Looking in the rear-view mirror

David Paul analyses recent case law relating to HMRC's CJRS compliance activities.

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The coronavirus job retention scheme (CJRS), announced on 20 March 2020, allowed employers to reclaim certain employee costs in the form of a government grant administered by HM Revenue & Customs (HMRC) when their employees were furloughed. The concept of employees being furloughed was new to the UK at that time but has since become a more familiar term.

The legal structure was contained within formal Treasury Directions and the initial HMRC guidance (upon which many employers relied) grew, and even changed, as issues became increasingly apparent. The speed of introduction and the complexity of the original scheme, and the further phases as the pandemic developed made it difficult for employers to comply with these very complicated arrangements during difficult times.

The schemes were extended several times before closing in September 2021 and the total amount distributed in CJRS payments was £68.9bn. This was paid to 1.3m employers covering 11.7m individual furloughed employees. The government has estimated that 5% of the amounts paid have been overclaimed due to fraud or error, a loss to the Treasury of somewhere between £3.5bn and £5bn.

The Taxpayer Protection Taskforce (TPT) was therefore formed to pursue error and fraud in the Covid-19 schemes. The taskforce prioritised tackling the riskiest cases. Up until February 2023, the TPT recovered over £490m of overpaid Covid-19 employment scheme grants, in addition to the £534m recovered prior to the taskforce being established.

Although the CJRS came to an end on 30 September 2021, HMRC's compliance activity is continuing to focus on employers' overclaims of CJRS and we are now seeing some cases going before tax First tier tribunals (FTTs). What is clear from several of these cases is that if a claim has not met the strict technical requirements, it is likely to fail at a FTT. Although they may be sympathetic, the tribunal judges have no power to consider anything other than the legislative position.

Key points

- The government estimates that 5% of the amounts paid under the CJRS have been overclaimed due to fraud or error costing the Treasury between £3.5bn and £5bn.
- Until February 2023, the Taxpayer Protection Taskforce recovered over £490m of overpaid Covid-19 employment scheme grants.
- HMRC's compliance activities are leading to cases going before the First tier tribunals.
- The legislation that applies to HMRC's ability to claw back overpaid CJRS claims is in FA 2020, Sch 16.
- Under FA 2020, Sch 16, overclaimed CJRS becomes a tax and HMRC can raise an assessment for the amount it considers to have been overclaimed.

Why tax tribunals?

The specific legislation that applies to HMRC's ability to claw back overpaid CJRS claims is in Schedule 16 of Finance Act 2020. This sets out that a charge to income tax arises when the employer has claimed an amount of CJRS to which it is not entitled. The charge is equal to 100% of the amount of over-claimed CJRS grant which has not already been repaid by the employer to HMRC.

So overclaimed CJRS (although it is effectively a government grant) becomes a tax and HMRC has power to raise an assessment for the amount it considers to have been over-claimed. The usual tax time limits from TMA 1970, s 34 and s 36 apply, with HMRC able to raise an assessment within four years following the year of assessment in which the overclaim arose unless the taxpayer's behaviour was careless or deliberate, in which case extended time limits apply.

HMRC has said that it will issue an assessment where an error is identified that has not been notified and also for amounts notified but not then repaid within 30 days if the customer has not otherwise agreed time to pay arrangements. Generally, assessments will be raised in cases where the taxpayer doesn't engage or fails to make payments as agreed.

Throughout the lifespan of the CJRS the government's aim was to process claims quickly and check the validity afterwards. HMRC's main emphasis on CJRS compliance has been to tackle fraudulent claims and while its published guidance states that it 'will not be actively looking for innocent errors' we have now seen several cases go to tribunal as HMRC attempts to claw back the amounts paid for technical breaches.

Details of some of these cases are summarised below. While these are all fairly low value compared to the tax at risk, and so far relate to fairly small employers, they will give a flavour of some of the issues that are being pursued by HMRC.

Missed deadline

In *Carlick Contract Furniture Limited* [2022] UKFTT 220 (TC) two individuals commenced employment with the employer on 24 February 2020. This was just after the cut-off date for the company's February payroll, so their pay for both February and March was processed in the March payroll run. This was reported to HMRC on a Real Time Information (RTI) return on 25 March 2020 with payments processed the following day.

