Neutral Citation: [2024] UKFTT 00588 (TC)

Case Number: TC09227

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/14053

SELF EMPLOYED INCOME SUPPORT SCHEME – taxpayer accepted not entitled on claims for SEISS – preliminary issue – whether sums received by her were amounts that could have been claimed by her employer as coronavirus job retention scheme payments – no – appeal dismissed

Heard on: 19 June 2024
Judgment date: 4 July 2024

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

SOFIA LORENZO

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ms Harriet Brown and Ms Rebecca Sheldon of Counsel appearing pro bono through the Revenue Bar Association under direct instruction.

For the Respondents: Ms Laura Ruxandu of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was a video hearing using the Tribunal video hearing system. A face-to-face hearing was not held because it was not expedient to do so. The documents to which I was referred were contained in a hearing bundle of 243 pages. .

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. The appeal concerns assessments issued by HM Revenue & Customs (**HMRC**) to Sofia Lorenzo (**Appellant**) pursuant to paragraph 9 Schedule 16 Finance Act 2020 to recover sums on the basis that HMRC "consider [the Appellant] has received an amount of coronavirus support payment to which [she was] not entitled".

4. Until 5 February 2019 the Appellant operated as a self-employed semi-permanent makeup and beauty therapist. From that date the business previously operated by her was incorporated (originally under the name Dermalluxe Aesthetics Limited and after a change of name Babe Aesthetics Limited (**Babe**)) and she became an employee of the company. The Appellant was the sole director and shareholder of Babe.

5. During the pandemic, the Appellant applied for and received coronavirus support payments under the Self-employed Income Support Scheme (**SEISS**). However, as she was an employee throughout the period for which the SEISS payments were made, she accepts that she was not entitled to receive such sums.

6. Despite accepting that she had no entitlement to SEISS the Appellant appealed the assessment on the basis that she had received payments under SEISS because of an innocent mistake and that as an employee should have been entitled to receive payments funded through the Coronavirus Job Retention Scheme (**CJRS**). She claims her CJRS entitlement would have been greater than the amounts paid to her by way of SEISS. In essence she invited the Tribunal to treat the claims she had incorrectly made under SEISS as claims made by Babe for CJRS and conclude either that she had not received sums to which she was not entitled and/or that it would be unfair of HMRC to assess in all the circumstances.

7. When this matter was first called on for hearing on 13 February 2024 the Appellant represented herself. It appeared to me, and the Tribunal Member (Mr Simon Bird) with whom I sat, that the grounds on which the Appellant appealed raised questions as to our jurisdiction which HMRC had not anticipated and with which the Appellant was ill equipped to deal. The hearing was adjourned and I made directions 1) for the Appellant to produce a witness statement addressing the facts relevant to determining whether the circumstances for a CJRS claim were met (but for the formality of a claim under that scheme); and 2) for HMRC to produce a skeleton argument addressing the jurisdiction of the Tribunal when considering appeals against assessments under Paragraph 9 Schedule 16, in particular whether we were entitled to consider public law arguments and/or the exercise of HMRC's discretion to assess in circumstances where coronavirus support payments had been paid under the wrong scheme but in circumstances in which there had been a parallel entitlement to support.

8. We also suggested that the Appellant might attempt to seek representation by contacting Tax Aid or through the Revenue Bar Association (RBA). Ms Brown and Ms Sheldon agreed to represent the Appellant on a pro bono basis through the RBA.

9. Mr Bird was unable to attend the relisted hearing but agreed that I should proceed to hear it alone. I would like to express my thanks to Ms Brown and Ms Sheldon for taking the instruction and to all Counsel for the assistance provided to the Tribunal.

10. Following the delayed production of the Appellant's witness statement the parties exchanged skeleton arguments focused on the jurisdictional question that had concerned Mr Bird and me. However, the witness statement and skeletons identified that contrary to the position asserted by the Appellant, it was not clear that Babe would have been entitled to make CJRS claims and hence there was a factual and legal dispute which required to be determined in advance of considering the Tribunal's potential public law jurisdiction.

11. In this decision I set out my reasons for concluding that Babe would not have been entitled to make claims under the CRJS acting through the Appellant as its sole director in respect of the employment of the Appellant. Accordingly, I set out below only the legislation, evidence and factual findings relevant to the preliminary dispute.

