Neutral Citation: [2024] UKUT 00306 (TCC)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Applicant: Bandstream Media and Corporate Communications Ltd	**Tribunal Ref: UT/2024/000029**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

APPLICATION FOR PERMISSION TO APPEAL

DECISION NOTICE

JUDGE JONATHAN CANNAN

Introduction

1. The applicant ("Bandstream") seeks permission to appeal against a decision of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 22 December 2023 ("the Decision"). The FTT refused permission to appeal in a decision notice released on 27 February 2024. Bandstream renewed its application to the Upper Tribunal. I have previously refused permission to appeal on paper in a decision released to the parties on 18 July 2024. This is my decision following an oral renewal of the application heard on 24 September 2024. Mr John Tann appeared for Bandstream and Mr Asif Razzak appeared for HMRC.

2. *Section 11(1) Tribunals, Courts and Enforcement Act 2007* provides for a right of appeal to the Upper Tribunal "… on any point of law arising from a decision made by the First-tier Tribunal…". I should only grant permission to appeal if I am satisfied that it is arguable, with a realistic prospect of success, that there is an error of law in the Decision.

3. The FTT dismissed Bandstream's appeal against assessments to tax made for tax years 2019-20, 2020-21 and 2021-22. The assessments totalled approximately £25,000 and arose out of what HMRC considered to be incorrect claims by Bandstream for support payments under

the Coronavirus Job Retention Scheme ("the CJRS"). The CJRS was introduced pursuant to the Coronavirus Act 2020 by way of Treasury direction. The direction in question was the Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction which was made on 15 April 2020 (" the Direction"). Relevant provisions of the CJRS are set out in a schedule to the Direction. Several subsequent Treasury directions were made but the parties limited their submissions before the FTT to the Direction and Mr Tann similarly limited his submissions on this application.

4. The FTT set out relevant paragraphs of the Direction and its understanding of the operation of the CJRS in the Decision, including an appendix to the Decision. The broad purpose of the CJRS was described at [1] of the appendix as follows:

> Under paragraph 2.1 of the Schedule to the Coronavirus Direction dated 15 April 2020 ("**the Coronavirus Direction**"), the CJRS was established to provide support payments 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. The scheme allowed a qualifying employer to apply for reimbursement of the expenditure incurred by the employer in respect of the employees entitled to be furloughed under the scheme.

The Decision

5. There was no dispute that Bandstream was a qualifying employer or that it had incurred qualifying costs in respect of which it was entitled to make a claim. The FTT quoted paragraph 5 of the Direction which defines qualifying costs as follows:

> 5. The costs of employment in respect of which an employer may make a claim for payment under CJRS are costs which:
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> (a) relate to an employee
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> (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 [ie 28 February 2020 or 19 March 2020],
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> (ii) in relation to whom the employer has not reported a date of cessation of employment on or before that date, and
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> (iii) who is a furloughed employee (see paragraph 6), and
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> (b) meet the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee.

6. The relevant employee who had been furloughed was Mr Graham Smith, who was an employee, director and shareholder of Bandstream. The FTT found at [5] that throughout 2019 and up to and including 31 March 2020 Mr Smith's taxable pay was £600 per month. During that time he had also received dividends at a rate of £2,500 per month. Bandstream's accountant, Mr Tann watched a televised Parliamentary debate in which the Chancellor of the Exchequer stated in response to a question that directors who had previously been paid dividends and only a small salary should make use of the CJRS. Mr Tann therefore advised

Bandstream and Mr Smith that dividends he had previously received could in future be replaced with additional salary and Bandstream could claim under the CJRS for the increased salary. Bandstream paid Mr Smith a salary of £2,500 per month in April 2020 and subsequent months. It made claims under the CJRS based on the salary of £2,500 per month.

7. Qualifying costs of employment must also meet the conditions in paragraph 7.1 to 7.15 of the Direction. The FTT identified that the condition in paragraph 7.1 was relevant, in particular paragraph 7.1(b)(ii):

> 7.1 Costs of employment meet the conditions in this paragraph if:
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> (a) they relate to the payment of earnings to an employee during a period in which the employee is furloughed, and
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> (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.

8. An employee's "reference salary" depends on whether the employee is a fixed rate employee. It is not clear whether Mr Smith was a fixed rate employee as defined by paragraph 7.6 but nothing turns on whether he was a fixed rate employee or a non-fixed rate employee. For purposes of illustration, I shall assume that Mr Smith was a fixed rate employee. The reference salary of fixed rate employees is defined by paragraph 7.7 as follows:

> 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).

