Neutral Citation: [2024] UKFTT 00616 (TC)

Case Number: TC09237

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/00863

Coronavirus Job Retention Scheme – clawback of payments - the Coronavirus Act 2020 Functions of HMRC (Coronavirus Job Retention Scheme) Direction of 15 April 2020 – whether fixed rate employee in paragraph 7.6 - no –-whether purported February 2020 pay increase part of the reference salary for the purposes of paragraphs 7.2 or 7.7 – no

Heard on: 4 July 2024
Judgment date: 9 July 2024

Before

TRIBUNAL JUDGE IAN HYDE
DEREK ROBERTSON

Between

LASER BYTE LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Peter Puttock, director

For the Respondents: Matthew Lindsay, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns the application of the Coronavirus Job Retention Scheme ("CJRS") for employers who furloughed their employees during the coronavirus pandemic.

2. The issue in this appeal is the amount of CJRS support payments an employer can claim. Specifically, it is concerned with whether the furloughed employee should be treated as a fixed rate employee and, further, whether a pay increase first reported in a Real Time Information ("RTI") PAYE return on 29 March 2020 was effective in February 2020 and so to be taken into account in determining the reference salary.

THE FACTS

3. Mr Puttock, the sole director and employee of the appellant, represented the appellant in the hearing. He did not provide a witness statement but gave oral evidence.

4. Ms Valerie Wescott, an HMRC compliance officer, provided a witness statement and gave oral evidence as to her role in the investigation into the appellant's CJRS claims. The investigation into the appellant's CJRS claims was passed to Ms Wescott on 24 May 2022 from a Mr Wilkins, another HMRC officer.

5. Mr Puttock's accountant, Mr Hole, was present in the hearing but he was not called as a witness.

6. We find the facts as follows.

The appellant and its payroll compliance

7. The appellant is a small company providing software development services through Mr Puttock. It was formed in 1983 and has been trading since 1984. In earlier years there have been other employees but for all periods relevant to this appeal Mr Puttock has been the sole employee.

8. The Appellant has accountants, Gooch Maloney ("GM"), where the principal contact is a Mr Graham Hole. Mr Puttock relies upon GM for payroll and accounting services. He makes decisions about matters concerning his business, for example what salary to pay himself but GM manage payroll and reporting to HMRC under the RTI system. For this purpose GM operate a standard payroll system called Moneysoft, which sends reporting information to HMRC through RTI.

9. GM advise Mr Puttock as to the payroll position by sending him payroll information every quarter, so at the end of March he is sent the information and payslips for January, February and March and so on. He is also sent at that time a summary of the PAYE and National Insurance owed to HMRC and based on that information Mr Puttock would pay HMRC. Apart from that information, Mr Puttock would not have any knowledge of how GM record pay and other matters, for example his directors loan account. Thus, during any 3 three month period Mr Puttock would not know how matters are being recorded, he simply accesses the company account as needed, leaving GM to record the withdrawals, presumably as salary or on directors loan account.

10. References in this decision to the appellant reporting through RTI are shorthand for the appellant doing so through its agent GM.

Mr Puttock's salary

11. The salary paid to Mr Puttock, as recorded in the RTI returns in the period January 2018 to March 2020 inclusive including the payment period as reported by the appellant, is shown in Appendix 1.

12. Mr Puttock explained in oral evidence that, he had a written employment contract which was executed in 1987 when the appellant had two other employees and he had to engage an external consultant to put in the proper employment arrangements. However, his contract was in his loft and he has never looked at it or updated it. Further, so far as he could recall, it simply provided that he was to be paid by the appellant such salary as was to be mutually agreed. Mr Puttock accepted that there were no records of his salary. In effect it was whatever he decided it to be and what he told GM to reflect in the accounts and payroll.

13. Mr Puttock explained the pay history as set out in Appendix 1 and taken from the RTI records. He generally paid himself a modest salary, taking the balance of earnings out as dividend, and the amount from year to year depended on whether the business was doing well. Typically he would think about salary at the year end when he was preparing the papers to send to GM. His salary had been higher in previous years but in 2018/19 it was £800 a month but reduced to £550 a month for 2019/20.

