

Anonymous written evidence (OPR0006)

My husband works as an IT Contractor through his own limited company.

In April 2021, my husband found himself subject to an IR35 Determination from his Engager at that time. Even though his contracted role was originally agreed as being 'Outside' the IR35 Legislation, from 06/04/21, the Engager Determined that he fell 'Inside' the IR35 parameters.

On examining the HMRC CEST Tool result which the Engager based their Determination Decision on, he identified several discrepancies in the answers to some of the Tool's questions and brought this to the Engager's attention. As he disagreed with their Determination, the Engager informed him that he would have to submit a Dispute for their consideration. As supporting evidence, he completed the HMRC CEST Tool himself and included a copy of the Output Report which indicated that he would fall 'Outside' IR35 Legislation, an outcome which his accountant supported and which was consistent with his established working arrangements.

The Engager dismissed his Dispute and allowed their original IR35 Determination Decision to stand, a decision which had been based on a generic rather than an individual assessment using the HMRC CEST Tool. In addition, they informed him that he did not have the Right to Appeal. Not knowing if this was correct, he informed me of this and I called HMRC, to discuss the IR35 Dispute / Appeals process and to obtain the email address of the HMRC Appeals Team.

I was surprised to be informed by HMRC, that only the Engager and End Client have Rights of Appeal against HMRC under the IR35 Legislation. The Worker / Contractor is entitled to submit a Dispute against the Engager / End Client IR35 Determination Decision within 45 days of that decision. If, however, the Engager / End Client CHOOSE not to alter that decision, the Worker / Contractor DOES NOT HAVE THE RIGHT OF APPEAL.

The financial implications of this to the Contractor can be very severe and punitive, whilst still not giving the Contractor any additional rights enjoyed by permanent staff.

This being the case, I asked HMRC directly, if there was an IR35 Complaints Team who might handle failed Disputes on behalf of the Workers / Contractors, alternatively channelled through the formal complaint route. HMRC advised that there was no complaints team and no complaints process for IR35.

I pointed out to HMRC that this creates an imbalance of justice which is prejudicial and detrimental to the Worker / Contractor, allowing Engagers and End Clients to bring the IR35 Legislation into disrepute, manipulating it to their business advantage. I informed HMRC that my husband and other contractors were being forced by the Engager to drop their Disputes and accept their 'Inside' IR35 ruling (whether correct or not) or risk termination of contract before 06/04/21 for non-compliance. In other words, the Engager, in this instance employed the IR35 Legislation as a tool for constructive dismissal against any worker / contractor who did not accept their desired IR35 Determination, making HMRC the unwitting enabler of a potential contravention of Employment Law.

I went on to explain to HMRC that both Complaints and Appeals processes can start off at the same point of origin – ie a Determination Decision – following

parallel escalation routes – until they converge again at Judicial Review. Furthermore, I informed them that the absence of these processes at the preliminary levels of standard escalation does not exclude the Worker / Contractor from picking up the formal Complaint Process at the MP entry point and added that we would be contacting our MP accordingly, which we did.

As the IR35 Determination Process is a subjective one, without the Right of Appeal being available to the Worker / Contractor, this leaves the process open to such abuse in the absence of an independent overseer to police it. In addition, as the Right of Appeal is only exclusively available to the Engager / Client, this ensures that HMRC will never be aware of any Disputes submitted by the Worker / Contractor to the Engager / End Client, unless they choose to volunteer that information to HMRC. As there is no Appeals Process to consider Worker / Contractor IR35 Appeals, HMRC have no requirement to request such information and will remain oblivious to any abuses of their CEST Tool and IR35 Determination Process, especially when there is no Complaint Process in place to allow an alternative path to a remedy.

Consequently, this situation will ensure that the statistics of these futile Disputes will never be captured for reporting through the Freedom of Information Act and MPs will never be able to extrapolate the true, devastating impact of the misuse of the IR35 Legislation against Workers / Contractors.