However, one of the conditions which had to be met was that the relevant employee was included in an RTI return submitted to HMRC on or before 19 March 2020, the date of the announcement. These requirements were intended to prevent exploitation of the scheme through employments created solely to claim CJRS grants.

While the tribunal judge had 'every sympathy' for the employer it was decided that HMRC was correct to claw back the non-qualifying payment.

Technical difficulties are no excuse

A similar issue was identified during a compliance review which led to the tribunal case of *Oral Healthcare Limited* ([2023] UKFTT 357 (TC)). The CJRS claim had included ten employees who were not reported on RTI on or before 19 March 2020. When challenged, the employer explained that these employees had been employed then and would have been reported on RTI were it not for technical difficulties with HMRC's PAYE tool.

The tribunal judge described this as a 'sad case' and said 'whilst we have sympathy there is no provision in the legislation for any extension of time or for any remission because of mistakes. There was no entitlement to those payments and therefore the appellant is liable to tax in respect thereof'.

It was decided that the clawback by HMRC was therefore correct.

Reference salary must reflect qualifying salary

The case of *Zoe Shisha Events* [2023] UKFTT 398 (TC) considered whether the reference salary used in the calculations for CJRS was correct. The CJRS was calculated on the basis that a director's salary was £3,000 per month whereby the actual salary was £600 per month plus dividends. Payment of the dividend did not count towards reference salary. The tribunal found no documentary evidence to support the position that the salary had increased from the £600 per month.

The tribunal judge said: 'In light of the way that the reference salary is calculated under the CJRS, the Appellant may now wish that it had, prior to 19 March 2020, paid a higher salary (rather than £600 per month and the rest by way of dividends). However, we are satisfied that is not what in fact occurred.'

Oversight of third-party is no excuse

In November 2019 the director of *Luca Delivery Limited* [2023] UKFTT 278 (TC) notified the company's accountant that his wife was to become an employee and confirmed her salary of £5,000 per year. The company paid the accountant for processing her salary via the payroll but due to a misunderstanding this was not done. A CJRS claim was made on the basis that this salary had been processed via RTI but as a result of a compliance review by HMRC it was noted that her pay had not been reported. HMRC, therefore, sought a clawback.

The tribunal confirmed that there was no entitlement to CJRS even where this was caused by the oversight of a third party. No correction of the RTI filings had been made, and even if there had been such a correction, it would not have changed the position. The clawback was therefore considered correct.

Social media posts are work

The CJRS clearly sets out that claims under the CJRS could only be made in respect of 'furloughed employees'. A furloughed employee is defined as a person who has ceased all work for the employer for 21 calendar days or more. In the case of *Glo-Ball Group Limited* [2023] UKFTT 435 (TC) it was identified as part of a compliance visit from HMRC that one of the directors and employees had posted entries on the company's Facebook account while furloughed.

The essential decision which the tribunal had to decide was whether the posts comprise work for the purposes of the Scheme.

In adopting a purposive approach towards the purpose of the scheme the tribunal considered that any continuation of the activities that had been undertaken prior to lockdown is likely to comprise work even though the scale of those activities might have been considerably reduced.

The tribunal stated that: 'An employee who was turning out 100 widgets a day would still be working if they turned out only 3 widgets a day. Tested against this interpretation, we have come to the conclusion that the vast majority of posts that were made on Facebook comprised work, and in each of the periods in which support payments were claimed, she had not ceased all work for the appellant for a period of 21 calendar days or more.'

This case suggests that HMRC looks at information wider than the payroll itself to determine whether CJRS claims are correct.

Appellant was not a credible witness

The recent case of *Top Notch Accountants Limited* [2023] UKFTT 473 (TC) is another one where HMRC had no record of an FPS having been submitted by the employer by the deadline of 19 March 2020. The employer made a number of claims that it had been submitted by the deadline, but the FPS ID numbers and dates of submission did not tie in with HMRC's data. The employer's claims changed during the time of HMRC's review

and included an argument that a phone call had been made to HMRC and that HMRC must have deleted the FPS. HMRC did have a record of an 'earlier year update' though, which was made after the 19 March deadline.

