IN THE MATTER OF PEAR LIMITED
AND IN THE MATTER OF THE CORONAVIRUS JOB RETENTION SCHEME

OPINION

---

1. I am asked to advise Pear Limited ("Pear") whether it may "furlough" Workers it engages under the Coronavirus Job Retention Scheme ("CJRS").

The Facts

2. The facts are well known to me and those instructing me and so I set them out but briefly.

[REDACTED]

3. It is impossible to generalise about the pattern of work undertaken by Workers. Some will work week-in-week-out for the same Client through Pear. Others will supply their labour more intermittently.

Matters for advice

4. I am asked whether, in principle, Pear can apply the CJRS in relation to Workers and, if so, what the risks are, if any, and how the CJRS would apply to Pear.

5. In order to keep this Opinion to a manageable length, I propose to focus on whether Workers are capable of benefitting under the CJRS and what the risks are for Pear in operating the CJRS before outlining what Pear might be able to recover under the CJRS. If Pear then makes a decision in principle to proceed with CJRS, it will be necessary to give further, albeit relatively simple, advice.

The Operation of the CJRS

6. The CJRS is contained in a Treasury Direction made on 15 April 2020 under sections 71 and 76 of the *Coronavirus Act* 2020. Its purpose is set out in paragraphs 2.1 and 2.2:

> *"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.*
>
> *"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."*

And paragraph 8.1 provides:

"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."

7. The question whether and how the CJRS applies to Pear might most usefully be tackled by asking, in turn, (1) whether Pear qualifies (2) whether the Workers qualify and (3) what costs qualify, before turning, briefly, to examine (4) what sums are available to be reimbursed.

(1) Does Pear qualify?

8. Paragraph 3 of the Treasury Direction defines 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')."

9. I will assume that Pear has a PAYE scheme registered on HMRC's RTI for PAYE on 19 March 2020. The real question is whether Pear is an "employer."

10. Paragraph 13.1(e) of the Treasury Direction provides:

"'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"

And regulation 10 of the *Income Tax (Pay As You Earn) Regulations* 2003 provides:

*"1**0 Application to agencies and agency workers***
(1) For the purposes of these Regulations—

(a) agencies are treated as employers; and

(b) agency workers are treated as employees."

And by regulation 2 thereof:

"agency" has the meaning given in section 44 of ITEPA;

"agency worker" means a worker who is treated by section 44 of ITEPA as holding an employment with the agency for income tax purposes…"

11. Workers are treated by section 44 of ITEPA (the *Income Tax (Earnings and Pensions) Act* 2003 as holding an employment with Pear and it follows in my opinion that, for the purposes of the CJRS, Pear is an "employer" and indeed that Workers are "employees" and are "employed" by Pear.

(2) Do Workers qualify?

12. Paragraph 5 of the Treasury Direction provides:

> *"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."*

13. The costs of employment are calculated by reference to each 'qualifying' – my term – Worker. A Worker qualifies where (i) Pear made a payment of earnings to him in the 2019-20 tax year and prior to 28 February 2020 or 19 March 2020 (see paragraph 13.1) (ii) Pear has not reported a date of cessation of employment (in my opinion, for PAYE purposes) on or before that date and (iii) the Worker is a "furloughed" employee.

14. As to whether an Worker is "furloughed," by paragraph 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."*

15. Condition (b) is relatively straightforward to apply. Unless a Worker ceases to work for Pear for 21 calendar days or more he will not be "furloughed". However, both of conditions (a) and (c) are less straightforward for Pear.

16. As to condition (a), by paragraph 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."

17. Given what I know about how Pear works, I cannot imagine that this condition will have been satisfied hitherto. So the question arises whether Pear might write to Workers now and invite them to agree that they shall cease all work in relation to their employment? Although this all feels rather artificial given the intermittent working pattern of Workers, my opinion is that, if Pear were to take that course, and the Worker were to write back agreeing to cease all work then condition (a) would be satisfied in relation to that Worker. These communications could be by email or text or otherwise in writing.