9. Paragraphs 7.11 and 7.12 make further provision in relation to the conditions for qualifying costs of employment in paragraph 7.1:

> 7.11 Where paragraph 7.12 applies, the sum of the original payment described in paragraph 7.12(a) and the further amount described in paragraph 7.12(c) must be treated as having been paid at the time of the payment of the original payment for the purposes of paragraph 7.1(b)(ii).
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> 7.12 This paragraph applies where:
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> > (a) in the period beginning on 1 March 2020 and ending on the third day after the making this direction [ie 18 April 2020] an amount by way of wages or salary is paid in respect of a period of employment ("the original payment") to an employee
> >
> > (b) the original payment is less than the amount required by paragraph 7.1(b)(ii) for the purpose of claiming CJRS

(c) before making a CJRS claim in respect of the original payment the employer pays the employee a further amount ("the further amount") in respect of the period of employment to which the original payment relates, and

(d) the sum of the original payment and the further amount meets the requirements of paragraph 7.1(b)(ii).

10. Paragraph 8 then identifies the expenditure which is to be reimbursed where an employer makes a claim under the CJRS, including:

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).

11. The FTT described the effect of these provisions at [18] – [24] of the Decision:

18. Prior to 19 March 2020 Mr Smith was receiving £600 per month by way of gross salary. This fell within the ambit of paragraph 7.1 (b) ii. Because of this, paragraph 7.12 is potentially engaged as it only applies to payments made under that subparagraph.

19. Paragraph 7.1 sets out the conditions for costs to be qualifying costs of employment. Where, as in this case, an employee has been paid less than £2,500 per month, the employee must be paid an amount equal to at least 80% of his or her reference salary for their salary to be a qualifying cost. Reference salary in this case is £600 per month. These costs qualify because Mr Smith was actually paid an amount equal to that salary. It is to be noted that the 80% cap on costs which can be claimed by way of support payments appears not in this paragraph but in paragraph 8. Paragraph 7.1 is simply to identify employees whose salary comes within the definition of qualifying costs.

20. We now turn to paragraph 7.12. Wages were paid to Mr Smith in the period beginning on 1 March 2020 and ending on 18 April 2020. To fall within the ambit of paragraph 7.1(b) ii. that original payment must be less than £2,500. So, in this case, it must be the £600 which Mr Smith was paid up until 30 March 2020 and which was reflected in the appellant's RTI return.

21. For the provisions of paragraph 7.12 to bite, Mr Smith would have had to have been paid less than 80% of the amount which he was required to have been paid under paragraph 7.1(b) ii.

> 22. But he was not. He was required to have been paid £600 per month and was paid £600 per month.
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> 23. We were told by HMRC that the purpose of paragraph 7.12 was to cater for situations where an employee was due to be paid a certain amount but as a matter of fact, was paid less than 80% of that amount. So, an employee who was due to be paid £1,000 received only £750 for some reason. Paragraph 7.12 enables the employer to pay the additional £250 and thus calculate a support payment on the basis of the salary of £1,000 rather than being restricted to the £750 which was actually paid to the employee.
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> 24. And paragraph 7.12 certainly caters for this situation.

12. The FTT went on to accept at [26] and [27] that the purpose of paragraph 7.12 was as described by HMRC at [23]:

> 26. It is our view that the purpose of the legislation is, as submitted by HMRC, to cater for the situation which has been suggested by them, at [23] above. It was not intended to allow an employer, after the introduction of the scheme, to inflate an employee's wages and thus, effectively, have the taxpayer underwrite an employee's salary. This would drive a coach and horses through the legislation which was designed to fix an employee's salary to that recorded on the latest RTI submission prior to 19 March 2020. To interpret the legislation otherwise would lead to an injustice.
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> 27. Furthermore, notwithstanding the televised debates witnessed by Mr Tann, we cannot allow that to influence our interpretation of the clear language of the statutory provisions. We must look at the actual words used by the legislation and cannot (save in exceptional circumstances which do not apply here) consider the parliamentary debates which preceded the enactment of that legislation.

13. Bandstream relied on paragraph 7.12 as allowing sums over and above Mr Smith's reference salary to be reimbursed under the CJRS. As I understand the submission made to the FTT, it was that paragraph 7.12 permitted further payments over and above the £600 per month paid to Mr Smith prior to 19 March 2020 to be reimbursed. That was because the payments of £2,500 per month paid after that date met the requirements of paragraph 7.1(b)(i).

