



Neutral Citation: [2025] UKFTT 209 (TC)

Case Number: TC09430

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2024/01533

Coronavirus Job Retention Scheme – clawback of payments - the Coronavirus Act 2020 Functions of HMRC (Coronavirus Job Retention Scheme) Direction of 15 April 2020 –whether salary increases after March 2020 part of the reference salary for the purposes of calculating entitlement – no – whether HMRC conduct and wider circumstances relevant - no

Heard on: 7 February 2025

Judgment date: 14 February 2025

Before

**TRIBUNAL JUDGE IAN HYDE
PATRICIA GORDON**

Between

SWIFT TRADING WORLDWIDE LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Khawaja Raza, director

For the Respondents: Nathaniel Campbell, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This appeal concerns the application of the Coronavirus Job Retention Scheme (“CJRS”) for employers who furloughed their employees during the coronavirus pandemic.
2. The issue in this appeal is the amount of CJRS support payments an employer can claim. Specifically, it is concerned with whether the reference salary for the furloughed employee should reflect salary increases made after March 2020.

THE FACTS

3. Mr Raza, the sole director and employee of the appellant, represented the appellant in the hearing. He did not provide a witness statement but gave oral evidence. Mr Tahir Yazin, the accountant to both the appellant and Mr Raza, was present in the hearing in support of Mr Raza and made contributions on behalf of his client.
4. Ms Christine Peckham, an HMRC compliance officer, provided a witness statement and gave oral evidence as to her role in the investigation into the appellant’s CJRS claims.
5. We find the facts as set out below.

The appellant and Mr Raza’s salary

6. The appellant is a small company owned by Mr Raza. Mr Raza is the sole employee and director. The appellant’s business consists of wholesale activities and the retail sale of electrical household appliances.
7. During the covid pandemic Mr Raza made several attempts to obtain support from local and central Government. He secured a bounce back loan but had been refused a business rate grant by Birmingham City Council as he did not pay business rates. Further, HMRC advised him that he was not eligible for Self-Employed Income Support because he was not self-employed. In evidence he said that the only way he could get support was through CJRS.
8. Mr Raza tends for tax reasons to pay himself from the company in a mix of salary and dividends. In periods from at least April 2017 up to March 2020 Mr Raza was paid a salary of £400 a month. Dividends would tend to be between £5,000 and £10,000 a year.
9. From June 2020 Mr Raza’s monthly salary was increased in stages to the following amounts:

(1) to March 2020	£400
(2) June 2020	£980
(3) July 2020	£1,400
(4) October 2020	£2,240
(5) November to September 2021	£2,500
10. After the end of CJRS, Mr Raza’s monthly salary reverted back to £400.
11. Mr Raza’s explanation for the salary increase was that he needed to support himself and his business. However, he did not deny that he increased his salary to increase his entitlement to CJRS payments and we find that to be the purpose of the increases.

Procedural history

12. In May 2020 the appellant started making CJRS claims and in due course made claims totalling £27,058 in respect of the periods from 1 March 2020 to 30 September 2021. HMRC made CJRS support payments in respect of all these claims. The appellant’s claims were based

on the premise that Mr Raza was a fixed rate employee, that claims could be made from 1 March 2020 and could be calculated on the increased monthly salary paid in the relevant period.

13. On 16 December 2022, HMRC opened a check into the CJRS claims.

14. On 21 April 2023, following exchanges between the appellant and HMRC, HMRC issued notices of assessment to the appellant in the amount of £21,483.81 as set out in column 3 of the table at Appendix 1 (“the Assessments”).

15. The Assessments were based on HMRC’s conclusion that Mr Raza was a fixed rate employee, that the appellant could not claim from 1 March 2020 and that the relevant salary upon which CJRS claims could be made was the £400 monthly salary shown in the RTI return of February 2020 and not the increased salary paid after that date.

16. On 9 October 2023, following further exchanges, the appellant appealed against the Assessments and requested an internal review. The appellant claims the appeal was made on 16 May 2023 but we do not consider that anything turns on this point.

17. On 19 October 2023 HMRC issued a view of the matter letter and advised that the matter had been sent for an internal review as requested.

