



Neutral Citation: [2023] UKFTT 00705 (TC)

Case Number: TC 08896

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/00279

Coronavirus Job Retention Scheme – whether new employment arrangements shams or otherwise to be disregarded entirely – no – whether employees were fixed rate employees within paragraph 7.6 of the Schedule to the CJRS Directions – no – whether CJRS claims contrary to the exceptional purpose of the CJRS - no

Heard on: 24 March 2023

Judgment date: 4 August 2023

Before

**TRIBUNAL JUDGE MARK BALDWIN
SONIA GABLE JP**

Between

ARK ANGEL LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Kulvinder Bopari, an employee of the Appellant

For the Respondents: Mr Paul Marks, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The Appellant (“Ark Angel”) appeals against two notices of assessment (the “Assessments”) issued pursuant to paragraph 9 of Schedule 16 (“Schedule 16”) to the Finance Act 2020 (the “FA 2020”) in the sums of £59,664.54 and £16,000.00 and relating to tax years ended 5 April 2021 and 5 April 2022 respectively. The Assessments charge income tax as a result of Ark Angel receiving an amount of Coronavirus Support Payment (“Support Payment”) in relation to two employees under the Coronavirus Job Retention Scheme (“CJRS”) which the Respondents (“HMRC”) say was excessive.

2. Paragraph 8 of Schedule 16 makes a recipient of Support Payments under CJRS liable to income tax where a claim is made incorrectly. Paragraph 8(4) provides that income tax becomes chargeable at the time the Support Payment was received if at the time the Support Payment was received only part of the amount claimed was due. Paragraph 8(5) provides that the amount of income tax chargeable is equal to the amount of Support Payment to which the applicant was not entitled and which has not been repaid.

3. Paragraph 9 gives HMRC power to make assessments to income tax chargeable under paragraph 8.

4. We understand that Ark Angel now accepts that it is liable to pay part of the income tax charged in the Assessments to the extent that it is concerned with its CJRS claims for the period from 1 December 2020 to 5 April 2021.

5. Originally, Ark Angel was also assessed to a penalty under Schedule 41 to the Finance Act 2008 (as applied by paragraph 13 of Schedule 16), but this has now been withdrawn by HMRC.

6. The dispute between HMRC and Ark Angel revolves around how Ark Angel calculated its claims to Support Payments. We will give our decision in principle on the questions relevant to that calculation and leave it to HMRC and Ark Angel to calculate the amount of income tax in the light of those conclusions, with liberty to apply to the tribunal if they are unable to reach agreement.

7. The hearing in this case took place on 24 March 2023. We then invited written submissions on two questions which arose in the course of the hearing.

8. Mr Bopari presented Ark Angel’s case, with Mrs Bopari helping him and giving some evidence. We also heard from Rebecca Greenwood, the HMRC case officer, and reviewed a sizeable hearing bundle.

THE CORONAVIRUS JOB RETENTION SCHEME

9. Sections 71 and 76 of the Coronavirus Act 2020 gave the Treasury power to direct HMRC’s functions in relation to coronavirus. 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 HMRC’s administration of the CJRS on 15 April 2020. These were followed by a number of updated Directions in relation to CJRS during the pandemic. The subsequent directions do not alter the substance of the CJRS as set out below. References to paragraphs in this decision notice are to paragraphs of the Schedule to the Coronavirus Direction.

10. Paragraph 2.1 explains that the CJRS was established to provide Support Payments to employers on a claim made in respect of employment costs they incurred in respect of furloughed employees. Paragraph 2.2 explained that the CJRS 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.

11. Under paragraph 3 of the Schedule, an employer can make a claim for Support Payments under CJRS if they had a PAYE scheme registered on HMRC's real time information (RTI) system for PAYE on 19 March 2020.

12. Paragraph 5 of the Schedule describes the costs an employer is entitled to claim for under the CJRS. These 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) meet the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee.

13. Paragraph 5 of the Schedule 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, a Real Time Information employer must deliver to HMRC the information specified in Schedule A1 in accordance with this regulation". Schedule A1 details what information regarding payments to employees must be given to HMRC. This information includes the date of the payment made and the employee's pay frequency. This is HMRC's RTI system for PAYE.

14. A "relevant CJRS day" is defined by paragraph 13.1 of the Schedule as 28 February 2020 or 19 March 2020.

15. Paragraph 6 of the Schedule defines who is a furloughed employee. Paragraph 6.1 provides:

"An employee is a 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."

16. Paragraph 6.2 goes on to provide that "An employee has not ceased all work for an employer if the employee works for a person connected with the employer (see paragraph 13.4) or otherwise works indirectly for the employer."

