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Guidance on the Coronavirus Job Retention Scheme: what is its legal effect?

Posted on 02 June, 2020 by | Sam Way

It seems that every week since the end of March has been marked by a further update to the government's guidance regarding the Coronavirus Job Retention Scheme (CJRS). The scheme was announced on 20 March 2020 and the first guidance as to how it would operate published on 26 March 2020.

Yet it was a further two and a half weeks later, on 15 April 2020, that the CJRS was placed on a legislative footing, when the Chancellor issued the Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction (Treasury Direction).

Guidance before legislation

Employers acting before 15 April 2020 (as many were required to do) had to decide what to do on the basis of the government guidance, rather than the legislation itself. They were not alone. In both Re Carluccio's Ltd (in administration) [2020] EWHC 886 (Ch) and Debenhams Retail Ltd (in administration) [2020] EWHC 921 (Ch), the High Court was asked to determine the effect of administrators' actions taken under the scheme before the Treasury Direction came into force.

The government has continued with its initial approach of issuing guidance before legislation. Although a further Treasury Direction was issued on 20 May 2020, modifying the CJRS to reflect some of the changes announced before that date, it did not incorporate some of the most fundamental changes to the scheme which had already been announced. The second Treasury Direction, for example, only extended the CJRS to 30 June 2020, despite the Chancellor having announced on 12 May 2020 that the CJRS would remain open until the end of October. Employers therefore must continue to make decisions and plan for the future on the basis of the government's guidance alone, without knowing how new policies will be captured in statute.

Those advising employers may find themselves caught between the ever-changing guidance and apparently inconsistent wording in the Treasury Directions. How might the courts, if called on to determine that dilemma, resolve this conflict?

Status of the guidance

The starting point is, as many commentators have noted, the Treasury Directions are the delegated legislation which form the legal basis of the CJRS. The Treasury Directions themselves constitute the legal basis of the CJRS. However, that does not mean that the guidance is of no legal effect. It is likely to have some effect in the way that the Treasury Directions are interpreted.

Ordinarily, guidance issued by government departments as to the operation of legislation which falls under their purview is given little notice by the courts. The courts are clear that their role is to apply legislation, not the executive's interpretation of that legislation.

Guidance as an aid to statutory interpretation

However, guidance published by government departments is admissible as an aid to that interpretative exercise. In Ellis v Bristol City Council [2007] 1 WLR 1407, at paragraph 27, Lloyd Jones J (as he then was) stated the general rule as follows:

> "It is, of course, for the courts and not the executive to interpret legislation. However, in general, official statements by government departments administering an Act, or by any other authority concerned with an Act, may be taken into account as persuasive authority on the legal meaning of its provisions."

Even if admitted as an external aid to interpretation, government guidance is unlikely to be given any more weight than any other text. It has no special status. The court will respect the view of a government department tasked with implementing legislation, but only insofar as the cogency of the material requires. If the guidance is wrong, the court will not shy from saying so.

Guidance on the CJRS, however, has not been given in normal circumstances. It was published well in advance of the first Treasury Direction, with the clear intention that employers act on the basis of the guidance by placing employees on furlough.

It may be, therefore, that the government guidance is given much greater weight than normal in interpreting the Treasury Directions. Given the exceptional nature of the CJRS, the crisis which it was created to address and the fact that the guidance was published before the first Treasury Direction, it may be better viewed as part of the enacting history of the scheme, as opposed to departmental guidance interpreting existing legislation.

Material which forms part of the enacting history of legislation can, for example, be admitted as evidence of the mischief at which legislation was aimed. In Fothergill v Monarch Airlines Ltd [1981] AC 251, Lord Diplock noted that a report of "some official commission or committee … may be looked at by the court for the limited purpose of identifying the 'mischief' that the Act was intended to remedy, and for such assistance as is derivable from this knowledge in giving the right purposive construction to the Act."

In these circumstances, the courts take notice of the material as evidence of the "mischief" that the legislation aims to address, which the courts then apply in the course of an ordinary, purposive construction of the statute in question.

Such an approach may be attractive given the exceptional purpose of the CJRS. The mischief at which the legislation is aimed is complex and may be difficult to discern from the Treasury Directions themselves, and the scheme is therefore potentially open to abuse. This is reflected in the Treasury Directions, which contains a general prohibition against claims which are "abusive or … otherwise contrary to the exceptional purpose of CJRS" (paragraph 2.5).

As the CJRS is again extended until the end of October, there are likely to be fundamental changes to the operation of the scheme to allow furloughed employees to return to work part-time. Further complications, and the rapid timescale in which they must be implemented, may give rise to more instances of divergence between the guidance and the Treasury Directions. However, where the language of these documents varies, we may see the courts go to great lengths to find an interpretation which brings the two together.

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