18. On 30 January 2024 HMRC issued their review conclusion letter which upheld the Assessments save for some variations in the calculation of the amount due (“the Review Conclusion Letter”). The revised amount was £21,483.81 as set out in column 4 of the table in Appendix 1.

19. On 22 February 2024 the appellant appealed to the Tribunal.

ISSUES IN THIS APPEAL

20. HMRC accept that the appellant is entitled to claim CJRS support payments in respect of Mr Raza, the issue is how much it can claim. There are three issues in this appeal:

- (1) Whether the appellant is entitled to claim CJRS from 1 March to 19 March 2023;
- (2) Whether the appellant’s entitlement to CJRS payments should be based on the £400 monthly salary paid to Mr Raza up to March 2020 or the pay increases from June 2020; and
- (3) Whether HMRC’s behaviour and wider circumstances should be taken into account.

21. The burden of proof is on the appellant.

THE CJRS REGIME

22. Section 76 of the Coronavirus Act 2020 provided that:

“Her Majesty's Revenue and Customs are to have such functions as the Treasury may direct in relation to coronavirus or coronavirus disease.”

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

“1. This direction applies to Her Majesty's Revenue and Customs.

2. This direction requires Her Majesty's Revenue and Customs to be responsible for the payment and management of amounts to be paid under the scheme set out in the Schedule to this direction (the Coronavirus Job Retention Scheme).

3. This direction has effect for the duration of the scheme.”

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

The First Direction

25. The First Direction applied to amounts of earnings paid or payable by employers to furloughed employees in respect of the period beginning on 1 March 2020 and ending on 31 May 2020 (paragraph 12 of the First Direction).

26. The conditions in the First Direction that are relevant to this appeal are set out in Appendix 2.

27. Subject to the issues in this appeal, HMRC accept that the CJRS claim in respect of Mr Raza meets the conditions in the First Direction for making a claim.

28. Paragraph 8.1 sets out what can be reimbursed in a CJRS claim:

“8.1 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.”

29. Paragraph 8.2 provides that the amount an employer can claim is the lower of £2,500 a month or 80% of the employee’s “reference salary”. The reference salary is calculated in accordance with paragraph 7 and varies depending on whether the employee is a fixed rate employee within paragraph 7.6 or a variable rate employee within paragraph 7.2.

30. It is common ground that Mr Raza is a fixed rate employee. As such the reference salary used to calculate the amount of CJRS support payments an employer can claim is determined in accordance with paragraph 7.7;

“7.7 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...”

The Later Directions

31. Further Directions were issued to modify the effect of the First Direction. The appellant made claims under later Directions, being the Directions issued on 25 June 2020 and 12 November 2020. The later Directions did not alter the conditions for relief that are relevant to this appeal from those set out in the First Direction. Specifically, under these Directions the reference salary is still defined as the amount payable to the employee in the latest salary period ending on or before 19 March 2020 (Third Direction at paragraph 19.2 and Fifth Direction at paragraphs 11.2 and 13.2).

32. In short, for the purposes of this appeal, the position is the same for later periods as set out in the First Direction.

Reclaim and appeal mechanism

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

34. Paragraphs 8 and 9 of Schedule 16 to the Finance Act 2020 provides, so far as relevant, as follows:

“Charge if person not entitled to coronavirus support payment

8 (1) A recipient of an amount of a coronavirus support payment is liable to income tax under this paragraph if the recipient is not entitled to the amount in accordance with the scheme under which the payment was made.

...

(5) The amount of income tax chargeable under this paragraph is the amount equal to so much of the coronavirus support payment

(a) as the recipient is not entitled to, and

(b) as has not been repaid to the person who made the coronavirus support payment.”

Assessments of income tax chargeable under paragraph 8

“9 (1) If an officer of Revenue and Customs considers (whether on the basis of information or documents obtained by virtue of the exercise of powers under Schedule 36 to FA 2008 or otherwise) that a person has received an amount of a coronavirus support payment to which the person is not entitled, the officer may make an assessment in the amount which ought in the officer's opinion to be charged under paragraph 8.

(2) An assessment under sub-paragraph (1) may be made at any time, but this is subject to sections 34 and 36 of TMA 1970.

