



AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH  
TAX APPEALS COMMISSION

08TACD2025

Between

████████████████████

**Appellant**

and

**REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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### **Introduction**

1. This is an appeal to the Tax Appeals Commission ("the Commission") by ██████████ ("the Appellant") pursuant to section 28B(14A) of the Emergency Measures in the Public Interest (Covid-19) Act 2020 as amended ("EMPI Act 2020") against assessments raised by the Revenue Commissioners ("the Respondent") in respect of the Employment Wages Subsidy Scheme ("EWSS"). The assessments were raised for February 2021 to July 2021 in the total amount of €211,453.
2. The assessments were raised on the basis that the Appellant had failed to demonstrate to the satisfaction of the Respondent that its business had experienced or was expected to experience a 30% reduction in turnover or customer orders during the relevant periods, in accordance with section 28B of the EMPI Act 2020.

### **Background**

3. The EWSS was introduced by the Financial Provisions (Covid-19) (No 2) Act 2020, which inserted section 28B into the EMPI Act 2020, and replaced the Temporary Wage Subsidy Scheme. The EWSS was introduced in the context of the restrictions implemented on foot of the Covid-19 pandemic, and provided for a flat-rate subsidy to qualifying employers

based on the numbers of paid and eligible employees on the employer's payroll, and also charged a reduced rate of employer PRSI of 0.5% on wages paid that were eligible for the subsidy payment.

4. On 15 March 2023, the Respondent raised a number of assessments against the Appellant, on the basis that it had not abided by the terms of the EWSS. The assessments raised were for the months September 2020 to July 2021. Following an internal review by the Respondent, the assessments for September 2020 to January 2021 inclusive were vacated. The following assessments were not vacated and are at issue in this appeal:

Period of Assessment	Amount €
February 2021	29,000
March 2021	31,503
April 2021	41,050
May 2021	33,350
June 2021	33,850
July 2021	42,700
<b>Total</b>	<b>211,453</b>

5. On 9 October 2023, the Appellant appealed against the assessments to the Commission. An oral hearing was held in private on 23 September 2024. In written submissions, the Respondent objected to the Commission accepting the appeal on the basis that it had been brought late by the Appellant. However, at the hearing, senior counsel for the Respondent confirmed that it was withdrawing its objection.

### **Legislation and Guidelines**

6. Section 28B of the EMPI Act 2020, as in force from 1 January 2021, provided *inter alia* that:

*“(2A) Subject to subsections (4) and (5), this section shall apply to an employer for the period from 1 January 2021 to the date on which the qualifying period expires where –*

*(a)(i) in accordance with guidelines published by the Revenue Commissioners under subsection (20)(a), 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 –*

*(I) there will occur in the period from 1 January 2021 to 30 June 2021 (in this subsection referred to as 'the second specified period') at least a 30 per cent reduction, or such other percentage reduction as the Minister may specify in an order made by him or her under subsection (21)(b), in either the turnover of the employer's business or in the customer orders being received by the employer by reference to the period from 1 January 2019 to 30 June 2019 (in this subsection referred to as 'the second corresponding period'),*

*(II) in the case where the business of the employer has not operated for the whole of the second corresponding period but the commencement of that business's operation occurred no later than 1 May 2019, there will occur in the part of the second specified period, which corresponds to the part of the second corresponding period in which the business has operated, at least a 30 per cent reduction, or such other percentage reduction as the Minister may specify in an order made by him or her under subsection (21)(b), in either the turnover of the employer's business or in the customer orders being received by the employer by reference to that part of the second corresponding period, or*

*(III) in the case where the commencement of the operation of the employer's business occurred after 1 May 2019, the nature of the business is such that the turnover of the employer's business or the customer orders being received by the employer in the second specified period will be at least -*

*(A) 30 per cent, or*

*(B) such other percentage as the Minister may specify in an order made by him or her under subsection (21)(b),*

*less than what that turnover or those customer orders, as the case may be, would otherwise have been had there been no disruption caused to the business by reason of Covid-19...*

