AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between

67TACD2024

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by [redacted] ("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 September, October, and December 2020 and for May to November 2021 in the total amount of €57,376.50.

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 expected 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.

3. The appeal proceeded by way of a hearing on 8 March 2024.

Background

4. 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.

5. On 20 February 2023, the Respondent raised assessments in the following amounts against the Appellant, on the basis that it had not abided by the terms of the EWSS:

Period of Assessment	**Amount €**
September 2020	2890.50
October 2020	3636.00
December 2020	5350.00
May 2021	4100.00
June 2021	6000.00
July 2021	7850.00
August 2021	6300.00
September 2021	6950.00
October 2021	7600.00
November 2021	6700.00
Total	**57,376.50**

6. On 21 March 2023, the Appellant appealed against the assessments to the Commission. An oral hearing was held on 8 March 2024.

Legislation and Guidelines

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

> *"(1)… 'qualifying period' means the period commencing on 1 July 2020 and expiring on 31 March 2021 or on such later day than 31 March 2021 as the Minister may specify…*
>
> *(2) Subject to subsections (4) and (5), this section shall apply to an employer 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 July 2020 to 31 December 2020 (in this subsection referred to as 'the 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 July 2019 to 31 December 2019 (in this subsection referred to as 'the corresponding period'),*
>
> *(II) in the case where the business of the employer has not operated for the whole of the corresponding period but the commencement of that business's operation occurred no later than 1 November 2019, there will occur in the part of the specified period, which corresponds to the part of the 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 corresponding period, or*
>
> *(III) in the case where the commencement of the operation of the employer's business occurred after 1 November 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 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,

or

(ii) the employer's name is entered in the register established and maintained under section 58C of the Child Care Act 1991,

and

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

(3) The conditions referred to in subsection (2)(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), 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) 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), 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).”

8. 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 January 2021, the relevant specified period was 1 January 2021 to 30 June 2021 and the corresponding period was 1 January 2019 to 30 June 2019, and the relevant commencement date for a business was 1 May 2019 (section 28B(2A)). 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, and the relevant commencement date for a business reverted to 1 November 2019 (section 28B(2B)).

9. 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.*”

10. In respect of the “rolling reviews” mandated by section 28B(5) of the EMPI Act 2020, the Guidelines (1 November 2021 version) stated that

“*Employers must undertake a review of the six month period 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…as illustrated below:

Paydates in January to June 2021			
Date review is undertaken	Total of Column A & B equals 2021 figure		2019 Comparative period
	Actual results (A)	Projections (B)	
31 December 2020	N/A	January to June 2021	Actual results for period January to June 2019
31 January 2021	January 2021	February to June 2021	
28 February 2021	January & February 2021	March to June 2021	
31 March 2021	January to March 2021	April to June 2021	
30 April 2021	January to April 2021	May and June 2021	
31 May 2021	January to May 2021	June 2021	

Paydates in 2020			
Date review is undertaken	Total of Column A & B equals 2020 figure		2019 Comparative period
	Actual results (A)	Projections (B)	
31 August 2020	July & August 2020	September to December 2020	Actual results for the period July to December 2019
30 September 2020	July, August & September 2020	October, November & December 2020	
31 October 2020	July to October 2020	November & December 2020	
30 November 2020	July to November 2020	December 2020	

If an employer no longer qualifies, they must deregister for EWSS through "Manage Tax Registration" on ROS with effect from the following day (that being the 1st of the month) and cease claiming the subsidy…

If an employer becomes aware prior to the end of the month that they will no longer meet the eligibility criteria (e.g. unexpected donation or grant received at the start of a month), they should deregister immediately and cease to claim subsidies.

Subsidies correctly claimed in accordance with the terms and conditions of the scheme prior to deregistration will not be repayable…"

Evidence

[redacted]

11. [redacted] ("the witness") was a 50% shareholder and director of the Appellant, together with [redacted]. She stated that, prior to the incorporation of the Appellant, she had owned and managed a hairdressing business with [redacted] as a partnership ("the partnership"): "[redacted]. [redacted], [redacted]

[redacted].

12. They incorporated the business in [redacted] and re-opened in a larger premises in [redacted]: "[redacted]." The new salon was much bigger than the previous one which created opportunities to expand the business: "*the plan was to rent out chairs for makeup artists that could coincide with our wedding parties. I could actually offer private wedding consultations because I had the space*." They upskilled to enable them to provide services to a younger clientele. [redacted].

