Neutral Citation Number: [2022] EAT 199

Case No: EA-2021-001082-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 November 2022

Before :

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

- -

Between :

MELISSA MONES	**Appellant**
- and -	
LISA FRANKLIN LIMITED	**Respondent**

- -
- -

MR ADAM RILEY (instructed by North Kensington Law Centre) for the **Appellant**
The **Respondent** appeared through its Managing Director, **Mr Dean Franklin**

Hearing date: 16 and 18 November 2022

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JUDGMENT

SUMMARY

Contract of Employment, Unlawful Deduction from Wages

The EAT dismissed an appeal from the employment tribunal's decision that the respondent had not made any unauthorised deduction from the appellant's wages during a period when she had been furloughed. The appellant's claim and appeal had derived from the fact that her furlough pay had not been calculated in accordance with the formula for which the Coronavirus Job Retention Scheme ("CJRS") had provided. Each of the Treasury Directions, and the schedules thereto, issued under sections 71 and 76 of the Coronavirus Act 2020, had related to the obligations to one another expressly incumbent upon HMRC and the qualifying employer. None had created a statutory or contractual obligation owed by an employer to its employee. The CJRS did not affect existing employment law rights and obligations.

There had been no appeal from the employment tribunal's finding that the appellant had accepted the terms as to furlough set out in the respondent's letter dated 30 March 2020, which had necessarily varied her contract of employment for the period in question. In a different case, in the absence of such an agreement, and where an employer had chosen to furlough staff and claim reimbursement from HMRC under the CJRS, it might well be that an employee's contention for an implied term that his or her furlough pay would be calculated in accordance with the formula set out in the CJRS would have force. That would not be because the CJRS itself conferred a statutory or contractual right upon the employee, but because, in default of the parties' agreement to an alternative sum or methodology, a court or tribunal might accept that there had been a mutual intention to adopt the formula set out in the CJRS, as revised from time to time. That would be a fact-sensitive question and was not this case.

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE:

1. In this judgment, I refer to the parties as they appeared below. This is an appeal from the judgment of the London Central Employment Tribunal (Employment Judge Nicklin, sitting alone - "the Tribunal"), dismissing the claimant's claim for unauthorised deductions from wages, in the following circumstances.

2. Between 3 November 2018 and 17 September 2020, the claimant was employed as a part-time receptionist for the respondent, a specialist skincare clinic. Her contract of employment was dated 22 October 2018. By clause 4, the claimant was required to work nine hours per week, normally between 8.45am and 6.15pm on a Saturday. Clause 6 provided that she would be paid a starting salary of £13.00 per hour. From 2020 onwards, the claimant's working hours were varied by agreement, at her request, such that she was instead required to work six hours per week, between 2.00pm and 8.30pm on a Friday.

3. By letter dated 30 March 2020 ("the Furlough Letter"), the respondent informed the claimant, so far as material (sic):

> "Dear Melissa,
>
> **Furloughed Employee status and pay arrangements**
>
> …
>
> The purpose of this letter is to outline the Companies plan in relation to your employment and how we intend to structure your pay during this period.
>
> I can confirm that the Company will change your employment status to a furloughed employee from the 3 April 2020…
>
> **What this means:**
>
> Your change of status means that the Company is retaining you as an employee on furlough during this period of crisis instead of making you redundant. It also initiates income support for you from HMRC throughout the period of closure.

HMRC will cover 80% of your regular wage, plus the associated Employer National Insurance contributions and minimum automatic enrolment into your pension contributions on the subsidised wage.

Because you employment changed to working Friday's and ad-hoc less than a year ago, we will average your monthly earnings since you started this change to calculate your ongoing wage.

This change will wholly apply to your pay from 1 April onwards and you will continue to make payment in to your bank in the normal way on the last working day of each month.

…

The future:

We will continue to monitor all current advice both from the Government and Public Health England and provided updates if any changes affect you. We will inform you as soon as reasonably possible as to when the clinic will re-open once government guidance is clear that we are able to.

I'm sure you will have questions in relation to the content of this email, so please don't hesitate to get in touch.

…"

4. On 1 April 2020, the claimant replied to the Furlough Letter (sic):

"…

After taking some time to read your letter properly. From what I understand is that you will be averaging it from when I changed to Fridays. From reading the gov website, you are calculating my pay as if I have been working with you less than a year? Please kindly advise.

…"

The respondent answered her question, later that day, as follows (sic):

"…

We actually took advice on this. Although you have been with us for over a year your original contract was for set hours on a Saturday. However, when you could no longer work Saturday's, you switched to variable hours (mainly Friday's) therefore, the correct assessment of your current income is to average from when you started working flexible hours.

I trust this answers your question, but if there's anything else, let me know."

