Neutral Citation: [2023] UKFTT 00278 (TC)

Case Number: TC08752

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/02226

INCOME TAX – CJRS scheme – employee omitted from RTI submissions – assessments to recover CJRS payments – whether RTI return could be corrected after March 19 2020 to add an employee – no – appeal refused

Heard on: 9 February 2023
Judgment date: 8 March 2023

Before

TRIBUNAL JUDGE ANNE REDSTON
MS SUSAN STOTT

Between

LUCA DELIVERY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Thiago Padilha, Director of the Appellant

For the Respondents: Ms Victoria Halfpenny, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION AND SUMMARY

1. The Coronavirus Job Retention Scheme ("CJRS") was introduced because businesses were effectively forced to shut down as a result of the lockdown announced on 23 March 2020; this became legally effective on 26 March 2022 by virtue of the Coronavirus Act 2020. The CJRS provided funding for employers who furloughed their employees rather than making them redundant.

2. In the early months of the pandemic, one of the conditions for receipt of a CJRS payment was that the employee in question had been included on a Real Time Information ("RTI") return which had been submitted to HMRC by 28 February 2020 or by 19 March 2020, in other words, the employee had to have been included in an RTI return which immediately preceded the lockdown.

3. Luca Delivery Limited ("Luca") made claims under the CJRS for its director, Mr Thiago Padilha, and for Ms Beatriz Sartor, an employee and also Mr Padhila's wife.

4. Ms Sartor had been employed and paid by Luca since December 2019, but she was not included on Luca's RTI returns until June 2020, and thus had not been included on an RTI return submitted to HMRC by 28 February 2020 or by 19 March 2020.

5. HMRC issued assessments to recover CJRS payments of £4,789.35 made to Luca in relation to Ms Sartor for the period from 1 May 2020 to 31 October 2020.

6. Mr Padhila's evidence was that:

   (1) SJPR Accountants Ltd ("SJPR") had been responsible for running Luca's payroll;

   (2) SJPR had failed to carry out his instruction to add Ms Sartor to the payroll; and

   (3) he had only become aware of this omission in May 2020, when the couple needed to produce payslips for mortgage application purposes.

7. On the basis of that unchallenged evidence we found that the failure to include Ms Sartor on the payroll from December 2019 had been caused by SJPR's oversight.

8. However, the legislative requirement is strict. Ms Sartor had not been included in Luca's February or March RTI returns, and the Tribunal does not have the jurisdiction (broadly, this means "the power") to relax that requirement. As a result, Luca's appeal is refused. The assessments are confirmed in the amount of £4,789.35.

9. SJPR had also informed HMRC that it intended to correct the earlier RTI returns so as to include Ms Sartor from the date her employment actually began. However, we found as a fact that this had not happened, and we also agreed with Ms Halfpenny that even had it occurred, it would not have changed the CJRS position. That is because entitlement to CJRS depended on an employee being included in a return filed on or before 28 February 2020 and/or 19 March 2020, see further §56ff, and retrospective correction of an oversight or other omission does not change the CJRS position.

LATE APPEAL

10. HMRC issued its statutory review of Luca's appeal on 7 January 2022, so Luca was required under s 49G(5) of the Taxes Management Act 1970 to notify the appeal to the Tribunal by 30 days from that date, so by 6 February 2022. Luca notified the appeal to the Tribunal on 15 March 2022, around 5 weeks late.

11. The Tribunal applied the three step process set out *Martland v HMRC* [2018] UKUT 0178 (TCC). We decided that the delay was not "serious or significant" but neither was it insignificant or trivial.

12. The reason for the delay was that Mr Padilha had not initially been aware of all the correspondence between HMRC and his accountants, and when he became aware, he contacted HMRC to say that some of that information was incorrect. HMRC were unable to re-open the case, but told him that he could notify Luca's appeal to the Tribunal and that they would not object to the late appeal. Ms Halfpenny confirmed that HMRC had no objection.

13. Taking into account all the circumstances, including the particular importance of the need for litigation to be conducted efficiently and at proportionate cost and for statutory time limits to be respected, but also the period of the delay; the reasons for the delay, and the lack of any objection from HMRC, we decided to give permission for the appeal to be notified late.