13. While they had planned to lease out chairs in the new salon, it transpired that the lease precluded this. The witness confirmed that [redacted] people had worked in the partnership; [redacted] and that all [redacted] transferred to the Appellant. She confirmed that the trading name of the business remained the same, [redacted] This was to keep name-recognition for their older clients. The telephone number also remained the same when they moved premises, as did the social media page.

14. On cross examination, the witness stated that she did not know if the Respondent had been notified of payments to [redacted] prior to 21 July 2020: "*I've no idea. That's why I have an accountant. That's not my forte*." She stated that, when registering for EWSS, the Appellant created projections with its accountant, but stated that she did not have a copy. She also stated that the Appellant performed monthly rolling reviews "*verbally"* with its accountant. On further questioning, she agreed that she did not complete monthly rolling reviews, which she stated she left to the accountant: "*I'm sure [the accountant] got them and I left it to him to deal with them. I know it falls on me, but I honestly left [the accountant] to deal with it at the time. I didn't deal with it*."

15. The witness was asked to explain why the Appellant's accountant had provided different projection figures in correspondence with the Respondent:

> "*I'd say because the reality was we expected it to be between five and eight and it wasn't…As I said, the expectation was there but the reality, it wasn't…I think really the reality and the snowball effect from Covid because everything in costs went up so high after, it was after Covid. Like, Covid was dealing with one lot of problems and all that fear, but the reality of going back into business and starting again each time, everything went up, like stock went up a hundred percent. Everything went up. Costs rose but the revenue wasn't coming in. Would that not explain the difference between five and four?*

Q. No?

A. Okay. I don't know then the answer to that then really."

16. The witness agreed that the Appellant was effectively a continuation of the business previously carried on as the partnership: "*Yeah, it's still hairdressing*." However, she contended that the business had "*improved*" and there had been a "*change of direction…it was a total, total new venture…*" They had "*planned to earn a whole lot more and because of the pandemic we were shut down, we couldn't*." On re-examination, the witness stated that the Appellant currently took in roughly €3,500 - €4,000 per week. She stated that the Appellant gained new clients following its incorporation and move to a bigger premises.

Submissions

Appellant

17. In written submissions, the Appellant's agent stated that:

> "*Prior to* [redacted] *our client traded as a Partnership, with two partners* [redacted] *being entitled to 50% of the profits each. On* [redacted] *the decision was made to incorporate* [redacted] *as a direct result of the progression of trade and the potential introduction of a new revenue streams.*
>
> *Our client moved premises to* [redacted]*. The new premises was double the size of the old premises and had an estimated projected turnover of €4,000 per week as opposed to circa €2,500 per week.*
>
> *The new premises had capacity to generate rental income from the renting of "chairs" by self-employed individuals offering hair, beauty and cosmetic services. We understand this is common practice within the industry, however the previous premises could not facilitate due to size. The change in premises also allowed for the expansion of services into other markets for example on site events, specialised treatments and potential retail contracts with leading salon product providers, ultimately transforming the nature of the business from that of an unknown hairdressers' offering basic services to that of a creative salon*."

18. As a result, the Appellant submitted that, in effect, it commenced trade on [redacted] and that it was therefore necessary to compare turnover figures for the relevant qualified periods with projected figures rather than the 2019 comparative periods, i.e.

applying section 28B(2)(a)(i)(III) of the EMPI Act 2020. Applying these criteria, the Appellant suffered a reduction in turnover of 32%, 66% and 39% for the relevant periods.

19. The Appellant's agent stated that substantial changes had been made to the Appellant's business. It had changed from a partnership where the partners were charged income tax at the marginal rate to a company that paid corporation tax. The Appellant was obliged to comply with company law and file financial statements, which it had not had to do previously. The customer base of the business also changed from that of an older clientele requiring basic hair care to that of a younger, more diverse clientele requiring more complex and advanced techniques. The Appellant's agent submitted that *O'Loan, Inspector of Taxes v MJ Noone* [1949] IR 171, *Gordon & Blair Ltd v IRC* 40 TC 358 and *Cronin v Lunham Brothers Ltd* III ITR 363 supported the Appellant's contention that it should be treated as a new business for the purposes of EWSS.

