Neutral Citation: [2023] UKFTT 00435 (TC)

Case Number: TC08823

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2021/18610

INCOME TAX - Coronavirus Job Retention Scheme – assessments under paragraph 9 Schedule 16 FA 2020 – appellant's director making posts on social media – whether "work" for the purposes of being a "furloughed employee" – held yes – assessments upheld – appeal dismissed

Heard on: 19 April 2023
Judgment date: 22 May 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MISS PATRICIA GORDON

Between

GLO-BALL GROUP LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michelle Dowler and Samuel Dowler directors of the Appellant

For the Respondents: Paul Davison litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal relates to payments made to the appellant under the Coronavirus Job Retention Scheme (the **"Scheme**"). Between 23 April 2020 and 18 December 2020, the appellant claimed and was paid £9,486.38 by way of support payments under the Scheme. Payments under the Scheme could only be made in respect of "furloughed employees". A furloughed employee is one who, inter alia, has ceased all work for the employer for 21 calendar days or more. The appellant accepts that during the periods in which it has claimed support payments, one of its directors and employees, Michelle Dowler ("**Michelle**") posted entries on the appellant's Facebook accounts. The essential decision which we have to make is whether those posts (or any of them) comprise work for the purposes of the Scheme. If they do, then the appeal fails (in whole or in part). If they do not, then it succeeds (in whole or in part).

THE LAW

2. There is no dispute about the relevant law which is set out in the appendix to this decision. Definitions in the appendix have the same meaning in the body of this decision. For ease of reference, we set out the definition of "furloughed employee" in the Coronavirus Direction below:

> 6.1 An employee is furloughed employee if:
>
> (a) the employee has been instructed by the employer to cease all work in relation to their employment,
>
> (b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and
>
> (c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.

THE EVIDENCE AND FINDINGS OF FACT

3. We were provided with a substantial bundle of documents which included authorities. Oral evidence on behalf of the respondents was given by Officer Bryony Lombardi. Oral evidence on behalf of the appellant was given by Michelle and Samuel Dowler ("**Sam**"). Much of this evidence was unchallenged and uncontroversial, and from it we make the following findings:

The Scheme

(1) The Scheme was established to provide support payments to employers on a claim made in relation to the costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus. The Scheme allowed a qualifying employer to apply for reimbursement of the expenditure incurred by the employer in respect of the employees entitled to be furloughed under the Scheme.

The appellant's business

(2) The appellant is a company incorporated on 21 September 2018 which runs parties, discos, community events and after-school clubs for children aged 0 to 11 years old. It also runs parent and baby groups. The directors and employees are Michelle and Sam. Michelle is a class leader and, for example, would put on (before and since lockdown) classes at which parents and children would attend. The numbers will be small (for parent and baby groups, only 15 in each group) and the classes run for approximately 40 minutes. There would be two a day every weekday during term time.

(3) Before and after lockdown, the appellant would hire a hall at which it intended to put on classes, would then advertise those classes via social media including Facebook. The appellant had a database of parents with whom they would share the information about the

proposed activities and to which the parents could respond, online and pre-book and prepay for attendance at those events. The halls were booked in 5-to-6-week blocks and 90% of their business came from online awareness. Michelle and Sam both spent a very great deal of time on social media generating interest in their offering. Sam estimated that this was about 15 hours a week. Given that for parent and baby groups, the useful economic life of the relationship was only some two years, they were constantly having to seek new business.

(4) During lockdown, the time spent on social media reduced dramatically (Sam's estimate was that they spent only five minutes on it over an entire month). In April 2020, for example, there are only three posts whereas before lockdown there would have been 80 or 90.

(5) Before lockdown started in March 2020, they were running about 15 classes per week. Following the end of lockdown in September 2020, they started back with three classes or so a week but never got back to the number of pre-lockdown classes.

(6) In an email dated 28 April 2020 from the appellant to Michelle, the appellant explained that the appellant was able to offer Michelle furlough leave during which she would receive 80% of her normal pay, but "you will not be able to undertake any work for the Company during this leave".

The claims for Support Payments

(7) The appellant claimed payments under the Scheme for the period 23 March 2020 to 30 September 2021. During the period between 1 March 2020 and 30 June 2020, the so-called "classic" period during which no furloughed employees were allowed to work, the appellant's claims were based on 80% of Michelle and Sam's monthly salary. During this period the claim was for approximately £3,785. This was claimed for four periods, basically March, April, May and June 2020.

