

Content: MDCM Ltd versus HMRC – What would CEST say?

Date: 26th March 2018

Prepared for: ContractorCalculator readers

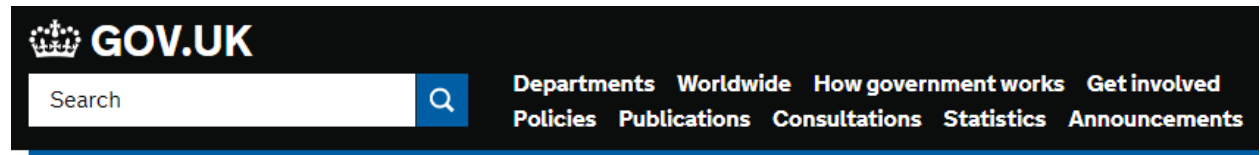
IR35 Case: MDCM Ltd versus HMRC – What Does CEST say?

Legal decision:

<http://www.bailii.org/uk/cases/UKFTT/TC/2018/TC06400.html>

CEST:

<https://www.gov.uk/guidance/check-employment-status-for-tax>



The screenshot shows the GOV.UK website header. On the left is the GOV.UK logo with a crown icon. Next to it is a search bar with the word "Search" and a magnifying glass icon. To the right of the search bar is a navigation menu with the following items: Departments, Worldwide, How government works, Get involved, Policies, Publications, Consultations, Statistics, and Announcements.

[Home](#) > [Business tax](#) > [IR35: working through an intermediary](#)

Guidance

Check employment status for tax

Use this service to find out if you, or a worker on a specific engagement, should be classed as employed or self-employed for tax purposes.

So, let's get started:

<https://www.tax.service.gov.uk/check-employment-status-for-tax/setup>

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Question 1:

About the people involved

Which of these describes you best?

The end client is the public body, corporation or business that the worker is providing services to.

- The worker
- The end client
- The agency paying the worker
- None of the above

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We chose “The Worker”. We are running this as if Mr Daniels is trying to assess his position for tax purposes.

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Question 2:

About the people involved

Has the worker already started this particular engagement for the end client?

Yes No

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He has actually finished it, but we will chose Yes.

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Question 3:

About the people involved

How does the worker provide their services to the end client?

- As a limited company
- As a partnership
- Through another individual (not an agency)
- As a sole trader

Continue

Point 8 from the judgement:

8. *The appellant is a company of which Mr Daniels and his wife are the directors and employees. The appellant's business consists of providing construction management services to construction companies.*

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Question 4:

About the worker's duties

Will the worker (or their business) perform office holder duties for the end client as part of this engagement?

Being an office holder isn't about the physical place where the work is done, it's about the worker's responsibilities within the organisation. Office holders can be appointed on a permanent or temporary basis.

This engagement will include performing office holder duties for the end client, if:

- the worker has a position of responsibility for the end client, including board membership or statutory board membership, or being appointed as a treasurer, trustee, company director, company secretary, or other similar statutory roles
- the role is created by statute, articles of association, trust deed or from documents that establish an organisation (a director or company secretary, for example)
- the role exists even if someone isn't engaged to fill it (a club treasurer, for example)



If you're not sure if these things apply, please ask the end client's management about their organisational structure.

Yes

No

Continue

Mr Daniels is not an office holder. Point 9 in judgement:

9. *Mr Daniels has a long experience in the construction industry, with a background in quantity surveying as an employee of a major construction company. He set up the appellant in 2004 to escape working for a large company and now provides construction services management services, including night shift management. Mrs Daniels is a director and employee of the appellant but no evidence was given as to her role in the business.*

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Question 5:

About substitutes and helpers

Has the worker's business arranged for someone else (a substitute) to do the work instead of them during this engagement?

