

Ms Rowena Fletcher  
Chair, IR35 Forum  
HMRC, 100 Parliament Street  
London SW1 2BQ

27 March 2018

Dear Rowena

**IR35 Forum – HM Revenue & Customs Position Paper on Mutuality of Obligation**

Thank you for explaining HMRC's position on mutuality of obligation ("MOO") at the IR35 Forum meeting on 11 December 2017 and in your subsequent position paper, which I have carefully considered.

As you know, the discussion around MOO is particularly important in relation to the Check Employment Status for Tax ("CEST") tool which does not consider the existence of MOO in an engagement. Broadly speaking, this is because HMRC believe MOO always exists in any contract. We disagree, and this letter sets out our understanding of MOO and cites case law to support that view. In forming this view, I have drawn on my own experience as Director of Policy and External Affairs at IPSE, the experiences of our members, the expertise of my colleagues and I have also spoken with lawyers and other experts in this area.

In your position paper, you quite rightly state that consideration is a basic requirement of any contract. However, we query whether it is correct to assume that the basic consideration of pay for work is sufficient to create the requisite MOO which characterises an employment relationship. We would challenge the notion that MOO exists in every engagement where there is an obligation on the individual to provide work and for the client to pay for work performed.

Case law establishes that something more is required for an employment relationship. For example, in *Usetech Ltd v Young (H.M. Inspector of Taxes) (2004) 76 TC 811*, Parker J said at paragraph 60:

*"I would accept that it is an over-simplification to say that the obligation of the putative employer to remunerate the worker for services actually performed in itself always provides the kind of mutuality which is a touchstone of an employment relationship. Mutuality of some kind exists in every situation where someone provides a personal service for payment, but that cannot by itself automatically mean that the relationship is a contract of employment: it could perfectly well be a contract for free lance [sic] services."*

Indeed, there have been cases which involve contractors providing services where the absence of MOO has been fatal to a finding of employment within the context of the IR35 legislation. In each of these cases, there was a contract in place. For example, in *Marlen Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 411 (TC), the First Tier Tax Tribunal found that the requisite MOO for an employment relationship did not exist in relation to an individual who supplied engineering, design and drafting services to a client through an intermediary. There were at least a couple of occasions where the individual contractor was sent home without pay when the computer servers broke down, whereas paid employees were not sent home. In addition, both parties had terminated contracts part way through (there was a series of contractual engagements). These factors were deemed inconsistent with there being the requisite MOO, even though there was still a contract (or series of contracts) in place.

Similarly, in *MBF Design Services Limited v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 35 (TC), the First Tier Tax Tribunal found that there was insufficient MOO to establish employment for tax purposes in relation to a contractor providing design engineering services to a client through various intermediaries. Again, this was despite the fact that there was a contract in place.

In the *Usetech* case mentioned above, Parker J summarised this by saying that the requisite MOO does not exist where there is both no obligation on the client to provide work and no obligation to pay the worker for time in which work is not provided: see *Usetech Ltd* per Parker J at paragraph 64.

MOO therefore does not exist in circumstances where, for example, the client can send the contractor home without pay when there is insufficient work or an unexpected break in the project. This is to be contrasted with an employment relationship where the employer would be required to continue paying the employee in such circumstances. MOO also does not exist where the client can end an engagement early without any obligation to provide notice or compensation, as there is no obligation to continue working or continue paying until the specified work is complete, as was the case in both the *Marlen* and *MBF Design Services* cases referred to above.

As set out in your position paper, CEST does not explicitly look at MOO. However, in light of the above, it cannot be said that MOO is present in all public sector engagements or that every person using CEST will have already established MOO. Accordingly, the CEST tool overlooks a fundamental aspect of the test for employment status. This is particularly significant given HMRC's guidance that it will "stand by" the result of the CEST tool (unless the information provided is not accurate). In our experience, clients (particularly those in the public sector) place great weight on the results of the CEST tool. However, many of IPSE's members have reported that they disagree with the outcome of the CEST tool; it does not always provide a completely accurate assessment of an individual's employment status.

In *Hall v Lorimer* [1992] STC 599 at 611, Mummery J made the following observations about the test for determining whether someone is an employee or self-employed:

*"In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another."*

Each individual's circumstances must therefore be assessed in the round. Without any questions related to MOO, the CEST tool does not give the complete picture.

Given employment status is so complex, we also feel it would be helpful if there were some avenue for contractors to challenge or appeal any conclusion of employment status that a public sector client makes under the off payroll working rules. Due to some public sector clients' excessively cautious assessment under the off-payroll rules and reliance on the CEST tool (which does not take MOO into account), many contractors are finding that their fees are being treated as deemed employment income when they remain legitimately self-employed. Such appeal or challenge could be either to the client itself or to some external body such as a tribunal, although the forum for any such challenge or appeal would need to be considered further.

In light of the above analysis, I would therefore urge HMRC to reconsider its position on MOO generally and in relation to the CEST tool.

Yours sincerely

A handwritten signature in black ink, reading "Simon McVicker". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Simon McVicker  
Director of Policy and External Affairs, IPSE