(8) Flexible furlough was introduced with effect from 1 July 2020 and ran to 31 October 2020. This allowed employees in respect of whom a claim had been, or could validly have been, made during the classic period to return to work on a flexible basis. However, if an employee had not been eligible for payment during the classic period, they were not eligible employees for payments under the flexible furlough scheme.

(9) The appellant made further claims for payment under the Scheme for July, August, September, October, November and December 2020. The total of those claims amounted to approximately £5,700.

Officer Lombardi's involvement

(10) Officer Lombardi was the assessing officer. She reviewed the claims made by the appellant. It was her view that the social media posts made by Michelle comprised work for the purpose of the Scheme. This had two consequences. The first was that in respect of the classic period, Michelle was not eligible to be included in the claim for that period. The second consequence was that because of this ineligibility, she was not an eligible employee for the purposes of claims made under the flexible furlough regime. As a result, Michelle could only be treated as an eligible employee on and from 1 November 2020.

(11) Correspondence from the appellant's agent stated that Michelle had carried out classes between 23 November 2020 and 11 December 2020, yet the appellant had claimed for classic furlough payments for these periods in respect of Michelle. The appellant should have claimed payments under the flexible furlough scheme.

(12) Officer Lombardi therefore calculated that the appellant was liable to tax of £3,312.92 on the overclaimed support payments for the period between 23 March 2020 and 30 September 2020, and further tax on over claimed payments for the period 23 November 2022 to 11 December 2020 in an amount of £136.73. She assessed the appellant accordingly on 13 August 2021.

(13) She accepted the claims made in respect of Sam.

(14) Officer Lombardi undertook an enquiry into the claims and in doing so corresponded with both the appellant and the appellant's agent. She sought to clarify the legal position with

both and requested information from them in order to come to a view of the appellant's position.

(15) The clarification that she sought caused the appellant to write to HMRC, two MPs and to HM Treasury. The appellant indicated that it was not prepared to answer further questions and that it was unhappy about the way in which HMRC had conducted itself and the impact on Michelle and Sam's mental health. It also said that they did not understand how making a modest number of social media posts could impact on their claim in that it was difficult to see how they constituted work.

Procedure

(16) On 10 September 2021 the appellant appealed against those assessments.

(17) On 17 September 2021 HMRC issued their view of the matter letter. It was HMRC's view that Michelle had not ceased all work in relation to her employment by virtue of the social media posts which fell outside the permitted safe harbour of carrying out statutory duties. It was HMRC's view that as there had been social media posts from 25 March 2020 to 24 June 2020 and Michelle had not ceased to work for a period of three consecutive weeks. Therefore, the first claim under the Scheme in which Michelle could have been included was from 1 November 2020. As she had carried out classes between 23 November 2022 to 11 December 2020, any such claim should have been under the flexible furlough regime and not the classic furlough regime.

(18) On 7 October 2021 the appellant accepted an offer of review. On 18 November 2021, HMRC issued their review conclusion letter which upheld the assessments. On 17 December 2021, the appellant notified its appeal to the tribunal.

(19) The parties attempted to reconcile their differences via ADR and a meeting was held on 14 June 2022. Unfortunately, the ADR concluded without the parties reaching a resolution.

The social media posts

(20) The relevant posts are set out in the table below:

March 2020:	25, 26, 27, 28, 31
April 2020:	1, 5, 9, 12, 14, 28
May 2020:	2, 15, 23, 24
June 2020:	6, 13, 19, 24
August 2020:	9
September 2020:	12, 13, 16
November 2020:	10, 16, 17, 18, 25
December 2020:	4, 16, 28
January 2021:	4, 5, 6

(21) These posts on Facebook fall into a number of categories.

(22) Firstly, those which express Michelle's view about the difficulties of lockdown and how supportive everyone should be of each other. An example of this is the post on 26 March 2020 on the Glo-Ball Kids Facebook page.

(23) Secondly, post advertising a specific event, for example that on 27 March 2020 advertising a virtual mini disco, which was followed up by further posts regarding its live streaming and photographs from it (see the posts on 28 March 2020 and 5 April 2020).