17. Paragraph 13.4 provides that:

"For the purposes of determining whether a person, company or charity is connected with an employer for the purposes of CJRS-

- (a) whether a person is connected with an employer must be determined in accordance with section 993 of the Income Tax Act 2007;

(b) without prejudice to paragraphs 13.4(a) and 13.4(c), whether a company is connected with an employer (where the employer is a company) must be determined in accordance with section 1122 of CTA;”

18. Paragraph 6.7 provides that “An employee has been instructed by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing (which may be in an electronic form such as email) that the employee will cease all work in relation to their employment.”

19. Paragraph 6.8 provides that “Training activities directly relevant to an employee’s employment agreed between the employer and the employee before being undertaken must be disregarded for the purposes of paragraph 6.1(a).”

20. Paragraph 8 sets out what expenditure can be reimbursed in a CJRS claim. This includes an employee’s gross earnings, but the amount to be paid to reimburse an employee’s gross earnings is capped at the lower of £2,500 per month and 80% of the employee’s “reference salary”, which is calculated in accordance with paragraphs 7.1 to 7.15.

21. An employee’s reference salary is calculated in one of two ways depending on whether an employee is a “fixed rate” employee or not. A fixed rate employee is defined at paragraph 7.6:

“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.”

The points on which we invited written submissions from HMRC and Ark Angel were points on the interpretation of paragraph 7.6.

22. Paragraph 7.7 states that: “the reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020”

23. Paragraph 7.2 provides:

“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.”

24. Paragraph 7.3 goes on to state:

“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.”

25. Paragraph 7.4 provides the definition of “regular salary or wages” as follows:

“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.”

BACKGROUND

26. Ark Angel’s business involved acquiring, renting out, and managing commercial or industrial property. The CJRS claims which we are concerned with were made in respect of its two employees, Ramandeep Boparai (“Ramandeep”) and Kulvinder Boparai (“Kulvinder”) (together, “the Employees”). Ramandeep was and still is the Director of the Appellant. The Employees are husband and wife.

27. In the period in the period in the tax year 2019/20 prior to 27 February 2020, no employment contracts were in place, and the two Employees, who were registered on HMRC’s RTI system, received ad hoc payments.

28. On 27 February 2020, formal employment contracts were signed. These new contracts increased the Employees’ salaries to £3,200 per month for a fixed term of four months, from 27 February 2020 to 30 June 2020.

29. On 19 March 2020, each Employee’s RTI submission reflected a payment of £480. Bank statements confirmed these payments were made on 20 March 2020 to each Employee.

30. Ark Angel’s RTI submissions did not reflect the new monthly salary payments until 25 May 2020, by which time the first CJRS payment had been received.

THE EVIDENCE

31. We had before us a witness statement from Officer Greenwood, who was cross-examined by Kulvinder, and a hearing bundle. We also heard from Ramandeep and Kulvinder in the course of the hearing. We have sorted the evidence by reference to the issues it primarily relates to.

Why did Kulvinder and Ramandeep enter employment contracts in February?

32. When HMRC began to investigate Ark Angel’s claims, Officer Greenwood had a telephone meeting with Ramandeep on 4 August 2021 to discuss Ark Angel’s claims for Support Payments. Her witness statement records the following points (among others) as having been discussed at that meeting:

She lost her other job with ‘We’ll Mind Your Own Business’ in February 2020, leaving her with no income. Until more work was found, herself & her

husband Kulvinder decided to replace this income by taking a higher salary from Ark Angel Ltd.

In our telephone meeting, Ramandeep explained that she and her husband Kulvinder only took pay from Ark Angel when necessary. If she was employed elsewhere, they wouldn't take much pay from Ark Angel. If she wasn't employed, they'd take more to supplement their income.

Ramandeep explained that in February 2020 she lost her employment with We'll Mind Your Own Business Ltd, leaving them with no income. Ramandeep & Kulvinder discussed the situation, they took the decision to replace this lost income and support themselves by increasing pay from Ark Angel until more work was found. Their usual joint income was £80 - £90k per year, after looking at their day-to-day living expenses they decided that they needed to earn £6000 a month to cover their expenses. When I queried this, Ramandeep said they have 'lots of expenses' CJRS claims were based on an annual salary of £37,500 each or £3,125 per month. This was done by verbal agreement between husband & wife – in Ramandeep's words 'it's a close company with no one else involved'.

33. In her witness statement Officer Greenwood said that Ramandeep had told her during the interview that no written employment contract existed. This was a family (husband and wife) situation where written agreements were not considered necessary. Officer Greenwood commented that this made sense to her and she saw no reason to pursue the point further.

