overpayment due to their incorrect calculation of the relevant employees' pay over the relevant period.

59. HMRC argue and we agree that the appellant's point is irrelevant if HMRC are right and the appellant is not entitled to the any of the CJRS support payments. The argument is essentially conceding an adjustment to the original claims but presuppose that the claims are valid. If they are not then the adjustment is irrelevant.

60. As we have found the appellant is not entitled to the CJRS payments at all this argument necessarily fails and we do not consider it necessary to address where there was such an over payment.

PAYMENTS UNDER THE FIFTH DIRECTION

61. It is agreed between the parties, and we have found, that of the total CJRS claims £5,575.81 was made in the months of November and December 2020 in respect of Mr Green and Mr Reynolds.

62. These claims were therefore subject to the CJRS conditions as varied by the Fifth CJRS Direction. HMRC now accept that the conditions for these claims are satisfied in that the first payments reflected in RTI returns for Mr Green and Mr Reynolds, being 27 March 2020 and 26 March 2020 respectively, whilst late for the purposes of earlier claims, satisfy the condition in paragraph 6.2(c) that a payment of earnings was made and reported on the RTI return after 19 March 2020 and before 31 October 2020.

63. HMRC therefore wish the Tribunal to exercise its powers under section 50(6) TMA to reduce the assessment to £39,785.74.

64. We agree that this is appropriate.

DECISION

65. In our view the CJRS claims made by the appellant do not satisfy the conditions for claiming CJRS support payments amounting to £39,785.74 under the First Direction.

66. We do not accept we have jurisdiction to ignore the conditions clearly set out in the First Direction nor to apply public law principles to afford the appellant protection.

67. As regards the claims totalling £5,575.81 made under the Fifth Direction, we agree that the Tribunal to exercise its powers under section 50(6) TMA to reduce the assessment to £39,785.74.

68. We direct that the assessment be reduced by £5,575.81 to £39,785.74 but, subject to that adjustment, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. 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.

IAN HYDE
TRIBUNAL JUDGE

Release date: 19 June 2024