(24) Thirdly, posts asking followers to go to and like the other Facebook pages run by the appellant. For example, the post on 2 May 2020 asking followers to go and like the Glo-Babies Facebook page, followed up by a thank you on 23 May 2020 for those who had posted likes.
(25) Fourthly, posts by Michelle telling her Facebook audience that she had completed training and received a diploma (28 April 2020).
(26) Fifthly, posts pointing customers towards other information, for example a Toggle newsletter (9 April 2020) or a website for a charity which assists mothers with new babies (see the post dated 6 January 2021 – after the period in question in this appeal)
(27) Sixthly, posts informing the customers that they have been nominated for an award and asking those customers to vote for them. (See for example posts dated 24 May 2020, 19 June 2020 and 24 June 2020).
(28) Finally, posts informing their customers of the activities they had been working on during lockdown, advising that the activities which had been shelved during lockdown would be resurrected once lockdown finished, and setting out details as to what those activities would be and how customers could access them. And also asking for feedback about what the customers would like to see as regards those activities to keep them safe once they resumed (see for example posts on 6 and13 June 2020, 19 August 2020, 12, 13 and 16 September 2020, 4,10, 16 and 17 November 2020 and 28 December 2020).

DISCUSSION

Burden and standard of proof

4. The burden of showing that the assessments are valid in time assessments which have been properly served on the appellant, rests with HMRC. They must establish these on the balance of probabilities. They have done so. The appellant has not challenged the validity of the assessments nor denied that it had received them. Having considered the evidence, it is our view that these are valid in time assessments which were properly notified to the appellant.
5. The burden then shifts to the appellant to show that it is more likely than not that it has been overcharged by the assessments.

Submissions

6. During the period of the enquiry and, we suspect, at the ADR meeting, the appellant has raised a number of issues including; how difficult the legislation is to follow, the fairness of HMRC's enquiry and behaviour, the correctness of the HMRC team assigned to deal with the enquiry, the lack of information available, and the fact that the appellant is exactly the sort of person for whom the Scheme was intended to benefit.
7. When it came to the hearing, however, it was clear that Michelle and Sam appreciated that the jurisdiction of the tribunal was limited to an exploration of the facts and the application of the law to those facts. We have no jurisdiction to consider the fairness of the legislation or of HMRC's behaviour. We can only consider whether, in short, Michelle's social media posts comprised work. In consequence of this, their submissions to us were as follows:

(1) Michelle's social media posts did not comprise work which they saw as something which was the provision of a personal service for a reward in money or benefit. In lockdown the business received no income and so neither it nor either of them received any reward or benefit from those posts.
(2) There is a difference between working and posting things on social media, and not working and posting things on social media. Before and after lockdown, they posted Facebook content on a regular basis which took a considerable length of time. These postings could amount to 20 or 30 a day. However, during lockdown those postings were much

reduced and restricted to perhaps one every two or three days. In these circumstances it is disproportionate to recover or tax on all of the support payments, even if those postings did comprise work.
(3) The Scheme was intended to benefit businesses like the appellant whose income dropped to zero during lockdown.
(4) No events were put on, or services provided, during lockdown.
(5) They and the appellant have at all times tried to abide by the relevant rules and legislation, which were difficult to follow and were constantly changing.
(6) If the appellant is found liable to pay the assessments, this will cause considerable financial hardship.

8. On behalf of HMRC, Mr Davison submitted as follows:

(1) Michelle was not a furloughed employee. To be so, she was not allowed to undertake any work in her role as an employee of the appellant, which included providing services, generating revenue and social media management. Furthermore, she had not ceased work in relation to her employment for 21 days or more by dint of the social media posts, and thus the costs of employment claimed in respect of Michelle were not qualifying costs.
(2) These social media posts were not undertaken by Michelle to "fulfil the duty or obligation arising out of an Act of Parliament" which can be disregarded when considering whether someone has undertaken work.
(3) Whilst work is not defined in the Coronavirus Direction it should be viewed in the context of section 4 of the Income Tax (Earnings and Pensions Act) 2003 and so should be seen as an employment under a contract of service or any activity under an employment for their employer or a connected party.
(4) The relevant guidance in force at the time of the appellant's claims stated that an employee could not undertake work for or on behalf of an organisation which "includes providing services or generating revenue……". Furthermore, guidance which was extant on 22 April 2020 dealt with furloughed directors and indicated that they should not do work of a kind they would carry out in normal circumstances to generate commercial revenue or provide services to on behalf of their company.
(5) Michelle's activities of posting content on social media pages and undertaking social media management, which engaged with the appellant's customers and sought new opportunities to increase reach and visibility comprised work for the purposes of the Coronavirus Direction. The result of this is that the costs of Michelle's employment did not relate to payment of earnings to Michelle as she was not furloughed.