5. From 3 April until 7 September 2020, when the respondent's clinic re-opened, the claimant

remained an employee of the respondent, on furlough, and was paid in accordance with the terms set out in the Furlough Letter. Her last day of employment was 17 September 2020. Amongst other claims set out in the form ET1 which she subsequently presented (with which this appeal is not concerned), she asserted that there had been unlawful deductions from her wages, constituted in the difference between the pay which she had received as a furloughed employee and that which she asserted that she ought to have been paid in accordance with the Coronavirus Job Retention Scheme ("the CJRS"). It was the respondent's case that her pay fell to be calculated as set out in the Furlough Letter, had been correctly calculated and that she had been paid in accordance with, or at least as advantageously as, her contractual entitlement. The hearing before the Tribunal took place on 9 July 2021, at which the claimant represented herself and the respondent was represented, as it was before me, by Mr Dean Franklin, its Commercial Director.

6. In its reserved judgment, sent to the parties on 9 August 2021, the Tribunal found as follows:

> **"17. I accept the Claimant's evidence that, aside from her regular shifts (Saturdays to 2019 and then Fridays from 2020) she worked variable hours during the course of her employment. The Claimant's payslips from 2019 show a variable number of hours being paid month to month.**
>
> **18. From January 2020, her normal day was Friday, working a 6-hour shift although she worked on other occasions on an ad-hoc basis, as shown on her payslips.**
>
> **19. I find that, during the furlough period, the Claimant was paid in accordance with the furlough letter dated 30th March 2020 (i.e. she was paid from April 2020 at 80% of her average pay received since moving onto the new working arrangement in January 2020). This is the Respondent's position and it was not challenged by the Claimant. She says that the pay should have been calculated in accordance with the Treasury Direction to HMRC rather than the furlough letter (which I shall deal with in my conclusions below), but there was no evidence before me to show that the amount she had been paid in the furlough period was not calculated in accordance with the terms of the furlough letter. The Respondent's calculation (p.140 of the bundle) was based on the terms of her new role. Mrs Franklin suggested that the Respondent may have overpaid the Claimant in its calculation, but this point was not pressed and there was no contract claim brought in these proceedings by the Respondent.**

20. As to what the parties had actually agreed in respect of furlough pay, the only evidence of agreement is the furlough letter dated 30th March 2020. The Claimant agreed to be furloughed and the letter, necessarily, varied the terms of her contract of employment for this period. Whilst the Claimant had queried the calculation of her pay on 1st April 2020, this was before the variation took effect on 3rd April 2020. She did not further challenge or query the calculation after Mr Franklin's response. I find that she therefore accepted those terms by entering into the period of furlough without further protest.

…

Issue 4: calculation of furlough pay

69. I have carefully considered the Claimant's calculations in her schedule of loss and the written submission supplementing it. The Claimant's argument proceeds on the basis that she should be entitled to be paid furlough pay based on the formulae set out in the Treasury Direction. This means she seeks to import that formulae into her contract. The flaw in this argument is to assume that the Treasury Direction governs the contractual relationship and the Claimant's employment rights. The CJRS concerns HMRC and the employer. The scheme grants funding to employers for their furloughed workers based on claims made by those employers, subject to various conditions. It does not alter the Claimant's existing employment rights. The contractual variation which arises from the decision to furlough is simply the agreement formed between an employer and an employee as to the employee becoming furloughed. Whilst that step may be required in order for the employer to claim under the CJRS, it is not open to the Claimant to seek to enforce the Treasury Direction against her employer where this differs from the terms of her agreed contractual variation.

70. The Claimant's remuneration is subject to the variation to her employment contract which, as I have found, was concluded in the terms of the letter of 30th March 2020. If she had not agreed to become furloughed, subject to the terms in the letter, there would have been no variation to her contract and the Respondent would then have had to decide whether it could maintain that situation or whether it would have to consult with the Claimant about redundancy. Necessarily, the furlough agreement avoided redundancy at that time.

71. Given that the terms of her period of furlough were governed by the letter of 30th March and she was paid in accordance with that letter (or at least on terms as advantageous as that letter), there is no contractual basis for her pay to be increased after the event.

72. Accordingly, I conclude that the Respondent has not made any unauthorised deductions to the Claimant's wages in respect of the calculation of the furlough pay period."

7. By her notice of appeal, the claimant asserted that the Tribunal had misdirected itself as to section 13(3) of the **Employment Rights Act 1996** ("the ERA") because it had not considered that

the amount properly payable to the claimant had been governed by the rules of the CJRS which had been an implied term of the contract dated 30 March 2020 (i.e. the Furlough Letter).

