

BBC pay: 20 key questions the PAC must ask HMRC about Off-Payroll and CEST



HMRC representatives are to come before Parliament's Public Accounts Committee (PAC) in a matter of days, to answer for the part it has played in the BBC saga that left hundreds of freelancers facing unjust retrospective tax bills.

As HMRC prepares to roll out to the private sector the Off-Payroll rules that proved the catalyst for the chaos within the BBC, the PAC has a golden opportunity to hold the taxman to account.

The PAC can also gain further insight into the reasoning behind decisions that have forced thousands more public sector contractors into false employment, by asking questions that HMRC has so far refused to answer. Here are 20 questions the PAC needs to ask HMRC, and why they need to ask them:

1. You have previously described your Check Employment Status for Tax (CEST) tool as "a reliable guide". Do you stand by your assertion that CEST is reliable?

BBC director general Lord Hall noted that an employment status test developed in conjunction with Deloitte and HMRC had determined roughly 900 of 1,000 staff to be self-employed. Lord Hall also asserted that the majority of problems within the BBC stemmed from the introduction of CEST, which subsequently indicated that 92% of freelancers were 'deemed employees'.

2. Given the problems that the BBC has had with CEST, what changes have been made to the public-facing version of the tool?

According to Government's agile methodology framework, which CEST was supposedly developed in accordance with, the tool is still in beta phase, requiring continual testing and development of the software. However, two years on from its launch, there have been no material changes to CEST's underlying code despite the problems faced by the BBC and many others.

3. Why do you think CEST told 92% of presenters that they were caught by IR35?

HMRC provided the BBC with support on how to use the tool, which ultimately reversed the status decision of a previous HMRC-approved employment status test for hundreds of freelancers.

4. Do you believe 92% is an accurate assessment of how many are caught by IR35? Is CEST giving the right answers in these cases?

In its 'Off-Payroll factsheet', HMRC estimates that two-thirds of limited company contractors are outside the scope of IR35, yet considered this to be the case in just 8% of instances concerning BBC presenters.

5. Do you maintain that CEST is fit for purpose in its current form?

CEST has been subject to widespread criticism in the press, with many describing it as 'not fit for purpose'. HMRC has stated that

'enhancements' will be made to CEST in time for the private sector rollout of the Off-Payroll rules, even though employment status in no way hinges on whether you work in the public or private sector. This admission implies that HMRC knows CEST is insufficient in its current format.

6. If the BBC presenters were assessed wrongly, is it likely that there are other tax payers hired by public sector bodies who have also been subject to wrongful tax deductions?

The majority of BBC presenters received dubious results from CEST, even after HMRC had provided the BBC with extensive support on how to use the tool. It is likely that other public bodies, especially those who didn't receive the same degree of support as the BBC, have also received questionable results.

7. Of the £550m in tax revenues you claim has been collected as a result of the Off-Payroll rules, what proportion do you think could be due to incorrect CEST assessments?

HMRC claims that the Off-Payroll rules resulted in an additional £550m raised in income tax and National Insurance Contributions (NICs) in the public sector in the first year. If even a small portion of those affected were victims of incorrect assessments, millions ought to be refunded.

8. What has HMRC done, in terms of sampling individuals, across the public sector, to check that taxpayers are being assigned the correct tax status?

HMRC owes a duty of care to the taxpayer. Given the discrepancies between the proportion of 'deemed employees' anticipated by HMRC and the numbers within the BBC returned by CEST, it's fair to assume that HMRC would have taken steps to ensure that taxpayers aren't subject to wrongful assessments.

9. What proportion of CEST's users is being handed automatic passes after indicating that the individual can provide a substitute?

An [HMRC response to an FOI request](#) by ContractorCalculator claimed that 54% of CEST's users are told 'IR35 does not apply'. An examination of the tool shows it will provide this answer immediately after the individual declares they can substitute, without asking any further questions, contrary to the approach required by employment case law.

10. If somebody wants to challenge the status that CEST has assigned them, how do they go about doing that?

Despite the tool's contentiousness, the Off-Payroll rules do not include provisions for contractors to challenge IR35 status decisions made by CEST.

11. If CEST has wrongly assessed a limited company contractor, how do they go about reclaiming the extra tax they paid? And can they reclaim the employer's NI portion of the fees paid by the hirer for their services?

Similarly, the Off-Payroll rules do not include provisions for contractors to reclaim overpaid tax in the instance that CEST is found to have made an incorrect status decision. This is especially concerning, given there is also widespread evidence indicating that many public bodies have deducted their employer's NI liability from the contractor's rate.

12. How many public sector bodies are using CEST as the only method by which they assess the status of their freelance workers?

The BBC is among several public sector organisations that have revealed they felt compelled to use CEST after HMRC reiterated it would only stand by the results issued by its tool.

13. Can you provide any evidence detailing the impact that the Off-Payroll rules and CEST have had on the inner-functioning of other public sector bodies?

Evidence provided by the BBC has demonstrated that the Off-Payroll rules and CEST have caused it massive disruption and damaged its relationship with presenters.

14. Why did HMRC decide to omit mutuality of obligation (MOO) from the CEST tool?

MOO is one of the three key tests of employment that case law requires must be considered when assessing an individual's IR35 status. HMRC has stated that the use of CEST implies that MOO has already been ascertained, yet Off-Payroll requires that anybody working via a limited company be assessed, irrespective of MOO.

15. Given your experiences of the BBC, what amount of lead time do you think a business will need, once your new version of CEST has been published?

HMRC publicly launched CEST just two months before the Off-Payroll rules were implemented in the public sector, leaving public bodies ill-prepared. The BBC has since stated that in the build-up to April 2017, it warned HMRC that the impending changes were "coming in too quickly and would cause huge difficulty".

16. Do you think it would be a good idea, in the interests of transparency and rigour, to commission formal testing of CEST and publish the findings?

HMRC has been criticised for failing to provide any credible test documentation to support its claims regarding CEST's accuracy, while [testing of CEST conducted by ContractorCalculator](#) has found it to return wildly inconsistent results. Meanwhile, the tool is being used to determine the tax status of tens of thousands of contractors each month.

17. Do you think that CEST in its current form constitutes 'reasonable care'?

Under the Off-Payroll legislation, hirers are required to take 'reasonable care' when assessing an individual's status. Reasonable care isn't defined within the legislation, but an examination of tax tribunal precedents and HMRC's own compliance handbook demonstrate that [CEST does not meet this requirement](#).

18. Do you think that, for fairness, workers who have been previously assessed using the tool should have their status reassessed?

Given the points of contention highlighted, to ensure fairness and resolve any disputes, it would make sense to reassess the status of affected individuals. HMRC's assumed confidence in CEST should mean it has no issue with contractors having their status reassessed.

19. CEST has been criticised for being unable to cope with sectoral differences. How does HMRC plan to overcome those challenges as we approach April 2020 and the planned roll out to the private sector?

In October 2018, HMRC claimed improvements would be made to CEST ahead of the Off-Payroll private sector rollout, following criticism and concerns shared in [response to its consultation](#). More recently, BBC chiefs criticised CEST for being too general even for industries within the public sector.

20. Why doesn't CEST save a copy of the workers' test results against their tax record?

If HMRC is confident in CEST's accuracy, as it claims to be, a logical measure would be to log each worker's IR35 status for each engagement, as determined by CEST, against their tax record.

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