FRAUD UNDER THE FURLOUGH SCHEME

On the 20 March 2020, the UK Government's Chancellor, Rishi Sunak announced a number of measures to help employees and businesses through the COVID-19 pandemic crisis: one of them was the Coronovirus Job Retention Scheme ("CJRS"). As billions of pounds is paid in grants to companies, the temptation to exaggerate claims, lie, cheat or just make fraudulently claims will occur. New loopholes and opportunities for fraud have emerged. HMRC is aware of this and have even set up a specialized whistleblower line. **Yasin Patel** and **Amy Hazlewood** explore the scheme and the potential criminal offences for anyone found to have made fraudulent claims under the CJRS.

Furlough Scheme: what is it?

The furlough scheme has been set up so businesses and employers can apply to Her Majesty's Revenue and Customs ("HMRC") for a grant to cover 80% of their employee's wages (up to a total of £2,500). Rather than being dismissed, employees are put on furlough and kept on the payroll. Thus the employee is on an "enforced leave".

The scheme opened for applications on 20 April 2020 (although it will cover backdated wages from 1 March 2020) and remains in place until the end of June 2020, but may be extended if necessary. The take-up of the scheme is extraordinary. HMRC has said that by the 3 May 2020, a total of 6.3 million jobs had been temporarily laid off by 800,000 companies with claims amounting to £8 billion. 23% of the 27.9 million employees who were employed in mid-March have now been furloughed[1].

As the Government looks to find a way to roll back it's furlough scheme, efforts to claw back some of the money wrongfully and/or illegally claimed will soon be stepped up.

HMRC has said that any fraudulent claims made under the scheme are likely to result in criminal convictions. Its chief executive Jim Harra, told the Treasury

[1] The Guardian – 4 May 2020

select committee on 8 April 2020 that he expected it to be targeted by fraudsters stating,

"*we are going to be paying out a vast sum of money in a rapid period of time. Any scheme like this is a target for organised crime. Any scheme that pays out I'm afraid attracts criminals that want to defraud it and people that are genuinely entitled to it who inflate their claims*"[2].

Examples of fraudulent claims that could be made under the scheme include:

1. Where an employer places an employee on furlough, but instructs an employee to provide work or services that generate an income for them.

2. Where an employer allows an individual not usually employed by them to be classed as an employee in order for that employer to access funds from the furlough scheme that they would otherwise not be entitled to.

3. Where a company presents false information to HMRC in order to gain access to the funds available through the furlough scheme.

Charges

This article assesses three possible charges the Crown Prosecution Service ("CPS") may bring against those who are suspected of wrongfully claiming furlough funding:

1. General offence of Fraud and/or Theft;

2. Failing to Prevent Tax Evasion – this is a corporate criminal offence aimed at employees or associated persons who facilitate tax evasion;

3. Cheating the Public Revenue – this offence is targeted at individuals who defraud HMRC.

[2] https://parliamentlive.tv/Event/Index/041436b2-2558-4b82-80a7-9fbd7d24c533

1. General Offence of Fraud/ Theft

The Fraud Act 2006 ("the Act") provides for a general offence of fraud with three ways of committing it:

i. by false representation,

ii. by failing to disclose information, and

iii. by abuse of position.

It is an offence to commit fraud by false representation[3]. The representation must be made dishonestly[4]. This test applies also to sections 3 and 4 of the Act. The current definition of dishonesty was established in *Ivey (Appellant) v Genting Casinos*[5] replacing the 2 stage *Ghosh*[6] test with the purely objective test: would the act conducted be one an ordinary, reasonable person consider to be dishonest?

The prosecution must also show that the person makes the representation with the intention of making a gain or causing loss or risk of loss to another[7]. The gain or loss does not actually have to take place. The same requirement applies to conduct criminalised by sections 3 and 4 of the Act.

Directors, for example, who have made a false claim under the CJRS may breach section 2 of the Act, pertaining to fraud by false representation. Directors of companies, if found guilty, may be subject to a fine, community order and/or imprisonment depending on the severity of their fraudulent conduct. A conviction may also lead to possible director disqualification proceedings on the grounds of unfitness.

The Act also makes it an offence to commit fraud by failing to disclose information to another person where there is a legal duty to disclose the information. This may apply to furlough applications that deliberately omit

[3] The Fraud Act 2006 s.2
[4] The Fraud Act 2006 s.1(a)
[5] [2017] UKSC 67
[6] R v Ghosh [1982] 2 All ER 689
[7] The Fraud Act 2006 s.1(b)

information that would otherwise be material to the assessment in receiving the funds.

The maximum custodial sentence of 10 years is the same as for the main existing deception offences and for the common law crime of conspiracy to defraud[8]. Ultimately, it is those sentencing guidelines that would be used to sentence any person found guilty of this offence.

2. Failing to Prevent Tax Evasion

Pursuant to the Criminal Finances Act 2017, it is a corporate criminal offence if a business fails to prevent its employees or any person associated with it from facilitating tax evasion[9]. This is a strict liability offence. This means that the intent on the company's part does not have to be proved in order to obtain a conviction. The only thing that has to be proved is that that there has been criminal tax evasion that has been facilitated by a person or entity who performed services for or on behalf of the business.

