

## Has HMRC misled the Chancellor and Treasury on the Off-Payroll tax and IR35 rules?



HMRC's integrity has been called into question after correspondence emerged suggesting that the taxman may have misled the Chancellor of the Exchequer and the Treasury on key parts of the law used to determine IR35 status, and which were purposely omitted from the CEST tool used to underpin the implementation of the new off-payroll tax rules.

In a letter to Environment Secretary, Michael Gove, sent in response to a constituent's concerns regarding the public sector IR35 reforms, and specifically HMRC's Check Employment Status for Tax (CEST) tool, Chancellor Philip Hammond made some flawed statements about a key area of the law central to assessing employment status.

The exact same statement was also used by Financial Secretary to the Treasury, Mel Stride, in an almost identical letter to his constituents, which contained many more of HMRC's trademark claims.

Worryingly, on both occasions, the claim was used to rebut criticisms of CEST.

The interpretation of case law regarding mutuality of obligation (MOO) now being espoused by HMRC, the Chancellor, and Financial Secretary of the Treasury has been already contradicted many times:

- HMRC's own QC at the BBC presenters tribunal suggests a different stance
- Judges consistently disagree with HMRC's position: one case being weeks before CEST's launch
- The Supreme Court in Pimlico highlighted further inadequacies of HMRC's position
- An ex-tax inspector says HMRC's opinion is not worth a hill of beans

Dave Chaplin, CEO of ContractorCalculator says: "HMRC have been roundly exposed as getting the law wrong, and are now using the Chancellor of the Exchequer to propagate their warped views to cover up their failings for fear of admitting that the 750,000 tax payer assessments issued by the tool are invalid."

"HMRC appear to have become the puppeteers of both the Chancellor in one hand and the Secretary of the Treasury in the other, issuing mistruths and denials to constituents to shore up their flawed position."

## The Chancellor's flawed assertions on MOO

The letters, when responding to concerns about the CEST tool being inaccurate and not aligning with the law stated:

*"Mutuality of obligation refers to any existing agreement where an individual provides services and receives payment for doing so – better understood as a contract existing between the two parties. CEST assumes as its starting point that a contract either exists or is being discussed."*

In a letter from Mel Stride, Financial Secretary of the Treasury this was followed with the following unsubstantiated statement:

*"Some people lobbying against CEST have falsely claimed that it does not accord with case law."*

These statements are being made despite the widespread knowledge that the CEST tool does not align with the law, that HMRC's stance on MOO is wrong, and that HMRC have admitted it holds no evidence to prove its claims that the tool is accurate.

## Chancellor's comments are 'a grave concern'

This incorrect interpretation of the law has been rejected by numerous Judges during multiple court cases, and notably [contrasted with what HMRC's own QC had to say about MOO](#) during a recent hearing concerning three BBC presenters.

"We doubt the Chancellor or the Financial Secretary to the Treasury have any idea of what MOO is," says ContractorCalculator CEO, Dave Chaplin. "Which is why they appear happy to relay – albeit unwittingly – HMRC's falsehoods regarding MOO and CEST."

"HMRC has been propagating its erroneous claims to public authorities and [IR35 Forum](#) members of late, but it's a grave concern when these false claims are coming from the country's key economic and fiscal decision makers."

"The Chancellor has reiterated HMRC's supposition that MOO is present for all contractors. This assumption was built into CEST, meaning in excess of 750,000 CEST results will need to be re-examined, as will thousands of blanket decisions taken by the likes of the NHS," adds Chaplin.

Leading QC Jolyon Maugham forewarned of the same outcome. Speaking at [Select Committee hearing on BBC pay](#) on 20 March 2018, he stated:

"In two years' time this Committee is going to be looking at a different question, which is whether the BBC and the NHS were right to force everybody to be taxed as employees in circumstances where the case law has shown after the fact that very often those people were properly taxed as self-employed."

He added: "They [NHS and BBC] are saying everybody is an employee in circumstances where the law does not support that conclusion."

## Taxman conduct warrants a full inquiry

"I am not sure quite what to make of the Chancellor's comment and which case law he was relying on," comments former tax inspector and director of [Tax Networks Ltd](#), Chris Leslie.

"This interpretation of MOO is clearly at odds with the tax tribunal decisions. It would appear as though the Chancellor has relied on HMRC's Employment Status Manual, which, of course, is just HMRC's opinion and not worth a hill of beans."

"HMRC is now in a very precarious position," warns Chaplin. "It has misled thousands of taxpayers; its [consultation](#) process chooses to ignore research demonstrating its failures, and now it is trying to cover its tracks by misleading the Chancellor. Public officials are required to abide by the [Nolan Principles](#), which include objectivity and honesty, and HMRC is failing on both counts. We need a full inquiry before any further changes to IR35 are considered."

