



Neutral Citation: [2024] UKFTT 00302 (TC)

Case Number: TC09131

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Birmingham Employment Tribunal, Centre
City Tower, Birmingham

Appeal reference: TC/2022/11978

CORONAVIRUS JOB RETENTION SCHEME – Whether claims for payments under the CJRS were correctly calculated – paragraph 5, 7 and 8 of the Coronavirus Act 2020 Functions of Her Majesty’s Revenue & Customs (Coronavirus Job Retention Scheme) Direction of 15 April 2020 – validity of assessments to recover alleged overpayments – paragraphs 8 and 9 of schedule 16 to Finance Act 2020 – appeal allowed in part

**Heard on: 19 March 2024
Judgement Date: 10 April 2024**

Before

**TRIBUNAL JUDGE ROBIN VOS
MR TERRY BAYLISS**

Between

JAMA ACADEMY LIMITED

Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents**

Representation:

The Appellant did not attend the Hearing and was not represented.

For the Respondents: **MR PAUL DAVISON** litigator of HM Revenue and Customs’
Solicitor’s Office

DECISION

INTRODUCTION

1. This appeal relates to payments made to the Appellant, Jama Academy Limited (JAL) in 2020 and 2021 under the Coronavirus Job Retention Scheme (CJRS). HMRC say that JAL claimed more than it was entitled to and have issued assessments totalling just under £11,000 to recover the amounts which they believe have been incorrectly claimed.
2. HMRC accept that their calculations which form the basis of the assessments are incorrect and invite the Tribunal to reduce the assessments to a total of £8,863.48 but, subject to this, to uphold the assessments.
3. For its part, JAL accepts that it has claimed more than it was entitled to but suggests that the amount which should be repaid is £2,812 and has therefore appealed against the assessments to the extent that they exceed this amount.
4. It is common ground that JAL was entitled to claim payments under the CJRS. The only dispute is about how those payments should have been calculated.

PROCEDURAL ISSUES

Non-attendance of the Appellant

5. Just before 11:00pm on Friday 15 March 2024, JAL's director, Mr Jama emailed the Tribunal to say that due to "unforeseen circumstances" he would not be able to attend the hearing on 19 March and requested that the hearing be postponed.
6. Although Mr Jama's email was copied to HMRC, there was a mistake in the email address and so HMRC did not become aware of the postponed application until the morning of 18 March when Mr Davison happened to call the Tribunal. Mr Davison immediately emailed the Tribunal to object to the postponement application. The objection was based on three grounds:
 - (1) The hearing had previously been postponed three times.
 - (2) Mr Jama did not give any details of the reasons for asking for the postponement.
 - (3) It would be in the interests of justice to proceed with the hearing in JAL's absence in accordance with Rule 33 of the Tribunal rules.
7. On the afternoon of 18 March 2024, on the instructions of Judge Vos, the Tribunal emailed Mr Jama informing him that the postponement application was refused and that the hearing would therefore go ahead the following day.
8. That decision was made broadly for the reasons set out by HMRC in their email objecting to the postponement. The email from the Tribunal did however make the point that "the Tribunal would need to understand exactly what the unforeseen circumstances are and why they are said to justify a postponement of the hearing" before it could agree to a postponement. It also observed that, if Mr Jama did not attend the hearing on behalf of JAL, the Tribunal would need to consider whether the hearing should nonetheless go ahead in JAL's absence in accordance with Rule 33 of the Tribunal Rules.
9. Mr Jama did not take the opportunity to provide any further details to the Tribunal as to the nature of the unforeseen circumstances which prevented his attendance at the hearing and he did not in fact attend the hearing.
10. We therefore had to decide whether to proceed with the hearing in JAL's absence. Rule 33 of the Tribunal Rules provides that the Tribunal may proceed with a hearing if the Tribunal

is satisfied that the party has been notified of the hearing and that it is in the interests of justice to proceed with the hearing.

