Neutral Citation: [2024] UKFTT 00744 (TC)

Case Number: TC09262

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video/telephone hearing]

Appeal reference: TC/2023/00794

CORONAVIRUS JOB RETENTION SCHEME- Whether claims for payments under the CJRS were correctly calculated - no- whether claim had to refer to those employees shown on a Real Time Information return by 28 February 2020 or by 19 March 2020 - yes- whether the assessments should be reduced - yes- Appeal dismissed. Paragraphs 5,7 and 8 of the Coronavirus Act 2022 Functions of Her Majesty's Revenue & Customs (Coronavirus Job Retention Scheme) Directions and paragraphs 8 and 9, Schedule 16 Finance Act 2020

Heard on: 09 July 2024
Judgment date: 15 August 2024

Before

TRIBUNAL JUDGE RUTHVEN GEMMELL WS
TRIBUNAL MEMBER NOEL BARRETT

Between

JOSOEMAG SERVICES LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

<u>Representation:</u>

For the Appellant: Emmanuel Joshua, Director of Josoemag Services Limited, ("counsel for JSL")

For the Respondents: Louise Dawson, Litigator of HM Revenue and Customs' Solicitor's Office, ("counsel for HMRC")

DECISION

INTRODUCTION

1. The form of the hearing was by video, and all parties attended remotely. The remote platform used was the Tribunal video hearing system. The documents which were referred to comprised of an amended Hearing bundle of 731 pages and a skeleton argument and a claim by Josoemag Services Limited ("JSL") and response by HMRC in relation to whether or not there had been a change in HMRC's policy regarding employees notified on a Real Time Information ("RTI") return.

2. 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, and a member of the public attended part of the hearing

3. JSL appealed against two assessments ("the assessments") which were issued pursuant to paragraph 9, schedule 16 to the Finance Act 2020 ("FA 2020") for the tax year ending 5 April 2021 in a total sum of £59,620.07.

4. JSL had then accepted HMRC's offer of a review which upheld the decision to issue the assessments but recommended varying the amounts raised to £48,949.13.

5. HMRC then undertook ' a further review of the calculations to exercise prudency now that the matter falls to the consideration of a tribunal' which identified that allowance given for one employee, Oluyemisi Fasan ("OF") was ineligible as OF was 'not registered on HMRC's RTI system for PAYE as of 19 March 2020'.

6. Accordingly, HMRC requested that that the tribunal use its power to reduce the assessments under Section 50(6) Taxes Management Act 1970 ("TMA 1970") to £51,244.79.

7. The appeal was late by 23 days, but HMRC had no objections to the appeal proceeding and similarly withdrew late payment penalties.

8. The tribunal, therefore, allowed the appeal to proceed.

Background

9. JSL, which was incorporated on 5 May 2011, provides security services and is based in Dartford, Kent. Emmanuel Olanrewaju Joshua ("EJ"), counsel for JSL, is a Director of the JSL.

10. JSL submitted 5 claims for CJRS support payments ("Support Payments") on HMRC's online claims portal in respect of 17 furloughed employees in a total amount of £117,787.40.

11. On 30 November 2020, HMRC wrote to JSL to advise that they were opening a check into their claim to make sure that it met the conditions for receiving Support Payments and that the correct amounts had been claimed.

12. There followed an extensive exchange by email and telephone, culminating in the appeal to the tribunal, the essence of which were disagreements over the method of calculation of Support Payments, including the information requested and supplied, the base date for and method of any calculations, a dispute as the policy of HMRC as to what evidence might be available in relation to the RTI condition and responsibility for recovery of any overpaid amounts.

CORONAVIRUS JOB RETENTION SCHEME - CJRS

13. As the basis of calculation of claims for Support Payments is of essence to this appeal, the details relating to the scheme are set out in detail.

14. The CJRS was established to provide Support Payments to employers on claims made in respect of their incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus.

15. 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. Sections 71 and 76 of the Coronavirus Act provided the Treasury with the power to direct HMRC's functions in relation to coronavirus.

17. Pursuant to these powers, the Treasury introduced the First Coronavirus Direction ("the Coronavirus Direction") to govern HMRC's administration of the CJRS on 15 April 2020 (subsequently followed by several Directions that set out modifications to the Coronavirus Direction in relation to CJRS during the pandemic).

18. Under Paragraph 3 of the Coronavirus Direction, an employer could make a claim for Support Payments under CJRS if it had a PAYE scheme registered on the Respondents RTI system for PAYE by 19 March 2020.

19. Paragraph 5 of the Coronavirus Direction detailed the Qualifying Costs an employer was entitled to claim for under the CJRS. This included Qualifying Costs that 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). "

20. The term "relevant CJRS day' was defined at paragraph 13.1:

> a) a day is a relevant CJRS day if that day is
>
> (i) 28 February 2020, or
>
> (ii) 19 March 2020."

21. Paragraph 5 of the Coronavirus Direction referred to Schedule A1 to the PAYE Regulations. This refers to Regulation 67B of the PAYE Regulations which states that "on or before making a relevant payment to an employee, a RTI employer must deliver to HMRC the information specified in Schedule A1 in accordance with this regulation".

22. Schedule A1 detailed the information regarding payments to employees which must be given to HMRC, including the dates of the payment and employees' pay frequency.

23. Paragraph 8 of the Coronavirus Direction set out what expenditure could be reimbursed in a CJRS claim. Paragraph 8.1 set out that:

"Subject as follows, on a claim by an employer for a payment under CJRS, the payment may reimburse-

(a) the gross amount of earnings paid or reasonably expected to be paid by the employer to an employee;

(b) any employer national insurance contributions liable to be paid by the employer arising from the payment of the gross amount;

(c) the amount allowable as a CJRS claimable pension contribution."

24. Paragraph 8.2 set out that:

> "The amount to be paid to reimburse the gross amount of earnings must (subject to paragraph 8.6) not exceed the lower of-
>
> (a) £2,500 per month, and
>
> (b) the amount equal to 80% of the employee's reference salary (see paragraphs 7.1 to 7.15)."

25. Paragraphs 7.1 to 7.15 set out conditions for qualifying costs to be included for variable and fixed rate employees.

26. Paragraph 7.2 set out that:

> "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."

27. Paragraph 7.3 stated:

> "In calculating the employee's reference salary for the purposes of paragraphs 7.2 and 7.7, no account is to be taken of anything which is not regular salary or wages."

28. Paragraph 7.4 provided the definition of "regular salary or wages" :

> "In paragraph 7.3 "regular" in relation to salary or wages means so much of the amount of the salary or wages as–
>
> (a) cannot vary according to any of the relevant matters described in paragraph 7.5 except where the variation in the amount arises as described in paragraph 7.4(d),
>
> (b) is not conditional on any matter,
>
> (c) is not a benefit of any other kind, and
>
> (d) arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions."