12. Given my conclusion on this issue the more intellectually challenging question regarding jurisdiction and HMRC's ability to assess under Paragraph 9 Schedule 16 where an entitlement under CJRS was established simply does not arise.

LEGISLATION

13. CJRS was facilitated and enabled by section 76 Coronavirus Act 2020 (**CA**) which granted HMRC such functions as may be directed by the Treasury in relation to coronavirus. Pursuant to section 78 CA the Treasury issued three Directions providing the framework for making SEISS payments and seven Directions pursuant to which CJRS payments were made.

14. Given the scope of this decision and the Appellant's concession that she was not entitled to payments under the SEISS it is not necessary to consider in any detail the scope of the SEISS however, it is relevant to note that the purpose of SEISS:

> "The purpose of SEISS is to provide for payments to be made to persons carrying on a trade the business of which has been adversely affected by the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease."

15. Though SEISS was modified by subsequent Directions (in particular providing the period for which the modified Direction applied) its purpose did not change.

16. As regards the preliminary dispute which I must consider, the critical CJRS Directions are the First (dated 15 April 2020) (**First Direction**), Third (dated 25 June 2020) (**Third Directions**) and Fifth (dated 12 November 2020) (**Fifth Direction**).

17. CJRS was introduced under the First Direction and responsibility for its payment and management was delegated to HMRC. The purpose of the scheme was set out in paragraph 2 which, so far as relevant to the preliminary dispute provided:

> "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.
>
> 2.2 Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a claim under CJRS are only made by way of reimbursement of the expenditure described in paragraph 8.1 incurred or to be incurred by the employer in respect of the employee to which the claim relates.
>
> …

> 2.4 Before making payment of a CJRS claim, HMRC must, by publicly available guidance, other publication generally available to the public, or such other means considered appropriate by HMRC, inform a person making a CJRS claim that, by making the claim, the person making the claim accepts that-
>
> > (a) a payment made pursuant to such claim is made only for the purpose of CJRS (and in particular as provided by paragraph 2.2), and
> >
> > (b) the payment must be returned to HMRC immediately upon the person making the CJRS claim becoming unwilling or unable use the payment for the purpose of CJRS."

18. A qualifying employer was defined in paragraph 3 of the First Direction as requiring a pay as you earn (**PAYE**) real time information (**RTI**) system registered with HMRC on 19 March 2020.

19. Qualifying costs were defined in paragraphs 5 and 7. They were costs:

(1) relating to a furloughed (and current) employee;

(2) to whom the qualifying employer had made a payment of earnings in the tax year 2019-20 which had been shown in a PAYE return submitted prior to the relevant CJRS day (defined so far as relevant to this matter as 19 March 2020);

(3) related to the payment of earnings during the period of furlough;

(4) which did not exceed 80% of the employee's reference salary capped at £2,500.

20. The First Direction provided for calculation of the reference salary to be determined for two classes of employee: fixed rate employees and variable rate employees. For the purposes of preliminary dispute the distinction was not relevant.

21. A furloughed employee was defined in paragraph 6:

> "6.1 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.
>
> …
>
> 6.6 Work undertaken by a director of a company to fulfil a duty or other obligation arising by or under an Act of Parliament relating to the filing of company accounts or provision of other information relating to the administration of the director's company must be disregarded for the purposes of paragraph 6.1(a).
>
> 6.7 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 an email) that the employee will cease all work in relation to their employment.
>
> …"

22. The expenditure to be reimbursed to the employer was defined in paragraph 8 and represented the "gross amount of earnings paid or reasonably expected to be paid by the employer to an employee".

23. The second Treasury Direction issued on 20 May 2020 did not materially alter the scheme as it then stood. It did however expand the activities that a director could undertake whilst continuing to be furloughed to include making CJRS claims and making wages payments.

24. The description of the purpose of the scheme was subject to minor amendment by the Third Direction:

> "2.2 Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a CJRS claim are used by the employer to continue the employment of employees in respect of whom the CJRS claim is made whose employment activities have been adversely affected by the coronavirus and coronavirus disease or the measures taken to prevent or limit its further transmission."