Discussion

9. We have no hesitation in agreeing with Sam and Michelle that the Scheme was designed to assist precisely the sort of business that they run. When coronavirus and lockdown hit, many people's income was suddenly reduced to nothing. So, broadly speaking, the purpose of the Scheme was designed to compensate qualifying businesses for the income that employees were no longer able to generate as a result of lockdown. It also enabled the employers to retain employees and pay them up to (initially) 80% of their salary subject to a cap of £2,500. So, both employer and employee benefitted. But in order to obtain and retain this benefit both employer and employee had to fulfil a number of legal requirements. So, it is not enough to say that the Scheme was designed to assist the appellant's sort of business. It could only benefit from the Scheme if it complied with the detailed provisions of the legislation.
10. In broad principle the Scheme was designed to provide compensation to employers in circumstances where the employees were undertaking no work for the employer. Such

employees needed to be "furloughed employees". And initially, during the classic period, this was an absolute condition. It was the quid pro quo for the compensation. The Government would pay compensation to replace the money earned by the employees but did not want the employer benefiting twice by virtue of the employee continuing to work. So, unsurprisingly, a condition of the payment of compensation was that the employee undertook no work for the benefit of the employer at all.

11. The crux of this appeal is whether Michelle was a furloughed employee during the relevant periods. To be a furloughed employee she must fall within the definition in paragraph 6 of the Coronavirus Direction. HMRC accepts that the email of 28 April 2020 sent by the appellant to Michelle fulfils the paragraph 6.1 (a) condition. So, the focus of the discussion is whether Michelle had ceased (or will have ceased) all work for the appellant for 21 calendar days or more.

12. The phrase "all work" seems to us to have both quantitative and qualitative elements. It is our view that even a single piece of work undertaken by an employee during the relevant period means that that employee cannot be a furloughed employee because he or she has not ceased "all" work.

13. The appellant has suggested that if Michelle's activities comprise work then because they had been considerably scaled down below the level undertaken pre-lockdown, only a proportion of the support payments should be clawed back. We do not consider that the legislation works like this. It is all or nothing. If there is a single piece of work, HMRC are entitled to clawback the overpayments in full.

14. This might seem to the appellant both unfair and disproportionate. But we have no jurisdiction to consider the fairness of legislation, and the concept of proportionality does not, in our view, apply to these charging provisions (although it does apply to any penalties which HMRC might seek to visit on the appellant).

15. So, the outcome of this appeal depends on whether the activities undertaken by Michelle in posting content on Facebook comprised work for the purpose of paragraph 6 of the Coronavirus Direction.

16. There is no definition of work in the legislation. Before us, HMRC argued that it could be taken as meaning any employment under a contract of service or activity under an employment for their employer. The relevant HMRC guidance states that the employee should not provide services or generate income for the business.

17. Whilst these are useful general pointers (and without wishing to provide a definition of work without having had this fully canvassed by represented parties) it is our view that in the context of the Coronavirus Direction, any activity undertaken by an employee with the view to either directly or indirectly generating income for an employer, or to enhance the employer's goodwill (brand value) or reputation, comprises work. It does not matter whether the activity actually generates income, what is important is that the activity is intended to generate income. This can be direct or indirect. Marketing activities which may not directly generate income (and judging the commercial worth of marketing activities is the most imprecise of sciences) comprise work. Indeed, many organisations of modest size employ either in-house or outsourced, the services of marketing experts.

18. We also need to adopt a purposive approach towards interpreting the legislation. The purpose of the Scheme as implemented by the Coronavirus Directive was essentially to require employees to completely cease the work that they had been hitherto undertaking for an employer. So, any continuation of the activities that had been undertaken prior to lockdown is likely to comprise work even though the scale of those activities might have been considerably reduced. An employee who was turning out 100 widgets a day would still be working if they turned out only 3 widgets a day. The Scheme was designed to ensure the compensation was provided only if that employee ceased producing widgets completely.

