



Between

██████████

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal by the Appellant to the Tax Appeals Commission (“the Commission”) against an assessment dated 22nd April 2021 made by the Revenue Commissioners (“the Respondent”) under section 28(11) of the Emergency Measures in the Public Interest (Covid-19) Act 2020 (“the 2020 Act”). Pursuant to this assessment, the Respondent sought the refund of payments totaling €4,840.04 made to the Appellant under the Temporary Wage Subsidy Scheme (“TWSS”) during the period 31st March 2020 to 26th June 2020.
2. As a consequence of this assessment the Respondent also assessed the Appellant under section 990 of the Taxes Consolidation Act 1997 (“TCA 1997”) as owing additional PRSI payments in the amount of €618.27. This calculation was not challenged by the Appellant and the outcome of the appeal in relation to the Appellant’s entitlement to TWSS payments must also determine whether additional PRSI is owed.
3. On foot of a notification to the Appellant and the Respondent dated 30th November 2022 and the Appellant’s and Respondent’s agreement with same this appeal has been determined without an oral hearing pursuant to section 949AN TCA 1997.

Background

4. The facts relevant to this appeal were largely agreed. In or around January 2020, the Appellant employed a domestic child-carer to look after her children in their home.
5. On 27th March 2020 the Oireachtas enacted the 2020 Act in order to mitigate the adverse public health and economic effects of COVID-19. As part of this, section 28 therein, commenced upon enactment, established the TWSS. The aim of this scheme was to provide much needed support to employees whose employment was at risk as a consequence of restrictions on their ability to work. The TWSS was designed so that it would be employers that would apply for and receive financial support for the specific purpose of paying employee wages in a time of reduced economic activity. For those employers who decided not to retain their employees, the employee was entitled to avail of an alternative payment known as the Pandemic Unemployment Payment (“PUP”). The PUP was a social welfare payment for employees and self-employed people who lost all their employment due to the COVID-19 public health emergency.
6. On or about 31st March 2020, the Appellant self-assessed and registered for the scheme through her tax agent (“the Appellant’s agent”) as being eligible to receive TWSS payments in respect of the child-carer who she employed to mind her children. This child-carer was unable to attend work from 23rd March 2020 as a consequence of the restrictions then in place.
7. For the period 31st March 2020 to 26th June 2020 the Appellant received support payments under the TWSS in respect of wages due to her child-carer in the amount of €4,840.40. The Appellant ceased to receive wage subsidy payments following the replacement of the TWSS by the EWSS.
8. On 18th August 2020 the Appellant received correspondence from the Respondent entitled “*Temporary Wage Subsidy Scheme (TWSS) – Domestic Employers*”. This stated that the Appellant had not been eligible to receive the aforementioned TWSS payments on the grounds that her “...*status as an employer [was] not linked to the operation of a business*” and that she did not “...*appear to meet the 25% reduction in turnover test*”. Consequently, all amounts paid to the Appellant under the TWSS were required to be repaid.
9. On 19th August 2020, the Appellant’s agent wrote to the Respondent raising queries in relation to the denial of the TWSS payments to the Appellant. The Respondent answered these queries on 28th August 2020 and outlined the reasons why the Appellant was deemed ineligible for TWSS payments.
10. Further exchanges occurred between the Appellant’s agent and the Respondent which cumulated in a stage 1 complaint being lodged with the Respondent (a “stage 1” complaint

is a formal complaint made to the Respondent by a taxpayer and is examined by an official in the Respondent's office where the taxpayer's affairs are managed).

11. Subsequently, on 24th November 2020, the Appellant wrote directly to the Respondent and advised that she was taking carriage of the matter and would herself correspond with the Respondent in relation to her deemed ineligibility for TWSS payments.
12. Subsequent correspondence ensued between the Appellant and the Respondent which resulted in the Appellant lodging a stage 2 complaint with the Respondent (a "stage 2" complaint is a review of the matter under dispute by a Principal Officer in a divisional office as opposed to the local office where the Appellant's affairs are managed).
13. The Appellant's stage 1 and stage 2 complaints were not upheld by the Respondent and on 22nd April 2021, the Respondent issued its notices of assessment. The Appellant exercised her right of appeal to the Commission and the appeal was submitted on 17th May 2021.

