

## **IR 35 Forum Minutes**

100 Parliament Street,  
29 August 2019

### **Attendees:**

Rowena Fletcher	HMRC – Chair
Samantha Hurley	Co-Chair. Association of Professional Staffing Companies.
Matthew Lewis	Confederation of British Industry (CBI)
Vaneeta Khurana	Chartered Institute of Taxation (CIOT)
Lewina Farrell	Recruitment and Employment Confederation (REC)
Jason Piper	Association of Chartered Certified Accountants (ACCA)
David Kirk	Institute of Chartered Accountants of England & Wales (ICAEW)
Justine Riccomini	Institute of Chartered Accountants of Scotland (ICAS)
Samantha Mann	Chartered Institute of Payroll Professionals (CIPP)
Matt Fryer	The Freelancer and Contractor Services Association (FCSA)
Alasdair Hutchison	The Association of Independent Professionals and the Self-Employed (IPSE)
Paula Jarnecki	HMRC
Tony Johnson	HMRC
Alan Reay	HMRC
Mark Frampton	HMRC
Stephen Gorham	HMRC
Elliott Selby	HMRC (Secretariat)

### **Apologies:**

Lesley Fidler	Chartered Institute of Taxation (CIOT)
Simon McVicker	The Association of Independent Professionals and the Self-Employed (IPSE)
Philip McNeill	Institute of Chartered Accountants of Scotland (ICAS)
Chris James	The Freelancer and Contractor Services Association (FCSA)

### **Welcome & introductions**

Rowena welcomed Forum members.

### **Mutuality of Obligation (MoO) Presentation**

HMRC thanked members for sharing their further views about HMRC's approach to MoO and Check Employment Status for Tax (CEST). HMRC confirmed it would respond in detail to letters from individual members.

HMRC has spent some months using the members views to help test its position on MoO, alongside the work to enhance CEST. HMRC explained it has not changed its

view from that set out in the paper published with the minutes of the meeting of 28 February 2019 and summarised its position as follows:

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 gave the classic formulation of the status test. The first test is that the “consideration” for the contract is “work and skill” in return for “a wage or other remuneration”. HMRC regards mutuality of obligation as a simple contractual wage-work bargain. Members pointed out that HMRC’s technical note reads as if HMRC believes the existence of a contract is alone sufficient to establish MoO. The contract has to be a contract for work.

HMRC explained its view that the first test is sufficient to establish MoO. The other tests suggested in the Ready Mixed Concrete decision, particularly that of control, established what type of contract for work it was. HMRC found support for its approach in Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471 Cotswold Developments Construction Ltd v Williams [2006] IRLR 181 and Cornwall County Council v Prater [2006] EWCA Civ 102; [2006],

HMRC acknowledged that an alternative interpretation of MoO has arisen from applying employment rights cases, following Carmichael v National Power plc 1999, to taxation and employment status generally. A member had drawn HMRC’s attention in particular to Secretary of State for Justice v Windle and Arada EWCA Civ 459. These cases relate to the status of overarching agreements (i.e. frameworks under which a worker may or may not be offered or accept work) and the rights requirements to demonstrate continuity of employment. HMRC’s position is that the individual engagements under the framework should be analysed, rather than the framework itself.

A second member pointed out that they had presented a paper with other authorities in support of this contention. HMRC said that it would respond in detail to that correspondence in due course.

HMRC explained that the two views are being argued in ongoing litigation in the Upper Tribunal and mutuality of obligation is an issue in several cases there.

CEST was introduced to help users determine the tax treatment of payments made under labour contracts. It assumes that a labour contract exists (or will exist) and that payments will be made under that contract. The questions posed by CEST make no sense in any other context. Without the payment of wages or other remuneration in return for work, i.e. MoO, there is no income to tax and no status for CEST to determine.

HMRC will not be adding questions to CEST to cover the alternative approach to MoO. The CEST landing page on Gov.UK will summarise the assumptions upon which CEST is based, including MoO, and it will be clear that CEST is guidance that reflects HMRC’s view of the law.

HMRC has listened to members and others who suggested that CEST should ask more questions to establish whether a worker is providing their services in the course of business. Material will be included to reflect the fact that an individual undertaking multiple contracts, with a range of engagers, (i.e. an itinerant worker) is more likely to be regarded as being self-employed than someone who undertakes a single contract, with one engager, and is economically dependent upon that contract.

AP1: HMRC agreed to expand the published note to clarify its position on MoO.

AP2: HMRC will respond in detail to the correspondence on MoO from members

### **Update on education and support package**

HMRC described the package of education and support it is providing to business to implement the reform and help organisations get the status of the contractors they engage right. HMRC has created a specialist team to deliver this. It includes one to one support for support for 2,000 of the UK's biggest employers through their Customer Compliance Managers, and direct communications to around 15,000 medium-sized businesses. This is supported by workshops, guidance, and webinars.

HMRC is prioritising help for those companies which are most likely to engage large numbers of contractors, looking at particular characteristics and sectors, but reassured members that we were aiming to support all those affected over the coming months. HMRC is writing out to the companies initially identified to raise awareness and offer fact sheets and further assistance. Two hundred letters have been issued to date with a further two thousand due in the next few weeks. HMRC reassured members that there had not been a negative reaction to receiving these letters.

Members asked about the support available to smaller businesses without a Customer Compliance Manager. HMRC explained we would reach smaller businesses through their agents who will be invited to workshops. Online guidance is also available now with further detailed guidance to be published before the end of the year.

Members asked why it was necessary to wait until November to issue letters to agencies and recruiters. HMRC explained that by November the necessary resources would be in place to deal with enquiries generated from the mailshot.