*and*

*(b) the employer satisfies the conditions specified in subsection (3).*

*(3) The conditions referred to in subsection (2)(b) or (2A)(b) are –*

*(a) the employer has logged on to the online system of the Revenue Commissioners (in this section referred to as 'ROS') and applied on ROS to be registered as an employer to which this section applies,*

*(b) having read the declaration referred to in ROS as the 'Covid-19: Employment Wage Subsidy Scheme' declaration, the employer has submitted that declaration to the Revenue Commissioners through ROS,*

*(c) the employer has provided details of the employer's bank account on ROS in the 'Manage bank accounts' and 'Manage EFT' fields, and*

*(d) the employer is throughout the qualifying period eligible for a tax clearance certificate, within the meaning of section 1095 of the Act, to be issued to him or her.*

*(4) Where on any date in the qualifying period the employer ceases to satisfy the condition specified in subsection (3)(d), the employer shall cease to be an employer to which this section applies as on and from that date.*

*(5) Where, by virtue of subsection (2) (apart from paragraph (a)(ii) thereof) or (2A) (apart from paragraph (a)(ii) thereof), and subsection (3), an employer is an employer to which this section applies –*

*(a) immediately upon the end of each income tax month (in this subsection referred to as 'the relevant income tax month') in the qualifying period, apart from July 2020 and the last such month, the employer shall review his or her business circumstances, and*

*(b) if, based on the result of that review, it is manifest to the employer that the outcome referred to in clause (I), (II) or (III), as the case may be, of subsection (2)(a)(i) or (2A)(a)(i) that had previously been envisaged would occur will not, in fact, now occur, then –*

*(i) the employer shall immediately log on to ROS and declare that, from the first day of the income tax month following the relevant income tax month (in subparagraph (ii) referred to as 'the relevant day'), the employer is no longer an employer to which this section applies, and*

*(ii) on and from the relevant day, the employer shall not be an employer to which this section applies and shall not represent that his or her status is otherwise than as referred to in this subparagraph nor cause the Revenue Commissioners to believe it to be so otherwise.*

*[...]*

*(11) Where the Revenue Commissioners have paid to an employer a wage subsidy payment in relation to an employee in accordance with subsection (7)(a) and it transpires that the employer was not entitled to receive such payment in relation to the employee, the wage subsidy payment so paid to the employer shall be refunded by the employer to the Revenue Commissioners.*

*(12) An amount that is required to be refunded by an employer to the Revenue Commissioners in accordance with subsection (11) (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 wage subsidy payment 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.*

*[...]*

*(13) Notwithstanding subsection (12), 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 wage subsidy payment referred to in subsection (11) had been paid by the Revenue Commissioners to the employer.*

*[...]*

*(20) The Revenue Commissioners shall prepare and publish guidelines with respect to –*

*(a) 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 (2) or (2A), will occur by reason of Covid-19 and the disruption that is being caused thereby to commerce, and*

*(b) the matters to which an employer shall have regard in determining the appropriate class of Pay-Related Social Insurance to be operated by an employer in relation to a qualifying employee for the purposes of compliance by the employer with subsection (7) (e)."*

7. Section 28B of the EMPI Act 2020 was amended from time to time to *inter alia* account for changes to the qualifying periods as the EWSS continued into 2021 and 2022. From 1 July 2021, the relevant specified period was 1 January 2021 to 31 December 2021 and the corresponding period was 1 January 2019 to 31 December 2019 (section 28B(2B)).

8. As required by section 28B(20), the Respondent published Main Guidelines on the operation of the EWSS (“Guidelines”). The Guidelines stated that:

*“The scheme is administered by Revenue on a “self-assessment” basis. Revenue will not be looking for proof of eligibility at the registration stage. We will in the future, based on risk criteria, review eligibility. In that context, employers should retain their evidence/basis for entering and remaining in the scheme.”*

9. In respect of the “rolling reviews” mandated by section 28B(5) of the EMPI Act 2020, the Guidelines (September 2020 version) stated that