Legislation and Guidelines

14. Section 28 of the 2020 Act established the TWSS and subsections (2) and (3) therein set out the following criteria for an employer to qualify for support:-

“(2)

This section shall apply where—

(a) the business of an employer has been adversely affected by Covid-19 to a significant extent with the result that the employer is unable to pay to a specified employee the emoluments the employer would otherwise have normally paid to him or her,

(b) notwithstanding the existence of the circumstances referred to in paragraph (a), the employer has the firm intention of continuing to employ the specified employee (and to pay to him or her emoluments accordingly) and is making best efforts to pay to the employee some of the emoluments referred to in paragraph (a) during the applicable period, and

(c) the employer has satisfied the conditions specified in subsection (4).

(3) The business of an employer shall be treated as being adversely affected to the extent referred to in subsection (2)(a) where, in accordance with guidelines published by the Revenue Commissioners under subsection (19), the employer demonstrates to the satisfaction of the Revenue Commissioners that, by reason of

Covid-19 and the disruption that is being caused thereby to commerce, there will occur in the period of 14 March 2020 to 30 June 2020 at least a 25 per cent reduction either in the turnover of the employer's business or in customer orders being received by the employer."

15. Under section 28(1) of the 2020 Act, "employee", is defined, in accordance with section 983 of the TCA 1997, as "any person is receipt of emoluments". "Employer" is defined as "any person paying emoluments". "Business" is not defined, however its ordinary meaning, as given by the Oxford English Dictionary, is "the activity of making, buying, selling or supplying goods or services for money, commerce or trade".

16. Section 28(9) – (11) of the 2020 Act makes provision for the repayment of wage subsidy in the following circumstances:-

"(9) Where the Revenue Commissioners have paid to an employer a temporary wage subsidy in relation to a specified employee in accordance with subsection (5)(a) and it transpires that the employer has not paid to the specified employee an additional amount equivalent to the temporary wage subsidy in accordance with subsection (5)(d), or that the employer was not entitled to receive a temporary wage subsidy in respect of any individual, the temporary wage subsidy so paid to the employer shall be refunded by the employer to the Revenue Commissioners.

(10) An amount that is required to be refunded by an employer to the Revenue Commissioners in accordance with subsection (9) (in this section referred to as "relevant tax") shall be treated as if it were income tax due and payable by the employer from the date the temporary wage subsidy referred to in that subsection had been paid by the Revenue Commissioners to the employer and shall be so due and payable without the making of an assessment.

(11) Notwithstanding subsection (10), where an officer of the Revenue Commissioners is satisfied there is an amount of relevant tax due to be paid by an employer which has not been paid, that officer may make an assessment on the employer to the best of the officer's judgment, and any amount of relevant tax due under an assessment so made shall be due and payable from the date the temporary wage subsidy referred to in subsection (9) had been paid by the Revenue Commissioners to the employer."

17. Section 28(18) of the 2020 Act placed the administration of the TWSS under the care and management of the Respondent. Furthermore, section 28(19) of the 2020 Act provides that:-

"The Revenue Commissioners shall prepare and publish guidelines with respect to the matters that are considered by them to be matters to which regard shall be had in determining whether a reduction, as referred to in subsection (3), will occur by reason

of Covid-19 and the disruption that is being caused thereby to commerce.”

Submissions

Appellant

18. The Appellant advised she became an employer for the first time in January 2020 and that her employee is a full-time professional nanny providing childcare to her children in their home. The Appellant further advised that she engaged the services of a payroll agent to look after her employee's wage related matters.
19. The Appellant submitted that as the government were pleading with employers to maintain staff on their payroll, she decided to retain and pay her employee for the duration of the period that the employee could not travel to her home (and the employee's place of work) because of lockdown restrictions. The Appellant submitted that in order to do this, she availed of the TWSS and as the payment under the scheme only partly covered her employee's normal net wage, she "topped up" her employee's wages to the normal level so that her employee would not be out of pocket for the duration of the restrictions.
20. The Appellant submitted that she applied for payments under the TWSS on a good-faith basis and had she realised she was ineligible for the support, she most likely would have terminated her employee's employment for the duration of the lockdown.
21. The Appellant submitted that none of the 18 versions of the Respondent's booklet entitled "*Frequently Asked Questions on the Guidance on the Operational phase of the COVID-19: Temporary Wage Subsidy Scheme*" referred to domestic employees being excluded from the scheme. The Appellant submitted that this was in stark contrast to the "*Guidelines on the operation of the Employment Wage Subsidy Scheme (EWSS)*" introduced from 1st September 2020 (to replace the Temporary Wage Subsidy Scheme) which explicitly states that domestic employees are excluded from support under the EWSS.
22. The Appellant submitted that the Respondent failed to provide her with any legislative provision which outlined why domestic employees are excluded from the TWSS despite numerous requests.
23. The Appellant submitted that it was punitive and unfair to place the financial burden of repaying the TWSS payments received in circumstances where the published guidelines in place were not clear, and the Respondent was also unclear on whether domestic workers qualified for the scheme. The Appellant submitted that it was evident that the Respondent was unclear on the eligibility criteria by virtue of them approving payments to her under the scheme only to later seek repayment of those sums allegedly paid in error.
24. In conclusion, the Appellant submitted that the legislation was unclear on whether she

qualified for payments under the TWSS and in those circumstances, it was unfair that she now be asked to repay sums originally awarded to her under the scheme.