14. The RTI record showed that Mr Puttock's pay also varied in February and March in each year. Thus in February 2019 it was £851.27 and in March 2019 £909.09. Mr Puttock explained the difference as being the effect of reaching PAYE and NIC thresholds at the end of the tax year. He must have instructed GM that he wanted a certain amount of net income, £800 in 2017/18 and 2018/19 and £550 in 2019/20. GM must have set up the software to achieve that, so at the end of the year when PAYE and NIC was payable the gross salary was automatically increased to produce the right net of tax pay. We were taken to payslips for some of the relevant months and they reflected that position, so in both February and March 2019 the net of tax salary was £800. Subject to our discussion below of the February 2020 position, we accept this explanation.

The £2,000 pay review

15. One of the issues in this appeal is whether, as Mr Puttock argued, his salary was increased in February 2020 from £550 a month to £2,000 a month. Mr Puttock argued that this variation to his salary was made and effective on 13 February. As set out below, HMRC's position is that when in March 2020 he realised that he could claim CJRS support payments and the amount depended on his pre March 2020 salary Mr Puttock retrospectively reported a salary increase for February 2020.

16. Mr Puttock's account was that, for a number of reasons, he decided in February to increase his salary and, having made that decision, told GM on 13 February when he dropped off his papers at their offices. This was not a meeting or a discussion but just an instruction to a GM employee to increase the salary to £2,000.

17. This decision was made before Mr Puttock knew that he could claim under CJRS. He had assumed he could not do so but later in March Graham Hole asked him if he was going to claim, which came as a surprise to him.

18. On 4 March 2020 the appellant reported in RTI a salary of £550 as having been paid to Mr Puttock in the period ending 28 February 2020. On 29 March 2020 the appellant made an amendment in RTI, reporting a salary of £2,000 paid (or payable) in the same month.

19. Mr Puttock in oral evidence accepted that, RTI returns aside, he did not have any evidence to support his argument. He was both employer and employee and it was unrealistic for him to record a conversation effectively with himself. Mr Puttock accepts that with hindsight he should have recorded the decision, perhaps by emailing GM, but he did not as he did not think it important at the time.

20. Mr Puttock gave several reasons for increasing his salary:

(1) He had a yacht in Greece but was considering buying a bigger one which would have required a maritime mortgage. He was told that to do so he would need to be able to show a decent salary;

(2) He had taken on a large contract which paid the appellant in 2019-20; and

(3) He was considering a sale of the company

21. HMRC argued that the fact Mr Puttock changed the reason for the salary increase showed there was no valid reason for it.

22. When asked about why the initial RTI return was made on 4 March 2020 showing pay of £550 when he had told GM in February to increase the salary to £2,000, Mr Puttock said he did not know but perhaps GM made a mistake. GM was under huge pressure at the time trying to implement payroll systems for hundreds of clients.

23. We do not accept Mr Puttock's evidence. The burden of proof is on him to show that the pay increase was effective in February 2020 and he has not done so. Whilst we accept as the sole director and employee of the appellant it would be artificial for him to record a pay review with himself, nevertheless the complete absence of any evidence, for example in exchanges with his accountant, who ran his payroll and reported on his behalf the RTI amendment or any evidence that the salary increase was payable or actually paid in February (whether in bank statements or being credited to directors loan account) is notable. Mr Puttock could have called Mr Hole or a relevant member of GM's staff as a witness but did not do so.

24. We note that Mr Puttock's pay shows a consistent pattern of relatively modest salary with the balance being paid out as dividends. From the records we were shown that salary was £800 or £550 a month with adjustments for PAYE and NIC at the end of the year. Mr Puttock accepted that this salary and dividend policy minimised the overall tax position. In awarding himself a £2,000 a month salary – and making himself liable to income tax and NICs on that salary - Mr Puttock was making a radical change in financial strategy for which there had to be a good reason.