19. The foregoing analysis clearly applies only to the classic period, and not to flexible

furlough. This revised regime reflects the Government's recognition that payments might be made to "top up" the income generated by employees rather than to replace that income altogether. And so the employees were entitled to work subject to certain conditions. However, it could only apply in respect of employees who qualified under the classic regime.

20. Tested against this interpretation, we have come to the conclusion that the vast majority of posts that Michelle made on Facebook comprised work, and in each of the periods in which support payments were claimed, she had not ceased all work for the appellant for a period of 21 calendar days or more.

21. In our view they are all designed to maintain and enhance the goodwill of the appellant's business and to maintain its brand awareness even though the appellant was not able to put on the activities which it had undertaken prior to lockdown.

22. This is wholly understandable. What business would not wish to maintain its reputation during this difficult period so that once the situation returned to normal, the business could start to generate income. So, positioning oneself to do this, during lockdown, is a no-brainer.

23. But the concept of work, in our view, does not distinguish between work which might have an immediate impact on revenue generation and activities which might have an impact on the ability of a business to generate revenues in the future. Both activities comprise work.

24. So, there is a tension between the commercially sensible and prudent course of ensuring that a business is fully prepared to go back into the market once lockdown finished, on the one hand, and complying with the provisions of the Scheme on the other.

25. On 31 March 2020, the Glo-Ball Facebook page states "okay all you lovely people locked up in isolation, we need your help to spread the Glo-Ball word. So, let's do a COMPETITION…." The post goes on to say that if a customer likes the page, they will be given an entry into the draw and furthermore, entering the draw would have an impact on the "likes", and will "really help us grow our audience which will be so crucial to our business when we come out of lockdown". This is clearly work. It is marketing and positioning of the business so it is better able to get back to normal once lockdown ends.

26. The posts in March and April 2020 relating to the holding of virtual mini disco are work in the same way that advertising and reporting back on activities which had formally been undertaken at a village hall was work. And just as the posts advertising the competition and asking for customers to post "Facebook likes" was marketing and positioning and thus work, the same is true of the post on 14 April 2020 thanking customers for posting those likes and telling them that the competition was closed and that the winner would be drawn and announced.

27. So too was the post on 28 April advertising that Michelle had undertaken further training, the subliminal if not overt message being that once lockdown was finished, the appellant was even better qualified to undertake the pre-lockdown activities that it had been pre-lockdown. The same subliminal if not overt messaging applies to the posts in May asking customers to vote in favour of the appellant in respect of its nomination for an award. The relevant post on 24 May dealing with the competition goes on to say "in this current climate it would be superb to win an award for Glo-Babies for all the [illegible] we have delivered and from all the people that have loved what we do. It would certainly give us such a boost when we can finally restart".

28. And so too with other posts, towards the end of the lockdown period, explaining how, once lockdown finished, post lockdown classes would be organised. For example, a post on 6 June 2020 asked customers to complete a survey to add their opinions as to how and when the customer would be satisfied to return to children's classes which will help shape procedures which should be put in place for a safe return.

29. We find that in each of the periods March 2020 to June 2020 Michelle's posts did comprise work. It cannot therefore be said that she had ceased all work for a period of 21 consecutive days in those periods. And because she was not a qualifying employee in the

classic period, she could not be one under the flexible regime until the start of November 2020. But during the period of the November claim, Michelle carried out classes, which were clearly work. And so, in our view, Michelle was not a furloughed employee in any of the periods in question.

30. Finally, we wholly appreciate that this decision will cause the appellant financial hardship. The only crumb of comfort that we can offer is that we suspect this financial hardship will be less acute than would have been the case had the support payments not been made to the appellant in the first place. At least now the appellant is able to generate income which might go some way towards satisfying the assessments.

DECISION

31. For the foregoing reasons we dismiss this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

32. 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.