Respondent

25. The Respondent submitted that it was clear from the wording of section 28(2) of the 2020 Act that, in legislating, the Oireachtas chose to limit the scope of financial assistance to those whose employers that had a “business”. This was a policy choice which, for good or ill, limited the discretion of the Respondent in the administration of the TWSS. The same limitation applies to the Commissioner in making his determination on the whether payments should have been made to the Appellant for the relevant period.

26. The Respondent opened section 28(19) of the 2020 Act which provides:

“The Revenue Commissioners shall prepare and publish guidelines with respect to the matters that are considered by them to be matters to which regard shall be had in determining whether a reduction, as referred to in subsection (3), will occur by reason of Covid-19 and the disruption that is being caused thereby to commerce.”

27. The Respondent submitted it is clear that where an employer sought inclusion on the TWSS, then they ought to have regard to those guidelines which were published by them on 26th March 2020. The Respondent submitted that these guidelines were available to the Appellant before she submitted her claim and as such, they rejected the Appellant’s submissions that inadequate guidance was available for her at the time she submitted her claim.

28. The Respondent submitted that the guidelines published under the name “*Covid-19 Temporary Wage Subsidy Scheme – Employer Eligibility and Supporting Proofs*” and on the proposed operation of the scheme entitled “*Frequently Asked Questions on Operation of the Transitional phase of the Temporary COVID-19 Wage Subsidy Scheme*” constituted “comprehensive guidance” and when combined with the Act itself made it clear that the Appellant was required to operate a “business” to be eligible to receive the TWSS. The Respondent submitted that as the Appellant did not operate a business, then she was ineligible for the support.

29. The Respondent submitted that as the Appellant was ineligible for support, then section 28 (9) of the 2020 Act was of relevance. It provides:

“In the event of any TWSS being repayable by an employer, same is deemed to be a ‘relevant tax’ pursuant to s.28 (10) of the Act and the provisions of the Taxes Consolidation Act 1997 (the ‘TCA’) apply, in terms of its collection by means of an assessment to income tax, as do the appeal mechanisms provided for in the TCA.”

30. The Respondent submitted in the event that the Commission held that the Appellant was deemed to be operating a “business”, then she was further required to prove under section 28 (3) of the 2020 Act that that the turnover of the business for the period 14th March 2020 to 30th June 2020, reduced by 25% in turnover or customer orders. The Respondent submitted that as the Appellant did not have any turnover then it could not satisfy that legislative requirement and as such the Appellant’s claim must fail. In those circumstances, the Respondent requested that the Commission uphold its assessment of the 22nd April 2021 and direct that the Appellant repay the sum of €4,840.04 in TWSS payments wrongly paid.

31. The Respondent also opened section 28(5) (g) of the 2020 Act which provides:

“where paragraph (d) applies, the employer shall treat the specified employee concerned as falling within Class J9 of Pay Related Social Insurance for the purposes of the employer’s obligations under Chapter 4 of Part 42 of the Act and the Regulations to report matters specified in that Chapter or the Regulations.”

32. The Respondent submitted that as “paragraph d” relates to circumstances where the Appellant is required to repay supports under the TWSS, then the Appellant was required to pay PRSI at a rate of 8.5%, representing the amount of employer’s PRSI on the amount of TWSS payments repayable to the Respondent. The Respondent submitted in those circumstances that its PRSI assessment in the sum of €617.27 be further upheld by the Commission.

Material Facts

33. The facts material to this appeal were as follows:-

33.1.1 The Appellant employed a domestic child-carer during the period March 2020 to June 2020.

33.1.2 The Government introduced safety measures during March 2020 in an attempt to curb the spread of Covid- 19. The practical effect of these safety measures was that the Appellant’s child carer was unable to attend the Appellant’s house and as such was unable to perform her duties.

33.1.3 The Appellant continued to employ and pay the child-carer’s wages throughout the relevant period, which included payments she received under the TWSS.

33.1.4 In or around 18th August 2020, the Respondent commenced an inquiry into the Appellant’s eligibility to receive payments under the TWSS.