29. Paragraph 7.6 defined a fixed rate employee as:

> "(a) the person is an employee or treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership),
>
> (b) the person is entitled under their contract to be paid an annual salary,
>
> (c) the person is entitled under their contract to be paid that salary in respect of a number of hours in a year whether those hours are specified in or ascertained in accordance with their contract ("the basic hours"),
>
> (d) the person is not entitled under their contract to a payment in respect of the basic hours other than an annual salary,
>
> (e) the person is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month in equal weekly, multiple of weeks or monthly instalments ("the salary period"), and
>
> (f) the basic hours worked in a salary period do not normally vary according to business, economic or agricultural seasonal considerations."

30. Paragraph 7.7 stated that:

> "the reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020".

31. Paragraphs 8.3 to 8.5 set out that an employer could be reimbursed for the NICs that were paid on the gross earnings under CJRS, but this could not exceed the total amount of employer's contributions actually paid by the employer for the period of the claim.

32. For the purposes of CJRS, NICs were the secondary Class 1 contributions an employer was liable to pay as a secondary contributor in respect of an employee by virtue of sections 6 and 7 of the Social Security Contributions and Benefits Act 1992 ("SSCBA") or sections 6 and 7 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 ("SSCB(NI)A")."

33. Paragraphs 8.8 to 8.9 set out that the employer could be reimbursed for the pension contributions to a registered pension scheme.

34. The amount allowable as a CJRS claimable pension contribution under paragraph 8.1(c) was:

> "the lower of the contribution payable by the employer in respect of the employee to a registered pension scheme for the relevant CJRS period, and 3% of the part of the gross earnings paid to an employee in a pay reference period that was more than the lower limit for qualifying earnings in that pay reference period (as set out in section 13(1)(a) of the Pensions Act 2008), but not more than the amount claimable by the employer under CJRS in respect of an amount of gross earnings as described in paragraph 8.1(a) in the same pay reference period."

Modifications to the Coronavirus Direction

There were a further six directions which modified the effect of the Coronavirus Direction so far as applicable to this appeal.

Second Coronavirus Direction dated 20 May 2020

35. The Second Coronavirus Direction, “modified the effect of” the Coronavirus Direction as but the effect of its paragraphs 2, 3, 5, 7, 8 were not modified by the Second Coronavirus Direction. The reference date set out at Paragraph 13.1 was also not altered.

36. Further, conditions in respect of qualifying costs were set out at Paragraph 7 but the determination of fixed and variable rate employees, what was not considered regular salary and wages and how to calculate the reference salary were not altered.

37. Paragraph 12 confirmed that the scheme was extended, and that CJRS had effect only 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 30 June 2020.

Third Coronavirus Direction dated 25 June 2020

38. The Third Coronavirus Direction, modified the effect of the Coronavirus Direction and Second Direction (known as “the original Directions”)

39. Paragraph 3 confirmed that the original Directions continued to have effect but were modified as set out in the schedule to this direction which was divided into two parts:

Part 1

40. Paragraph 1.2(a) set out that Part 1 of the schedule (CJRS having effect from 1 March 2020 to 30 June 2020) extended the time limit for making CJRS claims set out in the Coronavirus Direction.

Part 2

41. Part 2 of the schedule made provisions in respect of CJRS for the period beginning 1 July 2020 and ending 31 October 2020 and paragraph 7 set out that a CJRS claim might now be made by a qualifying employer in respect of an employee who was flexibly furloughed.

42. Paragraph 18 set out how a reference salary should be determined and for variable rate employees.

43. Paragraphs 20.1 and 20.2 confirmed that the method of calculating the reference salary for a variable rate employee was as set out at Paragraph 7.2 of the Coronavirus Direction and Second Coronavirus Directions.

44. Paragraphs 21.1 to 21.7 set out further conditions for calculating the reference salary of a variable rate employee but still included what was not considered regular salary and wages.

45. Paragraph 33 set out that the amount that was allowable as CJRS claimable employer NIC’s was now only referable to a CJRS claim period in July 2020.

46. Paragraph 34 set out that the amount that was allowable as a CJRS claimable pension contribution now only referable to a CJRS claim period in July 2020.

47. Paragraph 41 confirmed the relevant day for the purpose of CJRS was still either 28 February 2020 or 19 March 2020.

48. Further directions were issued on 1 October 2020 (”Fourth Coronavirus Direction”), 12 November 2020 (“Fifth Coronavirus Direction”) and 25 January 2021 (“Sixth Coronavirus Direction”) but the effect of those directions are not relevant to this appeal.

Finance Act 2020 (“FA 2020”)

49. Paragraph 8(1) of Schedule 16 to FA 2020 made a recipient of an amount of a Support Payment liable to income tax if the recipient was not entitled to the amount.

50. Paragraph 8(4) detailed when income tax became chargeable and, in this appeal, income tax was chargeable at the time the Support Payment was received.

51. Paragraph 8(5) detailed the amount of income tax chargeable as being equal to the amount of Support Payment to which a claimant was not entitled and had not repaid.

52. Paragraph 8(8) stated that in calculating profits or losses for the purposes of corporation tax, no deduction was allowed in respect of the payment of income tax charged under this paragraph.

53. Paragraph 9 afforded HMRC the power to make assessments to income tax as chargeable under paragraph 8 and allowed an Officer to make an assessment where she/he considered that a person had received an amount of Support Payment to which he/she/it was not entitled in an amount which ought, in the Officer's opinion, to be charged under paragraph 8.

Taxes Management Act 1970 ("TMA 1970")

54. An assessment could 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 TMA 1970.

55. When a person liable to income tax charged under paragraph 8 of schedule 16 to FA 2020 is a Company that is chargeable to corporation tax, then paragraph 11 also applied.

56. Paragraph 11 set out how the income tax charge operated in relation to a Company's calculation of their corporation tax liability.

Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) ("The PAYE Regs")

57. 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". This information includes information such as the employees name, start date, National Insurance number and payment date.

The Social Security Contributions and Benefits Act 1992 ("SSCBA 1992")

58. An employer is liable to pay Class 1 contributions as a secondary contributor in respect of an employee by virtue of sections 6 and 7 SSCBA.

Pensions Act 2008 ("PA 2008")

59. Paragraph 13 (1) (a) set out that a person's qualifying earnings in a pay reference period of 12 months, are the part (if any) of the gross earnings payable to that person, in that period, that are more than £6,240.

