

IR35 Forum - HM Revenue and Customs Paper on Mutuality of Obligation (MOO)

Introduction

At the Forum meeting on 11 December, HMRC noted claims in contractor bulletins and at roundtable discussions, that MOO is omitted from the Check Employment Status for Tax (CEST) service.

CEST does not explicitly look at MOO, it is designed to determine whether an existing or future contract will be one of employment or self-employment. It is assumed that a person using CEST will have already established MOO, which is necessary for a contract to exist, otherwise there would be no need to be using CEST to determine the status of the existing or hypothetical contract.

Some commentators in the press and some members of the forum have suggested this approach to MOO is flawed. HMRC has therefore provided its considered response to questions raised at the IR35 Forum regarding “mutuality of obligation” as part of the “irreducible minimum” of a contract of service.

Content

A basic requirement of any contract is consideration – the parties must be obliged to exchange something of value. In an employment contract, the main consideration will be work in exchange for pay. Mutuality of obligation will also exist in contracts for goods or services.

Where contractual obligations are conditional upon an event mutuality of obligation will exist, even though the event may not take place. The parties are nonetheless obliged to fulfil their obligations if the event occurs.

Where an arrangement doesn't oblige the parties to do anything, it isn't a contract, even if it's called an 'agreement' or labelled a 'contract'. It may be a head of agreement or offer setting out the terms on which a contract may take place. A head of agreement will become a contract, subject to any variations or implied terms, when the offer is accepted. The acceptance of an offer may be established by the conduct of the parties, such as providing labour.

The fact that a contract may be terminated does not affect mutuality of obligation during the contract, even if it may be terminated without notice. The fact that the duration of such a contract is uncertain is irrelevant to mutuality of obligation, whilst the contract continues.

Where a person is engaged in a series of contracts and there is no mutuality of obligation between each engagement this is irrelevant to mutuality of obligation during each engagement.

Where work is provided and remuneration is paid we will assume that there is mutuality of obligation and that a contract exists. We will consider whether this is an employment contract or a contract for services. We will be sceptical of an assertion that no mutuality of obligation - and logically no contract – exists in these circumstances.

We will consider a range of factors to establish whether a contract is an employment contract or a contract for services. This is distinct from consideration of mutuality of obligation, which will already have been established. For the avoidance of doubt the CEST online tool assumes that a contract exists or is being considered. We do not anticipate the tool being used outside of these circumstances.

Issues such as substitution and delegation should be taken into account when considering if a contract is consistent with an employment contract. This approach was established in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968) in which McKenna J observed that a limited or occasional power of delegation may be consistent with an employment contract. A useful precis of case law relating to personal service is contained in the recent Court of Appeal judgement in *Pimlico Plumbers & Another v Smith* (2017).

Where a worker is engaged on an assignment by assignment basis this may be a relevant factor, but will not be determinative. This was confirmed in *Arada v Windle & Another* (2016) in which Lord Justice Underhill observed:-

“An issue that arises in this case is the significance of mutuality of obligation in the employment contract. Every bilateral contract requires mutual obligations; they constitute the consideration from each party necessary to create the contract. Typically an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to keep the relationship in place until it is lawfully severed, usually by termination on notice. But there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed: see the decisions of the Court of Appeal in *Meechan v Secretary of State for Employment* [1997] IRLR 353 and *Cornwall County Council v Prater* [2006] IRLR 362”.