THE EVIDENCE

14. Before the hearing, the Tribunal received a Bundle of documents from HMRC. This was supplemented by other documents the day before the hearing; Mr Padilha did not object to the admission of any of those documents and we accepted them into evidence.

15. The documents provided included:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) various internal printouts from HMRC's system;

(3) extracts from Luca's bank account; and

(4) email correspondence between Mr Padilha and SJPR, and an email from Ms Sartor to SJPR. Although this correspondence was in Portuguese, it was accompanied by a translation made by Ms Sartor and Mr Padilha to which HMRC did not object, and which we accepted as accurate.

16. Mr Padilha provided a witness statement, gave oral evidence and answered supplementary questions from the Tribunal. We found him to be a credible witness.

17. Ms Marcia Deacon, the HMRC Officer who carried out the enquiry into Luca's CJRS claims, also provided a witness statement. She was unable to attend the hearing, but her evidence was not challenged by Mr Padilha and we accepted it.

18. On the basis of that evidence, we make the findings of fact set out below, which were not in dispute. We emphasise however that our findings about the role played by SJPR are based on the evidence provided to the Tribunal; we did not have witness evidence from any employee of that firm.

FINDINGS OF FACT

19. We first set out the facts about Ms Sartor's employment, followed by those about the CJRS claim.

Ms Sartor's employment

20. Luca was incorporated on 14 June 2016 and operated as a licensed carrier. Until November 2019, Mr Padilha was its only director and employee, but on 25 November 2019, Mr Padilha emailed Mr Sansão Rodrigues of SJPR saying "I have attached the documents you requested to set up my wife as an employee of Luca Delivery Ltd. If you need anything else, please let me know".

21. Mr Rodrigues responded the same day, saying "I'll pass it to Vania [an employee of SJPR] to register your wife with £5,000 a year". Later the same day, he emailed again, saying

"in order for me to include your wife in the company, she needs to send me an email authorising it", and adding "we will charge £18 on your monthly bill if she gets a salary".

22. Ms Sartor emailed SJPR the same day, providing the necessary confirmation, and on 27 November 2019, Mr Rodrigues emailed Mr Padilha, saying:

> "I will add £18 per month on your bill for your wife's payslip. My colleague Vania is still not sure about her salary, you will receive an email from us to answer some questions."

23. Later the same day, Vania emailed Mr Padilha saying "just to confirm salary of £5k per year monthly £833".

24. Ms Sartor received the salary of £833 per month from December 2019, and SJPR increased its monthly bill by £18 (as can be seen from Luca's bank statements). However, Ms Sartor was not notified to HMRC as a new employee and was not included on Luca's RTI returns. Mr Sartor's unchallenged evidence was that he was unaware she had not been added to the payroll until May 2020, when the couple applied for a mortgage and realised Ms Sartor did not have payslips.

25. SJPR then notified HMRC of Ms Sartor's employment, stating that it had commenced on 6 May 2020; she was included on Luca's RTI return for June 2020.

26. In the appeal letter sent by SJPR to HMRC dated 24 November 2021, on behalf of Luca, Mr Rodrigues said:

> "The director Thiago Padilha, had requested to register the employee Beatriz Sartor from December 2019, but unfortunately this wasn't processed as wages weren't decided at the time due to the company only being able offer a part time position for the employee. It is very likely that a clerical error took place on our part and we as Accountants did not get a confirmation of the wages."

27. Mr Padilha said that the emails between him and Mr Rodrigues showed that it was incorrect to say that Ms Sartor's wages "were not decided" in December 2019, it was instead clear that an annual salary of £5,000 had been agreed in November 2019.

28. On the basis of the email evidence provided, and taking into account also that SJPR were charging Luca £18 for processing the payroll, we find as facts that SJPR had been instructed in November 2019 to add Ms Sartor to the payroll and had been told that she would be paid £5,000 per year, but that SJPR had failed to include Ms Sartor in the RTI returns until June 2020.