25. The Third Direction introduced a time limit for making a claim under the First Direction requiring claims to have been made for the period to 30 June 2020 no later than 31 July 2020.

26. Flexi furlough was introduced by the Third Treasury Direction in respect of the period 1 July 2020 to 31 October 2020. The definition of a qualifying employer under the flexi furlough scheme required that the employer had made a qualifying CJRS claim before 31 July 2020 defined (in paragraph 8.3) as having been made in accordance with the First (or Second) Direction and in respect of an employee who ceased all work whether directly or indirectly for the employer for a period of 21 calendar days or more beginning on or before 10 June 2020.

27. A Flexi furloughed employee was defined in paragraph 10 as an employee who does no work in relation to their employment in the CJRS claim period or does not work the full amount of the employee's usual hours by reference to the terms of an agreement between the employer and the employee varying the terms of employment where such agreement is necessitated due to coronavirus. The agreement had to be made or confirmed in writing and the agreement retained until at least 30 June 2025.

28. The qualifying costs were similarly defined as under the First Direction and were the costs relating to a flexibly furloughed employee. The Third Direction introduced a formula to calculate the costs of employment effectively prorated costs to the periods in which the employee was working reduced hours.

29. The Fifth Direction extended the scheme in consequence of the second lockdown which began on 5 November 2020.

30. Schedule 16 Finance Act 2020 provides the statutory infrastructure for the taxation of coronavirus support payments including CJRS payments. Paragraph 8 introduces a charge to income tax in respect of amounts paid by way of coronavirus support payment to which the recipient was not entitled. The amount of the charge is equal to the amount of the coronavirus support payment incorrectly paid. Paragraph 9 provides that HMRC may assess for the charge arising under paragraph 8. For the purposes of Schedule 16 "coronavirus support payment" includes both payments made under SEISS and payments made under CJRS.

31. The recipient of an assessment issued under paragraph 9 Schedule 16 may appeal that assessment and where they do so the Tribunal's jurisdiction and power in respect of the appeal are as prescribed under section 50 Taxes Management Act 1970 i.e. to determine whether the appellant has been overcharged by the assessment.

BURDEN OF PROOF

32. The parties agreed that the burden of proving that the assessments overcharged the Appellant fell on the Appellant and that the standard of proof was on the balance of probabilities.

33. There was some dispute as to precisely what that meant in practical terms. On behalf of the Appellant it was submitted that positive evidence was not required to prove every disputed point of fact. For example (and relying on the presumption of regularity as explained in *CHF Pip! Plc v HMRC* [2021] UKFTT 383 (TC)) I was entitled to presume or infer that the Appellant would undertake her duties as a director of Babe in accordance with the law and act in the best interests of the company. Further, where there were gaps in the evidence it was entirely permissible for me to infer the relevant fact from the circumstances. In each such case no positive evidence of that fact need be adduced.

EVIDENCE

34. The evidence before me consisted of the documents included in the hearing bundle, the Appellant's witness statement and the matters addressed in cross examination and re-examination.

35. The documents relevant to the preliminary dispute were:

(1) Company information confirming the Appellant was the sole director of Babe.

(2) Employer summary for Babe showing the RTI "mandation" date of 23 February 2019, joining date of 30 April 2019 but a cessation date of 13 December 2021 effective from 5 April 2020. The sole employee is shown as the Appellant.

(3) Email from Appellant's accountants dated 15 February to the Appellant confirming her monthly salary and mileage claim arrangements and indicating that further earnings could be distributed to the Appellant by way of dividend.

(4) Copy employer payslip P30 for May 2019 and employee payslip for April 2019.

(5) Record of SEISS Phase 1 claim dated 16 May 2020 for the period May-July 2020 in the sum of £1,436 by reference to an average trading profit shown as £7,178.50 also showing the claim as accepted and paid on 26 May 2020.

(6) Record of SEISS Phase 2 claim made on 18 August 2020 for the period August-October 2020 in the sum of £1,257 by reference to the same average trading profit; also showing the claim as accepted and paid on 27 August 2020.