(3) Parts 4 to 6 of TMA 1970 contain other provisions that are relevant to an assessment under sub-paragraph (1) (for example, section 31 makes provision about appeals and section 59B(6) makes provision about the time to pay income tax payable by virtue of an assessment).”

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

“(6) If, on an appeal notified to the tribunal, the tribunal decides

...

(c) that the appellant is overcharged by an assessment other than a self-assessment, the assessment shall be reduced accordingly, but otherwise the assessment shall stand good

(7) If, on an appeal notified to the tribunal, the tribunal decides-

...

(c) that the appellant is undercharged by an assessment other than a self-assessment, the assessment shall be increased accordingly, but otherwise the assessment shall stand good”

CLAIM FROM 1 TO 18 MARCH 2020

36. The appellant claimed CJRS from 1 March 2020. HMRC rejected the claim in respect of the period 1 to 19 March on the basis that Mr Raza was not furloughed during the period and therefore did not meet the conditions for CJRS (para 5(a)(iii) of the First Direction). £185.81 of the Assessments is referable to this issue.

37. The appellant did not contest this point in the hearing. However, to the extent it does we agree with HMRC and find that the appellant is not entitled to CJRS support payments for this period on the basis that Mr Raza was not furloughed during the period.

THE REFERENCE SALARY

38. HMRC argue that the reference salary for the purposes of calculating the appellant's entitlement to CJRS is £400 and not the later increased salaries paid from June 2020. Paragraph 7.7 of the First Direction is clear, the reference salary is:

“...the amount payable to the employee in the latest salary period ending on or before 19 March 2020...”

39. Later Directions simply repeated that condition in slightly different words.

40. Further, to the extent the appellant might argue the point, dividends are not earnings and therefore not relevant salary.

41. Mr Raza did not engage on the wording of the Direction but argued that the appellant should be entitled to claim CJRS based on the higher salary for a number of reasons connected with HMRC's behaviour and wider issues.

42. We consider those wider grounds below but, subject to those arguments, we agree with HMRC that the appellant is only entitled to claim CJRS based on the February 2020 salary of £400 a month. The scheme of CJRS, repeated in each successive Direction, is that entitlement is based on the last month of salary paid prior to 19 March 2020.

HMRC BEHAVIOUR AND WIDER GROUNDS

43. Mr Raza raised in the notice of appeal and in the hearing a number of wide ranging arguments, being in summary:

- (1) He was never told he could not increase his salary.
- (2) All relevant information was sent to HMRC in May 2021 and HMRC did not ask for the money back for two years.
- (3) There was no help from the Birmingham City Council as they were not a business rate payer or from HMRC under SEISS because Mr Raza was not self-employed. CJRS was the only way he could get government support.
- (4) The appellant and Mr Raza has always paid their taxes in full and have never claimed any social security payments.
- (5) No one could live on £400 a month.
- (6) The CJRS money was spent on living expenses and to pay taxes.
- (7) Mr Raza has been seriously ill with cancer and has suffered from stress.
- (8) HMRC during the enquiry asked for too many documents, including business and personal bank account statements.

44. HMRC argued that the Tribunal does not have jurisdiction to hear these arguments and in any event, they are irrelevant to how the entitlement to CJRS payments under the Directions are calculated.

45. We are sympathetic to Mr Raza but we agree with HMRC that these arguments cannot help the appellant.

46. First, the Tribunal can only construe and apply the legislation enacted by Parliament. The Directions are very clear on how salary upon which the claim is based should be calculated, and it is easy to see why it has been drafted in such a way so that the system could not be abused by pay increases put through solely to maximise CJRS claims. There are no conditions in the CJRS Directions which deal with the points being made by the appellant. Further, even if we agreed (and we do not say that we do) that the Government should have designed its

support differently during Covid, for example to cover incorporated small business owners reliant on dividends, it is not for this Tribunal to bend the words the Directions or otherwise remake the legislation to do what we think Parliament should have done.