Members asked what action was being taken to inform software developers about the changes needed as a result of the proposed changes. HMRC explained that Real Time Information returns (RTI) are being updated and questions from developers are already coming in and being answered. Developers will be invited to discovery sessions and provided with detailed case studies.

AP3: HMRC to consider if it is possible to provide the planned support earlier than November.

AP4: HMRC to send examples of the letters being sent by the CCMs to members.

## **CEST**

HMRC thanked members for their help in the work to enhance CEST.

HMRC presented CEST to demonstrate the enhancements which have been made and ran through the new questions which have been added. HMRC explained that work was continuing and they did not yet have a release date, although the demonstration was a good indication of progress. Members indicated the questions on business on own account were good and a welcome development. Forum members noted as important that CEST now produces a PDF of the determination, and asked HMRC to add a facility to allow a job reference to be included.

Members asked about recent press reports that claimed HMRC had said in a litigation case that it would not stand by CEST and it was irrelevant. HMRC explained the case involved tax years before the introduction of CEST. The Judge had ruled that the Tribunal would only have reference to the facts and the legislation and had refused to consider as evidence the taxpayer's view of CEST. The Tribunal said CEST was not relevant as the taxpayer had not used CEST in determining their status at the time.

## **Guidance**

There was a discussion about the guidance published on 22 August 2019. HMRC confirmed this was the first stage of the planned guidance on off-payroll reform. Members asked if HMRC could issue further guidance on the following important topics: (i) contracted out services. (ii) what would happen if a contact finished prior to April 5 but a payment is made after that date. (iii) Members concern that contractual arrangements can change over time and that an initial decision on status can become outdated. HMRC agreed to include in the guidance a suggested timescale for review and re-testing.

AP5: HMRC to add job reference space to CEST PDF.

AP6: HMRC to develop further guidance for (i) guidance on contracted out services (ii) contacts finishing prior to 5 April with payment made after that date, and (iii) the appropriate timescale for reviewing contractual arrangements.

## **AOB**

Members asked about recent media reports that HMRC has written to contractors in the pharmaceutical industry about their tax returns. HMRC explained that the letters are not part of activity preparing for off-payroll reform but were part of routine

compliance activity. HMRC had written to some customers to prompt them to think about their employment status and to take advice. HMRC often takes this approach, writing to customers as part of compliance and customer support work and asking customers review and where necessary correct their tax returns with our help. HMRC agreed with members that it would be helpful to discuss compliance activity at the next meeting.

Members asked about HMRC's ongoing work to review and update the media guidance. HMRC confirmed it will continue to stand by the existing guidance until such time as the new guidance is issued. There is no update on publication as work with the industry is continuing.

Members asked when the transfer of liability provisions in the draft legislation will become active. HMRC explained that would happen when the Finance Bill came into force, usually from 6 April, subject to Parliamentary approval.

### **Update on outstanding action points**

#### **AP1/Feb – Forum members to respond to HMRC's invitation to participate in discussions on CEST enhancements.**

Completed prior to meeting - *closed*.

#### **AP2/Feb – Members to submit comments on draft MoO paper by 7 June 2019.**

Completed prior to meeting – *closed*.

#### **AP3/Feb – HMRC to prepare updated MoO paper by next meeting.**

Dealt with by presentation during meeting – *closed*.

#### **AP4/Feb – Forum members to send comments on slide pack on settlements and overpayment relief guidance by 7 June 2019.**

- HMRC said that provisional claims for overpayment relief and s. 58 relief were accepted. (Includes provisional amendments made to tax returns).
- As to the time limits for overpayment relief, details are given in the Self-assessment Claims Manual at page 9005.
- On the subject of backdating of interest set-offs (where overpayment relief for corporation tax and/or income tax relief under s. 58 ITEPA were being claimed for offset against an IR35 liability and interest was accruing on both amounts paid to and amounts payable by HMRC), HMRC agreed that their collection and management powers in section 1 of the Taxes Management Act did permit them to backdate offsets, but they would need to be persuaded that doing so would improve the overall collection of tax. A Forum member suggested that failure to do so was contrary to HMRC's policy on interest and was unjust, and that these considerations ought to be taken into account too. HMRC explained that as it was very clearly the statutory position they could not see that it was unjust or contrary to policy. Given evidence

that would support use of care and management they would be open to using that power. Completed– *closed*.

**AP5/Feb - HMRC to report back to next forum meeting.**

HMRC explained that the issue of offsets had been looked at in detail by the relevant policy area. The idea of using collection and management powers had been explored at the suggestion of members. HMRC was open to the idea of offsetting in the settlement but would need evidence from the tax profession that demonstrated the tax due would be collected more efficiently.

**AP6/Feb – HMRC to share the response to ICAEW note on guidance.**

Included in meeting papers – *closed*

**AP7/Feb – HMRC to discuss with data analysts the possibility of a breakdown of NICs between employee and employer contributions and report back at next meeting.** HMRC explained the information is not held – *closed*.

**Summary of New Action Points:**

AP1: HMRC agreed to expand the published note to clarify its position on MoO.
AP2: HMRC will respond in detail to the correspondence on MoO from members
AP3: HMRC to consider if it is possible to provide the planned support earlier than November.
AP4: HMRC to send examples of the letters being sent by the CCMs to members.
AP5: HMRC to review adding job reference space to CEST PDF
AP6: HMRC to develop further guidance for (i) guidance on contracted out services (ii) contacts finishing prior to 5 April with payment made after that date, and (iii) the appropriate timescale for reviewing contractual arrangements.