8. In its respondent's answer, the respondent stated:

> **"We stand by the Tribunal's decision on this issue. The appellant knows full well that her hours/role changed from January 2020 and for us to have calculated her furlough pay in any other way would have resulted in a morally indefensible enrichment of her income under the furlough scheme. We stand by our calculation as the only ethically and justifiable use of taxpayer's money."** (sic)

The parties' submissions

For the claimant

9. Before me, the claimant was represented by Mr Adam Riley of counsel. Mr Riley's overarching submissions were that the Tribunal had mischaracterised the status of the applicable Treasury directions (to which the CJRS, as revised from time to time, had been scheduled) and their relevance to the parties' contractual relationship, such that its finding that the claimant's furlough pay had been correctly calculated had been perverse.

10. Mr Riley submitted that, pursuant to powers conferred by sections 71 and 76 of the **Coronavirus Act 2020** ("the 2020 Act"), HM Treasury had issued the Coronavirus 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction, dated 15 April 2020 ("TD1"). By virtue of section 71 of the **2020 Act**, TD1 had constituted a form of delegated legislation. As such, it had been subject to ordinary rules of statutory interpretation. TD1 had comprised three numbered paragraphs, to which a schedule headed "Coronavirus Job Retention Scheme" had been attached. Numbered paragraph 2 had provided (with emphasis added by Mr Riley):

> **"This direction requires Her Majesty's Revenue and Customs to be responsible for the payment and management of <u>amounts to be paid under the scheme</u> set out in the Schedule to this direction (the Coronavirus Job Retention Scheme)."**

Mr Riley submitted that the emphasised wording indicated the mandatory nature of the payments for which the CJRS had provided, as set out in the schedule to TD1. Within that schedule, he pointed to the definition of "furloughed employee" for which paragraph 6 had provided, noting that the claimant had fallen within that definition. As she had not been a "fixed rate employee" (as defined by paragraph 7.6), her "reference salary" had been defined by paragraph 7.2 of the schedule. Having regard to the level of her earnings, in accordance with paragraph 8.2, he submitted that she ought to have been paid an amount equal to 80 per cent of her reference salary.

11. Mr Riley noted that, on 20 May 2020, a second Treasury Direction ("TD2"), had been issued. Paragraph 3 had provided that TD1 continued to have effect, but had been modified so that the scheme to which it related was that set out in the schedule to TD2. That schedule had retained the definitions of "furloughed employee" (paragraph 6); "fixed rate employee" (paragraph 7.6); and "reference salary", for a non-fixed rate employee (paragraph 7.2); and had continued to provide for a maximum reimbursable sum not exceeding the lower of £2,500 per month and 80 per cent of the employee's reference salary (paragraph 8.2). On 25 June 2020 a third Treasury Direction ("TD3") had been issued, modifying TD1 as previously modified by TD2. The attached schedule had been in two parts. Part 1 had made provision for claims as set out in TD1 and TD2 to be made no later than 31 July 2020 in respect of a time no later than 30 June 2020. Part 2 had made provision for the period beginning on 1 July 2020 and ending on 31 October 2020, introducing the concept of a flexibly-furloughed employee. Paragraph 20.1 (read with paragraph 18(b)) had retained the definition of "reference salary" for a non-fixed rate employee. By paragraph 31.3, where the CJRS claim period of a CJRS claim (in each case, as defined) occurred in the CJRS calendar month of September 2020, the maximum reimbursable sum had been reduced to the lower of £2,187.50 per month and 70 per cent of the employee's reference salary. Four further Treasury Directions had been issued, respectively on 2 October 2020; 13 November 2020; 25 January 2021; and 15 April 2021, relating to periods outwith that with which this appeal is concerned. In

advance of TD1, on 26 March 2020 the first piece of Government guidance on the CJRS had been published, subsequently updated many times, most recently on 15 October 2021.

12. Mr Riley submitted that, albeit that the CJRS had related to the mechanics of how employers should be reimbursed for payments made to furloughed employees, the retention of such employees had been its paramount purpose, a matter apparent from the scheme as a whole and, in particular, from the provisions relating to the "reference salary", the definition of which in the schedule to all relevant Treasury Directions had been unambiguous and had left employers who had chosen to sign up to the CJRS with an obligation to apply the prescribed formula for the calculation of furlough pay applicable to each category of employee. The Treasury Directions had been issued at speed in order to address a national crisis. Necessarily, they had been general and broad in scope. Had it been the intention of Government to authorise employers to depart from the prescribed formula, that would have been stated clearly. By the Furlough Letter, the respondent had confirmed that the claimant's employment status would change to that of a furloughed employee. Having regard to the formula applicable to the claimant, she had been underpaid for the period spanning April to August 2020, in the aggregate sum of £1,011.66, calculated as set out in a schedule which had been made available to the Tribunal and later appended to his skeleton argument (as amended in later correspondence) and payable pursuant to section 13(3) of the **ERA**. The Tribunal had been wrong to hold that the CJRS had concerned the interests of employer and HMRC. The Treasury Directions expressly had contemplated the interests of the employee, who had been required to cease work and for whom provision had been made to receive pay and be retained as an employee.