11. In this case, there was no doubt that JAL had been notified of the hearing given Mr Jama's application to postpone the hearing. The only question was therefore whether we considered that it was in the interests of justice to proceed with the hearing.

12. Having carefully considered the matter, we considered that it would be in the interests of justice to proceed with the hearing, notwithstanding JAL's absence for the following reasons:

(1) Although the starting point is that a party has a right to attend a hearing and the overriding objective in Rule 2 of the Tribunal Rules includes ensuring, so far as practicable, that the parties are able to participate fully in the proceedings, this has to be balanced against other relevant factors.

(2) This is a relatively straightforward appeal which has now been ongoing for almost two years. There was a public interest in the finality of proceedings so that both taxpayers and HMRC know where they stand and in avoiding prolonging proceedings which consumes not only the resources of the parties but also the resources of the Tribunal. In this case, if the hearing were postponed at very short notice, the costs already incurred by the Tribunal, including the provision of the Tribunal panel and an interpreter which had been requested by Mr Jama would be wasted.

(3) It is necessary for a taxpayer who wishes for a hearing to be postponed to give proper reasons why the application has been made. A vague assertion that there are "unforeseen circumstances" is not sufficient. It is necessary to explain at least in outline (and preferably in detail) what those circumstances are so that the Tribunal can consider whether they provide a proper reason for postponing the hearing, particularly at very short notice in circumstances where the party has known about the hearing for some time.

(4) We noted that there had been three previous postponements but, having consulted the Tribunal file, it is apparent that each of these postponements resulted from travel disruption due to train strikes. Only the first postponement had been requested by JAL. The second postponement took place on the initiative of the Tribunal and the third postponement was requested by HMRC. We did not therefore consider that the previous postponements were a significant factor in deciding whether to postpone the current hearing other than as part of taking into account the fact, as mentioned above, that the appeal has been outstanding for almost two years and that it is in the interest of justice to bring it to a conclusion.

(5) We had also had the opportunity prior to the hearing to look in more detail at the documents and correspondence contained in the hearing bundle. Our assessment was that JAL's case is sufficiently set out in those documents for the Tribunal to understand the points which JAL wishes to make so that the Tribunal could deal with the appeal fairly and justly (in accordance with the overriding objective in Rule 2 of the Tribunal Rules) even though JAL was not present at the hearing.

Amendment to the Respondents' skeleton argument of 12 March 2024

13. The Respondents made an application on 12 March 2024 to amend the skeleton argument which they had originally prepared on 21 June 2023 for a previous hearing (which had been postponed). The amendments related only to the calculation of the amount which HMRC now say should be repaid by JAL. The figure in the original skeleton argument was £8,731.48. The amendment increases this by about £130 to £8,863.48.

14. In his email of Friday 15 March 2024 applying for the hearing to be postponed, Mr Jama stated that he objected to HMRC's skeleton argument. He did not give any details of what he

was objecting to, nor the reasons for any objection. We assume however that he must have been referring to HMRC's application of 12 March 2024 as his email was sent as a response to an email sent to Mr Jama by the Tribunal on 13 March 2024 informing him that HMRC's application for permission to amend their skeleton argument would be dealt with at the start of the hearing if any objection to the amendment was received before the hearing.

15. In the circumstances, we had to decide whether to allow HMRC's application. We noted (as pointed out by Mr Davison) that the Directions which were in force did not require either party to provide a skeleton argument. HMRC's skeleton was provided to assist the Tribunal and the Appellant. Strictly speaking, we do not therefore consider that HMRC require permission from the Tribunal to submit a skeleton argument in advance of a hearing, nor to amend the version which they have produced for this hearing when compared to the skeleton argument which was prepared for the previous hearing.