34. In the meeting Officer Greenwood also discussed three associated companies, Greenwich Bay Ltd ("Greenwich"), Grosvenor (BBPOI) Ltd ("Grosvenor") and Akaal Accountancy Ltd ("Akaal"). Greenwich and Grosvenor were also property companies although both had been dormant for some time. Greenwich and Grosvenor had made a CJRS claim for Ramandeep in the period May-July 2021. Ramandeep told Officer Greenwood that an auction property had come up and it had been decided to reactivate the companies. Akaal was a new start-up accountancy business.

35. Kulvinder cross-examined Officer Greenwood at some length about her understanding of the contractual arrangements between Ark Angel and the Employees. Officer Greenwood explained that she had not asked for details or copies of the contracts, as her understanding (from what Ramandeep told her) was that there were no formalised terms. She simply wrote down what Ramandeep told her and later checked it for consistency against HMRC's systems.

36. In evidence to us Ramandeep confirmed that, when she lost her job with We'll Mind Your Own Business, she knew that the family needed a new source of income. She had an ad hoc employment with Ark Angel, as Kulvinder did. She explained that he did some weeding and general property maintenance and was in contact with the tenant. If there is something she can't do, Kulvinder would do it.

37. Having lost her job at We'll Mind Your Own Business, she and Kulvinder entered into new employment contracts with Ark Angel in February 2020. They took on these employments because they needed to replace the income they lost when she lost her job. In response to a suggestion from Mr Marks that the employment arrangements were simply to do with their own finances (and nothing to do with any work they were doing), Ramandeep said that if Ark Angel could afford to pay them she couldn't see why it couldn't. She disagreed with the idea that the new contracts of employment were just a way of extracting money to cover her and the family's costs. Kulvinder would certainly be continuing to look for auction properties for the company and they would discuss anything he found.

38. Mr Marks put it to Ramandeep that there was no evidence about any of this, in particular that the company was looking for new properties. Ramandeep replied that the various

companies she and Kulvinder own are always on the lookout for new opportunities. Mr Marks noted that Ark Angel hadn't bought anything in 2019, nor had any of its associated companies. Ramandeep agreed that it was fair to say that it was a long time since there had been a property acquisition.

39. Mr Marks put it to Ramandeep that when there was a gap in her employment in November 2018 she didn't take a salary from Ark Angel. In the summary of her 2018/19 tax position, she only had £2,150 of employment income. She agreed that she didn't have another job and also hadn't taken any money out of Ark Angel (unlike the position in February/March 2020). Ramandeep said that she wasn't in a position to go out and work then.

40. Mr Marks put it to her that the employment contracts entered into in February 2020 were worthless and the £480 payments were simply a continuation of the previous ad hoc arrangements. Ramandeep disagreed with that.

41. Ramandeep went on to confirm that the rental property in Ark Angel produces about £1,100 per month and this continued in March 2020, unaffected by Covid. She explained that the plan was that there was enough money in Ark Angel to pay salaries for four months (taking into account expected rental inflows and existing resources) and hopefully, by July, she would have got another job and Ark Angel would have acquired another property.

42. Mr Marks pointed out that Ramandeep and Kulvinder had increased their income by more than just the income lost by Ramandeep losing her job at We'll Mind Your Own Business. Ramandeep said that, even if she had found another job, Kulvinder would have carried on being employed by Ark Angel; the company wanted to find another property and Kulvinder was looking. When she lost her job, she knew the job market was slowing down.

43. As far as his work for Ark Angel was concerned, Kulvinder said he done some jobs in 2019 (to do with the roof) but didn't do anything in February 2020 apart from helping to move the office shortly after the contracts were signed. He did not have to do a great deal for the company. The tenant was on a fully repairing lease and, once the roof had been fixed, his work was confined to weeding and general maintenance. He spent some time liaising with the tenant's accountants department, but that wasn't really very much. Once the new contract was in place, he was actively looking for properties at auctions.

44. Kulvinder said that, when he and Ramandeep took on their employments, Covid was starting to spread (but not yet in the UK). His recollection was that there were more problems in China and deaths were starting in Italy, but nothing much here. Things were slowing down, but he thought that he and Ramandeep could work in the business at least until she got a new job in the summer. However, this all changed within days.

When payments were made

45. The hearing bundle includes a copy of Ark Angel's bank account for the relevant period, from which we note the following:

- (1) Immediately before 19 March 2020, the account had £13,364 in it.
- (2) On 20 March, the two payments of £480 were made. At that point, the account had just under £12,000 in it.
- (3) There were no further payments out until 27 May, when four payments of £1,994.65 each were made (two payments to each of Kulvinder and Ramandeep).
- (4) These payments were not made until two Support Payments had been received, each of £5,487.96, with one being received on 27 April and the other on 15 May. Ark Angel could have afforded to make the four payments made on 27 May without needing

to wait for those grant payments. The company's balances would have been low (around £3,000), but there was cash in the bank account to make the payments.