13. Mr Riley submitted that the Tribunal had erred in concluding that the Treasury Directions had not governed the contractual relationship between employer and employee and the latter's employment rights. At the very least, they had supplemented an employee's existing contractual

and statutory rights, defining the relationship between such rights and the concept of furloughed status. Should it be necessary to import the relevant formula into the claimant's contract of employment, that could be achieved via the implied term of mutual trust and confidence, whereby unlawful, capricious or irrational behaviour on the part of either party, was necessarily destructive of trust, Mr Riley submitted. The contractual variation identified by the Tribunal had done no more than set out how it was that the respondent had proposed to calculate the claimant's pay during the furlough period; it had not varied her salary or role, or constituted an agreement by the claimant to accept pay lower than that to which she had been contractually entitled.

14. Whatever the position set out in earlier guidance might have been, the requirement imposed after 30 March 2020, by TD1 and subsequent Treasury Directions, had governed the respondent's legal obligations to the claimant under the CJRS. There could be no question of unjust enrichment; the claimant had been entitled to be paid in accordance with the terms of the CJRS. In any event, it could not be assumed that payment in accordance with that scheme would have constituted a windfall in this case. It could not be known what the claimant would have earned absent the pandemic and the respondent's associated need to furlough staff, in particular given the Tribunal's finding that she had worked variable hours. The Chancellor had devised a broad-brush scheme, under which there would be winners and losers, but the overarching aim had been to avoid mass unemployment and redundancies. It had been open to employers to agree different arrangements with their employees, but not under the rubric of the CJRS, which had prescribed the formula to be applied in order to ascertain the reference salary for a non-fixed rate employee such as the claimant. That payment could have been topped up should the employer have wished to do so, but it set a minimum level below which it could not pay and, thereby, had intervened directly in the wage-work bargain between employer and employee. Under the CJRS, the employee had agreed to cease work in consideration of the employer's agreement to pay him or her in accordance with the terms of the scheme.

15. Mr Riley submitted that the Tribunal's construction of the CJRS had rendered large parts of it redundant and had not followed ordinary principles of statutory construction. The implication had been that the agreement set out in the Furlough Letter, entered into at a time when TD1 had yet to be published or in force, had survived the coming into force of delegated legislation. Acknowledging that the contract had operated to vary the claimant's entitlement to pay in the way in which it subsequently had been paid by the respondent, it had been superseded by TD1 and subsequent Treasury Directions, which had provided for retrospective effect, submitted Mr Riley.

16. Finally, Mr Riley contended, the fact that the CJRS had now closed, could have no bearing on the claimant's entitlement to the sum outstanding, for which the respondent's entitlement to be reimbursed by HMRC was not a pre-requisite. It may be that HMRC would be willing to reimburse any sum which the EAT ordered to be payable. Whilst any unwillingness to do so would operate harshly on the respondent, there would be a greater injustice to the claimant, were sums due to her to remain unpaid.

For the respondent

17. By his concise written and oral submissions, Mr Franklin argued that the Tribunal's conclusions and rationale therefor should be upheld. Treasury Directions could not reasonably have provided for all scenarios and nuances arising in connection with employees, such as the claimant, whose contractual hours had changed during the calculation period. Accordingly, a pragmatic approach had been required to avoid unjust enrichment of such an employee, in particular as the respondent would have been held responsible for its decision as to the use of taxpayers' funds, its interpretation of Government guidance and that which had been morally right. Calculation of the claimant's pay in the manner which she had sought would have resulted in her receipt of pay exceeding that which she would have earned had she continued to work and could not have been justified to Government. Furthermore, the CJRS had been between

the Government and businesses affected by the pandemic, and had now closed.

18. Mr Franklin told me that the claimant's original contract had, by her own choice, concluded at the end of 2019 and that the respondent had agreed to provide her with an alternative number of working hours, from January 2020 onwards. Any hours worked over and above those to be worked on Fridays, had been additional and ad hoc, to which the claimant had had no contractual entitlement. All hours worked had been paid at the hourly rate of £13.00. Only a short period had elapsed between the variation of the claimant's contract, effective from January 2020, and the beginning of the furlough scheme. Attempting to interpret the available Government guidance at that point, with the benefit of (non-legal) advice and looking at the situation from a moral perspective, the respondent had believed its approach to be correct. Albeit having raised a question as to the calculation of her furlough pay, the claimant had accepted it.