NIGEL POPPLEWELL

TRIBUNAL JUDGE

Release date: 22nd MAY 2023

Appendix

1. Sections 71 and 76 of the Coronavirus Act 2020 provide the Treasury with the power to direct the respondents' functions in relation to coronavirus.
2. Pursuant to these powers, the Treasury introduced the Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction ("**the Coronavirus Direction**") to govern the respondents' administration of the Scheme on 15 April 2020 (subsequently followed by a number of updated Directions in relation to the Scheme during the pandemic).
3. Under paragraph 3 of the Coronavirus Direction, an employer can make a claim for Support Payments under the Scheme if they have a PAYE scheme registered on the respondents' Real Time Information (RTI) system for PAYE by 19 March 2020.
4. Paragraph 4 of the Coronavirus Direction clarifies how claims can be made for employers with more than one PAYE scheme:

> 'If an employer has more than one qualifying PAYE scheme-
>
> (a) the employer must make a separate CJRS claim in relation to each scheme, and
>
> (b) the amount of any payment under CJRS will be calculated separately in relation to each scheme.'

5. Paragraph 5 of the Coronavirus Direction details Qualifying Costs an employer is entitled to claim for under the Scheme. At paragraph 5(a), this includes Qualifying 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) meet the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee'.

6. Paragraph 5 of the Coronavirus Direction refers to Schedule A1 to the PAYE Regulations. Paragraph 67B of the PAYE Regulations states that "on or before making a relevant payment to an employee, an RTI employer must deliver to HMRC the information specified in Schedule A1 in accordance with this regulation".
7. Schedule A1 details what information regarding payments to employees must be given to the respondents. This information includes the date of the payment made and the employee's pay frequency.
8. A relevant day is defined by paragraph 13.1 of the Coronavirus Direction as 28 February 2020 or 19 March 2020.
9. Paragraph 6.1 of the Coronavirus Direction sets out who is a furloughed employee in a Scheme claim and are those where:

> (a) The employee has been instructed by the employer to cease all work in relation to their

employment,

(b) The period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and

(c) The instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.

10. Paragraph 6.6 of the Coronavirus Direction states:

'Work undertaken by a director of a company to fulfil a duty or other obligation arising by or under an Act of Parliament relating to the filing of company accounts or provision of other information relating to the administration of the director's company must be disregarded for the purposes of paragraph 6.1(a)'.

11. Following the Third Coronavirus Direction published on 25 June 2020, an employee could be flexibly furloughed. Paragraph 10.1 of the Third Direction sets out who is a flexibly-furloughed employee in a Scheme claim, including:

'...

(b) The employee has been instructed by the employer –

(i) to do no work in relation to their employment during a CJRS claim period,

or

(ii) not to work the full amount of the employee's usual hours in relation to their employment during a CJRS claim period.

(c) The employee –

(i) does no work in relation to their employment during the CJRS claim period,

or

(ii) does not work the full amount of the employee's usual hours in relation to their employment during the CJRS claim period.…'

12. Following the introduction of flexi-furlough, an employee was able to undertake some work but were able to be flexibly-furloughed for the remaining hours not worked due to the effects of the Coronavirus pandemic, in line with their usual employment.

13. The Fourth Coronavirus Direction published on 1 October 2020 set out the deadline for making a claim under the Third Direction.

14. The Fifth Coronavirus Direction, published on 12 November 2020, relates to claims for periods after 1 November 2020, with the definition of 'flexibly furloughed' at 6.2 being the same as 10.1 of the Third Direction.

15. Paragraph 8 of the Coronavirus Direction sets out what expenditure can be reimbursed in a CJRS claim. Paragraph 8.2(b) makes reference to an employee's "reference salary" and instructs consideration of paragraphs 7.1 to 7.15 when calculating this.

16. Paragraph 8(5) of schedule 16 Finance Act 2020 ("FA 2020") details the amount of income tax chargeable as being equal to the amount of support payment to which the applicant was not entitled and has not been repaid. In addition, and as regards Corporation Tax computations, no

deduction is allowed in respect of the payment of income tax under paragraph 8(8).

17. Paragraph 9 of schedule 16 FA 2020 affords the Respondents the power to make assessments to income tax as chargeable under paragraph 8. An Officer, under paragraph 9(1), may make an assessment where he considers that a person has received an amount of Support Payment to which he was not entitled in an amount which ought in the Officer's opinion to be charged under paragraph 8.

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

19. 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 applies. paragraph 11 sets out how the income tax charge operates in relation to a company's calculation of their corporation tax liability.