

# Select Committee on Economic Affairs

## Finance Bill Sub-Committee

### Draft Finance Bill 2019–20: Off-Payroll working rules

Monday 9 March 2020

3.20 pm

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Members present: Lord Bridges of Headley (acting Chair); Lord Desai; Baroness Kramer; Lord Monks; Lord Rowe-Beddoe; Lord Tyrie.

Evidence Session No. 4

Heard in Public

Questions 41 – 51

#### Witnesses

[I](#): Siobhan Endean, National Officer for Equalities, Unite the Union; Professor Patricia Leighton, Centre for Research on Self-Employment.

#### Examination of witnesses

Siobhan Endean and Professor Patricia Leighton.

Q41 **The Chair:** Good afternoon. Thank you both very much for coming. There are apologies from two of our members, Lord Forsyth of Drumlean and Baroness Bowles of Berkhamsted. Would you like to introduce yourselves? If you would also like to make a short statement, please feel free to do so—or not; it is up to you. We then have questions.

**Professor Patricia Leighton:** As background, I have been researching and writing about self-employment for a very long time, going back to the 1980s—when we had a Department of Employment. I have worked closely with the Association of Independent Professionals and the Self-Employed, and am on the steering committee of the Centre for Research on Self-Employment.

Another minor thing is that the people I know the most about are professionals—typically interpreters, designers, people in the creative

industries, locum doctors. This is a very broad group of people we are talking about. Some are highly sophisticated and some are part of the gig economy, which is very different.

Finally, the research I do is not theoretical; I am not up to that. It is very much to do with face-to-face interviews and case studies with individuals, so I am very interested in the nature of the beast that we call self-employment.

**The Chair:** Thank you very much.

**Siobhan Endean:** I am a national officer for Unite the Union. Thank you very much for inviting us to give evidence today. We have been working with the broader trade union movement and the TUC to look at this issue. I look after British Sign Language interpreters, a group of workers who are by nature self-employed and who had a particularly tough time when the IR35 rules came in in the public sector in 2017. We wanted to raise some of the issues for them. More broadly, Unite takes strategic legal cases, particularly on the employment-status issue.

We in the trade union movement support workers' ability to pay their tax and national insurance, but in doing so they should be afforded full employment rights. We see the Employment Bill, which will shortly be before Parliament, as an ideal opportunity to ensure that people have an absolute right to employment rights and employment status.

Q42 **The Chair:** I would like to kick off by asking a couple of general questions. First, in recent years, we have seen a rise in the use of personal service companies. Why do you think that is? What factors lie behind that increase?

Secondly, HMRC's impact assessment suggests that employment for tax purposes will be determined for nearly 75% of personal service companies affected by the changes. Do you agree with that assessment of the proportion of contractors in disguised employment?

**Siobhan Endean:** From our perspective, there are business strategies out there that attempt to shift the risk down the supply chain in relation to the payment of tax and national insurance, but we also see a proliferation of insecure work. We see complex relationships between contractors and suppliers that distort the true nature of the employment relationship, and what arises from that is bogus self-employment.

According to BEIS figures for 2015, around 260,000 workers were covered by 260,000 personal service companies and umbrella companies, but we think that was a massive underestimate of the number of people who have been covered by personal service companies. A key issue for us is whether or not that is a relationship that people want to enter into, and whether they know that they are doing so, when they work for a company.

Very few workers in construction, transport and logistics have decided that they want to be self-employed workers. They are put in a situation

where their main or previous employer has decided to move them out of permanent employment and move the employment relationship to an agency supported by a personal service company. The first time you know that is happening when you apply to a job is when you are issued with a contract that says you are employed not by this company but by a different one. We often see that precondition for working for that company; you are provided with a contract that says, "If you want this job, you're going to have to sign this contract".

I shall give you an example that our members have asked me to talk you through. One of our members says, "I pay an umbrella company up to £100 a week to get my own wages. I have no holiday pay, no sick pay, no unpaid holiday pay. I can't work anywhere else if there is no work for a few weeks. In the rail industry I can only have one sponsor. My holiday pay is actually a percentage of my net income, so that is taken off. Then when I get it back it's at gross, so it's taxed twice. I also pay both employer's and employee's national insurance contributions". That is increasingly a source of employment for people, and from our perspective there is a real need for us to tackle abuses of these umbrella companies and the way they operate.

**The Chair:** Do you have any figures for the number of people who might have had their contracts shifted into an umbrella company?

**Siobhan Endean:** All I can say is that it is happening increasingly. We find that in logistics, in particular, a personal service company is the main route for companies to employ drivers. I do not have the exact figures for how much of the economy is covered by this, but I know there is an increase. We submitted a freedom of information request to BEIS, but we understand that at the time it did not collect those figures.

Q43 **Baroness Kramer:** From your experience of working with this group of people, do you see the changes which the tax authorities are making, whereby many of these people may now find themselves classified as employed for tax purposes, leading to changes in their employment status, or do you see a system in which those two different approaches to status remain separated, so that tax revenue might improve but not workers' rights?