25. We do not find Mr Puttock's reasoning for the pay increase credible. He may have been considering purchasing a bigger yacht in Greece but no evidence was produced to support the point. Further, even if the appellant did, as Mr Puttock asserted, hold intellectual property that made it sellable, we do not consider it likely that paying himself a higher salary as the owner and sole employee of a personal services company would make the company more attractive to a buyer.

26. We find it more likely that when the CJRS scheme was announced in March 2020 Mr Puttock decided to report a higher salary to maximise his entitlement to CJRS support payments. Accordingly, we find that the decision to increase Mr Puttock's salary to £2,000 and was made in March 2020 and backdated to February 2020.

Procedural history

27. In May 2020 the appellant started making CJRS claims and in due course made claims totalling £10,359.39 in respect of periods ending 30 April to 30 September 2020. HMRC made support payments in respect of all these claims. The appellant's claims were based on the premise that Mr Puttock was a fixed rate employee and that there had been a pay increase to £2,000 a month effective from February 2020.

28. On 2 October 2020, HMRC opened a check into the CJRS claims.

29. On 21 July 2022, following exchanges between the appellant and HMRC, HMRC issued a notice of assessment for the tax year ended 5 April 2021, to the appellant, in the

amount of £8,356.19 ("the Assessment"). The Assessment was based on HMRC's conclusion that Mr Puttock was a fixed rate employee and that the £2,000 pay review was not effective in February 2020.

30. On 18 October 2022, following further exchanges, the appellant appealed against the Notice of Assessment.

31. On 20 October 2022 HMRC issued a view of the matter letter.

32. On 3 November 2022 the appellant requested a review of the decision.

33. On 31 January 2023 HMRC issued their review conclusion letter which concluded that Mr Puttock was a variable rate employee and recalculated the CJRS overpayment to be £7,427.92 ("the Review Conclusion Letter").

34. On 28 February 2023 the appellant appealed to the Tribunal.

Issues in this appeal

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

(1) Whether, contrary to the methodology adopted by the appellant in its CJRS claims, Mr Puttock was not a fixed rate employee for the purposes of calculating the reference salary; and

(2) Whether the pay increase from £550 to £2,000 awarded to Mr Puttock was effective from February 2020 so as to be taken into account in calculating reference salary or should it be ignored as having been awarded retrospectively in March 2020 to take advantage of the CJRS rules and increase the CJRS claims.

36. HMRC expressly did not rely on paragraph 2.5 of the First Direction.

37. The burden of proof is on the appellant.

THE CJRS REGIME

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

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

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

> "1. This direction applies to Her Majesty's Revenue and Customs.
>
> 2. This direction requires Her Majesty's Revenue and Customs to be responsible for the payment and management of amounts to be paid under the scheme set out in the Schedule to this direction (the Coronavirus Job Retention Scheme).
>
> 3. This direction has effect for the duration of the scheme."

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

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

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

43. Further Directions were issued to modify the effect of the First Direction. The appellant made claims under two of these later Directions, being the Direction issued on 20 May 2020 and 25 June 2020. However, the parties are agreed that they did not alter the conditions for relief that are relevant to this appeal from those set out in the First Direction and we were not taken to them. We have therefore not considered their terms.

44. It is agreed that the CJRS claim in respect of Mr Puttock meets the conditions for making a claim, including that the appellant operated a PAYE scheme registered on HMRC's RTI system on 19 March 2020 (paragraph 3), Mr Puttock had been paid earnings in the tax year 2019-20 which is shown in a return under Schedule A1 to the PAYE Regulations on or before a relevant CJRS day and that Mr Puttock had been furloughed (paragraph 5).

45. This appeal concerns how to calculate the appellant's entitlement to CJRS support payments. Paragraph 8.2 provides that the amount an employer can claim is the lower of £2,500 a month or 80% of the employee's "reference salary". The reference salary is calculated in accordance with paragraph 7 and varies depending on whether the employee is a fixed rate employee within paragraph 7.6 or a variable rate employee within paragraph 7.2.