*“Employers must undertake a review on the last day of every month (other than July 2020 and the final month of the scheme) to be satisfied whether they continue to meet the above eligibility criteria and to take the necessary action of withdrawing from the scheme where they do not.*

*This review must be undertaken on a rolling monthly basis comparing the actual and projected business performance over the specified period...*

*If an employer no longer qualifies, they must deregister for EWSS through ROS with effect from the following day (that being the 1<sup>st</sup> of the month) and cease claiming the subsidy...”*

10. Where a participant in the EWSS wished to assess eligibility by reference to customer orders, the Guidelines (September 2020 version) stated that

*“If a reduction in customer orders is being considered as the basis for eligibility for the scheme, the following are examples of how it will apply –*

- *In the case of a retail business, a pub, a fast-food outlet and similar type businesses: at least a 30% reduction in the value of overall sales (cash, credit and orders, including on-line and telephone orders).*
- *In the case of a businesses [sic] which operates largely by way of “bookings” such as a restaurant, hotel, B&B, hostel, camp site, caravan park: at least a 30% reduction in the value of bookings for the relevant period.*
- *In the case of public and private transport service providers: at least a 30% reduction in the volume of online bookings for passenger journeys or a 30% reduction in the number of passenger journeys or a 30% reduction in the value of passenger ticket sales.*

- *In the case of a service provider, such as a call centre: at least a 30% reduction in the volume of call services provided, where the calls have not been diverted to be dealt with elsewhere within a group.*
- *In the case of energy suppliers: at least a 30% reduction in the volume of energy consumed.*
- *In the case of a business involved in the servicing of equipment: at least a 30% reduction in the number of service visits made or service jobs completed."*

## Evidence

- ██████████
11. ██████████ was the Appellant's managing director. He stated that he had been the ██████████ for ██████████. When he finished in that role, he used his redundancy to design the ██████████, which was ██████████. This was successful, and he created other ██████████. He stated that they started off ██████████ throughout the company.
  12. The Appellant subsequently launched ██████████. At first these ██████████, so the Appellant carried out research in order to develop ██████████.
  13. The witness stated that the ██████████ side of the business was 60-70% of the Appellant's business in the year prior to the pandemic. When lockdown was introduced they debated laying off all their staff, but the EWSS payments allowed the Appellant to retain all of its staff. He stated that without the EWSS the Appellant would not have survived.
  14. He stated that the Appellant's costs increased significantly during Covid-19, including the cost of materials. He stated that it could take eight to nine months between a customer ordering ██████████. The process was slow which affected the Appellant's turnover. He stated that the impact of the pandemic was that *"I put all my eggs in the ██████████ and that's where we are today."*
  15. The witness stated that at the onset of the pandemic, the Appellant had 30 to 35 employees, and it currently had 78 full-time employees with *"subbies and contractors"* bringing it to about 120. He stated that there was very little reward for creating more jobs.

He believed that [REDACTED]  
[REDACTED].

16. On cross examination, the witness confirmed that the Appellant's financial year-end prior to Covid-19 was 28 February 2020. It was put to him that his statement that the [REDACTED] side of the business constituted 60-70% prior to Covid was a vast exaggeration, and he stated that he did not have the figures in front of him so he did not know. He confirmed that he and his wife were the owners of the Appellant. He accepted that the Appellant's Outline of Arguments stated that it moved into [REDACTED] in [REDACTED], and that it also said prior to Covid-19 sales revenue from [REDACTED] constituted 32.61% of the Appellant's revenue of €2,445,799 to February 2020. He accepted that to say it constituted 60-70% was misleading and he apologised.
17. He agreed that the Appellant's corporation tax ("CT") returns showed turnover of €2,445,799 to 28 February 2020, €2.11m to 28 February 2021 and €3.531m to 28 February 2022. He agreed that employee numbers were stable for 2020 and 2021, and increased for 2022, and it was put to him that the closure of [REDACTED] had no impact on the Appellant's employee numbers. He disagreed, because he believed the Appellant would have been bigger and stronger if Covid-19 had not happened.
18. He stated that the Appellant reinvented itself as a result of the pandemic. He accepted that he had steered the Appellant towards [REDACTED], but stated that it was all led by Covid-19. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
19. Counsel stated that the EWSS was purely based on turnover and that profitability was not relevant. In response, the witness stated that "*Turnover is vanity and profit is sanity.*" He stated that without EWSS the Appellant would not have survived. He accepted that the Appellant was not a new business such as would have allowed it to compare its 2021 actual figures against 2021 projected figures. He stated that he would accept that the Appellant had not satisfied the reduction in turnover or customer orders test "*[i]f this was a normal shop and a normal business that sells the same thing every day but it's not.*"
20. The witness accepted that the Appellant ticked the box for 'turnover' on its Eligibility Review Form ("ERF") that was submitted to the Respondent. He accepted that the ERF showed that the Appellant's turnover had significantly increased for 2021 compared to 2019, with the exception of January 2021. He accepted that it showed turnover for 2021