We asked our MP, therefore, to offer his support to our complaint and escalate it to HMRC for investigation and resolution. We also asked him to raise this matter in the House of Commons with the proposal to rectify the IR35 Legislation so that it attracted the full support of either the existing 'complete' Appeals process employed elsewhere by HMRC, or allowed the channelling of grievances via the standard HMRC Complaint escalation process. The response we received from our MP and HMRC directed us to take the Engager to an Employment Tribunal on the matter and negated to answer the issue regarding how HMRC cannibalised the standard Appeals Process inappropriately and failed to provide any teams of staff to deal with any complaints or appeals arising from the IR35 Legislation.

Being conversant with the Courts and Tribunal Service standard Appeals Process, I decided to contact the Upper Tribunal Taxation Chambers, to find out if they were aware of the IR35 situation and to seek their advice. The gentleman I spoke to was very surprised to hear what I had to say and recommended that I approach HM Treasury to invite them to comment and to look into the matter. So, on their advice, I wrote to HM Treasury Minister on 31/08/21 and 20/09/21 and only received a summary acknowledgement to the latter. Approximately 2 weeks ago, still not having received a response from HM Treasury Minister, I contacted our MP's office to inform him of this and to ask if he could chase up a response on our behalf. To date, we have heard nothing from the MP or the HM Treasury Minister.

To assist in the understanding of the Dispute and Complaint argument, please refer to the process diagrams below. We hope that this will help demonstrate what is currently not happening.

Note. The first process map below, represents the IR35 Determination Disputes and Appeals Process as it exists currently and reflects the two Determination Decision paths applied, dependent upon whether your role is that of Engager / Client or Worker / Contractor.

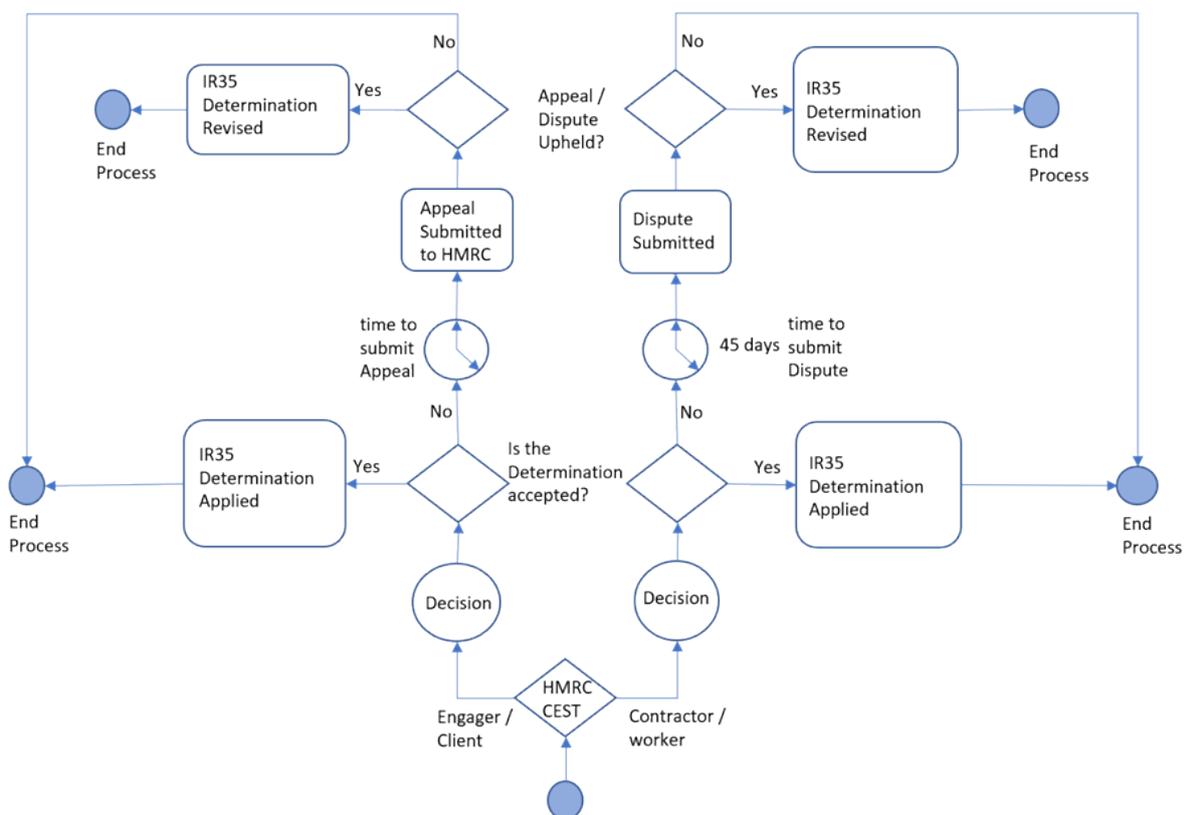
In a standard Appeals Process, there is only one Determination Decision from which a Dispute arises. When a Dispute fails, the same individual usually escalates their case to Appeal and (if allowed) can continue to escalate up to Judicial Review. HMRC have erroneously split the Dispute / Appeals Process into two separate IR35 Determination Decisions, one which defines the Worker / Contract role whilst the other defines the Engager / Client. Each of these Determination Decisions are separate entities but the IR35 Determination Process allows the Engager / Client Determination Decision to Supersede that of the Worker / Contractor Determination Decision – thus eliminating the path of escalation for the Worker / Contractor Dispute.