EVIDENCE

60. The tribunal heard evidence from EJ and HMRC Officer Paul Gray ("PG"),who worked within "compliance" and who had 32 years' experience of working with HMRC, both of whom provided witness statements.

61. EJ stated that he and his wife were the two directors of JSL he had run the company for a number of years.

62. On 10 December 2020, EJ stated that JSL submitted the names of their employees, their NIC numbers, and all relevant details for each month from April to August 2020 to the HMRC through their online account which HMRC reviewed.

63. Approximately a week later, EJ said HMRC Officer Steve Bulch, told him that there were no issues with this claim that payment would be approved and as far as EJ was concerned, the matter was closed although there was no written evidence to this effect.

64. EJ was, therefore, concerned and surprised when many months later he received requests for further information and then further requests. EJ was convinced that HMRC were calculating the Support Payments incorrectly and could not understand why HMRC required more and more information when he believed he had provided what was required.

65. EJ stated that he had simply done what HM Government had asked him to do which was to keep employees in employment during the coronavirus pandemic. He had relied largely on statements made in public by the Chancellor of the Exchequer, that employees were to be retained and paid "their usual incomes or something like that".

66. EJ had interpreted this as meaning the employees on the payroll in month 12 of 2019-2020 and confirmed that all employees for whom a Support Payment was made were employed as at March 2019. He was unaware of the guidance published on 20 April 2020 and JSL received no specific guidance from HMRC.

67. Throughout his interaction with HMRC, EJ stated that he made telephone calls and had difficulty in obtaining a response or sent emails which HMRC said they had no record of receiving.

68. EJ said that he was not aware of the guidance in relation to variable employees nor the "look-back" or "average" methods which HMRC claimed he should have used to calculate the Support Payments and was similarly unaware that was unable to claim holiday pay.

69. EJ confirmed that in error the incorrect national insurance number had given for employee OF. The National Insurance number for OF related to another employee on the written schedule provided and was, therefore, duplicated.

70. At least 5 separate account officers (with at least one officer assigned to each claim at the time of submission)had dealt with the claims and EJ did not accept that there could be an over claim.

71. EJ submitted pay advice statements for OF for March, April, May, July and August 2020 and a P60 for Tax year 2019-2020.

72. PG confirmed the terms of his witness statement and was cross examined by EJ.

73. PG confirmed that when it was stated he was "new" to the JS enquiry on 21 October 2021, as both his former colleagues, Stephen Bulch and Dean Donkin, who had taken over from him on 16 August 2021 had left the team, this did not mean, as EJ thought, that he was new to employment in compliance but that he was new to this particular case. PG confirmed that he had received largely on-the-job training in relation to the CJRS which had been introduced 2020.

74. PG also confirmed that he had made a search of RTI using the National Insurance numbers provided by (including the incorrect number for OF) and accordingly, had not noted that there

was no entry for OF on the RTI as was subsequently discovered prior to the tribunal hearing. He could not recall specifically finding OF on the RTI.

75. Similarly, PG confirmed that he had made an error in his assessments by incorrectly assuming that JS staff were 'fixed employees', which error was picked up on review on 12 December 2022 when the assessments were recommended to be varied to take account of the fact that the employees were 'variable employees'.

76. PG stated that throughout the correspondence with EJ and JSL he had failed to obtain the information he requested and believed that discussions with EJ were "going round in circles" PG's attempts to explain that 19 March 2019 was the correct base date to use, even if JSL did a not furlough staff until April 2020, was not accepted nor was it recognised by EJ/JSL.

77. Notices to Provide Information under Schedule 36 were issued on 9 February 2022 and 17 November 2021 and, on 21 October 2021, HMRC specifically asked JSL and how it had calculated furlough pay.

78. PG stated that he knew what JSL had said it had paid to its employees but as he had no access to JSL's bank statements could not confirm the actual payments made.

79. On 12 January 2022, HMRC requested JSL to show the monthly claim figures broken down to an individual level and to explain how it arrived at the monthly figure. JSL were asked to provide information, but PG was still unable to ascertain how the claim had been calculated from the spreadsheet the company provided because it only set out gross and net pay figures and he could not see how the reference salary had been calculated.

80. He, therefore, checked pay details from the monthly Real Time Information (RTI) pay submissions the company had made for each employee in 2019/20 to check that earnings that had been reported to HMRC prior to 19 March 2020, as this was the relevant date for entitlement and calculating the reference salary under the CJRS Directions.

81. PG looked at the pay submissions for each employee from Month 11 (which was the last pay before 19 March 2020) and compared this with an average of monthly pay made to employees in 2019/20, to establish the higher of the two amounts to use as the reference salary when calculating entitlement for each employee.

82. In using this method, he calculated that there had been an overclaim of the CJRS grant and on 4 April 2022, he emailed EJ with a spreadsheet of his calculations and asked him to provide a breakdown of how he arrived at JSL's figures.

83. EJ responded on 4 April 2022 to say that he did not agree with HMRC's calculations and felt his submissions had not been considered and that the figures have been made up. EJ also confirmed that that pay prior to the reference date had not been used because JSL did not claim for March 2020.

84. On 6 April 2022, HMRC called EJ and discussed how PG had arrived at the figures using one employee as an example. EJ still insisted that the reference date was not relevant, and the figures had been made up, so PG agreed to explain HMRC's position in writing.

85. On 8 April 2022, HMRC provided further information in respect of the relevance of the reference date and a link to guidance for employers that was made available at the relevant time.

86. On 11 April 2022, EJ stated that as JSL did not make any claims for March 2020, it had used the pay information after that date as a baseline figure. He also confirmed that JSL were an agency business and subcontracted to companies so that hours differed each month depending on work and availability.

87. On 21 April 2022, HMRC provided a further explanation of the relevance of reference date and set out the relevant legislation. On 10 May 2022, EJ stated in an email that he was still of the opinion that HMRC were making up numbers and he had supplied everything needed. He did not think consideration had been given to holiday pay or pension paid and felt that some employees/months had been missed. He stated the legislation had not been made available to everyone and that it was only for new employees and did not apply to his employees because he had not made a claim for March 2020.

88. On 6 June 2022, HMRC asked EJ to confirm the errors he had identified and stated that NICs and pension contributions were being considered and confirmed that holiday pay could not be included in the calculation and provided further links to the guidance .

89. On 5 July 2022, HMRC stated that they would raise assessments in the total sum of £59,620.07 on 11 July 2022, EJ emailed to confirm that he still did not agree with the figures for the reasons he had already given and that only estimated figures had been used and not what was actually paid to the employees.

90. On 6 September 2022, EJ sent an email stating that the calculation was wrong and provided a further breakdown. He stated that the company should not be penalised for the HMRC ignoring information. He also stated that he paid all staff, provided payroll reports, and followed guidance.