The pandemic and the claims

29. On behalf of Luca, SJPR made the following relevant claims under the CJRS scheme:

(1) March and April 2020: £1,140.80 for Mr Padilha; and

(2) May to September 2020: £4,789.35 for Ms Sartor

30. On 10 November 2020, Ms Deacon opened her enquiry into Luca's CJRS claims. There were considerable delays on the part of SJPR in responding to her questions, and at one point Ms Deacon issued an information notice under FA 2008, Sch 36.

31. Having considered all the information provided, on 2 November 2021 Ms Deacon raised two assessments. The first was for £2,065.55, and included an amount of £331.20 in relation to Mr Padilha; the second was for £3,055 and related only to Ms Sartor.

32. Those assessments were appealed. On statutory review, the review officer accepted that Luca's claim in relation to Mr Padilha was correct; Luca then notified its appeal against the assessments in relation to Ms Sartor.

33. HMRC asked that the Tribunal reduce the first assessment by £331.20 to £1,734.35 so as to eliminate the amount relating to Mr Padilha, and to uphold the second assessment.

THE LAW

34. The relevant CJRS provisions were set out and considered in *Carlick Contract Furniture v HMRC* [2022] UKFTT 00220 (TC) ("*Carlick*"), a decision of Judge Poole. We gratefully adopt his summary and analysis.

The statute

35. Section 76 of the Coronavirus Act 2020 provides that "Her Majesty's Revenue and Customs are to have such functions as the Treasury may direct in relation to coronavirus or coronavirus disease". Section 71 of the same Act provides:

> **"Signatures of Treasury Commissioners**
>
> (1) Section 1 of the Treasury Instruments (Signature) Act 1849 (instruments etc required to be signed by the Commissioners of the Treasury) has effect as if the reference to two or more of the Commissioners of Her Majesty's Treasury were to one or more of the Commissioners.
>
> (2) For the purposes of that reference, a Minister of the Crown in the Treasury who is not a Commissioner of Her Majesty's Treasury is to be treated as if the Minister were a Commissioner of Her Majesty's Treasury."

The First Direction

36. Pursuant to those powers, on 15 April 2020 the Chancellor of the Exchequer signed a Direction, entitled "The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction" ("the First Direction"). The main body of the First Direction, running to just three paragraphs, provided as follows:

> "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."

37. The substance of the CJRS was set out in the Schedule to the First Direction ("the Schedule"). After an introduction to the CJRS and its purpose, the Schedule specified in paragraph 3 the employers to which it applied: essentially any employer with a PAYE scheme registered on HMRC's RTI system on 19 March 2020. It was common ground that Luca met this requirement.

38. Paragraph 5 of the Schedule, headed "Qualifying costs", set out the costs for which a claim could be made under the CJRS:

> "The costs of employment in respect of which an employer may make a claim for payment under CJRS are costs which –
>
> (a) relate to an employee –
>
> (i) to whom the employer made a payment of earnings in the tax year 2019-20 which is shown in a return under Schedule A1 to the PAYE Regulations that is made on or before a day that is a relevant CJRS day,
>
> (ii) in relation to whom the employer has not reported a date of cessation of employment on or before that date, and

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

(b) meets the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee."

39. It is agreed that Luca satisfied paragraphs 5(a)(ii) and (iii) and 5(b). With regard to paragraph 5(a)(i), Ms Halfpenny referred to the definition of "relevant CJRS day" in paragraph 13.1 of the Schedule:

"For the purposes of CJRS –

(a) a day is a relevant CJRS day if that day is –

(i) 28 February 2020, or

(ii) 19 March 2020."

40. Paragraph 12 of the Schedule made it clear that payments under that Direction could only be made "in relation to amounts of earnings paid or payable by employers to furloughed employees in respect of the period beginning on 1 March 2020 and ending on 31 May 2020". Therefore, in relation to payments made in respect of later periods, one must look to a further Direction, issued in the same way and under the same authority, on 20 May 2020 ("the Second Direction").

The Second Direction

41. The Second Direction, pursuant to paragraph 2, "modifies the effect of" the First Direction. Paragraph 3 provides that the First Direction "continues to have effect but is modified so that the scheme to which it relates is that set out in the Schedule to this Direction".