20. In oral submissions, the Appellant's agent contended that the Appellant should be classed as a new business as it performed a lot of additional activities when it moved to its new location. It added [redacted] and gained new suppliers. Its clientele had become younger which required more complex and advanced techniques. It had gone from being a partnership liable to income tax to a company paying corporation tax and subject to company law.

21. In response to questions from the Commissioner, the agent confirmed that he was part of the same firm that had acted for the Appellant during its participation in the EWSS. He stated that he was not aware of any document submitted to the Respondent showing the Appellant's workings demonstrating that there had been a reduction of at least 30% between its projections and its turnover.

Respondent

22. In written submissions, the Respondent stated that the Appellant had failed to provide evidence that it had carried out rolling reviews during its participation in the EWSS, notwithstanding repeated requests from the Respondent to provide such evidence before the assessments were raised. While the Respondent had introduced Eligibility Review Forms ("ERFs") for pay periods from July 2021, the Appellant did not submit any ERFs as it selected the "new business" indicator.

23. It stated that the Appellant had failed to demonstrate that it was a new business such that the provisions of section 28B(2)(a)(i)(III) should be applied. Even if the Appellant satisfied the Commissioner that it was a new business, "*the basis for the Appellant's projections remains wholly opaque.*"

24. Furthermore, EWSS payments in the combined total of €26,642 were received in respect of the Appellant's two proprietary directors. The EMPI Act 2020 specifically excludes proprietary directors from the definition of 'qualifying employees' save for specific exceptions. In this instance, as payroll notifications were not submitted in accordance with Regulation 10 of the Income Tax (Employments) Regulations 2018, the two directors did not qualify for EWSS payments.

25. In oral submissions, counsel for the Respondent referred to the following provision of the Guidelines:

> "*The eligibility period to be reviewed for comparative purposes relates to the trade or the business, rather than the operating entity. For example, if a sole trader incorporates a business on 1 January 2021, the comparative review period for the newly incorporated company will be 2019 sole trader turnover*."

26. Counsel submitted that this was exactly the situation that existed in this appeal. The evidence demonstrated a continuation of trade between the partnership and the Appellant. This was confirmed in correspondence between the Appellant's agent and the Respondent. The ability of the Appellant to provide additional services over and above what was provided by the partnership was not in any way sufficient to prove it was a new trade. There was, at best, an expansion of the trade. Even if it was a new business, the Appellant had provided no documentation to justify its projections.

27. Furthermore, the clear inference from the evidence was that no rolling reviews were performed, which in itself was fatal to the appeal. The Commissioner only needed to consider the objection regarding the payments to the proprietary directors if he did not agree with the Respondent on the other two points.

Material Facts

28. 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:

    28.1. The Appellant is a business providing the service of hairdressing. It was incorporated on [redacted] and registered for corporation tax on [redacted]

    28.2. The two proprietary directors of the Appellant are [redacted] Prior to the incorporation of the Appellant, the proprietary directors carried on the business of hairdressing as a partnership ("the partnership").

28.3. The Appellant carried on its business from a premises on [redacted]. Prior to that, the business of the Appellant, and previously the partnership, had been carried on from a premises on [redacted] The Appellant's new premises was larger than the previous premises and allowed it to provide additional hairdressing services.

28.4. The trading name of the Appellant remained the same as the name of the partnership, [redacted]. The Appellant also retained the partnership's telephone number and social media page.

28.5. [redacted] transferred over to the Appellant and continued to work with it.

28.6. While the Appellant's business expanded after it moved to its larger premises, the business of the Appellant, and the partnership before that, remained as hairdressing.

28.7. The Appellant participated in the EWSS and received payments for the months of September, October and December 2020, and May to November 2021, in the total amount of €57,376.50.

28.8. The Appellant did not carry out rolling reviews during its participation in the EWSS.

28.9. Comparing the Appellant's turnover during the relevant specified periods against the relevant corresponding periods, it experienced an increase of 72% in turnover for July to December 2020, a decrease of 12% in turnover for January to June 2021 and an increase of 56% for July to December 2021. Consequently, the Appellant did not suffer a 30% decrease in turnover during any of the relevant specified periods.

28.10. The projections supplied by the Appellant, via its agent, to the Respondent changed over time. There was no analysis provided to the Respondent explaining or justifying the projections, or demonstrating that the Appellant had suffered a 30%+ decrease in turnover as compared against the projections.