91. On 14 September 2022, EJ emailed his request for a review of the Notices of Assessment, and the matter was to be subject to an independent review.

92. The review upheld the decision to issue the Notices of Assessment upheld but the amount was varied down to £48,949.13 as PG had, in error, misunderstood the guidance.

93. PG confirmed that he should have determined that the employees were variably paid in arriving at the reference salary and used the calculation method set out in the directions and guidance.

94. The review officer found that JSL had also used the incorrect calculation methods, used pay that was made to employees after the 19 March 2020 and included holiday pay, which was not permitted. The review officer performed a re-calculation using the variable pay methods as set out in the CJRS Directions and established that JSL had still been overpaid.

95. The review also included the company's entitlement to Class 1 Employer NICS and a pension contribution on claims made before 31 July 2020 in their calculation and was issued to the company on 12 December 2022.

96. On 9 January 2023, EJ asked whether HMRC could assist in getting money back from employees who had now left the company.

97. On 3 February 2023, the company submitted an appeal to the Tribunal.

98. After the appeal was submitted to the tribunal HMRC established that one employee with the initials 'OF' had been 'claimed' but who was not reported to HMRC on the RTI on or before

19 March 2020. Accordingly, JSL was not entitled to claim on behalf of OF and HMRC then considered that JSL had been overpaid .HMRC requested the tribunal to vary the Notices of Assessments to £51,244.79.

JSL's Submissions

99. HM Government, at the beginning of the pandemic, told all employers to make furlough claims for their qualifying employees but did not provide any support to employers at the time and certainly not to JSL.

100. In accordance with the requirement of the CJRS, the amounts claimed were paid in full as wages to employees of the Company who were not working but were furloughed and kept on payroll during the Coronavirus pandemic.

101. JSL did not need to claim a CJRS grant for staff in March 2020 but did need to claim for a small number of employees from April 2020 to August 2020.

102. JSL used pay in Month 12 (after 19 March 2020) for the reference salary of each employee, and therefore all relevant deductions were made (tax, NIC's, pension and holiday entitlement) and paid to employees.

103. As result of making the wage payments to the Employees, the Company also paid to HMRC ; Employer NIC @13.8% of £48,949.13 = £6,754.98; Employer tax @13.8% of £48,949.13 = £6,754.98 and Pension @ 3% of £48,949.13 = £1,468.47, totalling £14,978.43.

104. HMRC's review officer failed to consider that JSL had made these payments to HMRC and request that these amounts are deducted from the 'revised assessments' of £48,949.13.

105. HMRC's Steven Bulch approved the payments when the claim was first intimated.

106. HMRC informed JSL, 2 years after it had made the claim for CJRS support payments, that it had used an incorrect reference date and £59,620.07 had to be repaid which was reduced to £48,949.13, following a review.

107. JSL made full payment of the CJRS sum claimed to employees as wages and if it has overclaimed then it has overpaid employees as well. The majority of the employees to whom wages were paid had now left employment and JSL say that HMRC should seek any repayment from the employees and not JSL.

108. JSL submit that he emailed HMRC to request confirmation of how much tax and NI was overpaid but this was ignored.

109. JSL say that it is currently overdrawn because of the loss of work following COVID-19 and it cannot afford to pay the money that was paid to employees, to HMRC.

110. JSL asks that HMRC scrap what has been overclaimed and seek the money from the employees as they have records of where those employees are and asks that HMRC return all tax and NIC that the JSL overpaid.

111. JSL say that HMRC just want them to pay back the money it does not have and is not able to afford and seek to have any charges and penalties scrapped.

112. JSL refer to HMRC guidance published on Gov.UK which stated the following:

> "…You must pay the full amount you are claiming for your employee's wages to your employee. You must also pay the associated employee tax and National

Insurance contributions to HMRC, even if your company is in administration. **If you're not able to do that, you'll need to repay the money back to HMRC**" (bold is their emphasis).

"You must also pay to HMRC the employer National Insurance contributions on the full amount that you pay the employee. If you have submitted a claim for the employer National Insurance contributions and pension contributions, then **the full amount you claim in respect of these must be paid or you will need to repay the money back to HMRC**" (bold is their emphasis).

113. JSL submit that as it adhered to the published guidance and paid the employees in full it did not need to pay back the amounts claimed to HMRC.

114. On intimation of HMRC's intention to ask the tribunal to amend the assessments in respect of JSL employee, OF, whom HMRC say was not included in the RTI at the relevant date, JSL refer to OF's payslips and P60 submitted to the tribunal [and accepted by the tribunal] as evidence to refute HMRC's claim that OF was not on the RTI before March 2020.

115. JSL refer to and rely on 'a change in policy' referred to by Mr Dickson (HMRC case worker) in *Zoe Shisha Events Limited v HMRC* [2023] UKFTT 00398 (TC) at [40]

"On 9 April 2021, Mr Dickson wrote to Zoe Shisha Events Limited to notify a "very recent policy decision…which means we are now able to accept further evidence when considering if claims can be accepted and not only rely on the RTI submissions and payslips". It was then explained "we will require evidence of communication between yourself and the company which done your payroll wherein you have notified them of the increase to the salaries...[and] the business bank statement from January 2020 and February 2020 which evidence the higher salaries being paid from the company to yourself and your employee."

HMRC'S SUBMISSIONS

116. HMRC say that JSL received an amount of CJRS support payment to which it was not entitled because the claims were not calculated using the correct reference date and reference salary in line with the legislation.

117. JSL received an amount for one employee who was not submitted on the RTI as of 19 March 2020 therefore it was not entitled to receive a CJRS support payment on their behalf and request the tribunal to use their power to amend the assessments under Section 50(6) TMA 1970 to £51,244.79.

CJRS Calculation

118. Paragraph 2.1 of the Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Directions dated 15 April 2020 (the "Coronavirus Direction") set out that:

"The purpose of CJRS is to provide for payments to be made 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 and coronavirus disease"

119. Paragraph 2.2 of the Coronavirus Direction set out that:

> "Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a claim under CJRS are only made by way of reimbursement of the expenditure described in paragraph 8.1 incurred or to be incurred by the employer in respect of the employee to which the claim relates."

120. The 'qualifying costs' are costs that an employer is entitled to claim for under the CJRS. This includes qualifying costs that relate to an employee who satisfies the requirements at Paragraph 5 of the Coronavirus Direction, as follows:

> "(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) **meet the relevant conditions in paragraphs 7.1 to 7.15** in relation to the furloughed employee.(emphasis added)"

121. The 'relevant CJRS day' is defined at paragraph 13.1 as either 28 February 2020 or 19 March 2020.

122. HMRC initially accepted that all employees met the requirements of paragraph 5(a). Their position on this has altered in relation to one employee OF.