18. As to condition (c), this would generally be a simple condition to satisfy in the case of normal employees. But how does one deal with Workers who supply their services only intermittently via Pear? How is Pear to know whether they are "furloughed" or simply not engaged because, for non-coronavirus related reasons, the Client has no need of their services?

19. It is very likely that HMRC – which is administering the scheme – will take a sensible view of this condition. If Pear asks Clients to specify which Workers they are not using by reason of coronavirus and sense-checks their answer by looking at the pattern of recent engagement of those particular Workers (a matter I could advise further on) this should be enough. Moreover, strictly speaking, Pear has available to it the argument that all instructions it gives are "given by reason of circumstances arising as a result of coronavirus" because, but for the coronavirus, it would not be giving those instructions. However, it seems to me there is still <u>some</u> modest risk that HMRC would say that this condition is not satisfied.

(3) What costs qualify?

20. Let me assume, for the sake of argument, that condition 6(1)(c) is satisfied such that the Worker, to use my shorthand, qualifies. It is necessary then to return to paragraph 5(b) of the Treasury Direction which states that the costs an employer may claim under the CJRS in respect of a qualifying Worker are those that "*meet the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee."*

21. Paragraph 7.1 states:

"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."

22. Paragraph 7.1(a) imposes the unsurprising requirement that the costs Pear may seek to recover under the CJRS are its costs which relate to earnings of the qualifying Worker during the furlough.

23. There is however, it seems to me, a rather horrid bear-trap for Pear:

    (1) for Pear's costs of engaging a qualifying Worker to meet the condition in paragraph 7.1(b), Pear must pay that Worker either (i) £2,500 a month (or an appropriate pro-rated proportion) or (ii) (if less) at least 80% of the Workers "reference salary";

    (2) however, the amount, of those costs, that Pear can recover is set out in paragraph 8.2 of the Treasury Direction. Pear can only claim, in respect of gross earnings of a qualifying Worker, the lower of £2,500 or the amount equal to 80% of the Worker's reference salary;

    (3) so if Pear pays the qualifying Worker less than the amount mandated by paragraph 7.1 the "costs of employment" will not "meet the relevant condition" and so they will not qualify as "costs of employment in respect of which an employer may make a claim for payment under CJRS" (to use the language of paragraph 5(b)). However, if Pear pays the qualifying Worker more than the amount mandated by paragraph 7.1 it will not be able under the CJRS to recover the costs of the excess.

24. This 'bear-trap' is (a) all the more painful for Pear because its margins (relative, at least, to the sums paid to Workers) are thin and (b) all the more difficult for Pear to escape because, as I shall go on to address, the calculation of the figures in paragraph 7.1(b) is, given the nature of its relationship with its Clients, complex.

25. This "bear-trap" may well, on its own, be sufficient to cause Pear to consider it is not in its commercial interests – other matters that may impact on Pear's actions are not for me to assess – to operate the CJRS in respect of Workers. Nevertheless, I will briefly outline some other difficulties inherent in the calculation of the figures in paragraph 7.1(b):

    (1) Pear must first decide how much to pay a Worker, having regard to its recoverability under paragraph 8.2 of the Treasury Direction. As I have said, the payments must satisfy the conditions in paragraph 7.1 to qualify as costs it may reclaim under CJRS.

    (2) The costs under paragraph 7.1(b)(i) are forward looking. Pear could choose to pay a furloughed Worker £2,500 per month (or even more). However, as I have explained, it will only be able to recover the lesser of £2,500 per month and 80% of "the employee's reference salary" so if it wants to avoid being out of pocket it will need to quantify the Worker's reference salary. (I note in passing that is not clear to me what effect the words in parentheses in paragraph 7.1(b)(i) are intended to have having regard to the overall structure of the Treasury Direction.)

    (3) The calculation of the Worker's "reference salary" is complex:

        (i) Paragraph 7.2 provides that "except in relation to a fixed rate employee" (and Workers will not be "fixed rate employees" because (see paragraph 7.6(b)) they are not entitled to be paid an annual salary):

"the reference salary of an employee… 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."*

(ii) On its face, this paragraph 7.2 mandates a reasonably straight-forward mathematical exercise looking back over historical payments made to the qualifying Worker. However, by paragraph 7.3: "In calculating the employee's reference salary for the purposes of paragraphs 7.2… no account is to be taken of anything which is not regular salary or wages (my emphasis)." And by 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."