19. As to Mr Riley's contention that there would be winners and losers under the CJRS, Mr Franklin submitted that the fact that, when calculating a non-fixed rate employee's reference salary, no account was to be taken of anything which did not constitute regular salary or wages, was not comparable with the situation in this case; a bonus would normally be referrable to the company's performance, to the knowledge of its prospective recipient. That was very different from being paid a sum which the employee would not have earned had she been working. Furthermore, it would be likely to be very difficult for the respondent to obtain reimbursement from HMRC of any additional sum now said to be payable, now that the scheme had closed.

20. Regarding quantum, whilst no issue was taken by the respondent with the gross figures set out in the claimant's schedule, she would only have been entitled to receive a sum net of tax and national insurance, submitted Mr Franklin.

Discussion and conclusions

The legislation and Treasury Directions

21. Section 13 of the **ERA** provides, materially:

"Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

…"

22. Sections 71 and 76 of the **Coronavirus Act 2020** provided:

"71 Signatures of Treasury Commissioners

(1) Section 1 of the Treasury Instruments (Signature) Act 1849 (instruments etc required to be signed by the Commissioners of the Treasury) has effect as if the reference to two or more of the Commissioners of Her Majesty's Treasury were to one or more of the Commissioners.

(2) For the purposes of that reference, a Minister of the Crown in the Treasury who is not a Commissioner of Her Majesty's Treasury is to be treated as if the Minister were a Commissioner of Her Majesty's Treasury."

"76 HMRC functions

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

23. TD1 and its schedule provided, so far as material:

"The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction

The Treasury, in exercise of the powers conferred by sections 71 and 76 of the Coronavirus Act 2020, give the following direction:

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.

Signed by the Chancellor of the Exchequer

[Signature]

Her Majesty's Treasury

15 April 2020

Schedule: Coronavirus Job Retention Scheme

Introduction

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

Purpose of scheme

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.

2.3 The claim must be made in such form and manner and contain such information as HMRC may require at any time (whether before or after payment of the claim) to establish entitlement to payment under CJRS.

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.

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 employers

3.1 An employer may make a claim for a payment under CJRS if the following condition is met.

3.2 The employer must have a pay as you earn ("PAYE") scheme registered on HMRC's real time information system for PAYE on 19 March 2020 ("a qualifying PAYE scheme").

Employers with more than one PAYE scheme

4 …

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), and

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

Furloughed employees

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.

6.2 …

6.3 …

6.4 …

6.5 No claim to CJRS may be made in respect of an unpaid sabbatical or other period of unpaid leave of an employee beginning before or after 19 March 2020 (whether agreed or otherwise arranged conditionally or unconditionally on, before or after that day).

6.6 …

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.

6.8 …

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 …

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

7.9 …

7.10 …

7.11 …

7.12 …

7.13 …

7.14 …

7.15 …

7.16 …

7.17 …

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.

8.5 For the purposes of CJRS, "employer national insurance contributions" are the secondary Class 1 contributions an employer is liable to pay as a secondary contributor in respect of an employee by virtue of sections 6 and 7 of the Social Security Contributions and Benefits Act 1992 ("SSCBA") or sections 6 and 7 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 ("SSCB(NI)A").

8.6 No claim under CJRS may include amounts of specified benefits payable or liable to be payable in respect of an employee (whether or not a claim to the relevant specified benefit is actually made) during the employee's period of furlough and the gross amount of earnings falling for reimbursement as described in paragraph 8.2 must be correspondingly reduced.

8.7 The specified benefits for the purposes of paragraph 8.6 are:

(a) Statutory Sick Pay pursuant to section 151 of SSCBA or section 147 of SSCB(NI)A

(b) Statutory Maternity Pay pursuant to section 164 of SSCBA or section 160 of SSCB(NI)A

(b)Statutory Adoption Pay pursuant to section 171ZL of SSCBA or section 167ZL of SSCB(NI)A

(d) Statutory Paternity Pay pursuant to sections 171ZA and 171ZB of SSCBA or sections 167ZA and 167ZB of SSCB(NI)A

(e) Statutory Shared Parental Pay pursuant to sections 171ZU and 171ZV of SSCBA or sections 167ZU and 167 ZW of SSCB(NI)A

(f) Statutory Parental Bereavement Pay pursuant to section 171ZZ6 of SSCBA or any provision made for Northern Ireland which corresponds to that section.

8.8 A payment by an employer of a pension contribution in respect of an employee to a registered pension scheme is a CJRS claimable pension contribution if it is paid in respect of an amount of gross earnings as described in paragraph 8.1(a).