(5) The next salary payments were not made until 12 August (when, again, £1,995.65 was paid to each of Ramandeep and Kulvinder), by which time further Support Payment of nearly £11,000 had been received.

46. Just pausing there, assuming for a moment that the £480 payments in March were for the last few days of February, one would have expected four further sets of salary payments to have been made in the period covered by this account (for each of the months of March to June inclusive), but in fact only two payments had been made despite the fact that the company had, after making the payments on 12 August, over £23,000 in its bank account.

47. Ramandeep's explanation for there being no payment in April for March was that there was too much going on in her life. She was busy home schooling and her brother was ill. They had enough money in their accounts to pay the bills (mainly food), so there was no pressing need to put through a payment for March. When she finally got round to doing it, she took until May to pay the money out.

What were the payments of £480 in March 2020 for?

48. As far as the question of how many and which working days the payments of £480 related to, Ramandeep said that she and Kulvinder had been busy sorting out the house and creating a home working space for the company and they had worked for three days at the end of February (so it wasn't right to say that Saturday 29 wasn't a working day). She said that the £480 payment in March had to be for February; if it was for March, as HMRC suggested, it would far too low. The RTI payment clearly showed that they had new contracts and there was a business case (looking for new properties while she was unemployed) for this.

If the payments of £480 were for February, why was the RTI entry not made until 19 March?

49. As far as the RTI submission was concerned, Ramandeep said she didn't know the £480 was recorded on 19 March for week 52. Mr Marks put it to her that she had previously put payments through on the 5th of a month for the previous month but in March she did not put anything through until much later. She said that she could have put the February payment on the 5 March, but had decided not to pay the money or record it until after the March rent was received.

50. Kulvinder said that Ramandeep made the RTI submission on 19 March on a pro rata basis, working on the assumption that there would normally be 20 working days each month (to make the calculation easy) and working on the basis that they had worked for three days at the end of February. He explained that Ramandeep had had difficulties with the RTI/payroll software before.

51. Ramandeep had explained to Officer Greenwood that she didn't understand the PAYE tool and found it cumbersome. She kept submitting RTI reports and getting them wrong, incurring lots of fines in the process.

52. Mr Marks observed that Ramandeep had always previously made RTI reports on the 5th day of the following month, yet when she got to March 2020 things were very different. She knew how RTI worked and if the £480 had been a legitimate February payment it would have been paid on 5th March.

When were the Employees put on furlough?

53. The hearing bundle contained, in addition to the Employees' contracts of employment, letters placing each of them "on furlough". Both letters were dated 17 April 2020, although they stated that "Your period of furlough commenced on 1st March 2020". They made it clear

that the Employee was not required to carry out any work for Ark Angel and “Based on your monthly salary, while on furlough we will pay you £2,500 per month which is 80% of your contracted pay which complies with the CJRS.”

54. Turning to when the Employees were furloughed, Ramandeep agreed that the letters were dated 17 April. In reply to Mr Marks’ observation that the letters stated that furloughed started on 1 March, but the CJRC only started on 20 March, Ramandeep explained that Ark Angel had received the March rent and there was no reason to put anyone on furlough until they failed to receive the April rent.

Working for other companies

55. Ramandeep agreed that she started to work for Akaal (her accountancy business) in December. The company sent the first set of accounts to HMRC on 21 December 2021 and invoiced on 23rd. She set the business up in September, but had been doing training for most of the time until the beginning of December.

56. Turning to Kulvinder, he agreed with Mr Marks that he started working for Greenwich/Grosvenor from December 2020. He got papers for the property auctions about seven to ten days before the auction, which was in mid-December. His employment contracts with those companies were from the 1 December.

The quantum and financial impact of Ark Angel’s CJRS claims

57. Mr Marks asked Ramandeep whether it was the case that, without the CJRS support payments, the company could not have carried on making these payments beyond the beginning of July. Ramandeep agreed that this would be the case if the company had not been able to find a new property.

58. Mr Marks put it to Ramandeep that, through using CJRS (assuming that they win this appeal), Ark Angel will receive far more money in Support Payment than ever it would have been able to make on its own. Ramandeep agreed that this was the case, or at least it would have been if the company had not been able to find another property. Again, Mr Marks reminded Ramandeep that there was no evidence of the company actually looking for new properties.

59. When the CJRS was introduced she and Kulvinder were already employed. Their employments were extended in 2020 and every time she made a claim she believed Ark Angel was able to make Support Payment claims as long as the Employees were furloughed. She and Kulvinder didn’t visit the property and they suffered from the tenant not paying rent. The scheme had been introduced to help employers impacted by Covid and she thought that they met that requirement.