33.1.5 The Respondent held that the Appellant had not been entitled to these

payments which totaled €4,840.40.

33.1.6 The Respondent informed the Appellant that the grounds of its refusal were that the Appellant did not operate a “business” and given this position she did not fulfil the statutory requirements for the TWSS.

33.1.7 On 22nd April 2021, the Respondent made an assessment under section 28(11) of the 2020 Act requiring repayment of the sums received. These sums represented the TWSS payments received in the sum of €4,840.40 and the additional sum of €617.27 in employer’s PRSI on those sums.

33.1.8 The Appellant duly appealed this assessment to the Commission on 17th May 2021.

Analysis

34. Two primary issues arise in this appeal. Firstly, does the legislation require that an employer in receipt of subsidy payments under the TWSS have a “business”? Secondly, if the legislation does require this, what is the scope of the definition of the term “business”?

35. These matters were considered in a previous Determination of the Commission¹, a copy of which was provided to the Appellant and the Respondent in advance of the appeal hearing.

36. In addition to that Determination, both the Appellant and the Respondent were requested to provide any objections they had to the Commissioner adjudicating the matter under appeal in accordance with the provisions of section 949AN TCA 1997. This section provides where no objection is received from the parties within 21 days of the notification, the Commissioner may adjudicate the matter without the holding of a hearing and may have regard to a previous Determination of the Commission which shares common or related issues.

37. As no objection was received from either party, the Commissioner proceeded to adjudicate the matter without a hearing and having regard to the previous Determination finds:

37.1 The Appellant falls within the statutory definition of an “employer” and the child-carer within that of an “employee”.

37.2 It is explicit from the wording of section 28(2) of the 2020 Act that to qualify under the TWSS an employer must have a “business”. Moreover, under section 28(3) of the 2020 Act this business must have been affected adversely by reason of COVID-19 related disruption.

¹ 150TACD2022

37.3 As section 28(1) of the 2020 Act gives no definition of the word “business”, the ordinary meaning of that word is taken” as the “*manufacturing, buying, selling or supplying goods or services with a view to making a profit*”.

38. As section 28(2) and (3) of the 2020 Act require the existence of a business “of the employer” to have been adversely affected, it follows as the Appellant did not have a business, then she falls outside the scope of the TWSS and therefore should not have received the subsidy payments of €4,840.04 for the period 31st March 2020 to 26th June 2020. Consequently, the assessment of the Respondent of 22nd April 2021 must be affirmed.

39. In finding that the Appellant incorrectly received payments under the TWSS, the Respondent’s assessment regarding the payment of additional PRSI in the amount of €618.27, based on the application of a rate of 8.8% as opposed to a rate of 0.5% applicable to a “specified employee”, must also stand. Therefore, the appeal is denied and the Appellant is directed to pay the Respondent the sum of €5,458.31 which represents the TWSS payments wrongly paid of €4,840.04 and the employer’s PRSI of €618.27 due on that sum.

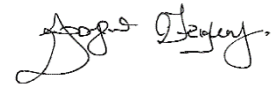
40. The Commissioner accepts that the Appellant registered for the scheme in good faith, viewing herself to be an eligible employer and the application to be in the interest of her employee, who she said would otherwise have been let go. However, despite the Appellant stating that she was not provided with reasons why her employee was deemed ineligible for inclusion on the TWSS, the Commissioner finds no substance in this argument given the repeated references to the support applying to “businesses” in the legislation and guidelines, which as noted were available at the time the Appellant submitted her claim.

41. Furthermore, as was held in the case of *Lee v Revenue Commissioners* [2021] IECA 18, the Commission does not enjoy equitable powers and as such does not have the jurisdiction to adjudicate upon the fairness or otherwise of legislation and must in discharging its duties apply the law as enacted by the Oireachtas. Therefore, the Commission is precluded from adjudicating on the Appellant’s submissions that the provisions of the Emergency Measures in the Public Interest (Covid-19) Act 2020 are unfair.

Determination

42. The result of this appeal is that the Respondent’s decision to assess the Appellant as owing the sum of €4,480.40 in TWSS payments received, plus additional PRSI of €618.27 must stand. The Commissioner appreciates that the Appellant may be disappointed with the result of this determination. The Appellant was however correct to appeal in order to establish the correct position regarding her liability.

43. This appeal is determined under section 949 of the TCA 1997. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law within 42 days of receipt in accordance with the provisions set out in the TCA 1997.



Andrew Feighery
Appeal Commissioner
15th March 2023