

CEST assessment rejected by judge as contractor recoups unlawfully deducted tax



A contractor has successfully used an employment tribunal to prove their outside IR35 status and reclaim thousands in overpaid tax, in a case during which the tribunal Judge ruled Elbourn was self-employed. This decision contradicted the result previously given using HMRC's Check Employment Status for Tax (CEST) tool, which had wrongly concluded that IR35 applied to his engagement.

Mr Elbourn appealed to the tax tribunal for unlawful deduction of wages, during an engagement with agency Qualserve Consulting Ltd and end-client the Met Office, on the basis that employers National Insurance contributions should not have been deducted from his rate.

However, Mr Elbourn lost his appeal on the basis that he was found to be neither an employee, nor a worker, but self-employed – meaning IR35 could not have applied to the engagement.

However, in securing legal proof of his employment status, Elbourn managed to prove that an estimated £9,500 was wrongly deducted from his income by the client and agency, who treated him as 'employed for tax purposes' under the Off-Payroll rules. As a result, the respondents are compelled to repay the sum deducted.

Qualserve had made the decision to tax Elbourn accordingly with a CEST assessment, which had found him within scope of the rules. An evaluation which was wholly rejected by Judge O'Rourke, who concluded: "He [Elbourn] was given a project and, apart from a weekly meeting to check on progress, he was his own master."

"This case marks a hammer blow for HMRC," comments ContractorCalculator CEO, Dave Chaplin. "CEST's accuracy has once again been called into question, in a case where the contractor's self-employed status was never in doubt.

"Moreover, the case has presented thousands more contractors, who have been overtaxed due to Off-Payroll, with a straightforward means of recouping what is rightfully theirs.

"Bizarrely, in this case, even though the client had decided using CEST, that he was a "deemed employee", they then put up a defence claiming that he was in fact self-employed. Whatever the Judge decided Elbourn would effectively win. Either he would be found outside IR35, or be found to be an employee or worker, in which case the employers NI would have been an unlawful deduction."

'The Elbourn defence': background

In August 2017, Elbourn reached an agreement in principle on a three-month contract with the Met Office and was referred to Qualserve after enquiring about the contractual position of the engagement.

In the meantime, the Met Office completed a CEST assessment without a copy of Elbourn's contract to hand. Instead, it based its assessment on what Elbourn describes as 'a boilerplate business analyst job description', a practice which is actively encouraged by the taxman, as the recent emergence of an [HMRC webinar on IR35](#) has shown.

CEST found him to be within IR35, which led to a dispute between Elbourn and Qualserve over employer's NI, which Qualserve insisted be deducted from Elbourn's rate. Despite this, Elbourn and his limited company entered into a contract with Qualserve to provide services to the Met Office in September 2017.

Continuing to work for several months while suffering excessive tax deductions, Elbourn's contract was eventually terminated in January 2018, and he presented a claim under s.230 of the Employment Rights Act 1996 in March 2018.

Though Elbourn failed with his claim, the ruling shows that his limited company should have been paid without deduction of tax from the outset, on the basis that Chapter 10 of the Income Tax (Earnings and Pensions) Act 2003 (the Off-Payroll rules) did not apply. As a result, Elbourn is awaiting a refund of roughly £9,500, including an estimated £3,300 in unlawfully deducted employer's NI.

"The claim was always going to fail, for the simple fact that Elbourn's contract and working practices pointed conclusively towards a contract for services. But that was the whole point," notes Chaplin. "Submitting an employment tribunal claim is free and, as this case has shown, can be used to secure almost undeniable proof over an individual's IR35 status."

Elbourn judgment could prove catalyst for further claims

This is a tactic which we understand has only been used once before, by IT contractor John Williams in the case [Williams v Hewlett Packard Ltd & Anor \(2002\)](#). However, Martyn Valentine, director of IR35 specialists [The Law Place](#) – who advised Elbourn – believes this outcome could open the floodgates for many similar claims:

"It's surprising that this route has only been rarely experimented with before. Obviously, use of the employment tribunal system would appear contrary to normal thinking for a contractor who typically goes to lengths to prove their outside IR35 status.

"But, as this case has shown, it can be used to help secure fair tax treatment for contractors who really have nothing to lose. If the Judge decides that they are self-employed, they will be outside IR35 and receive a refund of overpaid tax. If the Judge deems them to be employed, then they at least manage to secure employment rights. This could prove the catalyst for many similar claims."

CEST assessment rejected by Judge

In a [webinar delivered to NHS Trusts](#), HMRC's IR35 policy advisor Mark Frampton stated that the client "is often best placed to judge whether the person would have been an employee or self-employed". According to Chaplin, this outcome provides irrefutable proof that this is not true:

"The client aided – or rather hindered – by CEST, arrived at an assessment which was directly opposed to that reached by an employment tribunal Judge. It goes to show that end hirers are not well informed enough to make accurate status decisions, especially when they are encouraged by HMRC to overlook the individual contract and working practices."

Chaplin adds: "Though HMRC continues to champion CEST's accuracy, we now have the first of what I expect to be many cases where a Judge makes a status decision that contradicts CEST. This case adds to the [mound of evidence already available](#) demonstrating that HMRC's tool is woefully inaccurate."

Tribunal ruling 'a serious issue for HMRC'

While great news for contractors, this outcome will surely prove disastrous for HMRC, as well as non-compliant contractor clients and agencies, as Valentine explains:

"This exposes a seismic hole in the legislation. It's a serious issue for HMRC concerning the drafting of Chapter 10 that a contractor can make an employment status claim when outside IR35, potentially forcing the respondent to argue a position that puts them in jeopardy of having to refund significant deductions from the contractor's income.

"The judicial impact could be considerable when you think about the costs that public authorities incur when defending against these cases. Then you consider that HMRC would have to refund the tax deducted by respondents who will have to pay the contractors. This could get very messy, very quickly for HMRC, but it will be a mess of its own making."

He concludes: "This should also serve as a stern warning to clients and agencies who are happy to enforce incorrect tax treatment on contractors, and who fail to carry out a proper status assessment."

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