HMRC’S ARGUMENTS

60. HMRC amended their statement of case to remove suggestions that the employment contracts were not real contracts (their original statement of case had referred to them as “purported” contracts) and to remove the penalty assessment on Ark Angel. They had also disputed whether the Employees were furloughed, or whether Ark Angel’s business was adversely impacted by the pandemic. These issues are also no longer pursued.

61. HMRC submit that the Employees remained variable rate employees, primarily as the new contracts had no effect because they were not carried out. In this context HMRC draw attention to the following points:

- (1) With a monthly salary of £3,200, the daily rate would be around £110. So, three days’ wages would be £330 whereas the Employees were paid £480 for three days’ work in February.

(2) HMRC dispute that the £480 was paid for February. It was paid on 19 March for week 52.

(3) No salary payments beyond the £480 were paid until the end of May 2020.

(4) 80% of £3,200 is approximately £2,500 which is the maximum that can be claimed under the CJRS.

(5) The opening balance of Ark Angel's account on 1 March 2020 was £10,564. The total rent due before 30 June 2020 was £11,200. So, even assuming the tenant paid in full on time, there would not be enough money to pay the salaries due.

(6) Ark Angel had never previously had written contracts with the Employees.

(7) In interview with Officer Greenwood, Ramandeep did not initially mention written contracts; she even provided a rationale for Ark Angel not having any such contracts. Written contracts were not mentioned until 17 November 2021 and even then there were discrepancies between what Ramandeep had said about start dates (on 4 August 2021 she told Officer Greenwood that the new contracts started in March 2020) and the salary figures were different in the written contracts from what she told Officer Greenwood.

62. Alternatively, HMRC say that, if the Employees were fixed-rate employees, they did not have a reference salary as such.

63. HMRC also submit that the claims for Support Payments are contrary to the exceptional purpose of CJRS and so are disallowed under paragraph 2.5.

64. As far as the period of furlough was concerned, Mr Marks submits that the first date must be 17 April, as that is the first day where there is any evidence of written agreement. As far as the end of the period is concerned, this must be when Ramandeep and Kulvinder started to work for associated companies.

ARK ANGEL'S ARGUMENTS

65. Ark Angel take exception to HMRC's attacks on the validity of the written employment contracts. They say that these contracts were signed in February 2020.

66. As far as the periodic salary is concerned, they say that £480 is the correct salary level for three days work and the Employees worked for three days, including a Saturday, at the end of February 2020. The payment is clearly a payment for February 2020, albeit that it was not paid until 19 March and incorrectly entered in the PAYE RTI system. Ark Angel not regularly paying salaries at the end of each month reflects how busy/preoccupied Ramandeep was at the time; it does not indicate that Ark Angel was not committed to paying monthly salaries.

67. If Ark Angel had found another tenant it could have afforded these monthly salaries to June 2020 and beyond.

DISCUSSION

Were the Employees fixed rate employees?

68. As noted above, HMRC now accept that the employment contracts were entered into on 27 February 2020 and they no longer refer to them as "purported" contracts. That said, they clearly harbour reservations about the contracts and have drawn our attention to ways in which the operation of the contracts differs from their terms.

69. We found this aspect of HMRC's case perplexing. They say that the contracts are genuine, but say that they should be treated as of no significance because they were not carried out. We cannot accept this submission. HMRC have not suggested that the contracts are fraudulent, nor have they submitted in terms that the documents are shams in the sense of being "documents ... which are intended by [the parties] to give to third parties or the court the

appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create” (*Snook v London & West Riding Investments*, [1967] 2 QB 786 per Diplock LJ at 801).

70. In *The Brain Disorders Research Limited Partnership & another v HMRC*, [2017] UKUT 0176 (TCC), one of the questions considered by the Upper Tribunal was whether or not a finding of sham had been open to the First-tier Tribunal (“FTT”) in a case where it had not made a finding of dishonesty. The Upper Tribunal concluded that the FTT could make such a finding on the evidence. However, the Upper Tribunal did make it clear that for there to be a sham there must, as a minimum, be an intention to make things appear other than as they are – a “pretence” – stating at [24]:

“We are, however, conscious that a finding of sham, even if it does not imply dishonesty in the ordinary sense, necessarily requires the fact-finding tribunal to be satisfied of an intention to deceive or, at least, to make things appear other than as they are.”

71. There is a further line of cases which indicates that terms inserted in a document with a view to thwarting a statutory purpose, and which the parties did not seriously intend to have any effect, can be ignored on the basis that they did not form part of the true agreement. These are cases such as *Antoniades v Villiers & another*, [1990] 1 AC 417 *Autoclenz Ltd v Belcher & others*, [2011] UKSC 41, and *Bankway Properties Ltd v Pensfold-Dunsford & another*, [2001] EWCA Civ 528.