28.11. The EWSS payments made to the Appellant included payments totalling €26,642 in respect of the two proprietary directors. The Appellant's proprietary directors had been on the company's payroll between 1 July 2019 and 30 June 2020; however, the Appellant did not notify the Respondent of this until 21 July 2020.

Analysis

29. The burden of proof in this appeal rests on the Appellant, who must show that the Respondent was incorrect to raise assessments in the total amount of €57,376.50 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.*"

30. 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.

31. However, where the business did not commence operating until after 1 November 2019, for claims during 2020 and from July 2021 onwards, or until after 1 May 2019, for claims from January to June 2021, the business was entitled to compare its actual turnover against its projected turnover as if there had been no disruption as a result of the pandemic. If the comparison showed a reduction of at least 30%, the business was entitled to EWSS payments. It is on this basis that the Appellant claims it was entitled to the payments received by it.

32. The Respondent objected to the Appellant's contended entitlement to EWSS payments on a number of separate grounds, which will be considered in turn.

Requirement to carry out rolling reviews

33. 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*".

34. There was no evidence submitted to show that the Appellant carried out any rolling reviews while it participated in the EWSS. The Appellant's witness confirmed that she did not perform any such reviews and stated that she left such matters to her accountants. The Appellant's accountants, who also represented her at the hearing, did not submit any evidence that rolling reviews had been performed, and the matter was not addressed by the Appellant's agent at the hearing. In its submissions, the Respondent set out what it stated were repeated instances of requests from it to the Appellant to provide rolling reviews, which it stated were not complied with by the Appellant. It furthermore stated that the Appellant did not submit ERFs as of July 2021 as it selected the "new business" indicator. In the circumstances, the Commissioner finds as a matter of fact that no rolling reviews were carried out by the Appellant during its participation in the EWSS.

35. The necessity of carrying out rolling reviews has been considered by the Commissioner in previous determinations concerning EWSS[1]. 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.*"

36. As it is found that the Appellant did not carry out rolling reviews, 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 payments and it is determined that the Respondent was correct to require repayment of the EWSS payments made to the Appellant.

37. While this is determinative of the appeal, the Commissioner will address the other matters that arose at the hearing.

Whether the Appellant was a 'new' business

38. It seemed to the Commissioner that the entirety of the Appellant's case as argued before him was that the Appellant had commenced business after [redacted] and thus was entitled to rely on projected turnover rather than a comparison with the relevant

[1] 83TACD2023; 28TACD2024.

corresponding period in 2019. In support of its contention that it should be treated as a new business, it highlighted that: (1) It ceased trading as a partnership and was incorporated as of [redacted] (2) It registered for corporation tax and VAT as of [redacted] (3) It moved premises in [redacted], from the smaller premises [redacted] which enabled it to provide additional services to its customers, including private clients; and (4) It attracted a younger clientele with more complex hairdressing requirements, which necessitated upskilling by the Appellant's staff.

39. The Respondent submitted that the Guidelines provided that the eligibility period to be reviewed for comparative purposes related to the trade or business, as opposed to the operating entity. The fact that the Appellant incorporated in [redacted] did not affect its trade of hair-dressing, which remained essentially the same. While it had expanded, the trade had not changed.

40. The Commissioner has considered the Guidelines and agrees with the Respondent that they discuss commencement of the "trade" or the "business" after May/November 2019 (as appropriate) with respect to comparison against projected turnover. While section 28B(2/2A/2B)(a)(i)(III) of the EMPI Act 2020 refers to the *"commencement of the operation of the employer's business*", the Commissioner also notes that section 28B(20) mandated the Respondent to prepare the Guidelines, and therefore he considers that it is appropriate to interpret *"commencement of the operation of the employer's business*" in light of the Guidelines. Consequently, he accepts the submission of the Respondent that the question to be determined is whether the Appellant commenced its trade after May/November 2019, not whether the legal status of its operating entity changed.

41. On that basis, the Commissioner is not satisfied that the Appellant has demonstrated that its trade changed in [redacted] or at an earlier date in [redacted], which would have entitled it to utilise projected rather than actual turnover. The Commissioner considers that the evidence demonstrates that the Appellant's business expanded when it moved to its new premises and took on new customers, but that the basic trade of hair-dressing remained the same. [redacted] "[redacted] *."* The Commissioner considers that this strongly suggests that the Appellant's trade remained the same, notwithstanding its change of location and legal status. Furthermore, the Commissioner notes that [redacted].

