

IR35 defeat threatens broadcaster backlash for HMRC: Lorraine Kelly tribunal analysis



HMRC's grasp of IR35, its [relentless pursuit of broadcasters](#) and the resulting questionable spend of taxpayers' money on unwinnable tribunals are being questioned following [its most recent tax tribunal loss](#).

[Television presenter Lorraine Kelly](#) won a decisive victory in her appeal against a tax bill amounting to circa £1.2m marks the latest in a series of tribunal defeats for the taxman.

- Tribunal ruling result straightforward because Kelly was clearly not controlled
- HMRC relied on the written agreement alone, ignoring other evidence
- The taxman's interpretation of mutuality of obligation (MOO) rejected again at tribunal
- This ruling raises further questions over HMRC's waste of taxpayer money

"Looking at the judgment, there was very little doubt over the outcome, which makes it all the more concerning that HMRC saw fit to fight Kelly's appeal," highlights ContractorCalculator CEO Dave Chaplin. "HMRC's losses are mounting and will no doubt encourage more presenters to challenge the taxman at tribunal."

HMRC concluded that IR35 applied to agreements between Kelly's limited company Albatel Ltd and ITV Breakfast Ltd for her to present television programmes 'Daybreak' and 'Lorraine' between September 2012 to July 2017.

HMRC fall's short with efforts to establish control

HMRC did not provide any witnesses, relying solely on the contractual arrangements agreed between Albatel Ltd and ITV as its evidence. Among the arguments put forward by HMRC were that the written agreements implied control through:

- Kelly's requirement to comply with OFCOM regulations binding ITV
- ITV's editorial control over Kelly's work
- A clause requiring that Kelly provide services for 42 weeks each year.

Kelly agreed that she was obliged to meet OFCOM regulations. However, she disagreed that there was any obligation on her to comply with all reasonable requests of ITV as she controlled the show, explaining that it was no more than a reasonable working relationship.

The taxman's argument concerning OFCOM was rebutted by Keith Gordon, representing Kelly, who questioned HMRC's inability to distinguish between ITV's responsibility as a broadcaster and the test of control. This point was reinforced by IR35 expert Martyn Valentine of [The Law Place](#):

"HMRC put forward a weak argument, claiming that because ITV was subject to OFCOM, that this somehow created an implied right of control. This is a red-herring, because OFCOM's regulations apply irrespective of employment status."

Why did the taxman ignore certain evidence?

While HMRC relied on the contract alone, Kelly's witnesses confirmed that neither party felt bound by every clause, citing multiple occasions where Kelly undertook activities breaching these conditions.

One witness, 'Lorraine' editor Susan Walton, described a meeting attended by ITV officials and HMRC officers in July 2015, summarising the key points from the meeting which were documented and signed by attendees. Included among these points were the following:

- Ms Kelly drives and controls her services and the programme
- Presenters need to be aware of OFCOM. Ms Kelly is not bound by ITV's Code of Conduct
- There are no appraisals
- Planning of shows would be discussed with Ms Kelly; they couldn't do anything Ms Kelly didn't believe in

"What's very worrying about this case is that HMRC had the evidence available, indicating that Kelly was not controlled. Yet, HMRC either choose to ignore it, or interpreted it in a manner which was contrary to the fact, as pointed out in paragraph 80 of the ruling," says Chaplin.

Kelly was 'in control'

HMRC had attempted to draw comparisons between Kelly's arrangements and the [recent Christa Ackroyd case](#). However, Gordon highlighted that Kelly's contract was no more than a contract for the provision of specific services, noting that ITV had no right to direct Kelly concerning what work she did, contrary to Ackroyd's arrangement.

In addition, Gordon reiterated that Kelly had final say over the running time of interviews, as a sign that she was wasn't controlled. As Valentine highlights, this was far from being the only indicator:

"There were numerous examples of Kelly exercising overall control over the content of the show, and even the people that would be involved in her team. Far from being controlled, she was largely in control."

Valentine's sentiment was reflected by Judge Jennifer Dean, who, [in her judgment](#), noted: "In looking at the overall picture, we were wholly satisfied from the evidence that contrary to being part of a jigsaw, Ms Kelly was the jigsaw."

HMRC's interpretation of MOO rejected at tribunal, again

Though it wasn't central to Kelly's case, it was acknowledged that there was a personal requirement for her to perform the services. Of more significance was mutuality of obligation (MOO), HMRC's interpretation of which was once again rebuffed at tribunal.

While the taxman argued that the arrangement between Kelly and ITV met the criteria for the employment test, Judge Dean concluded that it only amounted to the 'irreducible minimum' present in any exchange of labour.

"Whilst the points relating to MOO were largely neutral, the Judge certainly didn't subscribe to HMRC's public view that just getting paid for doing something was enough to say sufficient MOO exists," notes Valentine.

"What was decisive, as is the case with the vast majority of self-employed contractors, is that if they do not turn up to work, they do not get paid. They only get paid for the work done."

What does the ruling mean for HMRC and broadcasters?

This latest ruling is of even greater significance given the current volatile relationship between HMRC and the broadcasting industry. The BBC is currently pursuing a settlement with the taxman for retrospective bills handed out to hundreds of presenters as a result of dubious assessments [conducted by its Check Employment Status for Tax \(CEST\) tool](#). Following the ruling, it awaits to be seen how many of the affected presenters will feel compelled to launch their own legal challenge.

The judgment also marks another damaging tax tribunal defeat for HMRC which, as Valentine highlights, has done little to justify its IR35 determinations in the court room of late:

"If HMRC had done its legal research properly, it would have conceded that IR35 didn't apply at a much earlier date, preventing taxpayer's money from being wasted on a case which had very little chance of success. HMRC's job is to collect the correct amount of tax, not waste it."

Chaplin agrees: "This is money that would be better spent on hospitals, nurses and schools, rather than aggressively and unfairly trying to extract money from taxpayer's when it clearly isn't due."

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