(7) Record of SEISS Phase 3 claim made on 6 December 2020 for the period November 2020 – January 2021 in the sum of £1,436 by reference to the same average trading profit; also showing the claim as accepted and paid on 15 December 2020.

(8) Screenshots of the Appellant's professional Facebook page. There were 5 screenshots spanned the period 18 August 2020 to 8 October 2020. Each of the screenshots were in similar form. On the left was information identifying the business including contact details. Beneath that section and also on the left of the page was a photo montage. Both these are identical on each of the screenshots. On the right there is a short post which is dated, beneath which there is a larger photograph. It is not clear from the photograph or posts when the featured work in the post had been carried out.

(a) The post on 18 August 2020 states "We're OPEN! Back creating beautiful lips 💋 to book in follow the link in bio 👆" there then follows a description of the procedure, product, type of anaesthesia, pain level and price all pertaining to a larger photograph beneath of some augmented lips (the emoji's replicated here are not identical to the posts but the best assimilation of them available in word).

(b) That for 21 August 2020 states: "Fresh Week, Fresh Results ✨ Liquid Rhino to balance out the side profile". The description of the procedure etc pertaining to photographs of a before and after straightened nose is then provided.

(c) On 26 August 2020 there is a further post "the dreamiest of lips" 😍😍😍" and information relating to a before and after lips treatment.

(d) 1 September 2020's post: "Our signature lips using only 0.5ml 💉😍" Again relating to a before and after lips treatment.

(e) 8 October 2020: "Killing it [flame emoji] first time filler client using just 0.5ml" and a photograph of a lip treatment.

(9) Digital copy of the Appellant's self-assessment tax return for tax year 2019/20 showing £12,500 income from employment with Babe as the employer and confirming no income from self-employment in that year. That return had not however, been submitted at the time at which any potential entitlement to CJRS arose.

(10) Digital copy of the Appellant's self-assessment tax return for tax year 2020/21. In the "What makes up your tax return" both the Employment and Self Employment boxes are checked. On the return, £2,000 of dividend income is declared. The employment pages show no income from employment. £4,129 is declared on the self-employment pages as sums received under SEISS.

(11) A timeline of the covid period. So far as relevant here it confirms that the first lockdown was effective from 26 March 2020 with hairdressers (and providers of beauty treatments) being permitted to start to provide their services again from 4 July 2020. The second national lockdown was effective from 5 November 2020; whilst it was lifted on 2 December 2020, Tier 3 restrictions were then in place for most of the country. Whilst not stated in this document hairdressers and similar businesses were precluded from operating under Tier 3 restrictions. Tier 4 restrictions were introduced in London and South East from 21 December 2020. On 6 January 2021 the third national lockdown began with hairdressers then unable to operate until 12 April 2021.

(12) RTI information showing payments made to the Appellant by way of wages/salary from 30 April 2021 to 30 March 2022.

36. The Appellant gave evidence by way of a witness statement on which she was cross examined. There was no transcript of the proceedings and I have worked from the handwritten note that I took during the hearing. I accept that the Appellant gave her evidence truthfully. Ms Ruxandu accepted that the Appellant was truthful and relied on her evidence.

(1) The Appellant had originally set up her business in a self-employed capacity. However, in early 2019 she appointed an accountant.

(2) The accountant had incorporated her business, but she did not understand what that meant in legal or practical terms. She no longer wanted the responsibility of keeping the books or being responsible for tax and reporting and understood that what was proposed relieved her of the practical responsibilities she wished to delegate. Her oral evidence was clear that she considered herself to be self-employed throughout the period only starting to understand the effect of incorporation after the pandemic.

(3) In the period prior to covid her full time job was the provision of beauty and aesthetic treatments. Her income in the year prior to covid had been £1,040 per month plus mileage. She knew that these sums were paid to her through payroll as she was receiving payslips but did not recognise that this was a change in her status from self-employed to employed. From the answers she gave in cross and re-examination I infer that she perceived only that the payslips were a consequence of appointing an accountant to manage her books.

(4) The accountant had been appointed on a contract that ran for annual periods. The first annual period ended as the covid period began. She did not renew the contract and had no contact with the accountant during the pandemic.