This means someone who:

- was equally skilled, qualified, security cleared and able to perform the worker's duties
- wasn't interviewed by the end client before they started (except for any verification checks)
- wasn't from a pool or bank of workers regularly engaged by the end client
- did all of the worker's tasks for that period of time
- was substituted because the worker was unwilling but not unable to do the work

Yes - and the client agreed

Yes - but the client didn't agree

No - it hasn't happened

Continue

Point 17 in judgement:

17. Indeed Mr Daniels suggested that MDCM need not at the outset have provided STL with Mr Daniels. Mr Daniels gave two examples where MDCM offered to provide substitute services in addition to or as cover for Mr Daniels. However, HMRC pointed out these were proposed substitutions which did not actually happen and in any event they were proposals for companies to provide services not individuals. We therefore find that whilst the contract with Solutions included a right to substitute another suitably qualified individual it was never exercised by MDCM.

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Question 6:

About substitutes and helpers

If the worker's business sent someone else to do the work (a substitute) and they met all the necessary criteria, would the end client ever reject them?

The criteria would include:

- being equally skilled, qualified, security cleared and able to perform the worker's duties
- not being interviewed by the end client before they start (except for verification checks)
- not being from a pool or bank of workers regularly engaged by the end client
- doing all of the worker's tasks for that period of time
- being substituted because the worker is unwilling or unable to do the work

! We need to know what would happen in practice, not just what it says in the worker's contract.

- Yes - the end client has the right to reject a substitute for any reason, including if it would negatively impact the work
- No - the end client would always accept a substitute who met these criteria

Continue

Judgement. Point 30:

30. *The contract between MDCM and Solutions which applied to the STL arrangements provided that MDCM could provide a substitute for Mr Daniels. Indeed Mr Daniels suggested that MDCM need not at the outset have provided STL with Mr Daniels. However, Mr Philpott gave evidence that STL required the services of Mr Daniels. On those days when Mr Daniels gave notice that he would not be on site STL would call Solutions and ask for a substitute. They did not ask Mr Daniels to provide one nor would they accept that Mr Daniels was entitled to provide one. We accept Mr Philpott's evidence notwithstanding the terms of the MDCM contract with Solutions.*

Comment: The question is worded badly. He wasn't allowed to provide one.

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Question 7:

About substitutes and helpers

Has the worker's business needed to pay a helper to do a significant amount of the work for this engagement?

A helper is someone who does some of the job the worker is hired to do, either for or with them.

For example - if a lecturer was hired by a university to write and deliver a study module:

- a researcher hired to source information could be classed as doing a significant amount of the lecturer's work
- a company the lecturer pays to print and bind materials for the module would not be classed as doing a significant amount of the work

Yes No

Continue

There is nothing in the judgement that refers to helpers, and if there was one it would surely have been mentioned. Therefore we chose No for this.

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Question 8:

About the work arrangements

Can the end client move the worker to a different task than they originally agreed to do?

This includes moving project or location, or changing to another task at the same location.

- Yes - but only with the worker's agreement
- Yes - without the worker's agreement (if the worker doesn't want to change, the end client might end the engagement)
- No - that would need to be arranged under a new contract or formal agreement

Continue

From a case law perspective, the wording in this question mixes things up considerably. Moving someone to a new location is the WHERE aspect of control. Moving someone on to a different project is the WHAT aspect. WHAT is far more important than WHERE in case law. Being moved within tasks within a project is perfectly fine, and is what happened to Mr Daniels, as described in the judgement.

Judgement, point 46 and 51:

46. HMRC made a submission that STL controlled where Mr Daniels worked because they redirected him to work on Aldwych House but **this submission was withdrawn during the hearing after hearing witness evidence, it being clear that the STL had asked Mr Daniels whether he wanted to work on the Aldwych House site.**

51. Further, the fact that STL had to ask for his agreement before Mr Daniels moved over to the Aldwych House site **indicates no power to direct where Mr Daniels would work.** In considering that point we have taken the view that both periods, Prospect House and Aldwych House are part of a single continuous hypothetical contract rather than two separate ones. Both parties assumed that this was the case and in the artificial world required by the Intermediaries Legislation, it seems to us that this is correct.