16. Nonetheless, even if permission were required, we would grant it. The amendment is very minor and simply reflects an error in HMRC's original calculation. JAL does not give any reason for objecting to the amendment. There is no prejudice to JAL in making this amendment as, although it increases the amount which HMRC say should be repaid by approximately £130, it is quite clear to us how the error has arisen. Whilst JAL challenges a number of aspects of the way in which HMRC have calculated what they say is the overpayment to JAL, none of the points made by JAL affect, in isolation, the particular figure in respect of which HMRC have identified the error.

17. To the extent necessary, we therefore gave permission for HMRC to rely on their amended skeleton argument.

CJRS – THE LEGAL FRAMEWORK

Calculation of CJRS payments

18. The Coronavirus Job Retention Scheme was of course introduced in the context of the Covid pandemic. It took effect in March 2020 and allowed employers to make a claim for a payment from the Government for part of the costs of employing furloughed employees.

19. Under the Coronavirus Act 2020, the Treasury was given power to make Directions setting out the details of the CJRS. The initial Direction was made on 15 April 2020 (the "First Direction"). This contained a schedule setting out the details of the CJRS including the conditions for making a claim and the way in which any payments claimed should be calculated.

20. Under paragraph 5 of the First Direction, a claim could be made in respect of a furloughed employee who had received earnings in the tax year 2019/20 and who was employed on 19 March 2020.

21. Paragraph 8 of the First Direction sets a cap on the amount which can be claimed. This is the lower of £2,500 and 80% of what is referred to as the employee's "reference salary". In this case, it is the second figure which is lower and so it is necessary to consider how to work out an employee's reference salary.

22. This is dealt with in paragraph 7 of the First Direction and depends on whether the employee is a "fixed rate employee".

23. The definition of a fixed rate employee is contained in paragraph 7.6 of the First Direction. To the extent relevant, the conditions include a requirement that the employee is entitled under their contract to be paid an annual salary in equal weekly or monthly instalments irrespective of the number of hours actually worked in a particular week or month and that the

basic hours worked do not normally vary according to business, economic or agricultural seasonal considerations.

24. If the employee is a fixed rate employee, the reference salary is simply the amount of salary payable to the employee in the last weekly or monthly period ending on or before 19 March 2020.

25. However, where the employee is not a fixed rate employee, the calculation of the reference salary is set out in paragraph 7.2 of the First Direction which, to the extent relevant, reads as follows:-

“7.2 Except in relation to a fixed rate employee, the reference salary of an employee ... 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.”

26. In respect of these provisions, there are two important points to note. The first is that the reference salary is whichever figure is the greater of the two alternatives. The second is that a reference salary needs to be calculated for each employee and so it is possible that in respect of a particular claim for a particular period, the first alternative (referred to by HMRC as the “average method”) may give a higher figure whilst for another employee, the second alternative (referred to by HMRC as “the look back method”) may give a higher figure.

27. Further Directions were made by the Treasury between May 2020 and January 2021. These Directions made various amendments to the CJRS including, for example, the introduction of the “flexi furlough” scheme whereby CJRS payments could be claimed where an employee did some work but less than the number of hours which they would normally have worked.

28. However, none of the changes have any material impact on the calculation of the payments to which JAL was entitled in this particular case other than to note that, in September 2020, the maximum which could be claimed was 70% of the reference salary rather than 80% and in October 2020, the maximum was 60%. After that, the amount which could be claimed went back to 80%. In this decision, we therefore refer only to the provisions of the First Direction.

Validity of assessments

29. Although JAL does not raise any challenge to HMRC’s assessments other than the amount, we should briefly mention the relevant assessing provisions as it is up to HMRC to establish that the assessments have been properly made.

30. The relevant provisions are contained in paragraphs 8 and 9 of schedule 16 to the Finance Act 2020 (Schedule 16).

31. Paragraph 8(1) of Schedule 16 provides that a recipient of a CJRS payment is liable to income tax if the recipient is not entitled to the amount in question under the CJRS. Paragraph 8(5) of Schedule 16 confirms that the amount of income tax payable is equal to the amount of the CJRS payment to which the recipient was not entitled.