46. If an employee is a fixed rate employee the reference salary used to calculate the amount of CJRS support payments an employer can claim is, in accordance with paragraph 7.7;

> "…the amount payable to the employee in the latest salary period ending on or before 19 March 2020…"

47. If an employee is a variable rate employee the reference salary is determined by paragraph 7.2 which in respect of each month takes a higher of average pay over the tax year 2019-20 and the amount actually paid in that month.

48. The purpose of the different calculations is in our view clear. Where salaries are variable then an averaging is appropriate but for employees on fixed salaries taking the last month is more convenient.

Reclaim and appeal mechanism

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

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

> "**Charge if person not entitled to coronavirus support payment**
>
> 8 (1) A recipient of an amount of a coronavirus support payment is liable to income tax under this paragraph if the recipient is not entitled to the amount in accordance with the scheme under which the payment was made.
>
> …
>
> (5) The amount of income tax chargeable under this paragraph is the amount equal to so much of the coronavirus support payment
>
> (a) as the recipient is not entitled to, and
>
> (b) as has not been repaid to the person who made the coronavirus support payment."
>
> **Assessments of income tax chargeable under paragraph 8**
>
> "9 (1) If an officer of Revenue and Customs considers (whether on the basis of information or documents obtained by virtue of the exercise of powers under Schedule 36 to FA 2008 or otherwise) that a person has received an

> amount of a coronavirus support payment to which the person is not entitled, the officer may make an assessment in the amount which ought in the officer's opinion to be charged under paragraph 8.
>
> (2) An assessment under sub-paragraph (1) may be made at any time, but this is subject to sections 34 and 36 of TMA 1970.
>
> (3) Parts 4 to 6 of TMA 1970 contain other provisions that are relevant to an assessment under sub-paragraph (1) (for example, section 31 makes provision about appeals and section 59B(6) makes provision about the time to pay income tax payable by virtue of an assessment)."

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

> "(6) If, on an appeal notified to the tribunal, the tribunal decides
>
> …
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment, the assessment shall be reduced accordingly, but otherwise the assessment shall stand good
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides-
>
> …
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment, the assessment shall be increased accordingly, but otherwise the assessment shall stand good"

FIXED RATE EMPLOYEE

52. In the Review Conclusion Letter and in this appeal HMRC argued that Mr Puttock is not a fixed rate employee within paragraph 7.6 and is therefore a variable rate employee within paragraph 7.2.

53. If Mr Puttock is a fixed employee the salary period is in effect the month of February 2020. However, if he is a variable rate employee, the difference in calculation means that even if Mr Puttock is right and the £2,000 pay review is to be taken into account, its effect in the averaging calculation mandated by paragraph 7.2 is considerably diluted. It is in Mr Puttock's interest therefore to be a fixed rate employee.

54. Mr Puttock argued that he was a fixed employee. His salary varied over time but, as demonstrated by the RTI returns, it was of a fixed amount, most recently £550 a month.

55. HMRC referred to the informal nature of the engagement between the appellant and Mr Puttock. For example in a call with HMRC in October 2020 Mr Puttock said:

> "[question] How did you determine what each employee's usual pay was?
>
> [Mr Puttock] periodic chats. Two or three times per year. With accountant.
>
> No kind of written contract.
>
> Amount up or down depending if successful trading year,
>
> Large Contract … paid in stage payments …not kept to, but majority came in, in 2019-20
>
> So 2020-21 increase."

56. However, HMRC did not argue that the informality meant there was no contract (paragraph 7.6(b)). Instead, HMRC relied upon the condition in paragraph 7.6(e):

> "(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…"

57. HMRC argued that this condition was not satisfied due to this informality so that the appellant would vary the salary depending on circumstances such as having a large contract. Specifically, HMRC argued that whilst Mr Puttock was paid a regular salary it was increased in February and March each year. HMRC argued that meant he was therefore not entitled to be paid a fixed amount each month. The purported variation in February 2020 was also indicative that there was no fixed entitlement.

58. Mr Puttock argued that his pay was fixed, it was just an after-tax amount. Paragraph 7.7(e) required the employee to be entitled "to be paid" fixed amount and that was what he was entitled to as he was always paid, in the case of 2018/19, £800.

