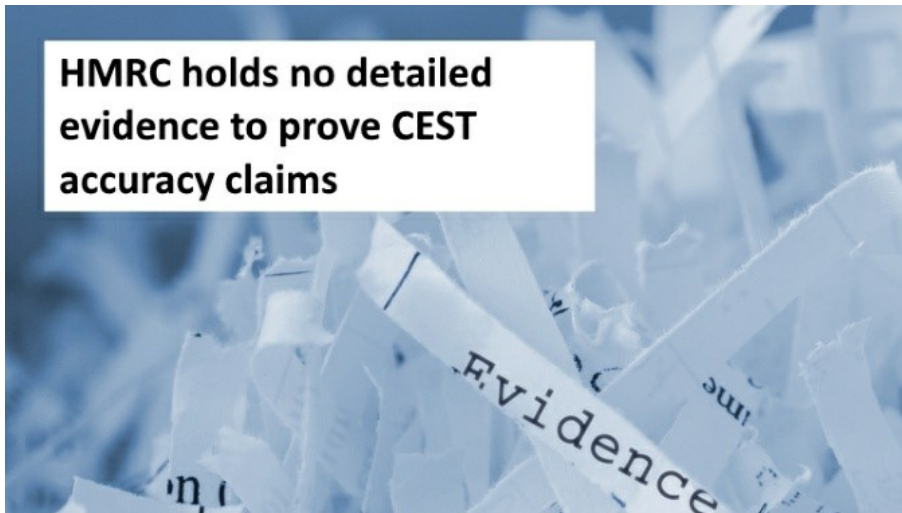


HMRC holds no detailed evidence to prove CEST accuracy claims, reveals FOI requests



HMRC has acknowledged, in response to a series of Freedom of Information (FOI) requests, that it has no detailed evidence to demonstrate that its Check Employment Status for Tax (CEST) tool is accurate.

After the [fallout from the BBC pay scandal](#) had already demonstrated the strain that IR35 is having on the public sector, HMRC's admission will raise further questions concerning future plans for the legislation.

During the latest committee meeting, it was revealed that CEST had failed 97% of BBC broadcasters who had used the CEST tool, prompting Jolyon Maughan QC to dismiss HMRC's effort at trying to achieve an "impossibly difficult" task.

With more than 40,000 individuals currently using CEST to assess their IR35 status each month – as revealed in response to another FOI request from ContractorCalculator on 1 November 2017 – many will have been forced into false employment, and subject to excessive taxation, as a result.

HMRC admits having no proof that CEST is accurate

Following the release of CEST, HMRC has continued to champion its accuracy but has been unable to support its assertions with tangible evidence. Instead, it [decided to attack the source](#) after ContractorCalculator tested CEST against the historic IR35 cases in March 2017 and found that it was [unable to return the correct outcome in 37% of cases](#).

Since then, the taxman has stonewalled a series of requests from ContractorCalculator. On 28 November 2017, HMRC denied an FOI request to disclose documentation evidencing CEST's processes and results when tested against each of the historic IR35 cases. HMRC gave as its reason for declining, that it would take more than 3.5 hours to provide the data, supposedly exceeding the cost limit set out in the Freedom of Information Act (FOIA).

To ensure that the 3.5 hours rule couldn't be enacted, ContractorCalculator sent a further request for evidence of the answers entered into CEST, and its ultimate judgment, when tested against just seven of the IR35 tribunal cases. Instead, [HMRC's response on 16 February 2018](#) revealed that the taxman holds no detailed test data at all:

'The CEST tool testing was done by workshop... The only documented output of the workshops is the set of rules used by the tool.'

'Our records show that HMRC has used the CEST tool to test all the cases cited in your request, but we do not have a record of how each question was answered as part of that testing, only the end determination.'

'Has HMRC shredded the evidence?'

CEST was built using an Agile Software Development approach, a central tenant of which is automated testing. However, an examination of the code base available for inspection online, along with an analysis of HMRC's responses to several FOI requests, suggests that no formally documented or automated acceptance tests even exist. As a result, HMRC is unable to prove that CEST correctly calculates the results for the historic IR35 court cases, or any cases for that matter.

"For a tool of such importance, the supposed lack of rigour involved in its testing methodology is astonishing," comments ContractorCalculator CEO Dave Chaplin, whose career history includes commercial software development for leading UK financial institutions and legal practices.

[Antony Marciano](#), founder of [RiverGlide](#) – a consultancy that specialises in coaching agile software delivery - comments: "Testing the validity of this tool's answers with an undocumented ad-hoc approach via workshops is insufficient for Government-produced software of this magnitude. A more diligent approach would have been to drive the design of the solution using the court cases as the test scenarios.