32. Paragraph 9 of schedule 16 is the assessing provision. This provides as follows:-

“9(1) If an officer of Revenue and Customs considers ... 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."

33. Mr Davison submits that the assessing officer in this case, Ms Foley, clearly did consider that JAL had received CJRS payments to which it was not entitled and that the assessments reflected the amount which, in Ms Foley's opinion ought to be charged.

34. Although Mr Davison 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.

36. The time limits for making an assessment are set out in paragraph 9(2) of Schedule 16. This cross-refers to sections 34 and 36 of the Taxes Management Act 1970 which give HMRC a minimum of four years from the end of the relevant tax year to make an assessment. The assessments in this case were made in July 2021 in respect of payments made in 2020 and 2021 and so there is no doubt that the assessments were made within the relevant time limit.

37. The appeal mechanism contained in Parts 4-6 of the Taxes Management Act 1970 is imported by paragraph 9(3) of Schedule 16. This is the basis for JAL's appeal to the Tribunal.

38. We note that JAL's appeal was notified to the Tribunal outside the 30 day time limit for such appeals but that HMRC do not object to the late appeal. It is apparent that the reason for the late appeal is that JAL mistakenly made an appeal to the Social Entitlement Chamber within the relevant time limit and only sent the appeal to the Tax Tribunal when it was notified of its mistake. Given the reason for the late appeal, we give permission for the appeal to be notified to the Tribunal outside the statutory time limit.

39. The only other point to note about the relevant appeal provisions is that section 50(6) Taxes Management Act 1970 requires the Tribunal to reduce an assessment if it decides that the appellant has been overcharged by the assessment. As we have said, HMRC accept that in this case, JAL has been overcharged. The only question is whether the assessment should be reduced to the figure of £8,863.48 suggested by HMRC, the figure of £2,812 proposed by JAL or some other figure.

BACKGROUND FACTS

40. There is no real dispute about the facts which are relevant to this appeal which we summarise below.

41. JAL is an after school tuition centre which has been in existence since 2018. It has two employees, the director Mr Jama and his colleague Mr Ali, both of whom provide tuition services to pupils who have learning requirements and who are preparing for exams.

42. Both individuals have employment contracts. Mr Ali's working hours are stated to be 4 hours per week but with a provision enabling JAL to vary his working hours to meet the needs of the business. The contract provides that Mr Ali will be paid monthly but does not give

details of the salary which will be paid. Mr Jama's employment contract is similar except his working hours are stated to be 15 hours per week.

43. In a telephone conversation with HMRC in October 2020, Mr Jama explained that the hours worked would vary each month with January and February being the peak times as that was when students were studying for exams. He also explained that Mr Ali received £10 per hour whilst his own pay represented the balance of the fees received by JAL after deducting expenses.

44. All of this is borne out by HMRC's records of the amounts paid to Mr Jama and Mr Ali by way of salary in the 2019/20 tax year where the amounts paid each month. The payments to Mr Ali varied between zero and £250 whilst the amounts paid to Mr Jama varied between zero and £1,200. We therefore find as a fact that the position in relation to working hours and pay is as explained by Mr Jama to HMRC in the conversation referred to above.

45. Both Mr Jama and Mr Ali were employed by JAL throughout the 2019/2020 tax year and continued to be employed by JAL on 19 March 2020. JAL was therefore in principle entitled to make CJRS claims in respect of them.

46. Between March 2020 and March 2021, JAL made 13 CJRS claims in respect of Mr Jama and Mr Ali. These covered every month in that period except for January 2021 with two claims being made for October 2020, the first covering 1-15 October and the second covering 16-28 October. The total amount claimed was £15,078.01.