42. In paragraph 5 of the Schedule to the Second Direction, the "Qualifying costs" were specified in almost identical terms to those set out above in relation to the First Direction (the differences are not material for present purposes, but essentially they represented an expansion of the scheme). An identical definition of "relevant CJRS day" was included at paragraph 13.1, and the duration of the scheme was extended by paragraph 12 from 31 May to 30 June 2020, so that it covered earnings to furloughed employees in respect of the period beginning on 1 March 2020 and ending on 30 June 2020.

The Third Direction

43. A further Direction ("the Third Direction") was issued on 25 June 2020; this amended the scheme which had been created by the First Direction and modified by the Second Direction. Those earlier Directions were again stated as continuing in effect, but "modified as set out in the Schedule to this direction".

44. That Schedule was divided into two parts. Part 1 was very short, and essentially imposed a deadline of 31 July 2020 for making claims under the First and Second Directions (covering the period up to 30 June 2020). Part 2 introduced the concept of "flexible furlough", and was stated to apply in respect of amounts of earnings paid or payable to flexibly furloughed employees in respect of the period beginning on 1 July 2020 and ending on 31 October 2020.

45. Part 2 of that Schedule provided that payments to (or in respect of) an employee under the new flexible furlough scheme could only qualify for a CJRS claim by the employer if the employee in question was subject to a claim under the original scheme, as follows:

"This paragraph applies in relation to an employee if-

(a) on or before 31 July 2020, the employee's employer makes a CJRS claim in accordance with the original CJRS directions in respect of the employee for a period ending on or before 30 June 2020, and

(b) the employee ceased all work (whether directly or indirectly) for the

> employer (or a person connected with the employer) for a period of 21 calendar days or more beginning on or before 10 June 2020."

Other Directions

46. Further Directions were issued on 1 October 2020, 12 November 2020, 25 January 2021 and 15 April 2021. None of these is relevant for the purposes of the present appeal.

Clawback provisions

47. Paragraphs 8 of Schedule 16 to the Finance Act 2020 is headed "Charge if person not entitled to coronavirus support payment" and so far as relevant provides:

> "(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."

48. Paragraph 9 is headed "Assessments of income tax chargeable under paragraph 8" and so far as relevant reads:

> "(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)."

THE PARTIES' SUBMISSIONS AND THE TRIBUNAL'S VIEW

49. We first set out the party's submissions, followed by our discussion and conclusion.

Mr Padilha's submissions on behalf of Luca

50. Mr Padilha said that it was clear that:

(1) Ms Sartor had been an employee before the beginning of the pandemic;

(2) he had instructed SJPR to put her on the payroll;

(3) Luca had paid SJPR £18 a month to do this; and

(4) he had been unaware this had not been actioned until the couple needed a mortgage in May 2020.

51. He referred to the appeal letter sent by SJPR to HMRC dated 24 November 2021, to which reference has already been made at §26. This said:

> "The director Thiago Padilha, had requested to register the employee Beatriz Sartor from December 2019, but unfortunately this wasn't processed as wages

> weren't decided at the time due to the company only being able offer a part time position for the employee.
>
> It is very likely that a clerical error took place on our part and we as Accountants did not get a confirmation of the wages. In trying to remedy the situation taking the clients best interest, in May 2020 as payslips were requested by the client, we were informed that the employee was already working for Luca delivery ltd and that wages were paid in cash.
>
> From that moment on payslips were processed, and submission done to HMRC, with the firm intention to do an Year To Date as correction of earnings for the year to ensure we stayed compliant.
>
> We have an email sent by the client which he sent the documents of the employee for the payroll registration, which we can provide, should it be necessary.
>
> Giving the miscommunication and apparent clerical error on our part, we, SJPR Accountants, kindly request this case to be reviewed and the account to be updated, as we have now put in place measures to prevent any further incidents similar to this from happening ever again."

52. Mr Padilha said that it was clear from this letter that SJPR accepted that they were at fault, even though they had given the wrong reason, namely their failure to confirm the amount of pay rather than their failure correctly to operate the payroll. He submitted that Luca should not have to bear the cost of SJPR's mistake.