(5) She had been legally prohibited from providing treatments in any of the lockdown periods. As regards the period between lockdowns, in her statement she explained that the industry in which she worked was one of the most affected because of the requirement for one-to-one contact meaning that she could not work for roughly a year. She also stated that she had no income in that year. Following directly on from that she says "No physical work was able to be carried out during the various lockdowns. I was only able to do admin work such as replying to queries or advertising to keep the business 'relevant' for when she was able to open again".

(6) Ms Ruxandu cross examined the Appellant extensively on this paragraph by reference to various documents. In response to such cross examination the Appellant accepted that there had been some income for the business from which it was possible to declare a dividend of £2,000 but confirmed that she had not been paid a wage or salary in the period from the final payslip in February 2020 until April 2021.

(7) The Facebook posts were put to the Appellant. This is my record of the questions and answers:

> "Q – [read words from witness statement quoted in (5) above] you had to do that?
>
> A – yes
>
> Q – Had to be active otherwise you would lose your clients?
>
> A – yes
>
> Q – kept advertising and replying
>
> A – yes
>
> …
>
> Q – you posted to advertise all through the pandemic to keep your business relevant?
>
> A – yes
>
> Q – [the example at 35(8)(a)] is an example of what you posted?
>
> A – yes"

(8) She did not expect to receive payslips or expect the relevant returns to be made as there was no income from which to pay her the salary she had received in the prior year. She accepted in cross examination that when business began to return, and she appointed accountants, there was no rectification of accounting to treat the dividend paid as wages.

37. After oral evidence had closed, and during the lunch adjournment, HMRC made an application to introduce further documents. I was sent them but did not open them. The Appellant objected to their introduction. Ms Ruxandu initially supported her application on the basis that the documents were necessary as shortly prior to lunch Ms Brown had invited me to infer from the dates of the Facebook posts that there was only evidence of admin activity in the period 18 August – 8 October 2020 and, had HMRC wanted to demonstrate a wider period of activity, any documents supporting such a conclusion should have been produced. I reminded Ms Ruxandu that she had taken the opportunity to cross examine the Appellant in respect of the Facebook posts made available in the bundle and that the dates had been flagged

by me during cross examination. Considering my reminder, Ms Ruxandu withdrew her application.

PARTIES SUBMISSIONS ON THE EVIDENCE

Appellant's submissions

38. Ms Brown made a headline submission that the purpose of both SEISS and CJRS was to provide money into the hands of those affected by coronavirus and the associated lockdowns. For the self-employed that was done by reference to a drop in the individual's trading profit attributable to the lockdown/virus. Similarly under the CJRS compensated employers where their employees could not generate sufficient income to cover the wages/salary bill. But in both instance it was the individual that was the beneficiary of the support schemes.

39. I was taken meticulously through the CJRS requirements to demonstrate that Babe was entitled to make CJRS claims but had not done so because of the mistaken understanding of the Appellant that she was self-employed. If I were to take the mistake out of the equation, I could be satisfied that:

(1) Babe was a qualifying employer (this was not in any event disputed by HMRC).

(2) As the Appellant was employed by Babe, she had a reasonable expectation that she should be paid salary on the same basis as in the prior tax year.

(3) The payments incorrectly made under the SEISS scheme represented the vehicle by reference to which her salary entitlement was met and should be treated as reimbursed costs of employment which would otherwise have arisen and have been required to have been met by Babe. As such they were qualifying costs under CJRS.

(4) There were NICs costs which had been incurred in the relevant tax year (i.e. 2019/20) for which Babe was entitled to be reimbursed.

(5) Whilst there was no direct written evidence of furlough it was to be inferred from the fact that it was impossible to provide treatments whilst during lockdowns and that as the Appellant was the sole director and employee there was a de facto cessation of all work for which there would, in any event, be some written record.

(6) She also preyed in aid the presumption of regularity which would permit me to infer that Babe would have put in place a furlough agreement had the misunderstanding as to status not occurred. The Appellant in her capacity as a director would, by reference to the presumption, have done what was required of Babe in order to comply with the CJRS.

(7) The only evidence of work undertaken was by reference to the screenshots all of which were of posts made between 18 August and 8 October 2020 when there was no lockdown and, by reference to the Third and subsequent Directions, flexi furlough permitted some work.