Both the Engager / Client and the Worker / Contractor should have separate IR35 Determination Processes with their corresponding paths of escalation from Dispute to Appeal and upwards.

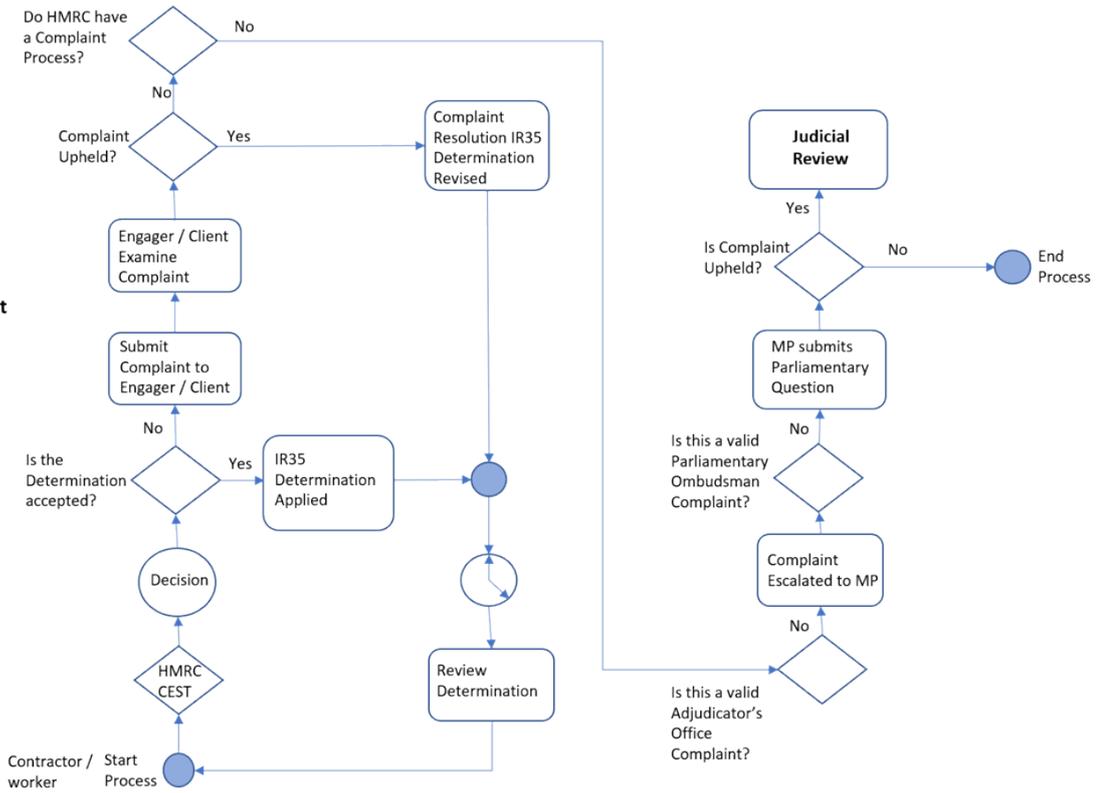
The second process map, represents the 'non-existent' IR35 Complaint Process which does in part exist but, only from the MP's entry into the process.

