PGMOL Upper Tribunal victory solidifies mutuality of obligation in law

The Upper Tribunal (UT) decision in HMRC's defeat to Professional Game Match Officials Limited (PGMOL) has served up a "demolition job" on the taxman's interpretation of mutuality of obligation (MOO), leaving HMRC with no choice but to appropriately address its flawed Check Employment Status for Tax (CEST) tool.

This is according to a number of legal experts reacting to the recent ruling, in which the same arguments used to justify MOO's omission from CEST were roundly rejected by the UT. The decision is a damaging defeat for HMRC, one that marks a precedent rendering the taxman's position on MOO untenable.

"HMRC's stance on MOO has come under serious criticism from many quarters and this judgment backs up the critics," says David Kirk, of David Kirk & Co. "The judges have done an expert demolition job on everything that HMRC has to say on the subject. But the fact is that the judges have simply but firmly reiterated what has been the law for a long time, and this issue ought never to have come to court."

MOO once again central to HMRC tribunal defeat

The taxman originally suffered defeat at First-tier Tribunal (FTT) in 2018, largely on the grounds that there was insufficient MOO between PGMOL and the football referees engaged. In appealing the decision, Akash Nawbatt QC, representing HMRC, submitted that MOO is relevant only to the question of whether there is a contract at all and whether the contract contains an obligation to provide services personally.

This argument was swiftly rejected by Mr Justice Zacaroli, who, after drawing upon numerous Court of Appeal decisions, concluded that for 'work-related' MOO to exist there must be:

> - 'An obligation to perform at least some work and an obligation to do so personally'
> - An obligation on behalf of the employer to 'provide work or, in the alternative, a retainer or some form of consideration in the absence of work'
> - Obligations that 'subsist throughout the whole period of the contract'

Mr Justice Zacaroli ultimately concluded: 'We reject HMRC's contention that the requirement that there be mutuality of obligation is irrelevant to the categorisation of the contract as one of employment or one for services, beyond merely requiring that the services be performed personally.' Furthermore, Zacaroli added: 'We think it is insufficient to constitute an employment contract if the only obligation on the employer is to pay for work if and when it is actually done.'

“The ruling will undoubtedly be a major blow to HMRC, although it will not be a surprise to most commentators on employment status,” notes tax barrister Keith Gordon, of Temple Tax Chambers. “Referring to established Court of Appeal authority, the UT confirmed that MOO is a relevant consideration when considering a worker’s status and not, as per HMRC’s argument, relevant merely to the question as to whether or not a contract is in existence.”

Taxman confuses expectations with legal obligations

HMRC’s latest defeat stems partly from its inclination to interpret what the PGMOL Code of Practice referred to as “expectations” of referees instead as legal obligations. Having been disregarded by the FTT, this argument was once again refuted by the UT.

Martyn Valentine, director of The Law Place, observes that HMRC relied heavily on the case of*Cornwall County Council v Prater [2006]* in attempting to validate this assertion. However, Mr Justice Zacaroli reasoned: ‘We do not accept that the Court of Appeal was here suggesting that mutuality of obligation could be satisfied, so far as the employer was concerned, merely by an agreement to pay for work if and when it was done.’

Chris Leslie, an IR35 tax defence expert of Tax Networks who personally sat in on the UT proceedings, adds: “HMRC’s reliance on contractual MOO was yet again misconceived. What is inescapable is the fact that HMRC could not accept that this was not an ordinary case.”

Leslie alludes to the judgment, in which Mr Justice Zacaroli concluded: ‘The referees were highly motivated and wished to make themselves available as much as possible such that “there is no need for a legal obligation”.’

UT ruling conclusively disproves HMRC’s flawed stance on MOO

The decision spells disaster for HMRC and the Treasury. As recently as April 2020, Financial Secretary to the Treasury Jesse Norman reiterated Government’s flawed take on MOO in his response to the House of Lords Finance Bill Sub-Committee inquiry, stating:

‘Mutuality of obligation (MOO) is a term often used to describe the basic obligations that exist between a hirer and a worker. These basic obligations are where the hirer is obliged to pay remuneration, of any kind, and the worker is obliged to provide their work or skill in return… It is thus not correct to suggest that CEST fails to reflect mutuality of obligation.’

“HMRC and the Treasury often state their ‘position’ on mutuality of obligation, as if that is to be believed as the law,” comments ContractorCalculator CEO Dave Chaplin. “HMRC and the Treasury cannot magically create new law by stating their position. They, like everyone else, have to follow the case law laid down in the courts.”

HMRC’s assertiveness while failing to accept MOO for what it is will no doubt have contributed to the widespread adoption of its Check Employment Status for Tax (CEST) tool, which fails to consider the key employment test. The omission of MOO from CEST was flagged up as a major cause for concern in the Finance Bill Sub-Committee’s recent report on the Off-payroll rules, while legal expert Matt Boddington from Chartergates, warned that HMRC was setting CEST up for a fall when writing for ContractorCalculator in 2018.

Experts call for withdrawal or overhaul of CEST

Though HMRC has been unyielding in its stance amid heavy criticism over the past couple of years, experts agree that the latest UT ruling provides the taxman with no option but to concede defeat and make the changes to CEST necessary to align it with the law.

“This finding will require a major overhaul of CEST, given that the tool was programmed in accordance with HMRC’s previously criticised and now debunked view,” comments Gordon.

“Given the strong criticism of CEST as found in the recent report from the House of Lords Economic Affairs Committee, it is hoped that HMRC will now take active steps to withdraw CEST immediately and work with all stakeholders to ensure that any replacement tool that purports to determine a worker’s status will command the broad support that the current version lacks.”

“I fail to see how the Revenue can continue to pretend that CEST does not need to include a test concerning mutuality of obligation,” adds Kirk. “This has surely got to change.”

Chaplin agrees: “HMRC must now concede defeat on this matter and update CEST and its guidance so that both align with the law. In the meantime, whilst CEST remains inconsistent with the law, it arguably does not deliver on the legislative requirement for clients to exercise reasonable care.”

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