123. HMRC do not accept that claims for those qualifying employees have been calculated in line with the requirements set out in paragraphs 7.1 to 7.15, pursuant to paragraph 5(b) of the Direction and failing to do so resulted in an overpayment.

124. Paragraph 8.2, states that the amount to be paid to reimburse the gross amount of earnings refers to their 'reference salary' and must (subject to paragraph 8.6) not exceed the lower of –

> "(a) £2,500 per month, and
>
> (b) the amount equal to 80% of the employee's reference salary (see paragraphs 7.1 to 7.15)"

125. The calculation of the reference salary is dependent upon whether the employee is a "fixed rate" employee or a "variable rate" employee.

126. The reference salary of a "fixed rate" employee was set out at paragraph 7.7, that is:

> "…the amount payable to the employee in the latest salary period ending on or before 19 March 2020 (but disregarding anything which is not regular salary or wages as described in paragraph 7.3)."

127. It is not in dispute that qualifying employees did not fall into the "fixed rate" category which is defined at paragraph 7.6 therefore paragraph 7.7 of the Direction should be disregarded.

128. However, for "variable rate" employees, the reference salary should have been calculated in accordance with Paragraph 7.2 of the Coronavirus Direction, which set out that:

> "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."

129. HMRC refer to these two methods as the 'average' (para 7.2(a)) or the 'lookback' (para 7.2(b)) methods.

130. In addition, paragraph 7.3 stated:

> "In calculating the employee's reference salary for the purposes of paragraphs 7.2 and 7.7, no account is to be taken of anything which is not regular salary or wages."

131. Paragraph 7.4 provides the definition of "regular salary or wages" as follows:

> "In paragraph 7.3 "regular" in relation to salary or wages means so much of the amount of the salary or wages as–
>
> a. cannot vary according to any of the relevant matters described in paragraph 7.5 except where the variation in the amount arises as described in paragraph 7.4(d),
>
> b. is not conditional on any matter,
>
> c. is not a benefit of any other kind, and
>
> d. arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions."

132. Paragraph 7.5 then states that the relevant matters are:

> "a. the performance of or any part of any business of the employer or any business of a person connected with the employer,
>
> b. the contribution made by the employee to the performance of, or any part of any business,
>
> c. the performance by the employee of any duties of the employment, and
>
> d. any similar considerations or otherwise payable at the discretion of the employer or any other person (such as a gratuity)."

133. JSL confirmed during the compliance check that it used pay from Month 12 (pay made after 19 March 2020) as a baseline to calculate the reference salary of each employee. It also produced documents indicating that overtime and holiday pay had been included in the calculation of the reference salary.

134. This was contrary to the directions and guidelines as set out, so PG referred to the RTI submissions to establish how much JSL was entitled to claim. PG performed a calculation which identified an overpayment and resulted in the two assessments totalling £59,620.07.

135. At review, it was established that PG had slightly misinterpreted the method of calculating the reference salary for “variable rate” employees. He had compared the pay made to employees in March 2020 with the average of earnings in the tax year 2019/2020 and used the greater of the two as the reference salary in a calculation.

136. However, whilst the use of the "average” method was correct, the comparison with pay made in March 2020 was not and a “lookback” to pay made in the corresponding calendar year should have been adopted.

137. Accordingly, when the review officer performed a recalculation using the methods stipulated, HMRC established that a total of £68,838.27 was the amount that should have been paid on all claims made between 1 April 2020 and 31 August 2020.

138. The review officer concluded that, as JSL had claimed £117,787.40 in total then JSL had received an overpayment of the CJRS support grant in the sum of £48,949.13. Therefore, the review upheld the decision to issue the assessments but recommended that they be varied to this amount.

139. HMRC submit that the distinction between “fixed rate” and “variable rate” employees has already been considered by the First-tier Tribunal (FTT) in *Ark Angel* at [75 – 81] and *Jama Academy Limited* at [60].

140. Both Tribunal cases determined that where an employee is not a fixed rate employee, the calculation of the reference salary should use variable pay methods, for the best result. In *Jama Academy Limited*, Judge Vos provided a comprehensive explanation at [62]:

> '...By way of reminder, this requires a separate calculation for each employee for each claim period with the reference salary being the greater of the monthly or daily average for the 2019/20 tax year and the amount that the employee actually received in the corresponding month of the 2019/20 tax year.'

141. Following the appeal to Tribunal, HMRC undertook a further review of the calculations to ensure veracity. This has identified that OF was not included on an RTI submission in 2019/20, on or before 19 March 2020, as required by para 5(a)(i) of the Direction. The result of this was that JSL was not entitled to any of the claims made on behalf of OF.

142. HMRC submit that the Coronavirus Direction was drafted to convey the intentions of Parliament and the support it would provide at the material time, and to qualify for support payments under the CJRS scheme it was made unequivocally clear at Paragraph 5 that the relevant employee must be ‘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.’ This requirement was not altered by either the Second or Third direction.

143. The First-Tier Tribunal has already decided in multiple appeals (to include but not limited to *Carlick Contract Furniture* at [37]; *Luca Delivery Limited* at [60] and Oral Healthcare Ltd at [50] that the cut-off date was absolute.

144. Accordingly, HMRC submit that JSL was not entitled to the sum of £2,295.66 which was paid in relation to OF and request the Tribunal to use their power to amend the assessments under Section 50(6) Taxes Management Act 1970 (“TMA 1970”) to £51,244.79.

National Insurance Contributions

145. JSL say that £6,754.98 should be deducted from the ‘varied assessments’ amount to reflect the 13.8% in NICS that it paid on that amount.

146. HMRC submit that JSL has a statutory obligation to pay Class 1 Employer NICS as a secondary contributor in respect of an employee pursuant to Sections 6 and 7 of SSCBA 1992.

147. For all the claims that JSL was entitled to make between 1 April 2020 and 31 July 2020, Class 1 Employer NICS payable could be reimbursed pursuant to Paragraph 8 of the First and Second Direction.

148. At the material time, Class 1 Employers NICS were payable at a rate of 13.8% on earnings that exceeded the secondary threshold which in the tax year 2020/21 was £8,788 per year or £732 per month.

149. For the avoidance of doubt, 13.8% is only applied to earnings above the secondary threshold and because some employees’ earnings did not exceed this, there were no Class 1 Employer NICS payable on them and thus no Class 1 Employer NICS to be reimbursed.

