

## CEST-gate and DWP's £87m – to win, don't play the game



*IR35 Shield CEO Dave Chaplin explains why there may be more alarming public sector body tax bill revelations to come, and why the only winning move is not to use CEST at all.*

In the last month or so we've seen three public sector bodies become casualties of the widely criticised [HMRC Check Employment Status for Tax \(CEST\) tool](#): The [Department of Work and Pensions for £87m](#), the [Home Office for £29m](#) and now [HM Courts and Tribunal Services for £12m](#). The combined amount of tax being chased by HMRC is over £100m. But what's the full story here, and is there more to come on this latest episode of "CEST-gate"?

### Where did DWP go wrong with IR35 and CEST?

One of the well-known and [longstanding flaws with CEST](#) is that if you claim you have a right to substitute, it will simply ignore the rest of the answers and tell you the engagement is "outside IR35", however much they point to "inside IR35". That's in such stark contrast to the law that it's almost laughable.

The belief that a substitution clause negates the "personal service" test when examining status is a mistake and myth that has sadly developed over the past 20 years. Status determinations are just not that simple. It's a bit like putting a sticker on a car that reads "this is not a car" and expecting it to convince someone.

This false sense of security CEST creates is what made HM Courts and Tribunals Service (HMCTS) the most recent victim of status misdiagnosis. This is clearly documented in [HMCTS's accounts in the past two years](#), which states: "we had previously concluded workers are operating outside of the Off-Payroll working rules on the basis the individual worker could be substituted by another worker at the choice of the worker without consultation with the Department and without the Department having any right of veto."

Ironically, that statement alone demonstrates a misunderstanding of actual case law, as ratified by the Supreme Court. Sigh.

### Illusory substitution for IR35 does not work

However, HMRC and HMCTS are not the only ones getting this wrong. We've seen countless pop-up experts creating services based around these illusory substitution rights who all think that simple contract clause and demonstrating that you might know someone who could substitute is enough to make the car sticker approach work. It won't.

We've also seen services created by newbies to the market based around contracts and processes that mean you can answer CEST in a certain way to get an "outside IR35" result. That is tail wagging the wrong dog territory. [CEST has no legal authority](#), nor is it in the statute. It is just HMRC guidance.

Any reliance on CEST cannot be used as a legitimate basis in court. Judges won't care what CEST says or whether HMRC made a promise to "stand-by" that it then broke. They only care about the actual law – which means applying the statute and case law to the actual facts.

## The CEST control bar is too high, breaching its caveat

And CEST's problems aren't just about substitution either. Unless you have considerable financial risk, the only other way for most contractors on hourly or daily rates to get an "outside IR35" determination is if there is virtually no control.

On this, and contrary to law, the bar has been set so high that HMRC can easily claim you chose the wrong answers, therefore kissing its "stand-by" promise goodbye.

## CEST is an "alternative" rule book – why use it?

The point is that CEST creates exposure rather than protects it. Indeed, if you have used CEST in good faith and HMRC disagrees, your options are very limited. Who do you then get in touch with to complain and defend you when HMRC has issued you with the tax bill?

HMRC will of course want to engage in discussions with clients about whether they choose the right answers in CEST as if CEST is the final arbiter of the decision. It is not though – because it is not the law – so don't be duped into thinking it has any legal clout. Bizarrely though, HMRC's [own manual states that CEST should be used](#) issue decisions by inspectors. This logic is worrying, to say the least.

CEST is simply the pseudo-alternative law that HMRC has created – its own new rule book that overrides the actual law by the back door. The taxman wants you to play this game rather than having to fight with you on the basis of actual law, namely [because it loses more than half of the time](#) when it is forced to do that.

Using CEST makes you hostage to HMRC's alternative laws instead of being protected by the actual law.

## What does a good IR35 defence look like?

A solid IR35 defence should mean that you never end up having to appeal to a tax tribunal or having your firm's reputation dragged through the mud. But if you are cutting corners and relying on an insurer to pay your final tax bill then you are foolhardy – because you cannot insure against the non-payment of tax. Whilst you should certainly insure against tax defence costs, the wriggle room available to underwriters on IR35 cases means it would be foolhardy to rely on them if you have not conducted full due diligence.

At a tax tribunal you will need to provide evidence that supports your claims. Naturally, there are different types of evidence, and some carry more weight than others. There is the absolute truth, and there is also the evidential truth, and without divine powers, judges will of course rule based on the facts presented in court. As a result, the best type of evidence is that collected when events take place and then corroborated by the relevant parties. It will trump any hearsay evidence that may appear many years later. However, if you don't collect that evidence now you may struggle to discharge your burden of proof if HMRC uses its powers to issue you with a tax bill. This is why we developed [Monitoring at IR35 Shield](#) - to regularly recheck status and gather evidence in real-time.

However, some firms are just offering "re-assessments" to protect against this new threat. But, that is folly because they are just asking the same questions again. A proper forensic fact-find will ask different questions based on events that have taken place while gathering evidence to back those up – and that's what you need to do. It's funny that CEST doesn't do any of this for you, isn't it? Neither do many pop-up experts, because they are applying old IR35 defence tactics in a brand new Off-payroll world.

## Do not play the CEST game

There was a film many years ago called [War Games](#) where a character asks a supercomputer the best way to play noughts and crosses. Once the supercomputer has analysed the game, it responds by saying: "The only winning move is not to play."

The same should be said of CEST. Don't get roped in.

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