8.9 …

8.10 …

8.11 …

8.12 For the purposes of paragraphs 8.8 to 8.11:

(a) "registered pension scheme" means a pension scheme for the purposes of Part 4 of the Finance Act 2004

(b) …

(c) …

…

Succession to a business – new employer has no qualifying PAYE scheme

9.1 …

9.2 …

9.3 …

Succession to a business – new employer already has a qualifying PAYE scheme

10.1 …

10.2 …

PAYE scheme reorganisations

11.1 …

11.2 …

11.3 …

Duration of CJRS

12 CJRS has effect only in relation to amounts of earnings paid or payable by employers to furloughed employees in respect of the period beginning on 1 March 2020 and ending on 31 May 2020 and employer national insurance contributions and directed pension payments paid or payable in relation to such earnings.

Definitions etc.

13.1 For the purposes of CJRS:

(a) …

(b) …

(c) …

(d) "earnings" has the same meaning as it does in the employment income Parts of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") by virtue of section 62 of that Act

(e) "employment" and corresponding references to "employed", "employer" and "employee" have the same meanings as they do in section 4 of ITEPA as extended by

(i) section 5 of that Act

(ii) regulation 10 of the PAYE Regulations (application to agencies and agency workers), and

(iii) paragraphs 13.2 and 13.3 of this Direction

(e) "HMRC" means Her Majesty's Revenue and Customs

(f) "PAYE Regulations" means the Income Tax (Pay As You Earn) Regulations 2003.

13.2 …

13.3 …

13.4 …

Other directions under section 76 of the Coronavirus Act 2020

14.1 HMRC must take account of any amendment made to CJRS by any other direction under section 76 of the Coronavirus Act 2020.

14.2 Entitlement to a payment under CJRS is without prejudice to any entitlement to a payment under any similar scheme arising from a direction under section 76 of the Coronavirus Act 2020.

HMRC's accounts

15 CJRS payments made by HMRC must be shown in HMRC's consolidated accounts produced for the purposes of Section 6(4) of the Government Resources and Accounts Act 2000 and Section 2 of the Exchequer and Audit Departments Act 1921 for the year ending on 31 March 2021."

24. It is not necessary to set out the relevant parts of the Schedule, respectively to TD2 and to

TD3, but I set out below the Directions themselves:

TD2:

"The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction

The Treasury, in exercise of the powers conferred by sections 71 and 76 of the Coronavirus Act 2020, give the following direction:

1. This direction applies to Her Majesty's Revenue and Customs.

2. This direction modifies the effect of the Coronavirus Job Retention Scheme for which Her Majesty's Revenue and Customs is required to be responsible for the payment and management of amounts payable under the scheme set out in the Schedule to the direction made on 15 April 2020 by the Treasury in exercise of the powers conferred by sections 71 and 76 of the Coronavirus Act 2020 ("the CJRS direction").

3. The CJRS direction continues to have effect but is modified so that the scheme to which it relates is that set out in the Schedule to this direction.

Signed by the Chancellor of the Exchequer

[Signature]

Her Majesty's Treasury

20 May 2020"

TD3:

"The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction

The Treasury, in exercise of the powers conferred by sections 71 and 76 of the Coronavirus Act 2020, give the following direction:

1. This direction applies to Her Majesty's Revenue and Customs.

2. This direction modifies the effect of the Coronavirus Job Retention Scheme for which Her Majesty's Revenue and Customs is required to be responsible for the payment and management of amounts payable under the scheme set out in the Schedule to the direction made on 15 April 2020 by the Treasury in exercise of the powers conferred by sections 71 and 76 of the Coronavirus Act 2020 as modified by the further direction made in exercise of those powers on 20 May 2020 ("the original CJRS directions").

3. The original CJRS directions continue to have effect but are modified as set out in the Schedule to this direction.

Signed by the Chancellor of the Exchequer

[Signature]

Her Majesty's Treasury

25 June 2020"

The effect of the 2020 Act and the Treasury Directions

25. Each of the Treasury Directions was issued under sections 71 and 76 of the **2020 Act**, coming into effect upon signature by the Chancellor of the Exchequer without the need for Parliamentary approval. Thus, albeit unusual in form and origin, I accept Mr Riley's submission that each Treasury Direction constituted a form of delegated legislation and, as such, is subject to ordinary principles of statutory construction, as recently summarised by Lord Hodge DPSC, in **R (The Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department** [2022] UKSC 3, [29] to [31]:

> **"29. The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.' (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'**
>
> **30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it**

> **addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below…**
>
> **31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme*, 396, in an important passage stated:**
>
>> **'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.'"**

Government guidance on the CJRS, first issued on 26 March 2020 and amended variously thereafter, had no legal force.