(iii) There is a very real difficulty here with paragraph 7.4(b). The historical payments Pear has made to Workers will have been conditional on, in particular, the Worker being asked to do work by the Client and on them agreeing to do that work. They are analogous to overtime payments. And for that reason they would seem to me not to be "regular" payments (as defined by paragraph 7.4).

(iv) The consequence is that the payments Pear has made to Workers will not be taken into account in calculating the Worker's reference salary (see paragraph 7.3) and so will have to be ignored in the calculation prescribed by paragraph 7.2. In effect, Workers' reference salary will be zero. The further consequence seems to me to be that, by paragraph 8.2, Pear will not be reimbursed for making any payments to a Worker during a furlough.

(4) Perhaps there is some answer to this point. I am aware that the Guidance HMRC has published (https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme) says that:

"You can claim for any regular payments you are obliged to pay your employees. This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded."

I am also aware that the Guidance provides:

> *"Employees can be on any type of employment contract, including full-time, part-time, agency, flexible or zero-hour contracts."*

However, as a matter of law HMRC ought to apply the Treasury Direction not its own guidance. In any event, there must be a very real risk that it will do so such that there is a very real risk that Pear will not be paid under the scheme any payments that it makes to furloughed Workers.

(4) What sums are available to be reimbursed?

26. In light of the conclusion I have reached in relation to, in particular, (3) I will deal very briefly with the sums available to be reimbursed. These are set out in paragraph 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."*

27. However, it is those words "Subject as follows" that are important. As I have already indicated, paragraph 8.2 (which I do not repeat) limits the amount of gross earnings Pear might recover in respect of a qualifying Worker to the lower of £2,500 and 80% of his "reference salary" (which might very well be zero).

A practical way forward?

28. The Guidance that I have referred anticipates that employers may make payments to furloughed workers out of sums awarded under the CJRS. It states that:

> ***"After you've claimed***
> *HMRC will check your claim, and if you're eligible, pay it to you by BACS to a UK bank account.*
> *You must pay the employee all the grant you receive for their gross pay in the form of money. Furloughed staff must receive no less than 80% of their reference pay (up to the monthly cap of £2500).*
> *Employers cannot enter into any transaction with the worker which reduces the wages below this amount. This includes any administration charge, fees or other costs in connection with the employment."*

This can also be seen in paragraph 2.2 of the Treasury Direction.

> *"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."

So it is possible that Pear might choose to furlough Workers and make payments to them only after it receives the money from HMRC.

29. However I would make two points about this possibility.

    (1) The first is that it is not clear to me that a payment to a furloughed Worker conditional on Pear being reimbursed would qualify under the Scheme (see e.g. the words "the employee is being paid") (i.e. not might be paid) in paragraph 7.1(b) of the Treasury Direction. The guidance indicates that the payment to the furloughed employee might follow the employer being paid by HMRC but I do not think it anticipates that the payment to the employee might be conditional on the employer being paid by HMRC.

    (2) Payment by HMRC does not establish the employer's entitlement to the monies. It is simply a payment. The guidance makes this clear when it says: "HMRC will retain the right to retrospectively audit all aspects of your claim." It is not impossible for me to imagine a world in which Pear receives the money, pays Workers, and then faces a retrospective claw back from HMRC. One does not have to think too hard to identify circumstances in which HMRC has given guidance which guidance does not accord with the law and has subsequently resiled from the guidance and applied the law and those who relied on the guidance have been left, sometimes very substantially, out of pocket.

Summary

30. There are very real risks attached to Pear furloughing Workers and applying the CJRS in respect of them. For the reasons I have set out, it is, at the very least, sensibly possible to imagine that Pear will be left out of pocket. And, should HMRC apply the law as I understand it, it is in my opinion highly probable that any sums paid out by Pear to furloughed employees would not be reimbursable at all.

Jolyon Maugham

17 April 2020

Devereux Chambers