59. We do not accept Mr Puttock's argument that being entitled to a fixed amount in paragraph 7.6(b) is a reference to or included being entitled to a fixed after-tax amount of salary. PAYE and employee NICs operate as a deduction from salary and the amount of tax payable and therefore net pay will vary depending on personal circumstances. That cannot have been the intention of the First Direction to treat employees in such circumstances as variable rate employees and we do not accept that argument.

60. We therefore conclude that Mr Puttock was not a fixed rate employee within para graph 7.6.

REFERENCE SALARY

61. The amount payable as CJRS support payment depends on the amount of the "reference salary". As described above the amount of the reference salary is calculated differently depending on whether the employee is a fixed rate (paragraph 7.7) or variable rate employee (paragraph 7.2). It also depends on the employee's salary.

62. HMRC argued that the Mr Puttock's reference salary in February is £550. Mr Puttock argued that his salary had been varied in February 2020 to £2,000 a month. We have found that it was not so varied and that the salary was increased in March 2020 with retrospective effect and reported in RTI as if it had been effective from February.

63. Mr Puttock in the hearing took the Tribunal through the RTI return process but we do not find this assists either Mr Puttock's argument or the Tribunal. It is accepted that the RTI system allows employers to correct prior returns but RTI is a reporting system, and whilst making such a report may be evidence of intention or belief at the time, the content of the return does not determine whether the facts as reported are true or not: that is a matter of evidence. In that context we note and agree with this Tribunal's comments in *Farshad Khalili-Motlagh T/A Borge Restaurant v HMRC* [2024] UKFTT 00541 (TC) at [55] to [59] as to the limitations in the usefulness and authority of RTI returns.

64. Paragraph 7.7 defines the reference salary for fixed rate employees:

> "7.7 The reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020 (but disregarding anything which is not regular salary or wages as described in paragraph 7.3)."

65. We find that the reference salary for the purposes of paragraph 7.7 is £550. The £2,000 pay review did not take place until March and so was not payable to Mr Puttock in the February 2020, the latest salary period ending on or before 19 March 2020.

66. For completeness, in the event we are wrong as to Mr Puttock being a variable rate employee, we find that the £2,000 pay review should not be taken into account in the calculation of the reference salary in paragraph 7.2.

QUANTIFICATION

67. In the Assessment, HMRC assessed the appellant for £8,356.19 on the basis Mr Puttock was a fixed rate employee. However, on review HMRC changed their minds and decided that Mr Puttock was not a fixed employee. As described above this changed the calculation of the amount of CJRS support payment to which the appellant was entitled to and so reduced the amount HMRC considered was repayable from £8,357.19 to £7,427.92. The revised amount was set out in the Review Conclusion Letter.

68. By agreement with the parties we were not taken through the calculation of the appellant's liability and have reached this decision on the assumption that, were we to decide the two issues as to Mr Puttock's status as a fixed rate employee and the effect of the £2,000 pay review, that revised calculation is correct.

69. However, HMRC necessarily accept that, even if they are right, the July assessment is excessive. HMRC therefore wish the Tribunal to exercise its powers under section 50(6) TMA to reduce the assessment to £7,427.92.

70. We agree that this is appropriate.

DECISION

71. In our view the appellant was not entitled to all of the CJRS claims it made, for two reasons. First, Mr Puttock was not a fixed rate employee and second, the £2,000 pay increase was not effective in February 2020 and so should not be taken into account in calculating his reference salary for the purposes of paragraph 7.7 of the First Direction.

72. As regards the reduction in liability consequential on characterising Mr Puttock as a variable rate employee rather than fixed rate as HMRC had done in the Assessment, we agree that the Tribunal should exercise its powers under section 50(6) TMA to reduce the assessment to £7,427.92. We therefore direct that the assessment be reduced by £928.27 from £8,357.19 to £7,427.92.