However, a business cannot be criminally liable for failing to prevent the facilitation of tax evasion if the facilitator was acting in a personal capacity[10].

Furthermore, the offence cannot be made out if a person makes a mistake or is careless. It must be proved that the facilitator *knows* that they are committing the offence[11]. Unwittingly facilitating the commission of the offence would not be enough.

A business will also have a defence if it can prove:

i. That it had put in place reasonable prevention procedures to prevent the facilitation of tax evasion taking place[12], or

[8] The Fraud Act 2006 s.3
[9] http://www.legislation.gov.uk/ukpga/2017/22/part/3/enacted s.45(1)
[10] http://www.legislation.gov.uk/ukpga/2017/22/part/3/enacted s.45(2)
[11] http://www.legislation.gov.uk/ukpga/2017/22/part/3/enacted s.45 (5)(a)
[12] https://www.gov.uk/government/publications/corporate-offences-for-failing-to-prevent-criminal-facilitation-of-tax-evasion s.45 (2)(a)

ii. That it was not reasonable in the circumstances to expect there to be procedures in place[13].

HMRC Guidance

To this end, HMRC have published guidance that outlines six guiding principles of the process and procedures that businesses can put in place to limit the risk of representatives criminally facilitating tax evasion[14]:

i. Risk assessment

ii. Proportionality of procedures

iii. Top level commitment

iv. Due diligence

v. Communication and training

vi. Monitoring and review

The extent to which these measures have to be in place during the COVID-19 pandemic will be a matter for the courts and are likely to be considered on a case by case basis. Difficult questions for the courts lie ahead when presented with these statutory defences. What allowances, if any, will be given to the "reasonable prevention procedures" required to be put in place to prevent the facilitation of tax evasion taking place during the COVID-19 pandemic. Can it be reasonable in the circumstances to expect there to be procedures in place, or will courts expect them to already be in place given that the legislative requirements, and HMRC guidance have been in place since 2017?

The successful prosecution of this offence could lead to a significant fine[15]. Confiscation must also be considered if either the Crown asks for it or the court

[13] https://www.gov.uk/government/publications/corporate-offences-for-failing-to-prevent-criminal-facilitation-of-tax-evasion s.45(2)(b)
[14] https://www.gov.uk/government/publications/corporate-offences-for-failing-to-prevent-criminal-facilitation-of-tax-evasion
[15] http://www.legislation.gov.uk/ukpga/2017/22/part/3/enacted s.45(8)

thinks that it may be appropriate[16], but perhaps most detrimental to those convicted will be the reputational damage.

3. Cheating the Public Revenue

It is a common law offence to defraud or '*cheat*' the general public. Cheating the public revenue requires the prosecution to show that the defendant has made a false statement with the intention of defrauding HMRC[17].

The offence is often used to charge individuals who use tax arrangements to avoid paying tax to HMRC. However, as nothing is noted in statute, it could be the preferred charge used by the CPS to charge individuals who they suspect to have used the furlough arrangements to defraud HMRC.

What matters in all fraud cases is whether you were behaving dishonesty (The Ghosh test), and intended to cause a loss to HMRC. The Court of Appeal held in *R v Godir* [2018][18] that recklessness was not sufficient to convict someone of this offence although wilful blindness as distinct from recklessness could be sufficient grounds to convict.

Deception, however is not necessary in order to commit the offence. In *R v Mavji*[19] the court held that cheating did not necessarily require a false representation, either by words or conduct but could include any form of fraudulent conduct which resulted in diverting money from the Inland Revenue and depriving it of money to which it was entitled.

In this particular case the defendant had a statutory duty to make VAT returns and to pay the VAT due but had dishonestly failed to do either and no further act or omission were required to be alleged or proved in order to establish the offence of cheating the revenue.

To this end, this case indicates that an individual's failure to submit information pertaining to their financial circumstances when applying to the furlough scheme could amount to an offence.

[16] Proceeds of Crime Act 2002, s.6
[17] R v Hudson [1956] 2 QB 252
[18] EWCA Crim 2294
[19] (1987) 84 Cr App Rep 34 and approved in R v Redford (1989) 89 Cr App Rep 1.

The maximum sentence is life imprisonment, and/or unlimited fine as cheating the public revenue is a common law offence. However, following the case of *Goldstein and Rimmington*[20] it is clear that statutory offences should be charged where applicable.

Conclusion

Inevitably, as with any large grants scheme or project, corruption, fraud or even basic errors through ignorance and misunderstanding will follow. The same is to be expected under the CJRS Scheme. Employers, directors and shareholders, large and small companies, may be investigated and ultimately charged with the offences outlined above: avoiding being charged is one key factor and should be top of any person's list: failing that, defending the charge(s) will be the next goal. Quality representation and advice should be the priorities of all such personnel.

If you are seeking further legal advice in connection to fraud or associated charges contact Yasin Patel (y.patel@churchcourtchambers.co.uk) and/or Amy Hazlewood (a.hazlewood@churchcourtchambers.co.uk).

[20] [2006] 1 AC 459.