HMRC's CEST further undermined following Naryan tribunal ruling citing lack of MOO

HMRC's Check Employment Status for Tax (CEST) tool has suffered a further blow to its credibility after a doctor had multiple claims struck out at an Employment Tribunal (ET) on the basis that mutuality of obligation (MOO) wasn't present in her engagement.

Dr R Naryan was denied claims for unfair dismissal and wrongful dismissal after ET Judge Andrew Buchanan concluded that she had never been an employee of Community Based Care Health (CBCH) Limited.

Judge Buchanan instead ruled that Dr Naryan had been engaged as a worker, despite the fact that she was deemed subject to control and required to provide personal service during her 11-year engagement.

Crucial to the verdict was the absence of MOO, a key test of employment omitted from the CEST tool, based on HMRC's claim that it is inherent in every exchange of labour. As a result, the ruling has cast further questions over the tool, and the hundreds of thousands of assessments it has conducted to date.

"This isn't the first time a Judge has disproven HMRC's flawed claims regarding employment status, and no doubt it won't be the last," highlights ContractorCalculator CEO Dave Chaplin. "HMRC is now standing in a hail storm, while refusing to acknowledge that it's even raining."

Naryan v Community Based Care Health: the facts

Dr Naryan provided her services to CBCH for over 11 years, on a flexible basis as an out of hours practitioner. It was acknowledged that Dr Naryan would work regular shift patterns in accordance with a rolling 12 week rota, though she had the freedom to turn down work as she wished.

In February 2017, the client ended the engagement, prompting Dr Naryan to advance a number of claims, including those for unfair dismissal, breach of contract in respect of notice pay, and unpaid holiday pay.

Several of these claims hinged on Dr Naryan's assertion that she had been employed by CBCH, despite the fact that she traded via a limited company. This was contested by CBCH, which argued that she had provided services on a self-employed basis.

Lack of MOO proves critical in employment status verdict

In reaching his conclusion, Judge Buchanan noted that a significant degree of control had been exerted over Dr Naryan, who was also required to provide her personal service. These factors, he noted, were demonstrated in a number of ways, including:

> - Dr Naryan would face financial penalty should she fail to attend a shift on time
> - When carrying out home visits, Dr Naryan was required to use equipment and transport provided by the client
> - Dr Naryan's work was subject to audit and independent checking
> - There was no agreement that Dr Naryan could send in a substitute, if unable to work an agreed shift.

Judge Buchanan suggested that these factors were sufficient to evidence a contract of service, had it not been for the absence of MOO. In questioning whether the 'irreducible minimum' to determine a contract of employment was present, Judge Buchanan noted:

"I conclude that there was no obligation at all on the claimant to accept any work from the respondent and no obligation on the respondent to offer work," later adding: "The fact that the parties worked together as they did for over 11 years suited them both but it did not give rise to mutuality of obligation such as to create a contract of employment."

Consequently, Judge Buchanan concluded that Dr Naryan had been providing services as a worker, not an employee, thus invalidating her claims for unfair and wrongful dismissal.

Naryan case reinforces that CEST 'cannot be relied upon'

HMRC maintains that MOO is present in any engagement, an argument it has used to attempt to justify MOO's omission from CEST. This ruling, like many others, has proven otherwise, as director of The Law Place Martyn Valentine highlights:

"This judgment serves to illustrate HMRC's foolhardiness in disregarding MOO from its much maligned and discredited CEST tool. In deciding that the claimant was a worker rather than an employee, the tribunal placed great emphasis on the existence of a sufficient degree of MOO for a relationship of employment to arise.

"The fact that the claimant was not obliged to accept a particular shift was decisive and, accordingly, the irreducible minimum of obligation on each side to create a contract of service was not satisfied."

Valentine adds: "Although the claimant's company was only used as a means of payment, the underlying tests remain the same for IR35 and illustrate the crucial importance of properly assessing MOO at the outset. Given that CEST doesn't take into account MOO as prescribed by law, it cannot be relied upon, and to suggest otherwise is dangerous."

Naryan ruling a 'wake-up call to NHS trusts'

The ruling has been welcomed by the Independent Health Professionals Association (IHPA), which hopes it will act as a reminder to NHS trusts of their compliance responsibilities under the Off-Payroll rules.

"This ruling ought to serve as a wake-up call to NHS trusts who attended HMRC IR35 lead Mark Frampton's infamous blanketing webinar, in which he urged trustees to ignore the case law test of MOO, assuming it to be present on all occasions - something they should now see is clearly false," comments IHPA Secretary General Dr Iain Campbell.

"This is the case of a doctor working in a hospital care setting, for whom an irreducible minimum of MOO was absent. We believe this is the case for a significant number of locum health workers, many of whom are on one to four hour notice periods. These are notice periods which are actively used by both parties in practice."

What does this mean for HMRC and CEST?

The ruling exerts additional pressure on HMRC, which has so far maintained its flawed stance on MOO, in spite of overwhelming existing and emerging evidence proving the opposite.

"Even with an ET Judge providing assistance, CEST would be liable to conclude the wrong employment status in this case, for the simple reason that it refuses to acknowledge MOO," notes Chaplin.

"For decades, HMRC has attempted to impose its own warped interpretation of case law on the taxpayer, none more so than with the arm-twisting surrounding CEST. This case reinforces the fact that CEST is merely a reflection of what HMRC wishes the law to be, but not what it actually is."

The failure to consider MOO has contributed to what many would describe as biased outcomes from CEST, which may go some way to

explaining why HMRC has almost doubled its anticipated tax yield from the Off-Payroll rules, taking only payroll taxes into account.

In promising to 'enhance' CEST during the Off-Payroll private sector consultation, the taxman inadvertently acknowledged that the tool in its current format is not fit for purpose. This, Chaplin notes, leaves HMRC in a catch-22 scenario:

"HMRC has built a tool that pushes firms to deduct taxes from people in a manner that does not align with the law. Updating the tool would be akin to admitting that the original was wrong. If contractors were to then receive new assessments overturning an 'inside IR35' judgement, this will open the floodgates for litigation using a group action lawsuit."

Chaplin concludes: "HMRC needs to throw in the towel. It cannot roll out the Off-Payroll rules to the private sector with CEST in its current form without a massive disclaimer warning of its inadequacies. Should HMRC decide to fix it, a litigation scandal beckons."

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