

## MDCM Ltd case creates further controversy over IR35 and proposed reform rollout



The outcome from the latest IR35 Tribunal case has caused further controversy surrounding the legislation and has raised fresh concerns over anticipated changes in the private sector.

Construction contractor, Mark Daniels, [won his appeal against HMRC](#) over tax liability covering 2012-2014, but HMRC's Tribunal loss has led experts to dispute the rationality of the IR35 reforms and HMRC's IR35 assessment tool, CEST.

"This decision, while favourable for the contractor, just adds further proof that the IR35 rules are too complex and difficult to apply with any certainty," comments Andy Chamberlain, deputy director of policy at the Association of Independent Professionals and the Self Employed ([IPSE](#)).

"HMRC looked at the relevant factors and decided that IR35 should apply. The Tribunal looked at those same factors and decided that it shouldn't. If HMRC, with all its expertise, seemingly cannot make a correct determination, how are public authorities and individual businesses supposed to get it right?"

### Tribunal rules no substitution clause necessary

Control was a critical factor in the judgment, with the Tribunal refusing to accept HMRC's argument that Daniels was subject to a significant degree control from the client, Structure Tone Limited (STL).

"In reality, STL's instructions to Mr Daniels were directions for the contractors whom Mr Daniels supervised, and so were not instances of a right of control being exercised," notes Martyn Valentine, director of [The Law Place](#).

However, it was Daniels' victory, despite being required to provide personal services, which experts found most intriguing. Daniels disputed that his company's contract with Solutions Recruitment Limited contained a substitution clause, but this was found to be unenforceable in the engagement with STL.

"In every historic IR35 case won by the contractor, there has been a contractually enforceable right to substitute," notes Valentine. "In reality, the Tribunal accepted that a right to substitute did not exist, as STL would simply ask Solutions to procure a substitute and not the appellant."

### Confusion over contrasting concepts of MOO

The judgment also caused some confusion regarding mutuality of obligation (MOO), with the conclusions drawn contradicting comments elsewhere which implied the presence of MOO between Daniels and STL.

"MOO hasn't been described in detail at all in this judgment," says former tax inspector and director of [Tax Networks Ltd](#), [Chris Leslie](#). "Where it is suggested that MOO exists, it seems that the judge is referring to 'contractual MOO'. This is the narrow view of MOO that HMRC

takes, whereby the worker agrees to turn up and work, and the hirer agrees to provide the work and pay them for it.

“Employment MOO’, which is applicable to IR35, appears to be considered within the judge’s conclusion. This concerns an ongoing obligation between worker and hirer, which clearly wasn’t present in this engagement.”

Valentine confirms that MOO was not a factor within Daniels’ working arrangement: “The fact that MDCM Ltd’s open-ended engagement was terminated immediately after STL advised that the work had been completed pointed to self-employment, though I find it curious that MOO was given such little consideration throughout.”

## **Narrow interpretation of MOO central to CEST’s flaws**

Leslie adds that HMRC’s practice of considering contractual MOO for each IR35 case is central to the shortcomings of its Check Employment Status for Tax (CEST) tool:

“CEST grossly misleads people. HMRC has a duty of care to help taxpayers make sensible and correct decisions. So long as CEST continues to hinge on HMRC’s narrow interpretation of MOO, it is not fit for purpose and cannot be considered as assisting taxpayers in making the correct assessment.”

This shortcoming was again confirmed this week when ContractorCalculator ran the case through CEST after extracting the relevant facts. CEST was unable to determine a status, as it has been unable to do so for eight of the other 22 historic IR35 Tribunal cases.

## **MDCM case raises questions over legal representation**

The ruling came just weeks after another IR35 ruling, in which former BBC presenter [Christa Ackroyd lost her appeal against HMRC](#). For Leslie, the contrasting fortunes of the appellants weren’t the only striking difference between the two cases:

“In the MDCM case, the appellant managed to successfully defend himself against HMRC, which was represented by two HMRC officers. In the Ackroyd case, HMRC hired a QC and Barrister to fight its corner; the costs for whom will have run into tens of thousands of pounds.”

Leslie refers to Rule 2(2)(a) of the [Tribunal Procedure Rules 2009](#), which states:

*‘Dealing with a case fairly and justly includes dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties.’*

“With the case law surrounding IR35 proving so complex, and in many cases contradictory, the outcome can often depend on the representations in court, rather than the facts of the case,” explains Leslie.

“You have to question whether the contrasting ways in which HMRC has handled these two cases is fair. HMRC is state-funded; the appellants tend to be small entities; therefore, it appears to be an inequality of arms. The overriding objective must be in line with a fair and just appeal hearing – application of Rule 2.”

Valentine adds: “Nonetheless, HMRC’s shortcoming in this instance illustrates the importance of seeking competent legal advice and representation, especially when appealing IR35 cases.”

## **Can HMRC appeal at Upper Tribunal?**

To add further confusion to the case narrative, HMRC’s prospects of overturning the judgment have divided opinion among legal experts.

“It’s clear that this decision is of limited value for contractors in asserting IR35 status. It is likely that HMRC would succeed on appeal, as STL would not accept substitution of Mr Daniels, MOO was not properly discussed, and undue reliance was placed on the question of control,” Valentine concludes.

However, although the outcome may be considered contentious, Leslie believes that HMRC may face a difficult task if it wants to mount a challenge at Upper Tribunal:

“An appeal can only be brought to Upper Tribunal if there is evidence to suggest that the Tribunal judge has erred in law when making their judgment. As highlighted, there are some peculiarities with this ruling, though in my opinion nothing to warrant an appeal for HMRC.”

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