

Eight 'outside IR35' assessments not enough to secure NHS consultant outside contract



The NHS has refused to hire a locum doctor outside of IR35, despite the consultant having completed eight individual assessments all demonstrating that her contract wasn't caught by the legislation.

After being presented with evidence of the eight assessments, the NHS trust carried out their own analysis of the contract with [HMRC's flawed Check Employment Status for Tax \(CEST\) tool](#), determining that Dr Susan Smith – whose name has been changed to protect her anonymity – was within scope of IR35.

Dr Smith, like many others in her profession, refused the contract as a result. She says that the NHS's reliance on a tool which fails to align with the law is costing it desperately needed expertise at a critical time, with patient care suffering as a result.

"I don't want the NHS to collapse. But HMRC's CEST tool, and the perception within the NHS that its findings are legally binding, runs the risk of doing exactly that."

Eight IR35 assessments not enough for NHS green light

Dr Smith undertook eight individual assessments. Three of these were using CEST. The first of which she carried out with a department consultant, the second with an HMRC adviser over the phone, and the third with her business manager. Each time the tool determined that she was outside IR35.

After the NHS trust refused to accept her proof of status, Dr Smith sought five further private assessments. These included:

- Two professional contract reviews
- Two assessments of her working arrangement by qualified legal experts
- A case law-backed online assessment from [IR35Testing.co.uk](#)

Dr Smith incurred costs of £20,000 in proving her status, and would have gone to judicial review had the costs not been prohibitive.

Despite Dr Smith presenting her assessment results, NHS representatives – who Dr Smith notes were far removed from the specific engagement itself – carried out their own evaluation using CEST. Evidently having inputted different answers, they found her to be inside IR35.

NHS trusts refusing to budge on flawed CEST judgment

Every one of the private assessments that Dr Smith undertook [established a lack of control](#) imposed upon her, and an [absence of mutuality of obligation \(MOO\)](#), two key factors proving that IR35 did not apply.

An absence of MOO had already been demonstrated in Dr Smith's previous engagement carrying out the same job for another trust, when it terminated her contract early and with immediate effect several months ago. These arguments proved ineffective in changing the NHS's stance.

"I stressed all of these points to HMRC representatives – which in law prove my outside IR35 status – and they agreed. Yet they wouldn't deviate from processing my contract as inside IR35 on the basis that when they used CEST it said I was inside."

Is HMRC forcing the NHS to use CEST?

Astonishingly, despite being one of the key tests of employment, MOO isn't even considered within the CEST questionnaire, and is subsequently overlooked when assessing status with HMRC's tool.

When Dr Smith raised the issue of MOO with NHS representatives, they said that they failed to see the relevance as it wasn't included in the CEST questionnaire. This demonstrates a total lack of understanding of the legislation that the taxman is forcing NHS representatives to apply.

This lack of know-how appears to be a key driving factor behind the use of CEST by NHS administrators, as does a shortage of resources to implement proper compliance procedures.

However, a fear factor also appears to be present. Recently, the taxman has stressed that CEST is the [only means of assessing IR35 that HMRC recognises](#). Many NHS trusts therefore feel obliged to use CEST to avoid complications with the taxman further down the line, rather than grant locum staff a fair IR35 assessment.

"HMRC has misguided everybody. People freak out over the mere mention of HMRC and I think this concern has contributed a lot to the NHS's insistence that CEST is used."

How are the IR35 reforms affecting NHS services?

Since the [public sector IR35 reforms](#) took effect, Dr Smith says she knows of just one consultant performing her specialism who has agreed an outside IR35 contract. Whilst many locum staff have begrudgingly accepted contracts inside IR35, a substantial number are leaving the NHS altogether.

"My speciality is an area which is requiring increasing attention. Patient numbers are rising and hospitals are struggling. It's worsened by many professionals in my specialism moving into private care. It's continually heaping pressure on an already struggling department."

She adds: "A former colleague of mine who was working for the NHS for 15 years has recently left the profession altogether and began working in construction. So the talent base in the sector is shrinking rapidly, and with that means an additional strain on NHS services, which are already severely stretched."

Public sector changes encourage non-compliance

The situation is not being helped by efforts by some NHS trusts and agencies to avoid their compliance requirements by imposing blanket bans on limited companies. Others are minimising their compliance burden by refusing to provide case-by-case IR35 assessments, instead simply advertising contracts as either inside or outside of IR35:

"A friend of mine was offered a contract by an agency which stated that she was inside IR35, yet the notice period was just two hours. This contract required her to work through an umbrella of the agency's choice so that the trust could sidestep its compliance duties."

Elsewhere, trusts in more remote areas are refusing to enforce IR35 under the new regime in order to protect their livelihoods:

"I know another GP who owns a surgery in a remote area of Scotland who has told me that his surgery won't implement IR35. Because of their location, they already struggle with severe staff shortages, and subjecting them to the new IR35 rules threatens to run their locum consultants out of town."

Dr Smith concludes: "The changes are having a devastating effect on patient care right across the country. It's a problem which can't be mended by anybody but HMRC."

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