## HMRC prolongs MOO saga

The episode marks the latest turn in an ongoing saga over MOO, which began in September 2017 when an HMRC policy adviser incorrectly instructed NHS Trustees that MOO is present in every public-sector engagement.

The claim has since been rebuffed by barristers and IR35 legal experts. However, HMRC maintained its stance and promised to publish legal arguments vindicating its position in January 2018.

After failing to produce anything, the taxman claimed it would release its full arguments alongside the February IR35 Forum minutes. These were partially shared in March 2018, with no accompanying documents and the promise to publish something in due course.

ContractorCalculator since submitted another Freedom of Information (FOI) request to locate HMRC's arguments, but nothing has surfaced.

"HMRC sought feedback on MOO from Forum members over two months ago and still hasn't substantiated its legal position," comments Chaplin. "Meanwhile, the taxman is feeding misleading statements to the Chancellor to send to his constituents. It beggars belief."

## Has HMRC known CEST was wrong all along?

The taxman's position was further compromised by the emergence of two recent IR35 tribunal rulings. In the case of [Armitage Technical Design Services \(ATDS\) Ltd v HMRC](#), the Judge rejected the taxman's interpretation of MOO, stating:

*"HMRC's case is that where one party agrees to work for the other in return for payment, then this satisfies mutuality of obligation between the two parties. That would be true of every contract, both employment and for services, otherwise the contract would not exist at all. The mere offer and acceptance of a piece of work do not amount to mutuality of obligation in the context of employment status."*

Notably, though the details only emerged recently, the ruling was released in January 2017, one month before the beta launch of CEST. The revelation [suggests that HMRC knew that its decision to omit MOO from CEST was wrong](#) at the time, which unquestionably brings the taxman into disrepute.

"HMRC will have read this judgment and known its position was wrong," comments Chaplin. "Yet, it went on to launch a flawed tool which has since been used by more than 750,000 times by taxpayers."

## Tribunals show HMRC doesn't have a leg to stand on

Details of this case were unearthed hot on the heels of the [Jensal Software Ltd v HMRC](#) case, which saw HMRC rely on its interpretation of MOO, only to have it comprehensively rejected by Judge Jennifer Dean, who concluded:

*"Although there is MOO, it does not, in my view, extend beyond the irreducible minimum, nor does it demonstrate that the relationship was one of a contract of employment."*

"The recent IR35 case verdict delivered just two weeks ago showed Judge Dean was willing to explore and interpret MOO beyond the bounds of HMRC's highly simplistic definition," explains [Qdos Contractor](#) head of tax, Andy Vessey, who represented the appellant.

"She took the view that, although the contractor provided his services for payment, MOO did not of itself demonstrate a contract of service. The essence of the relationship was that there was no continuing obligation on the part of the hirer to provide work; if it chose to abandon the project there was no contractual basis upon which the contractor's company could demand further work."

Leslie also notes that Judge Dean acknowledged that MOO can exist in both a contract of service and a contract for services, and that the contractor's decision to terminate his final contract with the client to take work elsewhere demonstrated a lack of MOO. He added: "If the Judge was satisfied that these indicators pointed towards a lack of MOO, then HMRC and the Chancellor should too."

More recently, [Pimlico Plumbers' failed appeal](#) at the Supreme Court against a former worker's successful claim for workers' rights further cemented the inadequacies of HMRC's stance. In upholding the previous judgment, Lord Nicholas Wilson made the clear distinction between obligations held solely during the performance of assignments and obligations during periods between work assignments.

Alluding to the case of *Windle v Secretary of State for Justice* (2016), Lord Wilson referenced Underhill LJ's statement that: "a person's lack of contractual obligation between assignments might indicate a lack of subordination consistent with the other party being no more than his client or customer."

## HMRC representative makes MOO distinction in BBC case

MOO was also discussed in an IR35 tribunal concerning three BBC presenters this past month. During the case, Adam Tolley QC, representing HMRC, distinguished between what he termed 'general mutuality' and 'specific mutuality'.

Tolley described general mutuality in this instance as: "an obligation on the contractor's company to work the guaranteed minimum number of days and, on the BBC's part, to provide that number of days' work." He added that specific mutuality exists in "a wage/work bargain sense".

"Though he was defending HMRC, Tolley clearly acknowledged here two different kinds of MOO," notes Chaplin. "The 'general MOO' that Tolley refers to is necessary for there to be a contract in the first place, whereas 'specific MOO' is what characterises an employment contract."

"Unfortunately for HMRC, the general MOO that Tolley describes is the interpretation it has recited to MPs and the general public, which, alone, is not enough to suggest that a contractor is caught by MOO under IR35."

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