26 Construing the applicable Treasury Directions with the above principles in mind, and having regard to the unambiguous wording of section 76 of the enabling Act, it is clear that each Direction applied expressly to HMRC and imposed a requirement upon that organisation to be responsible for the payment and management of amounts "to be paid"/"payable" under the scheme. I do not accept that the claimant can derive the claimed support from the words "to be paid" or "payable" (as the case may be) in paragraph 2 of each Direction, which are referrable to HMRC's own obligations under the CJRS. That clear meaning is supported by the express purpose of the scheme as set out in section 2 of the schedule to TD1 and replicated, with certain immaterial modifications, in the

schedules to subsequent Treasury Directions. Each of the purposes specified by paragraphs 2.1 to 2.4 of TD1 related to the obligations to one another respectively incumbent upon HMRC and the qualifying employer. Paragraph 2.5 made clear that no claim could be made in respect of an employee if that claim were abusive or otherwise contrary to the exceptional purpose of the CJRS. With some immaterial modification to the relevant wording, the stated application and purposes of each Treasury Direction and of the increasingly complex CJRS remained constant on each occasion on which a new Treasury Direction was issued, the last such occasion being on 15 April 2021, applicable for a period ending on 30 September 2021. In such circumstances, in my judgement, the urgency with which TD1 had been issued cannot serve to explain the approach adopted by those who drafted it, nor can it explain the retention of the key wording in question throughout subsequent iterations over the following year, in the course of which other detailed amendments had been made. Furthermore, it cannot serve to alter the meaning of the words used.

27. In both form and substance, the CJRS provided qualifying employers with a grant, from a time following the Government's decision to impose a lockdown on 23 March 2020, with the assistance of which to pay their furloughed employees. Nothing in any Treasury Direction or attached schedule material to this case expressly imposed upon an employer an obligation to adopt the CJRS (as Mr Riley acknowledged), or obliged it to adopt the formulae set out in that scheme, as it applied from time to time, when paying its furloughed employees. Whilst such an employer had no entitlement under the CJRS to make a claim for a sum greater than it had paid to the employee in question, and, in any event, for costs of employment which did not constitute "qualifying costs", as defined, from a civil perspective that was a matter as between the employer and HMRC. The CJRS did not affect existing employment law rights and obligations. So it is that the editors of *Harvey on Industrial Relations and Employment Law*, at paragraph [40.32], identified the following "problem area" arising from the way in which the Treasury Directions had been drafted:

"*Whether wages need to be topped up.* As already explained, the Scheme does

> **not affect existing employment law rights and obligations, including rights under the worker's contract. As a result, even though none of the Treasury Directions requires the employer to top up the employee's wages to their normal amount, the employer will usually be in breach of contract if, in accordance with the scheme, it instructs the employee to cease all work and then fails to pay full wages. The situation is akin to an unlawful suspension without pay. That proposition holds true unless there is a contractual provision to the contrary such as a provision allowing the employer to lay off without pay: see para [6.04] above. Indeed, where such a provision exists (which will be rare these days) any furlough pay, even at 80 per cent, will be something of a windfall for the employee. However, for the most part, unless the worker agrees to vary the contract, the employer will have to top up the wages of the furloughed worker so that the employee receives his or her full contractual entitlement or else risk the possibility of a breach of contract or unauthorised deductions claim. Of course, in many cases the employee will agree to vary the contract to allow for payment of the lower amount if the alternative is redundancy."**

In argument, Mr Riley submitted that the above passage had to be approached with some caution because it had not distinguished between a fixed rate and other types of employee for whom the CJRS had prescribed the applicable reference pay. In any event, the context of the view expressed had been the topping up of wages, not under consideration in this case. Whilst, submitted Mr Riley, one could see, as a matter of principle, how an ability to vary the formula set out in the CJRS in the instant circumstances might be extracted, such an approach "would run headlong into the mandatory language of the statutory instrument". The wage-work bargain per se might fall outside the furlough arrangements made, but, where an employer chose to sign up to the CJRS, all of its provisions became applicable. In my judgement, those submissions miss the point, being the nature and effect of the CJRS and the employer's and employee's freedom to enter into alternative contractual arrangements.

28. Thus, whilst I accept that the claimant was a furloughed employee, as defined by section 6 of the schedule to TD1, and that she was not a fixed rate employee, as defined by paragraph 7.6 of that schedule, it does not follow that she was entitled, under her contract of employment, to be paid, at minimum, a salary calculated in accordance with paragraph 7.2 of that schedule, when furloughed. None of the Treasury Directions and schedules itself created a statutory or contractual

obligation between employer and employee; rather, as previously noted, each created rights and obligations as between the employer and HMRC.

The contractual position

29. There being no alternative statutory basis upon which Mr Riley relies for the claimant's asserted entitlement to the sums claimed, her contract of employment can be the only remaining source of any such obligation. At paragraph 20 of its reasons, the Tribunal found that the claimant had accepted the terms as to furlough set out in the Furlough Letter, which had necessarily varied her contract of employment for the period in question. There is no appeal from that finding; the notice of appeal asserts that "the Tribunal erred in law in that it did not consider that the amount properly payable to the claimant is governed by the rules of the CJRS as it was implied in the variation of contract that, while furloughed, the claimant would be paid on the basis set out in the CJRS."