42. Furthermore, the Commissioner notes the contents of an email from the Appellant's accountant to the Respondent dated 14 July 2022, wherein the accountant stated, "*While the company is a new company it is effectively a continuation of the business previously carried on as a partnership.*" While that was provided to the Respondent in the context of the Appellant's claim that it was entitled to claim EWSS payments for its proprietary directors (see below), the Commissioner considers it an accurate summation of the evidence before him regarding whether or not the Appellant should be treated as a "new" business.

43. In coming to this view, the Commissioner does not consider that the case law relied upon by the Appellant supports its contention that it should be treated as a new business. In *O'Loan, Inspector of Taxes v MJ Noone*, the respondent changed its business from fuel merchants to coal mining, and thus was considered a "new business". The Commissioner is satisfied that there was no equivalent or similar change in the Appellant's business in this appeal. In *Gordon & Blair Ltd v IRC*, the appellant changed its business from brewing beer to selling bottled beer brewed by another company. This was held to be a new business, but again the Commissioner considers that this was materially different to the situation pertaining in this appeal. Finally, in *Cronin v Lunham Brothers Ltd*, the court found that there was no permanent cessation, or major change in the nature of trade where a factory closed but the machinery and plant were maintained in working order. In this instance, the Commissioner is satisfied that there was no cessation of trade, but that the Appellant's trade continued, albeit with a different corporate structure and in a different location.

44. Therefore, the Commissioner determines that, as the Appellant was not a new business from May/November 2019, it was not entitled to rely on section 28(2/2A/2B)(a)(i)(III) of the EMPI Act 2020, but should have applied the turnover test by reference to the specified periods and corresponding periods as set out in section 28(2/2A/2B)(a)(i)(I). In the Respondent's submissions, it stated that, on that basis, the Appellant incurred: an increase of 72% in turnover for July to December 2020; a decrease of 12% in turnover for January to June 2021; and an increase of 56% for July to December 2021. Consequently, the Respondent submitted that the Appellant did not suffer a 30% decrease in turnover during any of the relevant specified periods, and therefore was not entitled to EWSS payments.

45. The Appellant did not challenge these figures submitted by the Respondent, as it contended that it was entitled to compare its turnover on the basis that it was a new business. As the Commissioner has not accepted that argument, and as the

Respondent's figures based on the correct test have not been challenged by the Appellant, the Commissioner finds that the Respondent was correct to disentitle the Appellant to the EWSS payments received.

46. Furthermore, even if the Commissioner was satisfied that the Appellant was a new business for the purposes of the EMPI Act 2020 and the Guidelines, he would still not be satisfied that it had discharged the burden of demonstrating that the Respondent's assessments were incorrect. This is because the Commissioner agrees with the Respondent that the basis for the Appellant's projections was "*wholly opaque*".

47. Firstly, the Commissioner notes that the projections supplied by the Appellant to the Respondent changed over time. On 1 February 2022, the Appellant's agent stated that, "*Projected turnover in the business under normal trading conditions is between €5k and €8k per week including VAT."* On 22 April 2022, the agent stated that "*The average weekly turnover in 2019 was €1,570 per week however the directors were expected to increase turnover to €4,000 per week as a result of the relocation to larger premises.*" On 15 August 2022, the agent stated that "*The directors were projecting average weekly turnover of €3,500 to €4,000 per week prior to the pandemic lockdowns.*" While the Appellant's witness did seek to address these discrepancies in her evidence, the Commissioner is satisfied that no meaningful explanation was provided as to why three different projections were provided during the course of correspondence with the Respondent.

48. Secondly, the Commissioner considers that the projections provided to the Respondent were bare figures with no explanation or justification supporting them. The Commissioner considers that it would be necessary for a participant in the EWSS utilising projected turnover to demonstrate that its projections were reasonable and justifiable. Furthermore, there was no analysis provided to the Respondent, or the Commission, to show that, even on the projections utilised by the Appellant, it was entitled to the EWSS payments on the basis of a reduction in turnover of at least 30%. In all the circumstances, the Commissioner considers that the Appellant would not have met the burden of proof in respect of the projections applied by it, even if it had been found that it was entitled to be considered a new business for the purposes of the EWSS.