The third and fourth process maps represent the standard existing models for actioning HMRC Appeals and Complaints. It is these processes which should fully support the IR35 Legislation to ensure that it is not misused in the Engager / Client business interest.

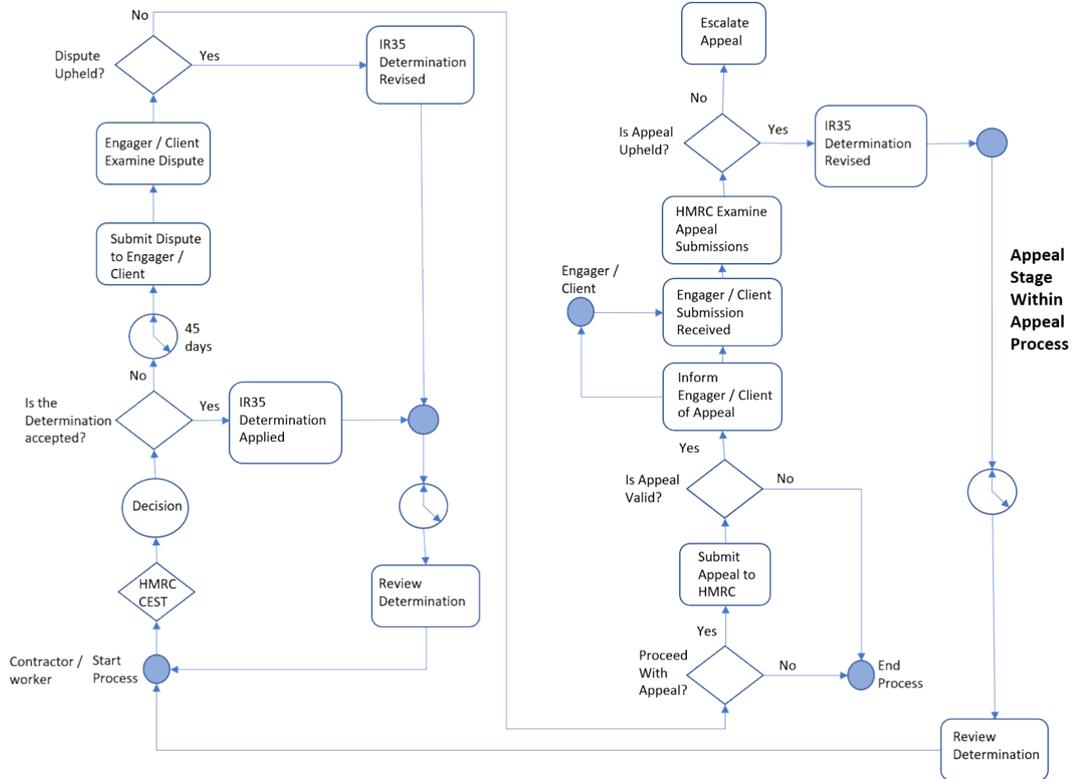
As Is IR35 Determination Decision Butterfly Dispute / Appeal Process