Question 9:

About the work arrangements

Once the worker starts the engagement, does the end client have the right to decide how the work is done?

This doesn't include general induction, or the need to follow statutory requirements like health and safety.

- Yes - the end client decides how the work needs to be done without input from the worker
- No - the worker decides how the work needs to be done without input from the end client
- No - the end client can't decide how the work needs to be done because it's a highly skilled role
- Partly - the worker and other people employed or engaged by the end client agree how the work needs to be done

Continue

Point 50 in judgement:

50. Further, *there was no evidence that STL controlled how Mr Daniels would carry out his role in fulfilling the work programme for that shift beyond wearing STL safety equipment to identify him as STL's representative. He was supervised by Mr Hawes but Mr Hawes only visited the site occasionally and Mr Nicholls was left to his own devices during the shift. We agree with Mr Daniels that STL did not exercise any more control on the site than they would over an independent contractor.*

Question 10:

About the work arrangements

Can the end client decide the schedule of working hours?

- Yes - the end client decides the worker's schedule
- No - the worker decides their own schedule
- Partly - the worker and the end client agree a schedule
- Not applicable - no schedule is needed as long as the worker meets any agreed deadlines

Continue

Point 20 & 45:

20. *Mr Daniels had to work during established shift times of 5:30pm to 7am, although if all the work had been done for that shift he could leave early. This applied Monday to Friday and, at the outset also included some weekend work, although this stopped due to concerns about working excessive hours.*

45. *HMRC point out that STL controlled the time Mr Daniels worked as he was required to work during the shift patterns, albeit he could leave early if the work was finished. Mr Daniels argues that this is not control but merely the way all construction sites are necessarily run.*

Question 11:

About the work arrangements

Can the worker choose where they work?

Yes - the worker decides

No - the end client decides

No - the task determines the work location

Partly - some work has to be done in an agreed location and some can be done wherever the worker chooses

Continue

Point 19 in judgement.

19. In October 2012 STL required a night shift manager for the construction project at Prospect House in London and contacted Solutions. Solutions provided Mr Daniels who started work on 26 October 2012 and continued working full time including through the Christmas period. Mr Daniels was not interviewed for the job and Mr Philpott stated that he had never heard of MDCM until asked by HMRC as part of their enquiries. On or around April or May 2013 the Prospect House project was finishing but STL had need of a night shift manager at another project in London, Aldwych House. STL asked Solutions and Mr Daniels whether he would like to move over to be the night shift manager for Alwych House and he agreed. He continued to work until 19 July 2013. However the STL contract with Solutions was still treated as applying.

Question 12:

About the worker's financial risk

What does the worker have to provide for this engagement that they can't claim as an expense from the end client or an agency?

These are things that:

- the worker has to provide to complete this specific engagement
- aren't provided by the end client
- could place the worker at financial risk if the cost isn't regained

They don't include expenses incurred by being based away from home for the engagement.

Select all that apply

Materials - items that form a lasting part of the work, or an item bought for the work and left behind when the worker leaves (not including stationery, and most likely to be relevant to substantial purchases in the construction industry)

Equipment - including heavy machinery, industrial vehicles or high-cost specialist equipment, but not including phones, tablets or laptops

Vehicle - including purchase, fuel and all running costs (used for work tasks, not commuting)

Other expenses - including significant travel or accommodation costs (for work, not commuting) or paying for a business premises outside of the worker's home

Not relevant

Continue

Point 14 & 25 in judgement:

14. *The standard terms of appointment would simply be for the day rate and so would not involve any reimbursement by either the construction company or Solutions for travel or subsistence expenses. Mr Daniels lives in the West Midlands and so when the work was in London Mr Daniels would drive to London and stay at a hotel, sleeping during the day. Mr Daniels would personally be reimbursed his expenses by MDCM, presumably in effect out of the day rate. The hotel costs were typically £75-100 a day and food £25.*

25. *In accordance with the normal arrangements STL was not responsible for any of Mr Daniels' travel, hotel or subsistence expenses which were paid for by MCDM.*

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Question 13:

About the worker's financial risk

What's the main way the worker is paid for this engagement?