(8) The posts were, in any event, basic and formulaic requiring little or no effort on the part of the Appellant which could constitute work undertaken. The evidence was that there were only 5 posts in 51 days. The posts were in marked contrast to the categories of posts and social media activity Judge Popplewell had considered amounted to work in the appeal bought by *Glo-ball Group Ltd v HMRC* [2023] UKFTT 00435 (TC). It was contended that the posts and advertising in that case the posts were not simply reciting what services would be available (or were available). Glo-ball was an events company, it was capable of and did run online events and the posts demonstrated that. The Appellant could not offer services except when lockdown restrictions were lifted.

(9) The posts also demonstrated that at least for the period from 1 September to 8 October 2020 there was a period of 21 days in which no work was undertaken at all supporting that the requirements for furlough had been met.

(10) There was ambiguity in the Appellant's response to cross examination questions regarding the posts. It had not been established that the Appellant worked "throughout" the relevant period as, at no point, had Ms Ruxandu established the Appellant's understanding of the question.

(11) Directors were permitted to undertake some activities and ,construed purposively, it was reasonable that the activities associated with keeping the business relevant were of the same nature as the permitted activities.

(12) The Appellant had simply received sums to which she would have been entitled had Babe applied under CJRS.

HMRC submission

40. HMRC contend that however harsh the outcome in this case, the Appellant made the wrong type of claim to coronavirus support payments, and the claim was one to which she was not entitled. The fact that she was an employee of Babe did not mean that there was necessarily any entitlement to CJRS support. Ms Ruxandu submitted, on the facts, the various requirements for a claim under the CJRS were not met and, in any event, Babe had a choice whether to have ceased the Appellant's employment and thereby avoid what was a reasonably high administrative burden of meeting the scheme requirements.

41. Ms Ruxandu worked through each of the requirements under the Treasury Directions to demonstrate that it was not simply a case of having made the wrong claim. Babe ceased to pay salary to the Appellant, ceased to operate the PAYE RTI system and hence had no qualifying costs to reimburse. In fact Babe had determined to remunerate the Appellant by way of dividend payment in preference to salary where treatments had been provided generating income and associated profits from which the dividend could be paid.

42. Babe had not entered and retained written furlough agreements and it could not be presumed that but for the Appellant's misunderstanding as to status all the necessary requirements would have been met.

43. It was submitted that the Appellant had accepted that she had worked throughout the period of the claims keeping the business relevant. Whilst some work during the flexi furlough period from 1 July 2020 was permissible a claim under CJRS was not permitted for such employees unless there had been a claim under the original scheme. It would not, Ms Ruxandu submitted, be appropriate to double up and roll assumptions together so as to facilitate the Appellant retaining sums claimed under an incorrect scheme when claimants who made mistakes (such as missing a claim deadline) under the correct scheme had become disentitled and were assessed.

FINDINGS OF FACT

44. From the evidence summarised above I make the following findings of fact:

(1) In the period relevant to the preliminary dispute the Appellant was an employee and the sole director of Babe.

(2) There is no evidence of a formal contract of employment or any written evidence of the terms on which she performed her duties as an employee but by reference to the email from the accountant, payslip, P30, P14, RTI data and her tax return I find that it was a relevant term of the employment relationship that she was entitled to receive a salary of £12,500 per annum.

(3) During the lockdown periods the Appellant was precluded from carrying out any treatments for her clients which represented the sole means of generating income for the business from which it may have been possible to pay wages. However, and on the basis that the Appellant had considered herself self-employed I find that she determined not to pay herself a salary/wage because the business had no income from which to pay it. Thus, whilst there must have been a de facto contract for her services in the prior year pursuant to which she had been paid £12,500 she did not reasonably expect to be paid a salary during lockdown periods. On the evidence, I do not find that she had ceased employment, only that, in consequence of her misunderstanding as to status, she reasonably recognised that there was no means of drawing any remuneration.

(4) By reference to her tax return for 2020/21 it is apparent (though no further documentation was provided) that a dividend of £2,000 was paid to her by Babe in that tax year. That indicates that she was able to undertake some treatment work in the period from 4 July to 5 November 2020 but rather than pay a wage the sum was distributed to her by way of dividend. I therefore find that she also did not reasonably expect to be paid a salary during the period when the lockdown restrictions were eased when the business permitted to operate.