47. We do not have precise details of the way in which those claims were calculated. However, in October 2020, Mr Jama provided HMRC with revised calculations showing that JAL had been overpaid by £2,812. In each case, the revised claim was based on a monthly reference salary for Mr Jama of £1,220 and for Mr Ali of £180.

48. Mr Jama notes that the £1,220 is based on his salary for February 2020 (the last month before the CJRS scheme came into effect). In fact, he was paid £820 in February 2020, but he explains that he was due an additional £400 which had been received late from a client by JAL which is why it was not reflected in his pay for February 2020.

49. As far as Mr Ali's pay of £180 per month is concerned, Mr Jama does not explain precisely how this was calculated. However, in his conversation with HMRC in October 2020, he noted that Mr Ali earned between £160 and £200 a month and so we infer that the figure of £180 is the average of those two figures. We also note that Mr Ali was in fact paid £180 in each of November 2019 and January 2020 although the figure for February 2020 was £140.

50. HMRC opened an investigation into JAL's CJRS claims in September 2020. As mentioned above, following the telephone conversation with HMRC in October 2020, JAL submitted a calculation covering the period from March 2020-October 2020 setting out the claims which it believed should have been made, concluding that, during this period, JAL had overclaimed £2,812.

51. In January 2021, Ms Foley sent JAL her calculation of the amount of the overpayment which she considered to have been made for the period from March 2020-December 2020. The total was £8,623.50 and was calculated on the basis that Mr Jama and Mr Ali were variable rate employees.

52. Their reference salary had been calculated by taking a monthly average based on the salary amounts which had been reported to HMRC as having been paid in the tax year 2019/20 divided by the number of months (of which there were eight) for which a salary had been received. This did not, however, include the amounts paid to Mr Jama and Mr Ali in March

2020 as the relevant return in respect of these amounts had only been received by HMRC in April 2020.

53. However, having received further information from Mr Jama and having discussed the position internally, Ms Foley considered that the March 2020 payments should be included in her calculation of the reference salary. She also decided that it would be more accurate to calculate a daily average for the purposes of calculating the reference salary given that JAL did not make payments to Mr Jama and to Mr Ali on a regular basis and that there were a number of months in which neither of them received any pay.

54. Based on these adjustments, Ms Foley recalculated the amount of the overpayment for the period from March 2020-December 2020 as £9,059.04 which was notified to JAL on 14 April 2021. It is perhaps worth noting that the difference between the overpayment figures for this period using a daily average rather than a monthly average (although admittedly also including the pay for March 2020) is only £500. The change from the monthly average to the daily average did not therefore make a significant difference to the calculation although it did increase the amount of the overpayment slightly.

55. Ms Foley subsequently became aware that JAL had made additional CJRS payment claims in February and March 2021. She therefore recalculated the overpayment (still using a daily average and including the March 2020 salary payments in calculating that average) to include these claims. This increased the overpayment (now covering the period March 2020-March 2021) to £10,718.22 which was notified to JAL on 6 May 2021.

56. Ms Foley however then spotted a further error which concerned allowing a credit of just over £175 which she concluded should not in fact have been allowed and so the final assessment issued on 14 July 2021 totalled £10,894.78 rather than £10,718.22.

57. None of these calculations/assessments took account of the possibility of taking the actual pay for the relevant month in the previous year as the “reference salary” in respect of the CJRS claims (ie the “look back method”) even where this would have produced a higher reference salary than using the daily average which was the figure which Ms Foley had in fact used to calculate the monthly reference salary for each of the claims.

58. JAL requested a review of Ms Foley’s decision. The review conclusion letter was issued on 27 January 2022. This largely upheld Ms Foley’s calculations subject to a very small amendment relating to the claim for March 2021 as Ms Foley had calculated the reference salary on the basis that there were 30 days in March rather than 31 days. The review therefore concluded that the amount of the overpayment was £10,880.20.

THE CORRECT CALCULATION OF THE CJRS PAYMENTS

59. As we have explained, the calculation of the reference salary for each monthly claim, which is the critical element in determining how much JAL was entitled to claim, depends on whether Mr Jama and Mr Ali were fixed rate employees.

