

## HMRC pulls wool over NAO's eyes during CEST enquiry



The National Audit Office's (NAO) enquiry into [HMRC's Check Employment Status for Tax \(CEST\) tool](#) has unfortunately provided little insight after the taxman responded to the questions posed by reiterating its policies and making unsubstantiated claims.

The outcome of the enquiry extends the existing Off-Payroll narrative that has been riddled with the taxman's unfounded assertions and reinforces the need for an investigation which subjects HMRC and CEST to sufficient expert scrutiny. The damage already caused to the public sector by the Off-Payroll rules and the potential for this to extend to the private sector highlights the urgent need for further investigation.

"Unfortunately, the NAO appears to have fallen victim to HMRC's tactic of responding to questioning with a number of stock responses that the contracting sector is now too familiar with," says ContractorCalculator CEO Dave Chaplin.

"From our extensive investigative work into CEST, we know that little of what the taxman says stands up to even the mildest scrutiny. HMRC has pulled the wool over the eyes of the NAO, which has unfortunately failed to conduct the cross-examination necessary to truly hold the taxman to account."

### NAO unable to hold HMRC to account for misrepresenting the law

The NAO opened an enquiry into CEST in August 2019 upon the suggestion from Parliament's Public Accounts Committee (PAC), following correspondence between the two and ContractorCalculator.

Its line of enquiry was informed by numerous documents evidencing CEST's failures and points of contention, compiled by ContractorCalculator and shared by the PAC, including ContractorCalculator's [open letter to Government and HMRC](#).

The NAO wrote to ContractorCalculator CEO Dave Chaplin with feedback, which it sought to provide based on three broad areas:

1. The accuracy of the assessments made by CEST
2. The adequacy of HMRC's testing of CEST
3. HMRC's assessment of the impact of IR35

However, as Chaplin highlights, the public body's lack of specialist expertise meant the insight was lacking and HMRC's responses went

untested:

“We appreciate the NAO’s efforts, but it’s clear that it doesn’t have the necessary in-house expertise to truly hold HMRC to account. IR35 is a very complex and niche subject, and the NAO’s admission that it wasn’t in a position to conclude whether CEST is accurate – one of the key areas of concern – meant it was unable to hold HMRC to account for misrepresenting the law.”

## HMRC’s view of the law unchanged by tribunal losses

When quizzed on CEST’s output, HMRC simply reiterated its policy that it would stand by the tool’s determinations provided CEST had been completed accurately and in line with HMRC’s guidance.

The NAO also asked HMRC if it had considered whether any changes to CEST were needed following recent IR35 tribunal outcomes, the majority of which the taxman lost. The recent cases have been notable for the consistent rejection of HMRC’s flawed argument concerning mutuality of obligation (MOO), which was [rebutted by judges on numerous occasions](#).

HMRC’s argument – that MOO in the context of IR35 is satisfied simply by there being an exchange of labour for remuneration – is the same argument used to explain MOO’s omission from CEST. However, despite this, HMRC told the NAO that its view of the law, and hence CEST, had not changed based on the recent tribunal activity.

“HMRC has confirmed that its ‘view of the law’ hasn’t changed, but the recent tribunal results demonstrate that the taxman’s view of the law in many areas is flawed, so this statement is largely irrelevant,” notes Chaplin.

“Interestingly, HMRC claimed it wasn’t considering changes based on the First-Tier Tribunal outcomes because they were non-binding and subject to appeal. I wonder whether it will consider changes when the Upper Tribunals reaffirm its flawed interpretation of MOO.”

## HMRC addressed testing questions with stock responses

Quizzed on the issue of widespread blanket IR35 assessments across the public sector, HMRC repeated its policy that it considers it reasonable to apply the same assessment result to contractors working under similar terms and conditions. According to the NAO, the taxman added that it “does not consider it is right to rule all engagements to be within or outside of the rules irrespective of the contractual terms and actual working practices.”

“The last sentence is crucial, because this is exactly what a lot of organisations are doing, and [of which there is increasing evidence](#),” comments Chaplin. “By reasserting its view, HMRC had added nothing to the discussion here, especially when continuing to ignore the widespread non-compliance that it claims to oppose.”

Questions regarding the adequacy of HMRC’s testing of CEST were also met with a stock response. HMRC informed the NAO that CEST was developed using a series of workshops in tandem with legal experts and IT professionals, before being tested against live and settled cases.

Detailed evidence of HMRC’s testing of CEST is still yet to emerge, despite [a number of freedom of information \(FOI\) requests](#) from ContractorCalculator. Unfortunately, rather than pursue evidence of HMRC’s testing, the NAO relayed the taxman’s assertions.

“Our issue was that HMRC had provided no testing data, and its response to the NAO does nothing to suggest otherwise,” says Chaplin. “Unfortunately, the NAO hasn’t scrutinised HMRC’s response further, which is what is desperately needed considering this tool is being used to determine the tax status of hundreds of thousands of contractors.

“Though HMRC consulted with many industry bodies, those that we have engaged with said that CEST was not fit-for-purpose. We would expect any substantive investigation to consult with these stakeholders, rather than relying on HMRC’s unreliable claims.”

## Urgent IR35 review required to prevent abuse of powers

The damage that the Off-Payroll rules have inflicted on the public sector has been widespread and well-documented, yet the [HMRC-commissioned report into the public sector impact](#) was largely inconsistent with all other research.

When challenged over the prospect of further research to gauge a more accurate representation of the public sector impact to help inform the decision over the private sector, HMRC detailed the concessions it has made. This included delaying the private sector implementation, the small company exemption and the client-led status disagreement process.

“The client-led disagreement process is a thinly-veiled attempt at passing the buck of handling status disputes by HMRC,” says Chaplin. “It has no detail and [doesn’t provide access to any court via an appealable decision](#). The [small company exemption also has some flaws](#) that will likely create further complications in practice.

“Even if we were to assume that these amendments were made with the best intentions and were workable, they do not address the issues that have plagued the public sector, caused by legislation that is fundamentally flawed.”

Chaplin concludes: “HMRC has continually employed the same tactics to avoid answering the important questions about CEST and the Off-Payroll rules. The failure of an official body to hold the taxman to account has enabled HMRC to blight the public sector by paralysing its flexible workforce.

“A comprehensive review of IR35 is essential not only to prevent further damage to UK plc and the economy come April 2020, but to hold HMRC to account and prevent it from further abusing its position.”

Published: 11 December 2019

© 2019 All rights reserved. *Reproduction in whole or in part without permission is prohibited. Please see our [copyright notice](#).*

200,000+ monthly unique visitors

© Copyright 2019 Byte-Vision Limited UK. All rights reserved [Copyright notice](#)