73. Accordingly, subject to the above adjustment, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

IAN HYDE
TRIBUNAL JUDGE

Release date: 09th JULY 2024

Appendix 1

RTI records

Reported Payment Dates and RTI submission dates

Payment Date	Amount (£)	RTI submission date
31 March 2020	2000.00	29 March 2020
28 February 2020	2000.00	29 March 2020
28 February 2020	550.00	4 March 2020
31 January 2020	550.00	31 January 2020
31 December 2019	550.00	31 December 2019
30 November 2019	550.00	29 November 2019
31 October 2019	550.00	31 October 2019
30 September 2019	550.00	30 September 2019
31 August 2019	550.00	30 August 2019
31 July 2019	550.00	31 July 2019
30 June 2019	550.00	28 June 2019
31 May 2019	550.00	31 May 2019
30 April 2019	550.00	30 April 2019
31 March 2019	909.09	29 March 2019
28 February 2019	851.27	28 February 2019
31 January 2019	800,00	31 January 2019
31 December 2018	800,00	28 December 2018
30 November 2018	800,00	30 November 2018
31 October 2018	800,00	31 October 2018
30 September 2018	800,00	28 September 2018
31 August 2018	800,00	31 August 2018
31 July 2018	800,00	31 July 2018

30 June 2018	800,00	29 June 2018
31 May 2018	800,00	31 May 2018
30 April 2018	800,00	27 April 2018
31 March 2018	909.09	23 March 2018
28 February 2018	886.73	07 March 2018
31 January 2018	800.00	31 January 2018

Appendix 2

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

"SCHEDULE

CORONAVIRUS JOB RETENTION SCHEME

Introduction

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

Purpose of scheme

…..

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

…

Qualifying costs

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

(a) relate to an employee-

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

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

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

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

…

Qualifying costs – further conditions

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

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

(b) the employee is being paid-

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

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

7.2 Except in relation to a fixed rate employee, the reference salary of an employee or a person treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership) is the greater of-

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

(b) the actual amount paid to the employee in the corresponding calendar period in the previous year.

7.3 In calculating the employee's reference salary for the purposes of paragraphs 7.2 and 7.7, no account is to be taken of anything which is not regular salary or wages.

7.4 In paragraph 7.3 "regular" in relation to salary or wages means so much of the amount of the salary or wages as-

(a) cannot vary according to any of the relevant matters described in paragraph 7.5 except where the variation in the amount arises as described in paragraph 7.4(d),

(b) is not conditional on any matter,

(c) is not a benefit of any other kind, and

(d) arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions.

7.5 The relevant matters are-

(a) the performance of or any part of any business of the employer or any business of a person connected with the employer,

(b) the contribution made by the employee to the performance of, or any part of any business,

(c) the performance by the employee of any duties of the employment, and

(d) any similar considerations or otherwise payable at the discretion of the employer or any other person (such as a gratuity).

7.6 A person is a fixed rate employee if-

(a) the person is an employee or treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership),

(b) the person is entitled under their contract to be paid an annual salary,

(c) the person is entitled under their contract to be paid that salary in respect of a number of hours in a year whether those hours are specified in or ascertained in accordance with their contract ("the basic hours"),

(d) the person is not entitled under their contract to a payment in respect of the basic hours other than an annual salary,

(e) the person is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month in equal weekly, multiple of weeks or monthly instalments ("the salary period"), and

(f) the basic hours worked in a salary period do not normally vary according to business, economic or agricultural seasonal considerations.

7.7 The reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020

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

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

…

Expenditure to be reimbursed

8.1 Subject as follows, on a claim by an employer for a payment under CJRS, the payment may reimburse-

(a) the gross amount of earnings paid or reasonably expected to be paid by the employer to an employee;

(b) any employer national insurance contributions liable to be paid by the employer arising from the payment of the gross amount;

(c) the amount allowable as a CJRS claimable pension contribution.

8.2 The amount to be paid to reimburse the gross amount of earnings must (subject to paragraph 8.6) not exceed the lower of-

(a) £2,500 per month, and

(b) the amount equal to 80% of the employee's reference salary (see paragraphs 7.1 to 7.15).

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

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

…"