60. We have no doubt that HMRC are correct in concluding that they are not fixed rate employees. This is for the following reasons:

(1) There is no entitlement under their employment contracts to be paid an annual salary nor to receive their pay in equal weekly or monthly instalments. All the contracts do is specify the normal number of hours to be worked for each week but, as we have mentioned, there is flexibility for JAL to ask its employees to work different hours depending on the needs of the business.

(2) There is no doubt that the hours worked by Mr Ali and Mr Jama were variable depending on the requirements of the business. As Mr Jama himself explained to HMRC,

there was a greater workload in January/February each year due to forthcoming exams. All of this is borne out by HMRC's records of the amounts actually paid to Mr Jama and to Mr Ali during the tax year 2019/20 which confirm that the amounts which they received changed every month, no doubt reflecting how many hours each employee has worked during the relevant month. If no work is done, no pay will be received.

61. In the light of this, it is clear that neither Mr Ali nor Mr Jama satisfy the requirements outlined at paragraph [23] above to qualify as fixed rate employees.

62. The result of this is that the reference salary for the period of each CJRS claim (generally for each month) must be calculated in accordance with paragraph 7.2 of the First Direction as explained in paragraphs [25 and 26] above. 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.

63. In these circumstances, it is not open to JAL to use a fixed monthly salary of £1,220 for Mr Jama and £180 for Mr Ali as this does not reflect their average daily or monthly pay for the 2019/20 tax year (see further in relation to this the calculations in paragraphs [73-75] below) nor is it the amount which they actually received by way of salary for each corresponding month in the 2019/20 tax year (which fluctuated each month).

64. JAL's calculations submitted to HMRC on 25 October 2020 showing an overpayment of £2,812 are not therefore correct. In addition, we note that those calculations do not of course take account of the subsequent claims from November 2020-March 2021.

65. Turning to HMRC's calculations, we agree with Mr Davison's submission that the calculations which form the basis of the July 2021 assessments are incorrect as they looked only at the daily average from the previous year in calculating the reference salary and took no account of the possibility that the amount actually paid to Mr Jama and/or Mr Ali in the corresponding month of the 2019/20 tax year might be more than the daily average and, in some months was in fact more than the daily average. It is quite clear from paragraph 7.2 of the First Direction that the calculation must be based on the higher of the two figures.

66. We also agree that the period in respect of which each claim is made must be looked at separately so that, for example, the look back method (using the actual salary paid during the corresponding month in the 2019/20 tax year) may give a better result for JAL in respect of one of its employees for a particular month whilst the average method (using a daily or monthly average) may give a better result for the same employee in another month.

67. In our view this conclusion follows naturally from the wording of paragraph 5 of the First Direction which is what confers on an employer the entitlement to make "a claim". This must refer to each separate claim that is submitted. There is no requirement either in paragraph 5 or in paragraph 7 of the First Direction that the reference salary in respect of each claim must be calculated in the same way.

68. All of this is to the benefit of JAL as it allows JAL to use the highest figure for the reference salary for each employee and for each claim period which is permitted by the two alternatives contained in paragraph 7.2 of the First Direction.

69. This is the approach which HMRC have now adopted in their revised calculations which were annexed to Mr Davison's skeleton argument. They have considered the average method and the look back method for each claim period and for each employee and have selected the alternative which gives JAL the greatest entitlement.

70. One of the complaints made by JAL is that HMRC have used a daily average rather than a monthly average when calculating the reference salary of each employee when using the average method. However, we consider this criticism to be misplaced. Paragraph 7.2(a) of the First Direction in effect requires the use of whatever average is the most appropriate in the circumstances. In this case, we agree with HMRC that a daily average gives a more accurate result given that there were a number of months for which Mr Ali and Mr Jama received no pay at all.