30. Thus, I begin with a consideration of the express terms as to pay on which the claimant agreed to be furloughed, as set out in the Furlough Letter. As previously recorded, those were (sic):

> **"HMRC will cover 80% of your regular wage, plus the associated Employer National Insurance contributions and minimum automatic enrolment into your pension contributions on the subsidised wage.**
>
> **Because you employment changed to working Friday's and ad hoc less than a year ago, we will average your monthly earnings since you started this change to calculate your ongoing wage.**
>
> **This change will wholly apply to your pay from 1 April onwards and you will continue to make payment in to your bank in the normal way on the last working day of each month."**

31. With obvious typographical errors corrected, there was nothing ambiguous in the above wording, nor has it been argued that there were express terms which fell to be reconciled as being mutually inconsistent. In short, the parties had agreed that, with effect from 1 April 2020, the claimant would be paid 80 per cent of her average monthly earnings from the time at which she had

commenced her new working pattern in January 2020, which payment, together with the specified employer contributions, would be subsidised by HMRC. It is a trite principle of law that a term contrary to an express term cannot be implied into a contract (see, for example, **Reda v Flag Limited** [2002] UKPC 38, [2002] IRLR 747 [45]). Thus, the implied term for which the claimant contends in her notice of appeal cannot be implied, as being inconsistent with the express basis upon which it had been agreed that her pay would be calculated during the furlough period. Nor can the asserted obligation arise as an incident of the implied term that an employer shall not, without reasonable and proper cause, conduct itself in a manner calculated, or likely, to destroy, or seriously damage, the relationship of confidence and trust between employer and employee, which must also be read consistently with the relevant express term. The only basis upon which Mr Riley submitted that it had formed part of that duty was that the Treasury Directions and their schedules themselves had imposed upon the respondent an obligation to pay the claimant in accordance with the formulae for which the CJRS had provided. As he acknowledged in oral submissions, that was a circular argument and, in any event, I have found that they had not.

32. Similarly, I reject Mr Riley's submission (to the extent independently advanced) that the agreed variation to the claimant's contract of employment set out in the Furlough Letter had been "superseded" by TD1. First, whilst the Furlough Letter had been drafted before TD1 had been issued, it had followed consideration by both contracting parties of guidance which, in the relevant respect, had reflected (albeit not used wording identical to) the formula subsequently set out in the schedule to TD1, as Mr Riley acknowledged. No significant change in the position had occurred thereafter, such that it could not be said that anything outwith the contemplation of the parties at the time at which they had contracted had arisen. But in any event, this submission, too, necessarily takes as its premise Mr Riley's primary contention, which I have rejected, that TD1 and its attached schedule had imposed upon the respondent an obligation to pay the claimant in accordance with the relevant statutory formula. It follows that it, too, must fail.

The complaint under section 23 of the ERA and disposal

33. There is no appeal from the Tribunal's finding, at paragraph 19 of its reasons, that the claimant had been paid in accordance with the agreed terms set out in the Furlough Letter. In the absence of an obligation to pay the claimant in accordance with the formula set out in the CJRS, as amended from time to time, there can be no basis upon which it may be said that the respondent had made the asserted unauthorised deductions from her wages, contrary to section 13 of the **ERA**, such that her complaint under section 23 of that Act necessarily failed. It follows that the Tribunal made no error of law in so concluding, or in its conclusions that the CJRS had concerned HMRC and the employer and that the claimant's furlough pay had been correctly calculated. Accordingly, the appeal is dismissed. On the facts of this case, I reach that conclusion without regret. The claimant's furlough pay had been calculated by reference to her revised working pattern, which had been agreed at her request. Had she been paid by reference to her original working pattern, whilst furloughed, she would have received a monthly sum significantly in excess of (or, in August 2020, equating with) 100 per cent of her highest monthly earnings in the new work pattern.

34. I add this. In this case, the Tribunal found that the parties had consensually and expressly varied the claimant's contract of employment to provide the formula by reference to which her furlough pay would be calculated. In a different case, in the absence of such an agreement and where an employer had chosen to furlough staff and claim reimbursement from HMRC under the CJRS, it might well be that an employee's contention for an implied term that his or her furlough pay would be calculated in accordance with the formula set out in the CJRS would have force. That would not be because the CJRS itself conferred a statutory or contractual right upon the employee (see above) but because, in default of the parties' agreement to an alternative sum or methodology, a court or tribunal might accept that there had been a mutual intention to adopt the formula set out in the CJRS, as revised from time to time. That would be a fact-sensitive question

and is not this case.