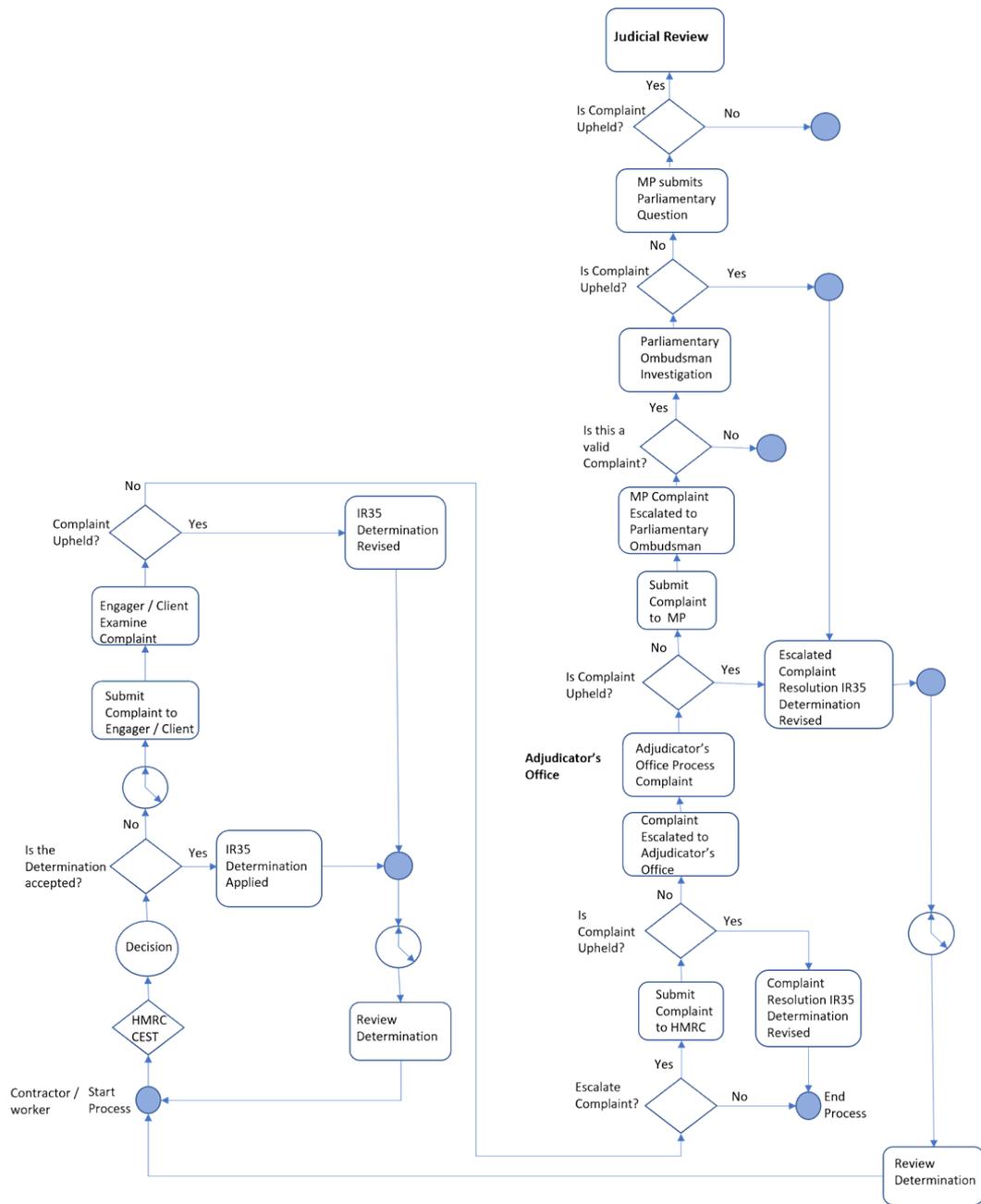
As Is IR35 Complaint Process



Dispute Stage Within Appeal Process



Complaint Process



4 November 2021