Payments to proprietary directors

49. The third major objection raised by the Respondent was the payment of €26,642 to the Appellant's two proprietary directors. The Respondent stated that the Appellant had not provided the requisite notification to permit the payment of EWSS subsidies to its proprietary directors.

50. As of 1 September 2020, section 28B(1) provided*, inter alia*, that

> "'*qualifying employee', in relation to an employer, means, subject to subsections (1A) and (1B) -*
>
> *(a) an individual, who, in relation to the employer is or was a specified employee for the purposes of section 28, or*
>
> *(b) any other individual who is on the payroll of the employer at any time in the qualifying period and receives in that period a payment of emoluments from the employer, but does not include -*
>
> *(i) in the case where the employer is a company, any individual who is a proprietary director of the company, and*
>
> *(ii) any individual who is connected with the employer,*
>
> *other than in a case in which that individual had been on the payroll of the employer at any time in the period from 1 July 2019 to 30 June 2020 and had received in that period a payment of emoluments from the employer and the employer has submitted to the Revenue Commissioners in that period a notification of the payment of the emoluments in accordance with Regulation 10 of the Regulations…"*

51. The "Regulations" were the Income Tax (Employments) Regulations 2018 (SI 345/2018). Regulation 10 states *inter alia* that

> "*(1) On or before the making of any payment of emoluments to an employee, an employer shall send a notification containing the following information relating to the payment of such emoluments to the Revenue Commissioners-*
>
> *(a) the date of the payment of the emoluments,*
>
> *(b) the normal pay frequency of the employee,*
>
> (c) *the personal public service number of the employee…*"

52. The Respondent stated that the Appellant did not submit any payroll notifications for 2019. For 2020, the first payroll notifications were submitted on 21 July 2020, which included emoluments to the two directors for the pay period February/March 2020. However, no notification was submitted in accordance with Regulation 10, as the Appellant did not notify the Respondent "*on or before the making of any payment of emoluments*" to the directors prior to 30 June 2020.

53. The Commissioner did not understand the Appellant to substantively dispute the Respondent's arguments at the hearing. In her evidence, the witness stated that she did not know if the Respondent had been notified prior to 21 July 2020. In correspondence dated 14 July 2022, the Appellant's agent stated that "*The directors were included on the payroll of the company for Month 2 and Month 3 of 2020…We understand the wages were reported to [the Respondent] for the pay periods above between the period 1 July 2019 and 30 June 2020.*"

54. The Commissioner does not consider that the above correspondence refutes the Respondent's position that the payments to the directors were first notified to the Respondent on 21 July 2020, and he finds as a fact that the first payroll notifications regarding the proprietary directors were submitted to the Respondent on that date.

55. Accordingly, it is determined that the Appellant's two proprietary directors were not entitled to receive EWSS payments. This is because the EMPI Act 2020 excluded proprietary directors from the definition of "qualifying employee" subject to the exception where a proprietary director had been on the payroll at any time from 1 July 2019 to 30 June 2020 and the employer had submitted a notification to the Respondent in accordance with Regulation 10. The Appellant's proprietary directors had been on the company's payroll during the relevant period; however, the Appellant had not notified the Respondent in accordance with Regulation 10, as the notification was not made "*on or before the making of any payment of emoluments*" but was made on 21 July 2020, which was outside of the relevant period.

Conclusion

56. In summary, the Commissioner concludes that the Appellant was not entitled to the entirety of the EWSS payments received by it because both (1) it did not carry out rolling reviews during its participation in the Scheme, and (2) it did not qualify as a "new" business and therefore was obliged to compare its turnover against the relevant corresponding periods during 2019 rather than against projections, and on that basis did not suffer a 30%+ reduction in turnover during any of the relevant specified periods. Furthermore, the Commissioner concludes that the Appellant's proprietary directors did not qualify for the portion of EWSS payments made by the Respondent in respect of them.

57. The Commissioner appreciates that this determination will be disappointing to the Appellant, and he considers that its directors were genuine in their belief that the Appellant was entitled to receive EWSS payments. However, the Respondent, and the Commissioner on appeal, are obliged to apply the legislation as enacted by the Oireachtas, and for the reasons set out herein, the Commissioner is satisfied that the

Appellant did not qualify for the EWSS payments received by it. Therefore, its appeal is unsuccessful.

Determination

58. 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 €57,376.50 for September, October and December 2020 and May to November 2021. Therefore, the assessments stand.

59. 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

60. 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

61. 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
05 April 2024