72. HMRC did not argue its case on either of these bases, that the employment contracts were shams or the salary provision was one which did not form part of the true agreement. Mr Marks’ submission is that, to have legal effect, the contracts need to be carried out, whereas here no work was ever done under the contracts (or was really intended to be done) and the payments made simply involved passing on the Support Payment received. There was nothing real about the contracts, in terms of either obligations to carry out work or entitlement to payments. Mr Marks went no further. He did not suggest that the Employees had been dishonest or that there had been “an intention to deceive or, at least, to make things appear other than as they are.”

73. In our judgment, it is not sufficient, in order for us to ignore the written contracts, that they were not carried out (by which we take Mr Marks to mean that they were not implemented in accordance with their terms). To ignore the written contracts on the basis that they are a sham or a pretence it must be the case that the parties were dishonest or, at least, that there must have been an intent to deceive or to make things appear other than as they are. Mr Marks did not allege either of these things in terms nor is there evidence sufficient to prove this.

74. Clearly, there are features of the new employment arrangements which might invite attention, but in the absence of a substantiated suggestion of dishonesty or an intention to deceive or make things appear other than as they are, that is not enough to enable us to ignore the contracts or any of their terms. On that basis, we accept the written contracts for what they appear to be, employment contracts for a four-month period at a monthly salary of £3,200.

75. Having decided that we should accept the employment contracts for what they appear to be, we need to go on to decide whether the Employees should be regarded as fixed rate employees within paragraph 7.6 on the basis of the terms of those contracts. Two questions on the interpretation of paragraph 7.6 arose in the course of the hearing and we invited written submissions on these as the parties were not ready to discuss them. These were:

- (1) We questioned whether HMRC’s position, that a person is a fixed rate employee if they meet any one of the conditions in paragraph 7.6, was correct. Our reading of

paragraph 7.6 was that all components of paragraph 7.6 were required to be complied with; otherwise all employees would be fixed rate employees as they would comply with sub paragraph (a), even if they do not meet any of the other requirements.

(2) We asked what the parties took the requirement that, to be considered a fixed rate employee, an employee must be entitled under their contract to be paid an annual salary to mean. In particular, does it require that they must be employed under a contract which does not have a fixed term of less than a year?

76. In their written submissions, HMRC now accept (as a matter of ordinary English usage) that, to be a fixed rate employee, an individual must meet all the conditions in paragraph 7.6. Ark Angel made some detailed submissions on the proper use of commas, semicolons and conjunctions generally to indicate whether items in a list are linked or not, but the question for us is not an abstract question of grammar. It is whether conditions (a)-(f) in this paragraph must all be satisfied before a person is a fixed-rate employee and the most important point here is that, if the requirements are not cumulative (i.e. they must all be satisfied), every employee will be a fixed-rate employee as they will all meet requirement (a). If there were any doubt about this, the use of “and” rather than “or” to join conditions (e) and (f) reinforces that conclusion.

77. Turning to our second question and condition (b), HMRC comment that it would be unusual for an annual salary to be referenced in a contract which is for less than 12 months. However, it would not be impossible for a shorter contract to satisfy the requirement, provided the employee’s pay was genuinely by reference to an annual salary. They also say that, if a monthly salary only is specified in an employment contract with no reference to an annual salary, then the requirement at 7.6(b) cannot be satisfied. However, they then submit (slightly inconsistently, to our mind) that the requirement at 7.6(b) could be met if the contract specifies an entitlement to an annual salary, even if it does not give details of the annual salary figure, instead stating a relevant figure and time-period that would allow an annual salary to be clearly identified (e.g., stating an entitlement to an annual salary and providing the amount as a monthly or weekly instalment of that annual salary – “you are entitled to an annual salary made up of 12 monthly payments of X”).

78. Ark Angel did not make any submissions focused on (b) beyond observing that HMRC seem to be arguing that the requirements of paragraph 7.6 cannot be met if a calculation (e.g. of hours worked) is necessary. To our mind, this is not what HMRC are now arguing; their final example indicates that they accept that an annual salary can be derived by a calculation. Clearly, that must be correct. The question paragraph 7.6(b) is asking is whether a person has an annual salary or not, not how that salary is calculated or articulated.

79. The question is what do “annual salary” in (b) and the definition of “basic hours” in (c) add to the definition of fixed-rate employee? Condition (c) is that “the person is entitled under their contract to be paid [the annual] salary in respect of a number of hours in a year ... (“the basic hours”)”. Put another way, why did the draftsman refer to an annual salary and the number of hours worked in a year in respect of which the individual is entitled to be paid that annual salary, rather than just defining a fixed rate employee as someone whose periodic payment entitlement remains broadly constant (which is condition (e))?