150. HMRC confirm that the Class 1 Employers NICS for each employee were considered in their calculation, and JSL was entitled to be reimbursed £2,259.85 on the CJRS support payments it was entitled to claim between 1 April 2020 and 31 July 2020. For the avoidance doubt, the calculation remains the same having excluded employee “OF”.

151. After 1 August 2020, an employer was not able to claim Class 1 Employers NICS in accordance with Paragraph 33 (1) of the Third Coronavirus Direction which stated:

> “An amount is allowable as CJRS claimable employer national insurance contributions only if the amount is referable to a CJRS claim period in July 2020.”

152. This change in the legislation was driven by the incentive to get the economy moving and get people back to work. It also coincided with the introduction of the flexible furlough scheme and HM Government support being tapered to reflect people going back to work.

153. Accordingly, HMRC submit, that JSL is not entitled to be reimbursed for any Class 1 Employer NICS that were paid between 1 and 31 August 2020.

Employer Tax

154. JSL submits that £6,754.98 should be deducted from the ‘varied assessments’ amount to reflect ‘the 13.8% in employer tax’ that it paid on that amount but has not specified the category of employer tax it is referring to which has made it difficult for HMRC to respond to this point.

155. HMRC have assumed it is referring to income tax that an employer is required to deduct pursuant to Paragraph 21 of the PAYE regulations.

156. The income tax that an employer is required to deduct pursuant to Paragraph 21 of The Income Tax (PAYE) Regulations 2003 (“PAYE Regulations”) is by reference to an employee’s tax code. The code and resulting tax liability for each employee depends on the amount of income and the amount of any applicable allowances and relief so it is not possible to apply a fixed rate of tax to all employees pay.

157. Furthermore, at the material time, the basic tax rate was 20% (not 13.8% as alleged) on earnings exceeding the employee personal allowance threshold which in the tax year 2020/21

was £12,500 per year or £1,042 per month and means that for a variable rate employee, the tax liability will vary.

158. HMRC also submit that Paragraph 8.1 of the Coronavirus Direction set out the expenditure to be reimbursed under CJRS would be the 'gross amount of earnings paid or reasonably expected to be paid by the employer to an employee'.

159. Consequently, there was an expectation that an employer would correctly calculate and claim for an employee's gross earnings and from this deduct the right amount of tax that each employee was liable to pay, which means that any deductions made on behalf of each employee would not have come at a cost to JSL and does not warrant a deduction from the recommended variation amount of the assessments.

Pension contributions

160. JSL submit that £1,468.47 should be deducted from the 'varied assessment' to reflect the 3% in pension contributions that it paid on that amount.

161. HMRC say that for all the claims JSL was entitled to make between 1 April 2020 and 31 July 2020, a payment of an employer pension contribution, in respect of an employee to a registered pension scheme, could be reimbursed if it was paid in respect of the amount of gross earnings, as described in paragraph 8.1(a).

162. Paragraph 8.9 sets out that the amount allowable as a CJRS claimable pension contribution under paragraph 8.1(c) was the lower of-

> "(a) the contribution payable by the employer in respect of the employee to the registered pension scheme for the relevant CJRS period, and
>
> (b) 3% of the part of the gross earnings paid to an employee in a pay reference period as applicable to the employee of 12 months that are-
>
> (i) more than the lower limit for qualifying earnings in that pay reference period (as set out in section 13(1)(a) of the Pensions Act 2008), and
>
> (ii) not more than the amount claimable by the employer under CJRS in respect of an amount of gross earnings as described in paragraph 8.1(a) in the same pay reference period."

163. Paragraph 13(1)(a) of the Pensions Act 2008 sets out that a person's qualifying earnings in a pay reference period of 12 months are the part (if any) of the gross earnings payable to that person in that period that is more than £6,240 per year or £520 per month.

164. This meant that JSL could only be reimbursed 3% of any earnings above this as a pension contribution as long as it did not exceed the gross earnings payable in a reference period. Furthermore, 7 of the employees claimed had opted out of a pension scheme so that JSL could not be reimbursed for them.

165. HMRC confirm that the pension contributions for each employee who had opted into a pension scheme was considered in their calculation and JSL was entitled to be reimbursed £590.92 on the CJRS support payments it was entitled to claim between 1 April 2020 and 31 July 2020. For the avoidance of doubt, the calculation remains the same having excluded employee "OF".

166. After 1 August 2020 an employer was not able to claim pension contributions in accordance with Paragraph 34 of the Third Coronavirus Direction which stated:

> "An amount is allowable as a CJRS claimable pension contribution only if the amount is referable to a CJRS claim period in July 2020."

167. As with the approach to NICs, the change was driven by the incentive to get the economy moving, get people back to work and it coincided with the introduction of the flexible furlough scheme support being tapered to reflect people going back to work.

168. Accordingly, HMRC submit that JSL is not entitled to be reimbursed for any pension contributions that were paid between 1 and 31 August 2020.

Validity of the Assessments

169. Paragraph 8(1) of Schedule 16 FA 2020 provides that a recipient of Coronavirus Support Payments is liable to income tax if it was not entitled to a Support Payment that it received in accordance with the scheme under which the payment was made.

170. The recipient in this instance was JSL, who claimed and received payments from HMRC.

171. Paragraph 8(4)(b) Schedule 16 FA 2020 provides that in circumstances where the recipient was never entitled to it, income tax is chargeable at the date the Support Payment was received, in this case on or around 23 April 2020.

172. The amount charged is equal to the amount of Support Payment to which the Applicant was not entitled to (paragraph 8(5) Schedule 16 FA 2020).

173. Paragraph 9(1) of Sch. 16 FA 2020 provides:

> "(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."

174. HMRC submit that the condition in paragraph 9(1) that an Officer "considers" is a reference to an Officer reaching a conclusion about the non-entitlement of the recipient of a Coronavirus Support Payment. PG conducted the compliance check and raised the assessments. Based on his evidence, the opinion that was formed was in consideration of the relevant evidence and his conclusion was a reasonable one.

175. PG determined that JSL was not entitled to receive an amount of CJRS support payments and concluded the amount charged would be an overclaimed amount claimed (and not repaid) under paragraph 8(5) schedule 16 FA 2020.

176. These assessments were made correctly under paragraph 9 Schedule 16 FA 2020.

177. Paragraph 9(2), schedule 16 FA 2020 provides that an assessment may be made at any time but makes this subject to the time limits set out in sections 34 and 36 of the Taxes Management Act 1970.

178. Section 34 TMA 1970 provides that there is a time limit of 4 years for raising an assessment. The first amount of tax became due when the first claim amount was received by

JSL – in this case on or around 24 April 2020 – and the assessments were issued within the statutory time limit on 19 August 2022.