being approximately 30% greater than the relevant period in 2019. He agreed that the Respondent allowed the Appellant's EWSS claims for 2020 and January 2021.

21. The witness stated that the Appellant's Outline of Arguments was correct to contend that it was forced to commence a new business model as a result of Covid-19, because it had to solely rely on [REDACTED]. He could not answer whether the Appellant had provided any monthly rolling reviews to the Respondent or had carried out any. He stated that he did not get involved in the Appellant's paperwork.
22. He was asked about the submission of the Appellant which sought to rely on its number of customer orders to justify eligibility. He stated that it was not possible to compare like-with-like, because the Appellant's business model changed. It was put to him that the Appellant should have compared the value of its customer orders, not the number. The witness stated that the test should have been in respect of profitability. He stated that he believed the Appellant was a special case and that month-on-month comparisons were not suitable for assessing its eligibility.
23. On re-examination, the witness stated that the Appellant produced different types of [REDACTED] pre-and-post pandemic. The value of orders arising from [REDACTED] was very different to orders for [REDACTED]. He reiterated that he believed it was a totally different business model. The Appellant had to refund [REDACTED] that had been planned for 2020 and 2021. The EWSS had saved the Appellant, and if it had not been for Covid-19 the Appellant would be in a much stronger position.

## **Submissions**

### *Appellant*

24. In written submissions, the Appellant stated that just prior to Covid-19, revenue from [REDACTED] constituted 32.61% of its sales revenue. The company was forced to close in March 2020, and the EWSS (and its predecessor scheme) offered a window of hope, which allowed the Appellant to retain its experienced employees.
25. Prior to the pandemic, the vast majority of the Appellant's [REDACTED] would have been deemed as [REDACTED]. The company devoted time and money in 2020 and 2021 to developing [REDACTED].
26. When it applied for EWSS, and in its subsequent engagements with the Respondent, the Appellant provided details of its turnover and the number of customer orders. The Respondent did not inform the Appellant that it interpreted the EMPI Act 2020 to mean the value of customer orders, rather than number. The subsequent decision by the

Respondent to allow the Appellant's EWSS claims for September 2020 to January 2021, having previously disallowed them, suggested that the Respondent was confused about the guidelines for eligibility.

27. The Appellant's projected turnover for January to July 2021 was 46% below its actual turnover for those months. It believed that it commenced a new business model as a result of the pandemic and therefore should be entitled to utilise projected turnover for January to July 2021, rather than actual turnover for January to June 2019. While overall turnover for 2021 reduced by only 16% compared with the relevant period in 2019, the Appellant's costs increased substantially, with the result that it recorded a net loss in its annual accounts to February 2022.
28. In oral submissions, the Appellant's representative stated that the Guidelines were confusing, and this was illustrated by the fact that the Respondent had originally disallowed the Appellant's EWSS claims for September 2020 to January 2021, before allowing them on internal appeal. When the Appellant applied for EWSS subsidies, it submitted evidence of the number of orders, and if this was not suitable the Respondent should have notified it at that stage.
29. The Appellant was asking the Commissioner to take into account the "*true sense*" of the EWSS scheme, and its purpose. To compare the Appellant's turnover between 2019 and 2021 would not be to compare like-with-like. 30% of the Appellant's business before Covid-19 had to stop, and the business of [REDACTED] was very different to that of [REDACTED]. The examples provided in the Guidelines all were businesses where the activity remained the same pre-and-post pandemic.
30. The Appellant was still recovering from the pandemic and was in a fragile state. It needed help, not punishment. The Appellant was not selling commodities, and when an order was placed by a customer it was a lengthy process before the Appellant received full payment. Therefore the Appellant's revenue model had changed as well. The Appellant would have been in a better position if it had not joined the EWSS at all than if it was faced with having to repay subsidies. The Appellant joined the scheme in good faith, and the Commission's decision would be very serious for the company.

