

Employment Lawyers Association – Written evidence (OPR0022)

INTRODUCTION

1. The Employment Lawyers Association (“**ELA**”) is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practise in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA’s role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA’s Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.
2. The Legislative and Policy Committee of ELA has nominated two of its members, Stephen Ratcliffe and Jennifer Sole, to prepare a response to this call for evidence (the “**Call for Evidence**”) on behalf of ELA.
3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

EXECUTIVE SUMMARY

4. The widespread use of CEST by clients and advisers is indicative of the desire to ensure compliance and avoid dispute. However, issues over the inability of CEST to provide an answer in borderline cases, and concerns over what will be considered to be "reasonable care" in responding to those questions, undermines the reassurance provided to those who wish to be compliant even in the most difficult of cases. We have made recommendations below as to how that may be addressed, and in particular a suggestion that HMRC should ensure that any CEST tool provides a determination in every possible permutation of answers to its questions, to ensure that the greatest degree of uncertainty can be removed.

QUESTION 1

Has the recent extension of the off-payroll working rules to the private sector made it more difficult for engagers to hire people with the right skills and expertise? To what extent has its introduction contributed to job vacancies?

5. ELA is unable to comment on this question.

QUESTION 2

For those engagers (and their advisers) who use the CEST (Check Employment for Tax Status) tool to assess employment status, how effective do you consider it to be? Do you have confidence in its results? If not, what further improvements need to be made to it?

6. CEST is widely used both by engagers and their advisers, due to the assurance provided by HMRC that, provided that reasonable care is applied in answering the questions posed by CEST, it will not seek to challenge the result given. However, its use gives rise to three distinct issues, as follows:
 - 6.1. CEST appears to suggest that a greater range of contractors fall within IR35 than is true of the applicable case law. In particular, significant weight appears to be placed on substitution, and the degree of financial risk on the contractor, neither of which factors is necessarily determinative in a wide range of decided cases. ELA recognises that CEST is not intended to reflect with absolute precision the present law on which contractors will fall within the off-payroll working rules, not least because that case law continues to develop, and there is arguably some uncertainty in the manner in which tax tribunals will resolve cases which are on their face quite similar. Rather, ELA understands that CEST is simply intended to give engagers an indication of how engagers should treat contractors if they wish to avoid HMRC challenge. That leaves engagers with the option of either following the CEST determination or, if they consider CEST provides an answer which departs from the applicable law, to apply the law as they (and their advisers) understand it to be and be prepared to engage in litigation with HMRC as to whether that understanding of the law is correct. In this way, while a CEST determination is intended to provide engagers (and contractors) with the option of avoiding dispute in what remains a developing and uncertain area of law, ELA would question whether the boundary between those cases, which it regards as so clearly outside IR35 that it will not seek to challenge them, is set at the right level.
 - 6.2. The CEST check does not always provide an outcome. In a significant minority of cases, CEST suggests that the responses given do not allow for a clear determination to be given that a contractor is on one side of the line or the other. The result is that, in those cases, the client is faced with the option of either seeking advice from HMRC or seeking professional advice (with the attendant cost). Whilst much of the advice provided by HMRC is helpful, the absence of a clear written determination on whether a contractor is inside or outside IR35 significantly undermines the benefit sought to be achieved by CEST, namely that it will give an answer which HMRC will not challenge. Bearing in mind that (ELA understands) CEST is not intended to codify case law, but simply to provide an indication of which cases HMRC will not seek to challenge, it is unclear why HMRC is unable to create a system which gives an outcome in every case. If it is HMRC's position that some cases are simply too complex for it to determine whether it would challenge them, we would respectfully suggest that it should now make that determination, in the interests

of providing as much certainty as possible for those engaging contractors via PSCs.