179. HMRC ask the tribunal to use its powers to vary the assessments due to the errors that have been identified with the calculations.

180. Section 50(6) TMA 1970 states that if on appeal notified to the tribunal, the tribunal decides that the appellant has been overcharged by an assessment, this shall be reduced accordingly, but otherwise the assessment shall stand good.

181. HMRC submit that regardless of the errors, PG's conclusions for the purposes of Paragraph 9 (1) remain objectively reasonable. In *Jerome Anderson*, at [30] the tribunal stated that:

> "as regards the requirement for the action to be "reasonable", this should be expressed as a requirement that the officer's belief is one that a reasonable officer could form. It is not for a tribunal hearing an appeal to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer's belief was not reasonable."

182. This was considered by Judge Vos in *Jama Academy Limited*, a CJRS case in which calculation errors were identified at [34] and [35]:

> "34. Although ……. conceded that the officer's conclusions must be objectively reasonable and although HMRC accept that the assessments were not correctly calculated, having read Ms Foley's witness statement and heard her evidence, we consider that the requirements of paragraph 9(1) are satisfied.
>
> 35. The reason for this is that the legislation was, at the time the assessments were made, relatively new and the requirements as to the relevant calculations were clearly not well understood either by taxpayers or by HMRC. Ms Foley took advice internally within HMRC as to the way in which the assessments should be calculated and followed that advice. Based on this, we consider that Ms Foley's opinion as to the amount of the assessments was objectively reasonable even though she was mistaken. To the extent that JAL is overcharged by the assessments, this should be dealt with by reducing the amount of the assessments rather than treating the assessments as invalid in their entirety."

Jurisdiction

183. JSL say it felt unsupported by HMRC. Further, the payments were approved, and it adhered to the guidance. It has also referred to delay and conduct during the compliance check.

184. HMRC submit that such grounds relate to matters which are more appropriate to a complaint or at its highest, a breach of legitimate expectation. The tribunal does not have a judicial review jurisdiction to consider public law arguments based on a clear line of authority provided by the Upper Tribunal in *HMRC v Hok Ltd* at [54-58], *Abdul Noor v HMRC* at [95] and followed in the context of direct taxes by the Court of Appeal in *Trustees of the BT Pension Scheme v HMRC* at [142-143].

185. In the above-mentioned cases, the Upper Tribunal and Court of Appeal concluded that the better view regarding the jurisdiction of the FTT is that the tribunal has no general jurisdiction to

determine matters which are so decided during an action for judicial review in the Administrative Court, including matters of fairness and/or legitimate expectation.

186. HMRC submit that the FTT 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.

187. Any claim to legitimate expectation which might be alleged at this stage or inferred from JSL's case is not within the jurisdiction of the tribunal, and further is not established on the facts or evidence presented.

188. The FTT has also already specifically considered whether it has jurisdiction to determine the fairness of the CJRS.

189. In *Carlick Contract Furniture Limited*, Judge Poole states at [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 and 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 argument here, where the Directions draw such a clear bright line to determine eligibility for the scheme".

190. In *Oral Healthcare Limited*, Judge Scott stated at [57] that:

> "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."

191. The FTT has been consistent when considering whether it has jurisdiction to consider the fairness of the CJRS. It has confirmed it does not have the jurisdiction to consider the fairness of a policy and it is HMRC's position that the submissions made by JSL in relation to the fairness of the CJRS policy should be disregarded by the tribunal.

192. HMRC say there is no 'change of policy', referred in *Zoe Shisha Events Limited* cited by JSL in relation to employee OF and the evidence put forward by JSL in relation to HMRC's submission that OF was not on the RTI on 19 March 2020

193. The policy referred to by Officer Dickson to the Appellant at [40] in *Zoe Shisha Events Limited* does not exist. The reference to this is within the background to the correspondence in this matter. In *Zoe Shisa Events Limited*, it was not in dispute that the employees were on the RTI prior to 19 March 2020, but the amount that was paid to those employees before the relevant date for the purposes of calculating the reference salary. Therefore, the wording of this correspondence, albeit incorrect, was in an entirely different context and is not relevant to this case.

194. For the avoidance of doubt, HMRC cited *Zoe Shisa Events Limited* because Judge Bedenham considered the Appellant's submission, that it had overpaid tax and National Insurance contributions on the payments it received and stated at [68] that this was not a matter for the FTT and should be addressed separately with HMRC. This was an issue that JSL raised in this appeal and, therefore, it was considered that the inclusion of this case in the bundle would assist the tribunal.

195. The assessments were raised correctly and in time for the reasons set out above and HMRC invite the tribunal to uphold the decision to raise the assessments and use its powers under section 50(6) TMA 1970 to reduce the amount of the assessments to £51,244.79.

THE TRIBUNAL DECISION

196. The tribunal were sympathetic to JSL's /EJ's experience in relation to the claims for Support Payments.

197. EJ had been initially told by Officer Steven Bulch that his calculations had been accepted and he considered that the matter was closed and then several months later that HMRC were opening a check into JSL's claim to make sure the conditions for receiving CJRS support payments had been correctly adhered to.

198. Thereafter, followed an exchange of correspondence and telephone calls which as HMRC said went 'round in circles'. HMRC were attempting to obtain information which JSL thought it had correctly submitted and which it was unwilling to accept was incorrect

199. The CJRS conditions were not uncomplicated, and it was clear to the tribunal that JSL had misunderstood them, as had subsequently the compliance check officer, PG, and to a limited extent the review officer resulting in HMRC providing a third computation of what was considered the correct amount overpaid.

200. JSL had diligently attempted to carry out what HM Government had asked it to do but when calculating its claim for Support Payments had either disregarded or misunderstood the detailed requirements that the legislation required for successful claims, including the correct reference date and the amounts that were eligible under the legislation and Directions.

201. EJ lost confidence in HMRC's calculations and considered that they were making up numbers.

202. HMRC struggled to obtain the information they required to make their calculations in accordance with the legislation and Directions which, in part, resulted in PG's error in relation to whether the employees were "fixed rate" or variable rate".

203. In addition, JSL had provided the incorrect National Insurance number for employee OF and submitted instead the number of another employee for whom the claim was made at the same time. Accordingly, when a check was made of National Insurance numbers, these initially appeared all to agree with HMRC's RTI records. When, however, the duplication was noticed "now that the matter fell to be considered by a tribunal", it became evident that OF was not registered on HMRC's RTI system for PAYE as of 19 March 2020.

204. Nevertheless, as was explained at the tribunal hearing the function of the tribunal is to ensure that the correct amount of tax is paid within the correct time limits and that taxpayers receive all the allowances and reliefs to which they are entitled, as set down in legislation passed by Parliament.