#### *Respondent*

31. In written submissions, the Respondent stated that the Appellant had not demonstrated that its business experienced, or was expected to experience, a 30% reduction in turnover or customer orders for the relevant pay dates. The Appellant registered for EWSS from

September 2020 to August 2021. When it registered through its agent, it made the following declaration:

*“I declare that I have read the eligibility criteria for the Employment Wage Subsidy Scheme and that the business qualifies for the scheme. I undertake that the business will abide by the terms and conditions of the scheme. I understand and accept that failure by the business to adhere to the terms of the scheme could result in recoupment of monies together with interest, penalties and prosecution. I undertake that the business will retain all records relating to the scheme, including the basis of eligibility, for review by Revenue.”*

32. The Appellant participated in the scheme on a self-assessment basis. The Respondent introduced the ERF from July 2021 onwards. In August 2021, the Appellant completed its first ERF and did so on the basis of its ‘turnover’. Per the Appellant’s own figures, it was not expected to suffer a 30% reduction in turnover but rather was expected to increase its turnover by 39.9%.
33. In May 2022, following a compliance review by the Respondent, the Appellant contended that it was eligible for EWSS payments on the basis of a drop in the number of customer orders. Following further correspondence, the Appellant provided turnover figures which showed turnover in 2019 of €2.19m compared to turnover in 2021 of €3.07m – an increase of approximately 50%. The value of customer orders received in 2019 was €2.5m and the value received in 2021 was €2.7m. The Appellant stated that the actual number of customer orders received in 2019 was 63 and in 2021 was 43.
34. Section 28B of the EMPI Act 2020 was clear and no ambiguity arose therefrom. Even if the Commissioner considered that it was ambiguous or unclear, the context and purpose of the Scheme had to be considered. The Guidelines, when considering the ‘customer order’ test, predominantly focused on the value of customer orders. Where there were examples of instances where volume was used, they were specific and isolated instances where there was a standardised high volume and low value product. It was submitted that the legislature did not intend for the Scheme to be availed of by companies who significantly increased their turnover during the pandemic and that the strained reading of the term ‘customer orders’ offered by the Appellant was irreconcilable with the Act and Guidelines.
35. In oral submissions, senior counsel for the Respondent stated that profitability was of no consequence. It was accepted by the Appellant that it existed prior to 1 May 2019, and that it had no entitlement to rely on projected figures for 2021, rather than its actual figures

compared to 2019. On the Appellant's ERF, it acknowledged that it was not a new business, and that it was relying on turnover for its calculations.

36. There was no evidence that rolling reviews had been performed by the Appellant. If they had been performed, presumably they would have been done on the basis of turnover. When the Appellant engaged with the Respondent on foot of the eligibility review, it contended that it was relying purely on the number of customer orders, rather than the value of those orders or its turnover. The only logical interpretation in terms of the purpose of the EMPI Act 2020 was to look at the value of the orders; *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43 and *Hanrahan v Revenue Commissioners* [2024] IECA 113.
37. It was clear from the figures that there was a large increase in the value of the Appellant's customer orders for February to July 2021 compared with the corresponding period in 2019. It was clear from an application of the legislation and the Guidelines that the Appellant did not qualify for EWSS for those months.