- 6.3. There are concerns over the concept of "reasonable care" in completing CEST, particularly as many of the questions appear to require a degree of interpretation and detailed knowledge of HMRC guidance. This can particularly arise where contractors complete CEST (with or without legal advice) and may interpret the questions, and the appropriate answer, differently from engagers who are seeking to avoid a dispute with HMRC. The well-publicised determination that the DWP has incorrectly determined a number of contractors to be outside IR35, notwithstanding its use of CEST, has the potential to undermine confidence in it. The result of the complex nature of the CEST questions and accompanying guidance, and uncertainty over the concept of "reasonable care" has resulted in a number of clients seeking professional advice on the manner in which CEST questions are answered, or simply outsourcing the completion of CEST entirely.
7. In addition to providing a complete set of clear answers to all possible responses to CEST questions, as noted in 6.2 above, a further improvement could be for the CEST response to indicate the particular factors which have caused the contractor to fall within or outside IR35. At present, no clear indication is given as to which specific answer(s) has been the "tipping point" in reaching the relevant determination, with the result that engagers are unable easily to assess whether amendments can be made to the manner in which they engage contractors to avoid disputes with those contractors over the application of IR35.

QUESTION 3

What changes have engagers had to make to apply the off-payroll rules to contractors, in terms of systems, personnel and training? By reference to your own experience, to what extent (if any) do you consider that compliance costs have increased because of the changes?

8. ELA understands that its members' clients who continue to engage contractors via PSCs have had to incur additional cost, and expend additional administrative resources, in order to ensure that payroll deductions may be made in respect of contractors who fall within IR35. It is unable to comment in further detail on the nature and scope of those additional burdens, however.

QUESTION 4

How well has HMRC supported engagers, contractors, and their advisers with the implementation of the new rules and is any further or different type of assistance needed?

9. As noted above, HMRC is available to provide guidance in the event of an "unable to determine" result. It also provides regular webinars on IR35. ELA believes that HMRC's assistance could go further (as above: at 6.2, by providing a complete set of clear answers to all possible responses to CEST

questions; 6.3, by making written determinations when CEST cannot assist; and 7, by providing reasoning to the CEST result).

QUESTION 5

To what extent has the introduction of the new rules generated disputes between engagers and contractors concerning the status of contractors *vis à vis* the rules and how successfully or otherwise have these been resolved?

10. The application of IR35 does, on occasion, lead to challenges from contractors, most typically in circumstances in which CEST indicates that the contractor should be treated as falling within IR35, but the contractor believes that they should not be. This is partly due to CEST apparently setting the bar at a different level from applicable case law, for the reasons we have explained (above at 6.1). However, challenges also arise from the nature of the questions posed, and the degree of interpretation required to be applied to them, including knowledge of applicable guidance (see 6.3, above). One means of addressing this may be to provide links to applicable guidance in respect of each and every question, as opposed to only some as at present, so as to ensure that even those who have not read the detailed HMRC guidance are as clear as possible on the manner in which questions should be answered. It would also be helpful for HMRC to identify points commonly made by contractors and ensure that HMRC's position on these points are clearly reflected in their guidance for the assistance of engagers and contractors. alike.

QUESTION 6

What behavioural effects have resulted from the introduction of the new rules in the private sector in terms of the arrangements adopted in hiring contractors?

11. The adoption of off-payroll working rules has resulted in some engagers declining to use contractors who are engaged via PSCs, due to the additional administrative resources required and the risk of dispute with HMRC. In those cases, it is common for engagers to instead use alternative resourcing models, such as the use of umbrella companies.

QUESTION 7

The Government is proposing a new employment body with powers to enforce employment rights, including for those engaged by agencies and umbrella companies. How effective do you think such a body will be in ensuring workers, particularly the lower paid, are treated fairly?

12. ELA is unable to comment on this question, since details of the new single enforcement body's precise enforcement powers and the manner in which it will exercise them has not yet been published. ELA is aware of past concerns being raised over the manner in which HMRC has focused its enforcement powers in respect of minimum wage, which some have suggested inappropriately focuses on inadvertent, technical breaches by large employers rather than deliberate and unambiguous breaches by the

worst offenders. However, until further details are provided of the single enforcement body's areas of focus, it would be premature to comment further.

QUESTION 8

How successful will the draft Finance Bill proposals for earlier publication of information about promoters and avoidance schemes be in protecting individuals from being drawn into such schemes?

13. ELA would simply note that clear and prompt guidance on which schemes HMRC regards as illegitimate is to be welcomed. Again, until examples arise in practice, it would be premature to comment on how successful HMRC is in ensuring that contractors and engagers are not involved in such schemes.

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