80. To our mind a person can only have an “annual salary” which they are entitled to in respect of a number of hours worked in a year if that person’s employment is for a fixed term of at least a year or is for an indeterminate period which will last for more than a year unless terminated by either party. Clearly, the employment might be terminable (for example, on giving an agreed period of notice or following a default), but the mutuality of obligation under the contract between employer and employee must be capable of lasting more than a year

without any further act by either party. Interpreted in that light, the idea of an “annual salary” to which a person is entitled in respect of a certain amount of work over a year makes perfect sense. It does not matter how the annual salary or work requirement is expressed (a point made very clear in condition (c)) but the contract must have a degree of permanence which makes it possible to calculate an annual salary and work requirement in a meaningful way (so, more than just an “annual equivalent” - the annual equivalent of every salary is capable of being calculated). These employment contracts had an end date of 30 June 2020 “unless your contract is extended”. An extension would (of course) need to be agreed by Ark Angel and the Employee. It is always open to parties to extend the term of a contract and this clause does no more than advert to the possibility that the contract might be renewed by agreement. The possibility of extension by agreement, whether or not articulated, is not sufficient to give the employment contracts the required degree of permanence.

81. On this basis, the two contracts of employment (for fixed terms of four months with the possibility of an extension if agreed by both parties) do not meet this requirement and the Employees were not fixed rate employees at any time.

If the Employees were fixed rate employees what was their reference salary?

82. 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” (paragraph 7.2). In turn “salary period” is defined (in a not entirely straightforward way) in paragraph 7.1(e). It would appear to refer to equal periods of a week or month by reference to which the person is entitled to be paid regardless of the amount of work done in that period.

83. The new contracts were for four months’ work, commencing on 27 February 2020 and ending on 30 June 2020. HMRC say that the monthly payment periods ended on 27 March, 27 April, 27 May and 27 June, by start date, or 31 March, 30 April, 31 May, 30 June, by end date. On that basis there was no salary period which ended before 19 March 2020.

84. We agree with that submission. The contracts provide that the Employees are to be paid “monthly in arrears” at the rate of £3,200 a month. On that basis a “salary period” will be a month, because that is the period by reference to which the Employees were entitled to be paid an equal instalment of their annual salary “regardless of the number of hours actually worked in a particular week or month”.

85. We agree with Ark Angel’s submission that the payments of £480 in March were for three days’ work at the end of February. That is the only rational conclusion. £480 cannot be a payment for the whole of March; it is far too small. Working on the basis of 20 working days a month, £480 is the right payment for the three days the Employees worked at the end of February. We accept the explanation that the PAYE filing in March was for February, albeit made late.

86. However, the last three days in February were not a salary period. Even if the Employees were entitled to be paid on the last day of each calendar month, rather than on the days suggested by HMRC, those three days at the end of February could not be described as one of a number of equal periods of a week or month by reference to which the person is entitled to be paid regardless of the amount of work done in that period; it was a one-off payment calculated, according to Ramandeep, by reference to the three days worked in a three day period at the end of February.

87. On that basis the first salary period would end on either 27 or 31 March, when the regular, fixed monthly payments started. No salary period would end on or before 19 March 2020. If the Employees were fixed rate employees, their reference salary would have been zero.

If the Employees were not fixed rate employees, what was their reference salary?

88. Paragraph 7.2 tells us how to calculate the reference salary of someone who is not a fixed-rate employee. This 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.”

89. There were detailed calculations relating to these amounts in the hearing bundle, but we are not in a position to express a view in this decision notice.

Paragraph 2.5

90. HMRC’s revised Statement of Case alleges that Ark Angel’s claims were “contrary to the exceptional purpose of CJRS” and so are disallowed by paragraph 2.5.

91. The purpose of CJRS, is to be found at paragraph 2.1:

“The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease.”

92. HMRC submit that, although the contracts were signed 27 February 2020, the new employment contracts were not related to additional work done by the Employees, or because of increased company turnover. As explained in the initial meeting with Officer Greenwood, the Employees decided to support themselves through salaries from Ark Angel. This was confirmed in an email of 8 August 2021 from Ramandeep, when she wrote:

“In Feb I lost my job at another company. It was decided to take a fixed monthly income each to cover our bills, it was expected to last for a couple of months whilst I found a new job at which point the contracts would cease.”