"This would have delivered transparency and accountability alongside the open source code. Without this, a fundamental piece of the jigsaw is missing, leaving no assurance that it actually produces the correct results."

Chaplin adds: "When I led teams developing online banking software, if we'd gone into a room and emerged claiming that the software all appeared to work fine, without any documentation to prove it, we would have been fired.

"We examined the CEST programming code last year and published the results online. Our findings proved that CEST is structurally flawed, and that HMRC would need to start from scratch to have any hope of achieving accuracy.

"You have to ask yourself why HMRC has chosen not to be transparent with this crucial part of the testing of the tool. It's absurd that there is supposedly no detailed documented evidence of formal testing of the tool. Has HMRC shredded any evidence to cover up CEST's shortcomings?"

HMRC and CEST's dubious history

The taxman was also outed for omitting mutuality of obligation (MOO) – a key element of employment case law – from CEST. When pressed on the matter during a webinar delivered to NHS Trustees in September 2017, HMRC policy adviser Mark Frampton stated that [CEST assumes MOO to be present in every public sector engagement](#).

This logic was immediately renounced by barristers and IR35 legal experts. HMRC claimed it would disclose legal arguments substantiating this claim in January 2018, but nothing was forthcoming.

The taxman [denied a subsequent FOI request from ContractorCalculator](#) on 23 February, claiming supporting evidence was "exempt from disclosure". However, HMRC did state that it now intends to release its arguments in April.

"It'll be intriguing to hear what HMRC has to say, given the absurdity of its claim," says Chaplin. "Somehow, HMRC believes it is going to convince everyone that every fruit in the greengrocers is an orange."

Last week the [details of another IR35 tribunal case emerged](#), which ContractorCalculator used to conduct another test. Although the contractor was deemed outside IR35 in real life, [CEST was unable to determine their status](#).

IR35 and CEST driving ill health in the public sector

The news comes after a [House of Commons inquiry into BBC pay](#) revealed the extent of the impact of IR35 on many broadcasters' wellbeing. MPs heard how one presenter suffered "life-altering levels of stress", whilst another [attempted suicide due to her IR35 ordeal](#).

At a recent committee meeting, presenter Paul Lewis disclosed that 97% of those within the BBC, who had used CEST, had been deemed caught by IR35, with broadcaster Kirsty Lang adding that the tool is "not fit for purpose".

"The conclusion that 97% of self-employed BBC presenters should have been classed as employed is ludicrous, and further proof of CEST's inaccuracies," says Chaplin. "You begin to wonder how many of these presenters would have been spared the trauma, had they not used CEST."

HMRC leaving itself at risk of judicial review?

The BBC isn't the only organisation affected. Uncertainty over IR35 is already heaping [further strain on social care services and the NHS](#), where locums have been refused outside IR35 engagements as a result of flawed CEST assessments.

"HMRC has taken a slapdash approach to building CEST, and now needs to stand accountable for its action. This could mean an extremely

high price to pay, given that CEST is effectively being used to overwrite the law,” says Chaplin.

“This is akin to the police inventing a speed radar gun that records all drivers’ speed as 100mph, but then asking car owners to self-assess whether they should start paying speeding fines.

“By forcing false employment upon people in this way, HMRC is leaving itself extremely vulnerable to a judicial review and risks countless claims for tax refunds from the self-employed through the tribunal system. This whole episode could be the next PPI scandal, which makes it even more appalling that HMRC wants to expand the new IR35 rules into the private sector.”

Calls for review of legislation and the CEST tool

Andrew Chamberlain, Deputy Director of Policy and External Affairs for [IPSE](#) highlights the damaging effects the reforms and CEST have had on the public sector: “The public sector is beginning to crack under the strain of the IR35 changes made last April. Widely reported problems at the BBC and the NHS are likely to be just the tip of the iceberg.

The real problem here is that the legislation heaps the impossible task of determining IR35 status onto public authorities. They are being put under tremendous pressure by HMRC to use the CEST tool in order to make these determinations, yet there is mounting evidence that the tool is not fit for purpose. The whole thing is a Kafkaesque mess. For the sake of our public services, the Government must urgently review both the legislation and the CEST tool.”

Seb Maley, [Qdos Contractor](#) CEO, agrees: “How are public sector bodies meant to stand by, and contractors expected to accept the some 400,000 answers it has given since April 2017?

“These reports strengthen the need for a thorough investigation into the accuracy of CEST.”

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