205. It was further explained that the tribunal, being the First-tier Tribunal, is bound by decisions of the Upper Tribunal and higher courts, such as the Court of Appeal and, in these particular circumstances by *Hok Limited*.

206. The tribunal accepted HMRC submission that there was no change in policyas regards the requirement to be registered on the RTI, as set out in the legislation, and agreed with the tribunals' statements referred to in *Carlick Contract Furniture, Luca Delivery Limited* and *Oral Healthcare Limited*, that the cut-off date of was an absolute requirement for which no exceptions could be made.

207. The tribunal also accepted that there was no policy, let alone a change in policy, as submitted by JSL, that further evidence could be considered for claims "not only relying on RTI's submissions and payslips". The Tribunal also accepted HMRC's submissions distinguishing the circumstances in *Zoe Shisha Events Limited*.

208. The tribunal concluded that the review officer's calculation and recommendation to amend the assessments, in the sum of £48,949.13, in her review letter of 12 December 2022, was correct in terms of the legislation set out here at length; except that it gave a Support Payment for OF which was not valid.

209. JSL had used the pay information from the Real Time Information (RTI) Full Payment Submission (FPS), of month 12 of the 2019-2020 tax year (pay made after 19 March 2020) as a baseline to calculate the reference salary for each employee or average earnings as JSL had only made claims from April 2020.Alternative calculations included a basic total of employee's pay, 'employer tax' and holiday pay.

210. EJ had understood that the 19 March 2020 date only applied to new employees.

211. HMRC, initially, used the reference date of the 19 March 2020 and pay from the FPS of month 11 of the 2019-2020 tax year or an average to work out the amounts under the belief that the employees were fixed rate employees. This is generally applicable where employees are paid an annual salary in respect of a number of hours worked in a year where the employee would be paid regardless of the number of hours worked in a week or month in equal instalments. Additionally, the basic hours worked do not normally vary.

212. On review it was, correctly, established that the pay for each employee varies and the calculations should have been worked out using the method for variable employees. Consequently, the initial calculations of PG and JSL were incorrect as each of them had used incorrect methods of calculation.

213. The review officer's calculation established, correctly, that the method for variable employees should have been used in the calculations and the information from the RTI and FPS of month 11 of 2019-220 should be used with a reference date of 19 March 2020.

214. The review officer's calculation, therefore, calculated 80% of the higher of the 'lookback' method and the 'average' method calculations for each employee. The Tribunal, accordingly, accept HMRC submissions in relation to the revised calculations and that JSL's employees were 'variable rate' employees, as referred to by Judge Vos in *Jama Academy Limited*.

215. The review officer's recommended correction to the assessments required to be amended by the addition of £2,295.66 which had been paid in relation to OF, as the tribunal were satisfied that this employee was not shown "in a return under schedule A1 to the PAYE regulations made

on or before a date that is a relevant CJRS date; that is to say RTI return at the appropriate date, in this case 19 March 2020.

216. Accordingly, the tribunal used its power to amend the assessments under section 50(6) TMA 1970 to a total amount of £51, 244. 79.

217. The tribunal did not accept that £6,754.98 should be deducted from the assessments amount to reflect the 13.8% in NICs that JS had paid. The tribunal preferred HMRC's submissions that JS had a statutory obligation to pay NICs as an employer and that HMRC had correctly calculated in their assessments a reimbursement of £2,259.85 for the Support Payments between 1 April 2020 on 31 July 2020 and were not entitled to any reimbursement on employers NICs that were paid between 1 and 31 August 2020.

218. On the assumption that the sum of £6,754.98, that JSL say should be deducted from the assessments amount to reflect "the 13.8% employer tax", refers to income tax that an employer is required to deduct under paragraph 21 of the PAYE regulations, the tribunal considered that this relates to tax which would have been deducted from an employee's gross earnings and reflects an amount the employee was liable to pay and was not an employer cost, like employer NICs nor a claimable pension contribution, and did not qualify under paragraph 8.1 of the Coronavirus Direction.

219. JL made no submissions on this matter at the hearing.

220. The tribunal considered that JSL could only be reimbursed 3% of any earnings, in terms of paragraph 13 (1) (a) of the PA 2008, that were in a pay reference period of 12 months of more than £6240 per year or £520 per month and could not claim for the 7 employees who had opted out of a pension scheme.

221. The tribunal considered that the reimbursement of £590.92 in relation to those entitled to claim between 1 April 2020 and 31 July 2020 was correct and that following the Third Coronavirus Direction, JSL were not entitled to be reimbursed for any pension contributions that were paid between 01 and 31 August 2020

222. JSL are liable to income tax if it is not entitled to a Support Payment in terms of paragraph 8(1) of schedule 16 FA 2020 and notwithstanding that PG's assessments were incorrect he had, nevertheless, come to an opinion that JSL had received an amount of Coronavirus Support Payment to which it was not entitled.

223. The Tribunal consider that PG's conclusions were objectively reasonable and agree with the tribunals' statements in *Jerome Anderson* at [30] and *Jama Academy Limited* at [34 and 35]. As stated by Judge Vos at [35] the relevant calculations were clearly not well understood either by taxpayers or by HMRC. PG also took advice internally as did the HMRC Officer in *Jama Academy Limited*.

224. Accordingly, the tribunal considered that PG's opinion as to the amount of the assessments was objectively reasonable even though he was mistaken and to an extent he was hampered by being unable to obtain from JSL the information he requested.

225. The assessments were issued within the statutory time limit on 19 August 2022 and within the time limit of 4 years for raising an assessment under section 34 TMA 1970.

226. As was explained at the hearing, the tribunal has no jurisdiction to and cannot take into account whether or not something such as the CJRS is fair and, as Judge Poole stated in *Carlick*

Contract Furniture Limited, the tribunal's role is to adjudicate on the law and has no jurisdiction other than that attributed to it by the statute which created it.

227. Similarly, the tribunal has no jurisdiction to consider complaints about HMRC or HM Government or a breach of legitimate expectation or to consider the inability to pay any assessment.

228. Paragraph 8 (1) of schedule 16 FA 2022 makes JSL liable to income tax in respect of any Support Payments to which it is not entitled, and that legislation offers no scope for HMRC to recover overpayments from employees to whom wages were paid.

229. The tribunal considered that JSL had received an amount because its claims were not calculated using the correct reference date and reference salary in line with the legislation.

230. Taking all these factors and reasons into account, the appeal is dismissed.

THE RIGHT TO APPLY FOR PERMISSION TO APPEAL

231. 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.

WILLIAM RUTHVEN GEMMELL WS
TRIBUNAL JUDGE

Release date: 15th AUGUST 2024