Ms Halfpenny's submissions on behalf of HMRC

53. Ms Halfpenny said that, for a CJRS payment to be validly made in the period March to October 2020, the employee in question had to have been included in an RTI return filed on or before 28 February 2020 or 19 March 2020, see the definition of "relevant CJRS day" at paragraph 13.1 of the schedule to the First Direction; the same definition had been retained in the Second Direction. She said that the position was as set out by Judge Poole in *Carlick* at [37], namely that:

> "the legislation is quite clear: for payments to (or in respect of) an employee to qualify under the CJRS, payment of earnings to that employee must have been included in an RTI PAYE submission not later than 19 March 2020."

54. In relation to payments under the Third Direction, she said that there could only be made if the employee had already been entitled in accordance with the original provisions. She asked the Tribunal to endorse and follow the following passage from Judge Poole's judgment at [39] of *Carlick*:

> "that [Third] Direction did not repeat the eligibility criteria from the First and Second Directions, it simply 'piggy backed' on the earlier Directions by providing that a claim could only be made in respect of employees in relation to whom a claim had been made under the First and Second Directions in respect of a period ending on or before 30 June 2022…it must be the case that only valid claims under the previous Directions could count for this purpose – otherwise completely fictitious claims in the earlier period could provide a basis for subsequent valid claims, which cannot have been the intention behind the Third Direction."

55. Ms Halfpenny said that on the facts of this case (which were not in dispute), Ms Sartor was not included in an RTI return until June 2020 and so Luca was plainly not entitled to a related CJRS payment.

Amendment to RTI return

56. The Tribunal noted the statement in the letter from SJPR that it "had the firm intention to do an Year To Date as correction of earnings for the year". We asked Ms Halfpenny if there had been such a correction.

57. Ms Halfpenny said that it could be seen from the print outs of HMRC's system provided for the hearing that there had been no correction: these showed that in May 2020, SJPR had informed HMRC that Ms Sartor's start date was 1 May 2020 (not December 2019).

58. Ms Halfpenny added that although under Reg 67E of the Income Tax (Pay As You Earn) (Amendment) Regulations 2003 it was possible to correct a RTI submission in year to add an employee from an earlier date, such an amendment would not have changed the CJRS position. That was because para 5(a)(i) of the Schedule to the First Direction (set out earlier in this decision) said that a CJRS payment could only be made to an employee (her emphasis):

> "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**."

59. Since the later of the two relevant CJRS days was 19 March 2020, it was clear that to be eligible an employee had to have been included in a return which had been "made" on or before those dates. A corrected return would not have been so made.

The Tribunal's view

60. The Tribunal agrees with Judge Poole's analysis of the legal position in *Carlick*, and on the facts of this case also agrees with Ms Halfpenny that the Tribunal has no jurisdiction to allow the appeal because:

(1) Ms Sartor was not included in an RTI return made by a "relevant CJRS day" namely 28 February or 19 March 2020, so there was no entitlement to CJRS.

(2) The Tribunal only has the jurisdiction to allow an appeal where the appellant was entitled to CJRS. We cannot allow an appeal where the appellant was not so entitled, even where this was caused by the oversight of a third party, here SJPR.

(3) No correction of the RTI filings had been made, and even had there been such a correction, it would not have changed the position, for the reasons given by Ms Halfpenny.

(4) Although Luca may have a claim against SJPR in relation to a failure to include Ms Sartor on the RTI returns from the date her employment began, this Tribunal does not have the jurisdiction to decide claims of that nature, and in particular cannot direct that HMRC recover the overpaid CJRS from SJPR. Moreover, our findings of fact have been made on the basis of the evidence provided for this hearing, and other facts may be relevant in the context of a civil claim against SJPR.

DECISION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

61. For the reasons set out above, the Tribunal refuses Luca's appeal. We confirm the first assessment in the reduced amount of £1,734.35 (so as to eliminate the amount relating to Mr Padilha) and we uphold the second assessment of £3,055. The total is thus £4,789.35

62. 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.

63. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 08th MARCH 2023