

Lorraine Kelly IR35 ruling proves HMRC's CEST tool is biased and inaccurate



HMRC's [Check Employment for Tax \(CEST\) tool's fallibility](#) has again been demonstrated after it incorrectly determined the employment status of the working arrangement established in the Lorraine Kelly IR35 tribunal case, published yesterday.

In a [decisive victory for Kelly](#) in her appeal against a £1.2m tax bill, Judge Jennifer Dean confirmed the outcome, stating: "We do not consider this to be a borderline case."

However, when answering CEST's questionnaire in accordance with the arrangements established within the judgment, ContractorCalculator and its team of IR35 legal experts found [vastly contrasting results](#).

"We spent two hours examining the decision and put the correct answers into CEST, substantiated with excerpts from the judgment," comments ContractorCalculator CEO Dave Chaplin.

"CEST was unequivocal – it thinks Lorraine Kelly should have been caught by IR35, contrary to the tribunal decision by Judge Dean. This is simply not good enough from a tool which HMRC has already used to issue backdated tax bills amounting to millions of pounds."

[Download the detailed evidence \(72 pages - PDF\)](#)

Kelly IR35 status: how did CEST get it so wrong?

While it was recognised that Kelly was required to personally perform services, a straightforward judgment was reached at tribunal due to the significant lack of control, with Judge Dean concluding:

"In our view, the level of control falls far substantially below the sufficient degree required to demonstrate a contract of service and we are satisfied that the factors strongly indicate that the contract was one for services."

As well as this, Judge Dean noted that mutuality of obligation (MOO) only amounted to the 'irreducible minimum' present in any exchange of labour. As status experts will be aware, the presence of [sufficient mutuality of obligation](#) is necessary to establish that the relationship is one of employment, but HMRC's IR35 tool was purposely designed not to even test for it, based on [HMRC's erroneous assumption that MOO is present in all engagement](#).

CEST provides no detailed feedback upon completion of the questionnaire, making it difficult to determine how it reaches its decisions. However, for IR35 expert Martyn Valentine of [The Law Place](#), the tool's failure to consider control holistically, and its refusal to acknowledge MOO altogether, are key to its failings:

“Once again this demonstrates HMRC’s flagrant disregard for key elements of law in its CEST tool. This includes MOO, and its inflexibility regarding real-life exercise of control.”

When will HMRC acknowledge CEST is not fit-for-purpose?

With CEST found wanting again, the outcome will heap further pressure on HMRC to acknowledge and address its shortcomings, something which the taxman has so far failed to do:

“HMRC has claimed, without providing any formal evidence of testing, that CEST is accurate. This decision is a clear indication that it is not fit-for-purpose,” highlights Chaplin. “It also goes to show that, should the tool be imposed upon the private sector as HMRC so wishes, thousands more legitimate contractors risk being forced into false employment.”

When asked why CEST had overturned the deemed employment status of so many BBC freelance presenters at a recent Public Accounts Committee (PAC) hearing, HMRC’s Jim Harra [deflected the blame towards the BBC](#), describing its previous employment status practices as “quite a bit adrift”.

With the affected presenters now subject to backdated tax bills based on dubious CEST assessments, Chaplin believes it’s time that HMRC and CEST’s users be held to account:

“CEST is delivering decisions that result in the incorrect amount of tax being collected. Its widespread use in the public sector appears to have resulted in over £250m being collected that never should have been. Organisations who have used CEST to make judgments should prepare for potential litigation by taxpayers who have been wronged.”

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