14. The FTT did not accept that submission for the reasons set out at [18] – [27]. The FTT considered that Mr Smith's reference salary was £600 and the cap on reimbursement in paragraph 8.2 applied to 80% of that sum. The appeal was therefore dismissed.

Grounds of Appeal

15. Bandstream relies on three grounds of appeal which may be summarised as follows:

(1) The FTT erred in its interpretation of paragraph 7.1.

(2) The FTT erred in its interpretation of paragraph 7.12.

(3) The FTT erred in its interpretation of government policy.

16. I shall consider each ground of appeal in turn to see whether it is arguable.

Ground 1

17. In considering this ground of appeal it is necessary to refer to the decision of the FTT in which it refused Bandstream permission to appeal ("the PTA Decision"). The FTT said as follows at [10] of the PTA Decision:

> 10. We set out our interpretation of [paragraph 7.12] in [16-22] of the decision. It was our view that this would permit a claim for support payment to be made on an amount greater than that paid on 19 March 2020, but only if an employee was being paid less than 80% of his wages. In this case Mr Smith was being paid 100% of his wages (namely £600). And so, the paragraph did not apply.

18. Bandstream compares this to what the FTT said at [21] of the Decision, quoted above. It points out that paragraph 7.1(b)(ii) refers to an employee being paid an amount equal to at least 80% of the employee's reference salary.

19. I am satisfied that the FTT was right to say at [21] of the Decision that for paragraph 7.12 to bite, Mr Smith would have had to have been paid less than 80% of the amount which he was required to have been paid under paragraph 7.1(b)(ii). The FTT did not say so explicitly, but paragraph 7.12 is looking at what was paid to the employee in the period 1 March 2020 to 18 April 2020. Costs of employment may be the subject of a claim where the conditions in paragraph 7.1 are satisfied. The relevant condition for present purposes is paragraph 7.1(b)(ii). It is satisfied in relation to Mr Smith because for the reasons given by the FTT he was being paid at least 80% of his reference salary of £600.

20. Bandstream says that the FTT erred in defining "an amount equal to at least 80%" in paragraph 7.1 to be "an amount less than 80%" in these paragraphs. However, that is not what the FTT was doing.

21. The FTT at [10] of the PTA Decision was postulating a situation where an employee was for some reason paid less than 80% of their reference salary in the period 1 March 2020 to 18 April 2020. In those circumstances, in the absence of paragraph 7.12, the costs of employment would not meet the conditions in paragraph 7.1 and therefore no claim for reimbursement could be made. I am satisfied that the FTT was right in its view as to how the Direction defines the costs of employment in respect of which an employer may make a claim. It was clearly alert to the fact that paragraph 7.12 is not relevant unless an original payment made in the period 1 March 2020 to 18 April 2020 would not otherwise meet the condition in paragraph 7.1(b)(ii).

22. Bandstream further argues that the FTT's approach means that Bandstream is not able to give Mr Smith a pay rise. That is not the case. It could give Mr Smith a pay rise, but it would not be able to claim reimbursement of the costs of employment above 80% of the reference salary paid to Mr Smith. That is the effect of paragraph 8(2)(b) of the Direction and the reference salary is clearly defined by paragraph 7.7. In this case it is £600.

23. It is not arguable that the FTT made any error of law in the Decision in its interpretation of paragraph 7.1 of the Direction.

Ground 2

24. Bandstream says that this is the most crucial and material error of law for the purposes of this application. It says that the FTT interpreted paragraph 7.12(b) to mean that the "original payment" must be less than the sum identified in paragraph 7.1(b)(ii) without giving any meaning to the words "for the purpose of claiming CJRS". Substituting the words of paragraph 7.1(b)(ii), it ought to have interpreted paragraph 7.12(b) as follows:

> (b) the original payment is less than [an amount equal to at least 80% of an employee's reference salary] for the purpose of claiming CJRS.

25. Bandstream says that the original payment was £600 which was less than an amount equal to at least 80% of an employee's reference salary for the purpose of claiming CJRS.

26. This submission cannot be correct. Mr Smith's reference salary as defined by paragraph 7.7 was £600 which is what he was paid prior to 18 April 2020. The original payment was therefore equal to Mr Smith's reference salary and paragraph 7.12(b) was not engaged.