### **Material Facts**

38. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:
- 38.1. The Appellant is a company that was established in [REDACTED]. It was originally involved in the business of [REDACTED]. In [REDACTED] it also began [REDACTED]. It did not have separate business divisions for the [REDACTED] elements of its operations.
- 38.2. For the financial year ending 28 February 2020 sales revenue from [REDACTED] constituted 32.61% of the Appellant's revenue of €2,445,799.
- 38.3. Following the onset of the Covid-19 pandemic, the [REDACTED] shut down and the Appellant focused its work on [REDACTED].
- 38.4. The Appellant participated in the EWSS from September 2020 to July 2021. On 15 March 2023, the Respondent raised assessments against the Appellant for the EWSS payments received by it. Following an internal review, the Respondent vacated the assessments for September 2020 to January 2021 inclusive. On 9 October 2023, the Appellant appealed against the remaining assessments, for February to July 2021, to the Commission. These assessments were in the total amount of €211,453.

- 38.5. The Appellant had not retained contemporaneous documentation to demonstrate its eligibility to participate in the EWSS. It did not perform any monthly rolling reviews for the months of February to June 2021. It submitted an ERF for July 2021 to the Respondent. This ERF was compiled on the basis of the Appellant's turnover.
- 38.6. Following a compliance intervention by the Respondent, the Appellant submitted figures to attempt to show its eligibility to participate in the EWSS. These figures were produced on the comparison of the Appellant's actual figures for January to July 2021 compared to projected figures for January to July 2021. The Appellant contended that it was entitled to rely on this comparison because it had been compelled by the pandemic to commence a new business model.
- 38.7. The Appellant also sought to rely on a decrease in the number (rather than the value) of customer orders received by it in January to July 2021 compared to the corresponding period in 2019. This was a *post hoc* attempt to justify its participation in the EWSS following the intervention of the Respondent.
- 38.8. The Appellant's CT return for the tax year ended 28 February 2020 showed turnover of €2,445,799. Its CT return for the tax year ended 28 February 2021 showed turnover of €2,117,297. Its CT return for the tax year ended 28 February 2022 showed turnover of €3,531,689.
- 38.9. The Appellant did not challenge the contention of the Respondent that the turnover figures provided by the Appellant showed turnover in 2019 of €2.19m compared to turnover in 2021 of €3.07m, which was an increase of approximately 50%. Nor did it challenge the Respondent's contention that its figures showed that the value of customer orders received in 2019 was €2.5m and the value received in 2021 was €2.7m. The Appellant contended that the number of customer orders it received in 2019 was 63, compared to 41 in 2021.

## Analysis

39. The burden of proof in this appeal rests on the Appellant, which must show that the Respondent was incorrect to raise assessments in the total amount of €211,453 for EWSS payments made to it. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J stated at paragraph 22 that "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.*"

40. The EWSS provided for wage subsidies during the Covid-19 pandemic where an employer was expected to experience a reduction of at least 30% in either turnover or customer orders being received during a specified period compared to the appropriate corresponding period. When the EWSS was introduced, the specified period was 1 July 2020 to 31 December 2020 and the corresponding period was 1 July 2019 to 31 December 2019. From 1 January 2021, the specified period was 1 January 2021 to 30 June 2021 and the corresponding period was 1 January 2019 to 30 June 2019. From 1 July 2021, the specified period was 1 January 2021 to 31 December 2021 and the corresponding period was 1 January 2019 to 31 December 2019.
41. The Respondent contended that the Appellant had not carried out monthly rolling reviews, and also did not accept that the figures provided by the Appellant demonstrated its eligibility to participate in the EWSS.