The tribunal decided that HMRC's records were consistent and clear and that 'the appellant's explanations and exhibits are inconsistent and lack credibility' and concluded that the alleged RTI confirmations from HMRC submitted by the appellant were not accurate and so HMRC was correct to clawback the amount claimed.

> "HMRC's view is that as the schemes are closed, and as it believes that the highest risk claims are already being addressed, it will see diminishing returns."

Why might an overclaim arise?

There are a number of reasons why mistakes might arise, particularly in claims in the early months of the scheme in 2020, where employers were working under significant pressure and guidance was being updated very rapidly.

Examples might include:

- Employers not being able to demonstrate that their circumstances met the purpose of the CJRS. The Direction for the original scheme says that it applies to employees who are furloughed, 'by reason of circumstances arising as a result of coronavirus or coronavirus disease or measures taken to prevent or limit its further transmission' but that no claim may be made if it is 'abusive' or 'otherwise contrary to the exceptional purpose' of the scheme. The more recent employer guidance states that employees can be furloughed if you 'cannot maintain your workforce because your operations have been affected by coronavirus'.
- Employees continuing to carry out work for the employer. When on furlough, an employee cannot undertake work for or on behalf of the organisation (eg providing services or generating revenue).
- Using the wrong basis for an employee's usual pay.
- Calculation of 'usual wages' for employees who are on variable pay.
- Claiming for the 'top up' amount where employers topped employees up to 100% of their usual salary, when support was only intended for up to 80% of salary (subject to a monthly cap).
- Treating a pre-salary sacrifice position as the reference point for salary.
- Incorrectly calculating employee's reference pay such as Including non-contractual bonuses in the calculations.
- Failing to pay out the grant to employees either at all, or within a reasonable period of time.
- Including ineligible staff in claims – for example staff who had left, or for whom an RTI had not been filed by the relevant deadline (this date varied depending on the relevant version of the scheme).

What next?

The TPT, the dedicated team of 1,000 staff which was established to recover overpayments of Covid-19 grants, including an estimated £2.3bn in respect of employees who continued to work, is scheduled to be disbanded in September 2023.

HMRC's view is that as the various Covid-19 schemes are closed, and as it believes that the highest risk claims are already being addressed, it will see diminishing returns, with cases of lower value and risk in the pipeline.

Therefore, HMRC considers that it is more cost effective to deploy TPT resource to 'business-as-usual tax compliance', and for Covid-19 scheme risks to be worked alongside other tax compliance activity. In making this decision it has considered the yield compared to tax compliance yield. For 2021-22, the TPT outturn yield was around £0.20m per full time equivalent (FTE) officer and for 2022-23 the TPT yield is around £0.28m per FTE. This is lower than 'business-as-usual tax compliance' work, where HMRC has delivered around £1.15m yield per FTE in recent years. HMRC has said that it will continue to monitor performance metrics on Covid-19 scheme compliance activity to ensure that it continues to pursue this risk while it remains cost effective to do so.

HMRC, therefore, believes that approach of working Covid-19 cases alongside 'business-as-usual tax compliance' enables HMRC to deal 'holistically and efficiently with all aspects of a customer's potential non-compliance issues'.

You can see from the FTT cases above that testing CJRS claims against RTI returns is an invaluable risk assessment tool deployed by HMRC and the reporting of CJRS and Eat Out to Help Out grants as income on company tax returns is providing further risk assessment data. As well as HMRC enquiries, though, the potential of any CJRS clawbacks is of interest to auditors.

So CJRS enquiries will continue for as long as they are cost effective and are likely to run for a little while yet. One thing that is evident, though, is that once we get to the four-year cut-off for normal time limits any arguments about reasonable care versus carelessness, the latter warranting extended time limits, the speed and complexities of the scheme's introduction will be heavily featured. In the meantime, we can expect more tribunals on the subject. ●

Author details

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