(5) There was no evidence produced which demonstrated that the Appellant had been furloughed by Babe. Furlough required an instruction to cease all work for a period of 21 days or more and not simply an inability to provide treatments. However, and in any event, the Appellant openly accepted that she did not see herself as an employee but as self-employed. Realistically, therefore she did not consider ceasing all work, to the contrary her evidence was that she needed to continue to respond to queries (such as they were) and advertise to remain relevant. I find that the Appellant was not furloughed.

(6) Not unsurprisingly, as I find she was not furloughed I also find that there was no written evidence of furlough.

(7) Based on both her witness statement and her evidence I also find that the Appellant worked to the extent that she could throughout the lockdowns. It was a challenging and difficult time for everyone but particularly so for those who had operated micro/one person businesses and even more so for those requiring one-to-one close contact. However, the Appellant did not give up, as she explained she maintained her business's social media presence and ensured that throughout the period she remained relevant to her existing and potential future customers. I find that the screenshots are an example of the activity she undertook. The ones provided relate to the period in which lockdown restrictions were lifted and provide examples of treatments which could then be provided. But based on the answers to questions put in cross examination I find that she did what she could to keep the business alive during the lockdowns so that she could start to provide treatment when restrictions were lifted. As set out in finding (9) below and by reference to her understanding, certainly by 20 May 2020 when she completed her first SEISS claim form, she had no reason to consider that she could not work to keep her business relevant.

(8) I find that although the posts were limited and followed a formula, they were not simply her maintaining a personal social media presence. It was a presence for the business.

(9) The Appellant completed SEISS claim forms. In the "Before you start" section the claimant was directed to scheme guidance and a declaration was made that the claim was made in accordance with such guidelines. The guidelines set out the terms of the scheme including the requirement that claimants were self-employed. I find that there was no

intended misdeclaration by the Appellant. She completed the claim genuinely believing that she was self-employed. On the basis that she had read the guidance (as confirmed in the declaration) and I have no reason to believe she did not so read it, it informed her that she could continue to work but would nevertheless be entitled to continue to make the claim. Based on such guidance I consider it unsurprising that the Appellant continued to do all she could to keep the business relevant.

APPLICATION OF FACTUAL FINDINGS TO THE CJRS REQUIREMENTS

45. There is no dispute that Babe was a qualifying employer and that the Appellant was a fixed rate employee having received a fixed salary throughout the period from when her employment commenced.

46. However I am not satisfied, on the facts, that the following requirements of the First Treasury Directive were met:

(1) Babe did not incur any qualifying costs (thereby not meeting paragraph 5, 7 and 8) because there were no costs of employment in respect of the Appellant. She believed she was self-employed and knew there was no income from which she could be paid, as such no wages were paid.

(2) The Appellant did not cease all work for a period of at least 21 days (as required under paragraph 6.1(b)). Her evidence in cross examination was that she worked to maintain the relevance of the business for when she could return to providing treatments. There was an absence of direct evidence as to the frequency with which she undertook activities to keep the business relevant in the lockdown periods and it is not therefore possible to infer that there was a period exceeding 21 days in which no work was done.

(3) The work undertaken was not limited to the activities of a director prescribed in paragraph 6.6.

(4) There was no written furlough agreement (contrary to the requirements of paragraph 6(7)).

47. Regarding the Third and subsequent Treasury Directives no entitlement arose because continuing entitlement of an employer to make claims in the post 1 July 2020 periods was contingent on claims having been made under the First and Second Treasury Direction.

48. Accordingly, no question arises as to the fairness of assessing to recover sums overpaid as SEISS which could have been paid pursuant to an entitlement to CJRS but for the failure to make such a claim. It may be that will always be the case given the nature of the two schemes. However, it certainly does not arise here, and it would therefore be inappropriate to speculate on what the Tribunal's jurisdiction might be.

49. The Appellant accepts that she is not entitled to SEISS payments the assessments must therefore stand and the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this preliminary 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. This Tribunal must receive the application 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 4th JULY 2024