*Requirement to carry out rolling reviews*

42. Section 28B(5) of the EMPI Act 2020 required participants in the EWSS to carry out a review of their business circumstances immediately upon the end of each month. If, on foot of this review, it was manifest that the anticipated decrease of at least 30% in either turnover or customer orders would not occur, the employer was obliged to immediately remove him or herself from the scheme. This was confirmed by the Guidelines, which also confirmed that *“This review must be undertaken on a rolling monthly basis comparing the actual and projected business performance over the specified period”* and set out tables providing further details. The Guidelines also stated that *“employers should retain their evidence/basis for entering and remaining in the scheme”*.
43. The Commissioner considers that there was no evidence before him to suggest that the Appellant carried out monthly rolling reviews prior to July 2021. The Appellant’s managing director stated that he could not say if they were carried out, because he did not involve himself in the paperwork, and the Respondent stated that it had been provided with no contemporaneous rolling reviews during its engagement with the company. Consequently the Commissioner finds as a matter of fact that no rolling reviews, as required by section 28B of the EMPI Act 2020 and the Guidelines, were performed by the Appellant between February and June 2021. The Appellant submitted an ERF to the Respondent for July 2021, and therefore no finding is made that the Appellant failed to carry out a rolling review for that month.
44. The necessity of carrying out rolling reviews has been considered by the Commissioner in previous determinations concerning EWSS. As stated in 83TACD2023:

*“the plain meaning of section 28B is that the carrying out of monthly rolling reviews was a necessary condition for participating in the EWSS. Subsection (2) states that section 28B shall apply to an employer, but that this is subject to subsections (4) and (5). As discussed herein, subsection (5) requires the carrying out of monthly rolling reviews. Therefore, it is clear that if an employer failed to carry out monthly rolling reviews, it was not entitled to participate in the EWSS.”*

45. As it is found that the Appellant did not carry out rolling reviews between February and June 2021, and as it was a requirement for participation in the scheme that rolling reviews be carried out on a monthly basis, it follows that the Appellant was not entitled to receive EWSS payments between February and June 2021.

*Whether the Appellant’s figures demonstrate entitlement to EWSS payments*

46. The Appellant’s claim to be entitled to EWSS payments for February to July 2021 rested on two separate arguments. Firstly, it contended that Covid-19 forced it to adopt a new business model, and that therefore it should be allowed compare its projected turnover for February – July 2021 against its actual turnover for those months. Secondly, it contended that it should be allowed to rely on a reduction in the number of customer orders received by it compared to the corresponding period in 2019.
47. In respect of the first argument, it was not in dispute that the Appellant was established in [REDACTED] and [REDACTED]. It was also not in dispute that the Appellant began [REDACTED]. Furthermore, the Commissioner accepts the evidence of the Appellant that the [REDACTED] ceased as a result of Covid-19 and that it consequently had to focus on the [REDACTED].
48. However, section 28B of the EMPI Act 2020 clearly provided that, unless a business commenced operations after 1 May 2019, it was obliged to compare its projected turnover or customer orders for the relevant specified period against its actual turnover experienced by it during the relevant corresponding period in 2019. For example, section 28B(2A) required a comparison of expected turnover or customer orders (while being adjusted on an ongoing monthly basis by the process of the requirement to carry out rolling reviews) for the period of 1 January 2021 to 30 June 2021 compared to actual turnover/customer orders between 1 January 2019 to 30 June 2019. A business was only allowed to rely on its projected turnover/customer orders for January to July 2021 against its actual figures for the same period if it commenced operations after 1 May 2019.