71. In any event, if a monthly average were to be calculated, we consider that this would need to be done by taking the total amount paid to Mr Ali and Mr Jama respectively during the 2019/20 tax year up to 19 March 2020 (when the period of furlough began) and dividing the result by the number of months in that period (ie from 6 April 2019-19 March 2020 - approximately 11½ months).

72. This is not the approach adopted by Ms Foley in her initial calculation in which she added together the amounts shown in the returns made to HMRC by JAL and then divided the result by eight (being the total number of monthly returns made by JAL in the relevant period). This only gives a monthly average for those eight months. It takes no account of the months in which nothing was paid and no return was therefore made to HRMC.

73. Using the approach we have explained in paragraph [71] above, there is virtually no difference between the monthly average and the daily average, once converted into a monthly figure. For example, for Mr Jama, HMRC have taken the daily average to be £15.32 which is the equivalent of £474.92 for a 31 day month or £459.60 for a 30 day month.

74. If, instead, a monthly average were calculated this would be £5,331 (Mr Jama's total earnings during the 2019/20 tax year) divided by 11.5 months which equals £463.57.

75. For Mr Ali, his total earnings for 2019/20 were £1,010. HMRC have calculated the daily average to be £2.90 which equates to £85 for a 30 day month and £89.90 for a 31 day month. If a monthly average were calculated, this would be £1,010 divided by 11.5 months which equals £87.82.

76. We therefore reject the suggestion that using a daily average rather than a monthly average makes any significant difference to the amount which can be claimed by way of CJRS payment in this particular case but, for the reasons we have explained, accept that a daily average is more appropriate.

77. Based on this, we accept HMRC's revised calculations. They have calculated the reference salary for each employee and for each period of claim using the higher of the look back method and the average method, all of which is for the benefit of JAL.

78. JAL also criticises HMRC for including the March 2020 payments in calculating the daily average. However, this criticism is unfounded as the effect of including the March 2020 salary payments is in fact to increase the average daily salary rate and therefore the amount which can be claimed by JAL by way of CJRS payments.

79. In addition, JAL refers to the fact that, in an email of 6 May 2021, Ms Foley notes that she has made some minor amendments to the number of days in certain claims. However, as Ms Foley explains in her email, these amendments to the number of days in the claims works in favour of JAL and not against it.

80. It is clear from the correspondence that the adjustments which Ms Foley is referring to relate to the fact that some of the claims which were in fact made do not relate to the full 30 or 31 days in a month. For example, the two claims relating to October 2020 on the face of it only relate to 28 days. Ms Foley's adjustments presumably increase the period of the claim to

the full 30 or 31 days in each month which means that she can increase the reference salary by multiplying the daily average by 30 or 31 days rather than, for example, 28 days. This cannot therefore be a reason for reducing the assessments.

DECISION

81. Based on all of the above, our conclusion is that HMRC's revised calculations are correct and are as generous to JAL as is possible within the parameters of the requirements of the relevant legislation which explain how the CJRS payments should be calculated.

82. In accordance with section 50(6) Taxes Management Act 1970, we find that JAL has been overcharged by the assessments dated 14 July 2021 and reduce those assessments to a total of £8,863.48.

83. We should make it clear that, in making our findings, there is no suggestion that JAL has deliberately claimed more by way of CJRS payments than it was entitled to. As we have said, the principles applying to the calculations are complex and clearly were not well understood either by HMRC or by taxpayers.

84. No criticism can be made of JAL for making mistakes in those calculations, particularly when it is clear that Ms Foley, even after consulting her colleagues, also made mistakes. This is no doubt one of the reasons why HMRC have accepted that it would not be appropriate in this case to charge any penalties. However, the job of the Tribunal is to determine what payments were actually due in accordance with the legislation and this is what we have done.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

85. 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.

**ROBIN VOS
TRIBUNAL JUDGE**

Release date: 10th APRIL 2024