93. HMRC say that Ark Angel increased the salary to Ramandeep and Kulvinder to cover a period until Ramandeep could find alternative employment to keep household earnings the same. Employment costs, which is what the CJRS is designed to support, are costs related to work done by Employees. There was no increase in work done, or evidence submitted to show that the Employees would have undertaken additional work to merit the increase in pay. The pay increase was not a reward for work done or future work to be done, but simply something which could fix a cashflow situation for the Employees’ household income. That, in HMRC’s submission, is not a genuine cost of employment. Costs to cover a job loss are not normal costs of employment recoverable via CJRS but are exceptional costs which are outside the purpose of CJRS, even if they were technically qualifying costs.

94. Turning to the quantum of the claims, it was not feasible that the new contracts would last the full four months based on the turnover of the company prior to the pandemic. But for the pandemic, there would not have been employee costs of £6,400 per month because it was completely unrealistic for that to have happened. The purpose of CJRS was to allow employers to retain employees on their pre-existing contracts, which were realistic going forward, so that when the restrictions were lifted employers and employees were in a similar financial position to the start of the pandemic. Ark Angel used the CJRS to increase turnover from £2,800 per month, to at least £5,000 per month from the CJRS scheme alone and this was used to pay the Employees. This is not something it would have been able to do, but for CJRS.

95. The economic points discussed at [90] have some force in the context of monthly claims of £3,200 per Employee. They produce far more money for Ark Angel than it might reasonably have expected to generate but for the pandemic and CJRS. The criticism of the employment contracts also has some force. It is clear from Ramandeep's evidence that the spur to the new arrangements was the family's need for money after she lost her job. These arrangements were designed to help bridge that gap, but the salary increases did not reflect additional work done. As Ramandeep put it in evidence, if Ark Angel could afford to pay them she couldn't see why it couldn't.

96. If we had held that the Employees were fixed rate employees with a reference salary of £3,200 per month each, we might have considered those claims to be contrary to the exceptional purpose of CJRS, not because we consider the contracts to be artifices or shams (and we repeat that this is no part of our decision) but because the CJRS claims give Ark Angel a far greater level of income than might ever have been expected but for the pandemic and we agree with HMRC that the purpose of CJRS was to support employers so that they could maintain their workforce in the way they might reasonably have expected to do but for the pandemic. However, given the conclusions we have reached (that the Employees were not fixed rate employees and so their reference salary is more in line with historic norms), we do not consider that claims at such a level would fall foul of paragraph 2.5.

What is the period of Furlough?

97. Paragraph 6.7 makes it very clear that an employee has only been instructed to cease all work once this has been agreed in writing. On that basis, the Employees did not become furloughed employees until 17 April 2020 when the letters putting them on furlough were written.

98. The Employees would cease to qualify as being on furlough if they worked for a person connected with their employer; see paragraph 6.2. The test of connection is that in section 1122 of the Corporation Tax Act 2010. Greenwich, Grosvenor and Akaal will all be connected with Ark Angel as all four companies are wholly owned by a combination of Kulvinder and Ramandeep.

99. Kulvinder accepted in evidence that he started to work for Greenwich/Grosvenor from the beginning of December 2020. Ramandeep started working in earnest for Akaal around the same time and Akaal filed its first set of accounts with HMRC for a client at the end of that month. She had set Akaal up two months earlier (at the end of September 2020) but she said she had been training in the interim period. We have no reason to doubt that.

100. Read literally, paragraph 6.8 only disregards training activities for the purposes of paragraph 6.1(a) (determining whether an employee has been instructed to cease all work in relation to the employment in relation to which the CJRS claim is being made) but does not have any role to play in relation to paragraph 6.2. We do not read paragraph 6.8 so literally. Paragraph 6.2 and 6.8 all help to decide whether an employee has ceased to work for an employer and in that context treating all training activity relevant to any employment (whether the employment in question or another employment with a connected person) seems to us to be a better and more coherent analysis of paragraph 6.8. On this basis, both Kulvinder and Ramandeep should be treated as working for a person connected with Ark Angel with effect from 1 December 2020.

DISPOSITION

101. We have determined the questions relevant to the calculation of the Support Payments Ark Angel was entitled to, and in consequence the amounts overclaimed which are now due from it as income tax, as follows:

- (1) the Employees were furloughed with effect from 17 April 2020;
- (2) both Employees started to work for a person connected with Ark Angel on 1 December 2020;
- (3) the Employees were not fixed rate employees within the meaning of paragraph 7.6 at any time and so their reference salary is to be calculated in accordance with paragraph 7.2; and
- (4) levels of Support Payment found in accordance with points (1)-(3) above do not fall foul of paragraph 2.5.

102. As we indicated at [6] above, it is now for the HMRC and Ark Angel to agree, based on these determinations, the amount due from Ark Angel to HMRC. If they cannot reach agreement, there is liberty to apply to the tribunal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

103. 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.

**MARK BALDWIN
TRIBUNAL JUDGE**

Release date: 4 August 2023