27. Bandstream says that the FTT restricted the use of paragraph 7.12 for pay rises, which is contrary to what the Chancellor stated in Parliament.

28. The extent to which external materials such as ministerial announcements can be taken into account in construing legislation was recently considered by the Supreme Court in *R (on the application of O) v Secretary of State for the Home Department* [2022] UKSC 3 where Lord Hodge writing for the majority said in relation to ministerial statements:

> 32. In their written case the appellants sought to support their contention … by referring to statements by a Government minister, Timothy Raison, to the Standing Committee … Such references are not a legitimate aid to statutory interpretation unless the three conditions set out by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, 640 are met. The three conditions are (i) that the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity; (ii) that the material must be or include one or more statements by a minister or other promoter of the Bill; and (iii) the statement must be clear and unequivocal on the point of interpretation which the court is considering.

29. These were the "exceptional circumstances" referred to by the FTT at [27] of the Decision. The FTT was clearly right not to take into account what it found had been said by the Chancellor in relation to the CJRS. The Direction might be described as convoluted, but it is not ambiguous or obscure. Nor does a conventional interpretation of the Direction lead to absurdity. In the circumstances, the FTT was right not to use the Chancellor's response to questions in Parliament as an aid to construction. I take the FTT's finding of fact in regard to that statement at face value, notwithstanding that Mr Tann was unable to locate any supporting entry in Hansard.

30. For the reasons given above, I am also satisfied that paragraph 7.12 is not directed towards pay rises. It is clear that paragraph 7.12 applies to amounts paid to employees in the period of uncertainty between 1 March 2020 to 18 April 2020 arising out of the pandemic which for whatever reason were less than an employee's reference salary. Claimants were then given an opportunity to "top up" the original payment at any time before making a claim so that it met

the 80% threshold required by paragraph 7.1(b)(ii). The Direction contains no provision for the reference salary to be re-calculated in the event of an increase in salary.

31. It is not arguable that the FTT made any error of law in the Decision in its interpretation of paragraph 7.12 of the Direction.

Ground 3

32. This ground is also directed towards the FTT's interpretation of paragraph 7.12 which Bandstream says is the only paragraph in the Direction which could deal with pay rises. Bandstream relies on the following specific statement made by the Chancellor in an address to the nation on 20 March 2020 announcing the CJRS:

> Government grants will cover 80% of the salary of retained workers up to a total of £2,500 a month – that's above the median income.
>
> And, of course, employers can top up salaries further if they choose to.
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> That means workers in any part of the UK can retain their job, even if their employer cannot afford to pay them, and be paid at least 80% of their salary.

33. Bandstream says that this contradicts the findings of the FTT at [26] of the Decision which the FTT re-iterated in the PTA Decision. Namely, that Bandstream's interpretation of paragraph 7.12 would lead to the unintended position that an employer could increase the wages of an employee in the knowledge that HMRC would contribute 80% of the increased wage.

34. For the reasons given under Ground 2, the FTT was right not to take into account expressions of government policy in construing paragraph 7.12 because the criteria in *Pepper v Hart* were not satisfied. In any event, the Direction was not published until 15 April 2020 and there is no suggestion that any draft was in existence on 20 March 2020. Further, the passage relied on from the Chancellor's address does not support Bandstream's case. The reference to employers being able to top up salaries further if they chose to do so, was clearly a reference to making good the 20% of the reference salary which could not be claimed pursuant to paragraph 8 of the Direction.

35. Mr Tann argued that if the FTT is right then support under the CJRS would not have been available in respect of increases in the national minimum wage or where employees had a contractual entitlement to an increase in salary. I do not consider that is a realistic argument. Even if furloughed employees were contractually entitled to increases in their wages or to increases in the national minimum wage, the clear words of paragraph 8(2) would still cap any claim at whichever is the lower of £2,500 per month and 80% of the employee's reference salary. The cap had no effect on the contractual liability of the employer to pay wages at a certain rate to the employee.

36. Again, it is not arguable that the FTT made any error of law in the Decision in its interpretation of paragraph 7.1 or 7.12 of the Direction.

Conclusion

37. For the reasons given above, I do not consider that it is realistically arguable that there was any error of law in the Decision and I refuse permission to appeal.

Signed: Jonathan Cannan **Upper Tribunal Judge**
Issued to the parties on: 26 September 2024