49. It was undisputed that the Appellant commenced its operations long before May 2019, and therefore it was not entitled to rely on its actual figures for 2021, but had to compare against its 2019 actuals. The Guidelines produced by the Respondent did provide that *"The 30% reduction in turnover or customer orders may be applied at the level of the entity as a whole or, if an entity is formally structured (and has been since before the COVID-19 pandemic restrictions in March 2020) into individual Business Divisions, at the level of the individual Business Division."* There was no evidence before the Commissioner to suggest that the Appellant was formally structured into individual business divisions, and he did not understand the Appellant to be contending that it was. In any event, the undisputed evidence was that the Appellant commenced [REDACTED] in [REDACTED] which long predated 1 May 2019. The Commissioner is satisfied that there is nothing in the EMPI Act 2020 itself, or in the Guidelines, which permitted the Appellant's approach of comparing its actual and projected figures for 2021, on the basis that it had adopted a new business model, but where its business operations commenced before 2019.
50. In respect of the Appellant's second argument, it claimed that it provided details of both its turnover and number of customer orders when it applied to join the EWSS. The Commissioner notes that no documentary evidence of such details was put before him, and that rather the Appellant's registration details as provided in the Respondent's book of documents makes no reference to either turnover or customer orders.
51. If monthly rolling reviews had been compiled by the Appellant, it would have been possible to ascertain the basis on which the Appellant contemporaneously considered itself eligible to participate in the scheme. However, having already concluded that no such rolling reviews were performed by the Appellant, the Commissioner further concludes that its purported reliance on the number of customer orders was not genuinely contemporaneous, but was rather a *post hoc* attempt to satisfy the Respondent's subsequent compliance intervention. In coming to this view, the Commissioner considers it significant that the Appellant's ERF for July 2021 was compiled on the basis of turnover, and he agrees with counsel for the Respondent's submission that it is reasonable to assume that, if monthly rolling reviews had been performed, they would also have been done on the basis of turnover rather than customer orders.
52. In 28TACD2024, the Commissioner stated that *"there is nothing in section 28B of the EMPI Act 2020 which allows for ... retrospective calculations to be carried out to justify receipt of subsidy payments. Rather, the wording is clearly prospective in nature: "there will occur in the specified period at least a 30 per cent reduction..." Hence the need for*



*projections to be carried out for the specified period, which were then to be compared against the corresponding period to assess eligibility.”* Similarly, he concludes that the Appellant herein was not entitled to seek to retrospectively justify its participation in the EWSS on the basis of numbers of customer orders.

53. In any event, even if the Appellant had justified its continued participation in the EWSS on the basis of a contemporaneous assessment of the number of its customer orders, the Commissioner is not satisfied that it would have been entitled to do so. While section 28B does not specify whether the reduction in customer orders should be in terms of numbers or value, it is clear from recent jurisprudence of the superior courts the words of a statutory provision should be given their ordinary and natural meaning, while being viewed in context; *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43. In circumstances where neither the Appellant’s turnover nor the value of its customer orders suffered a reduction of at least 30%, the Commissioner considers that the attempt to rely on a reduction in the number of customer orders was arbitrary. This was particularly so given the change in the Appellant’s business model, which resulted in less small-value [REDACTED] being placed, so that a comparison between the number of customer orders received by it in 2019 versus 2021 was not a true reflection of how well its business was doing.
54. However, the Appellant did not challenge the Respondent’s contention that the value of customer orders actually increased, from €2.5m in 2019 to €2.7m in 2021. Consequently, the Commissioner does not consider that the Appellant’s attempt to rely on the reduction in number of customer orders received, when both its turnover and the value of its customer orders increased, was in accordance with the statutory scheme provided for in the EMPI Act 2020, and as further detailed in the Respondent’s Guidelines.
55. Having determined that neither of the grounds put forward by the Appellant to seek to justify its eligibility for participating in the EWSS between February and July 2021 can succeed, the Commissioner is satisfied that the appeal cannot be upheld. As well as an increase in the value of customer orders, the Appellant saw an increase in turnover between 2019 and 2021. It did not challenge the Respondent’s calculations that its turnover increased from €2.19m in 2019 to €3.07m in 2021, and its CT returns also showed an increase compared to the pre-pandemic period.
56. The Commissioner accepts that this determination will be disappointing for the Appellant, which is to be commended for its success in [REDACTED] and in providing employment to its local community. However, the Commissioner’s role is limited to interpreting and applying the legislation as enacted by the Guidelines, and he cannot

create exceptions to the statutory regime on the basis that an appellant is particularly deserving, or because it contends that a test based on profitability would be more suitable than that based on turnover/customer orders. Therefore, for the reasons set out herein, the appeal is unsuccessful and the assessments raised by the Respondent are upheld.

### **Determination**

57. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent was correct in raising EWSS assessments in the total amount of €211,453 for February to July 2021. Therefore, the assessments stand.
58. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular sections 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

### **Notification**

59. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

### **Appeal**

60. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.



Simon Noone  
Appeal Commissioner  
23 October 2024