47. Second, many of the appellants wider arguments – for example HMRC delay from May 2021- amount to saying that, even if the appellant is not entitled to the CJRS payments under the conditions set out in the Directions, because of the circumstances it should nevertheless be entitled to keep them. These arguments rely on public law principles governing the reasonableness of HMRC behaviour or wider principles of fairness. These arguments are outside the jurisdiction of this Tribunal as set out in the Tribunal, Courts and Enforcement Act 2007 to consider these points (*HMRC v Hok* [2012] UKUT 363) and are matters for the High Court under an application for judicial review.

QUANTIFICATION

48. In the Review Conclusion Letter the reviewing officer concluded that there had been errors in the Assessments. The corrected amounts are set out in column 4 in the table in Appendix 1. The appellant has not objected to the revised calculations, and we take them to be correct.

49. HMRC therefore wish the Tribunal to exercise its powers under section 50(6) and (7) TMA to correct the Assessments to the amounts shown in column 4 in Appendix 1. The appellant’s overall liability will therefore increase marginally from £21,405.67 to £21,483.81.

50. We agree that this is appropriate.

DECISION

51. In our view the appellant was not entitled to all of the CJRS claims it made, for two reasons. First, there was no entitlement to CJRS support payments for the period 1 to 18 March 2020 and, second, the CJRS payments should have been calculated on Mr Raza’s salary of £400 not the later increased salaries.

52. As regards the errors in the Assessments identified in the internal review reduction, we agree that the Tribunal should exercise its powers under section 50(6) and (7) TMA and we therefore direct that the Assessments be adjusted as suggested by HMRC so that the appellant’s aggregate liability is increased from £21,405.67 to £21,483.81.

53. Accordingly, the above adjustment is made and the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

54. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**IAN HYDE
TRIBUNAL JUDGE**

Release date: 14th FEBRUARU 2025

Appendix 1

The Assessments and Review Outcome Letter adjustment

Accounting period ending	Tax year ended	Assessment amount	Review Outcome Letter amount
30 September 2020	5 April 2021	£2,250.48	£2,249.81
30 September 2021	5 April 2021	£10,204.56	£10,204.00
30 September 2021	5 April 2022	£8,950.63	£9,030.00
total		£21,405.67	£21,483.81

Appendix 2

The provisions of the First Directions are insofar as they are relevant to this appeal are as follows:

“SCHEDULE

CORONAVIRUS JOB RETENTION SCHEME

Introduction

This Schedule sets out a scheme to be known as the Coronavirus Job Retention Scheme (“CJRS”).

Purpose of scheme

.....

2.5 No CJRS claim may be made in respect of an employee if it is abusive or is otherwise contrary to the exceptional purpose of CJRS.

...

Qualifying costs

5. The costs of employment in respect of which an employer may make a claim for payment under CJRS are costs which-

(a) relate to an employee-

(i) to whom the employer made a payment of earnings in the tax year 2019-20 which is shown in a return under Schedule A1 to the PAYE Regulations that is made on or before a day that is a relevant CJRS day,

(ii) in relation to whom the employer has not reported a date of cessation of employment on or before that date, and

(iii) who is a furloughed employee (see paragraph 6),

(b) and meet the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee.

...

Qualifying costs – further conditions

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

(a) they relate to the payment of earnings to an employee during a period in which the employee is furloughed, and

(b) the employee is being paid-

(i) £2500 or more per month (or, if the employee is paid daily or on some other periodic basis, the appropriate pro-rata), or

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

7.2 Except in relation to a fixed rate employee, the reference salary of an employee or a person treated as an employee for the purposes of CJRS by

virtue of paragraph 13.3(a) (member of a limited liability partnership) is the greater of-

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

7.3 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.

7.4 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.

7.5 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).

7.6 A person is a fixed rate employee if-

- (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.

7.7 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 (but

disregarding anything which is not regular salary or wages as described in paragraph 7.3).

7.8 In paragraph 7.6 “contract” means a legally enforceable agreement as described in paragraph 7.4(d).

...

Expenditure to be reimbursed

8.1 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.

8.2 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).

8.3 The amount to be paid to reimburse any employer national insurance contributions must not exceed the amount of employer’s contributions that would have been assessed on the amount of gross earnings being reimbursed under CJRS.

8.4 The total amount to be paid to reimburse any employer national insurance contributions must not exceed the total amount of employer’s contributions actually paid by the employer for the period of the claim.

...”