- An hourly, daily or weekly rate
- A fixed price for a specific piece of work
- An amount based on how much work is completed
- A percentage of the sales the worker makes
- A percentage of the end client's profits or savings

Continue

Judgement, point 24:

24. **The day rate paid by Solutions to MDCM on the STL contract was £310 a day.** Throughout the period of the STL contract Mr Daniels would at the end of the week submit a timesheet to Mr Hawes who would sign it off and send it to Solutions. Solutions invoiced STL based on the days worked and Solutions would pay MDCM.

Question 14:

About the worker's financial risk

If the end client isn't satisfied with the work, does the worker need to put it right at their own cost?

- Yes - the worker would have to put it right without an additional charge, and would incur significant additional expenses or material costs
- Yes - the worker would have to put it right without an additional charge, but wouldn't incur any costs
- No - the worker would put it right in their usual hours at the usual rate of pay, or for an additional fee
- No - the worker wouldn't be able to put it right because the work is time-specific or for a single event
- No – they wouldn't need to put it right

Continue

The financial risk elements are examined in points 53 to 57 in the judgement. Nothing about rectifying errors is written. Had he been required to do so then it's very likely this would have been mentioned – we therefore chose No for this answer.

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Question 15:

About the worker's integration into the organisation

Is the worker entitled to any of these benefits from the end client?

- Sick pay
- Holiday pay
- A workplace pension
- Maternity/paternity pay
- Other benefits (such as gym membership, health insurance, etc.)

These don't include benefits provided by a third-party or agency.

Yes No

Continue

Point 66:

66. Accordingly, we find that in the hypothetical contract between STL and Mr Daniels he would not be entitled to any sick pay, holiday pay or any other employee type benefits.

Question 16:

About the worker's integration into the organisation

Is the worker responsible for any of these duties for the end client?

- Hiring workers
- Dismissing workers
- Delivering appraisals
- Deciding how much to pay someone

Yes

No

Continue

There is nothing in the judgment that says he did. In fact, point 68 made this clear:

21. As night shift manager Mr Daniels reported to the project manager Mr Hawes who at the start of the shift provided him with a list of instructions on matters that needed to be done during that shift. He was also required to manage the site generally including making sure the correct workers were on site, ensuring that the work was being done and being done safely. Mr Daniels would be STL's representative on the site, wearing the company's branded high visibility jacket and hard hat in order to be identifiable as the contact point amongst the contractors.

23. Mr Daniels represented STL as contact point for contractors. However, he did not participate in STL staff meetings or functions.

68. We have found as a fact that Mr Daniels was not invited to STL meetings or functions or other events run for employees. We find therefore that in the hypothetical contract Mr Daniels would also not be so invited.

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Question 17:

About the worker's integration into the organisation

Does the worker interact with the end client's customers, clients, audience or users?

These are people who use or are affected by the service provided by the public body, corporation or business. This would not include the worker's colleagues or other employees.

Yes No

Continue


No, he was a night manager.

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Question 18:

 **GOV.UK** Check employment status for tax [Home](#)

BETA This is a new service - your [feedback](#) will help us to improve it.

 HM Revenue & Customs

[Back](#)

We're unable to determine the tax status of this engagement

Why are you getting this result

We need more information to understand the working practices of this engagement.

You can review the answers you've given below.

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FACTS

HMRC believed that Mr Daniels should be caught by IR35.

A judge in court decided that this was not the case.

CEST is unable to determine.

Comment from Dave Chaplin, CEO, ContractorCalculator:

“This is now the 23rd IR35 court case to date. We have tested all of the court cases through CEST and including this one there are now 9 of those cases (39%) where it cannot determine the status.

HMRC claims CEST can determine status in 85% of cases, but our FOI requests asking them to prove this claim has resulted in them saying they do not hold this data.

We are in a ludicrous situation.”