**Siobhan Endean:** There are a number of reasons why the economy and labour market have changed. The deregulation of the labour market quite clearly led to that. There are a number of reasons why people are using this, and not just in relation to tax; other factors relate to people evading their responsibilities to provide employment rights.

It is also important for us to recognise it from the other perspective. I come back to the experience of IR35 for people who are genuinely self-employed. Our British Sign Language interpreters might work for a number of different public sector bodies in any one day. In 2017, because of the misunderstanding by public sector bodies about the use of IR35, they were routinely classified as coming under the IR35 rules, though they should not have been. It took some time to unravel that.

The question is: when you go to work today, do you consider yourself an employee or a self-employed worker? From our perspective, it is really important that we recognise that this has grown because employers do not necessarily want to see people as employees. They want to evade a number of responsibilities by putting employees under self-employed status.

**Professor Patricia Leighton:** First, the growth is because we have some very inventive lawyers in the UK—I am a lawyer myself, so I can say that. If this change goes ahead and we see the consequences, while I hate to use the word “scams” there will be other ways to protect people. I would rather say that we are dealing with offloading risk. We are outsourcing responsibilities to a personal service company, because the personal service company is not the individual. The individual is employed by the service company, yet the contract is with the company. However, the individual employed by the company has been responsible for tax. Maybe we should think more about whether one-person service companies are a convincing legal model for people to work through, or whether it is just a cunning plan in the Baldrick model.

My second point is about how people will react to this. We know that there is an incredible level of worry. People do not know where they stand. All the research that I have done tells me it is not about the people whom Siobhan has rightly identified, who are forced to set up a company or they will not get any work. Surely we should be concerned by the fact that people are put under duress: “You either sign this or you’re unemployed”. We have legal mechanisms that are not being used. People are frightened to go to court because a lot of these areas of work are in small communities, and they would be seen as a troublemaker. We need to recognise the difficulty people have in going to law.

In all the research that I have done, the findings about self-employment are that this is not just a British issue. You would expect it in the United States, but if you go to France and what lawyers would call civil law countries—most of Europe, Australia and New Zealand—the people I work with are mainly self-employed, because that is exactly what they want to be. A very high percentage of people who are self-employed are self-employed because they reject the idea of being an employee. We need to bear in mind the levels of stress and pressure, and the way human resource management has repressed them.

A lot of people complain about having no choice and the lack of creativity. They say, “I want to be different. I want to be creative, innovative and have variety in my life”. I worked with somebody at Monash University in Australia. She summed it up in an interview: “I look forward to Monday mornings, because I’m going back to work”.

Let us remember what self-employment brings to the British economy. One of our most successful industries is the creative industry: film, writing, theatre. These people live and breathe risk. They may not have work, but the quid pro quo is that they have choice and can be creative and innovative. If IR35 is enforced, we will put this sector of the

economy, which is incredibly important, at risk. It is one of the strongest sectors that we have.

Q44 **Lord Desai:** The way I see it is that the law was changed at some stage to offer people a new way of pricing whether they should be self-employed. There are people who, by the nature of their work, rightly have to be self-employed, but in between there are lots of people who could be defined as employed or self-employed.

What we are trying to do with IR35 is to remove the category of “pretend self-employment”. It must be difficult to define and discover who could be employed. There are different costs and benefits. We receive letters from people saying, “I used to be employed, then I became self-employed, and now the costs have changed. Therefore I might be out of a job”. We are trying to identify these intermediate people. Is it possible to identify them?

**Professor Patricia Leighton:** If we had a way to really be clear about what self-employment is and what an employee is, life would be much simpler for this sub-committee, for policy development and all the rest of it. However, what happens when it is tested in reality is a complete lottery; it is not assumption, not what somebody looks like, but when it is actually tested in a law court. It is almost impossible to predict the outcome of any given case.

**Siobhan Endean:** I echo what Patricia says. We recently took a case on behalf of Mr Blakely, who worked at Broadmoor Hospital, to establish his employment status. Initially the Employment Tribunal found that he was a self-employed worker; he had been employed through a personal service company. The Employment Appeal Tribunal overturned that judgment and said, “this was a sham contract”. Mr Blakely was not expecting to be employed by On-Site Recruitment Solutions, the PSC that said to him, “Unless you sign this contract, you’re no longer working here”. There is an important relationship that is not just about the employer determining the employee’s employment status but about the understanding and the intention of the employee; what they believe the contract should have been needs to be taken into account.

Relying on employment tribunal case law to define employment status is clearly unsatisfactory. We need to be able to say with clarity to self-employed workers, “This is our legal definition of a self-employed worker”. There needs to be a legal definition of employment status.

**Professor Patricia Leighton:** We have no statutory definition of either “self-employment” or “employee”. We have only one statutory definition, that of a “worker”, which is that self-employed people have certain characteristics. We do not have a basis on which to predict an outcome.

**Lord Desai:** It is interesting that the category of “self-employed” has grown tremendously.

**Professor Patricia Leighton:** Not tremendously.

**Lord Desai:** When I came across it, I thought that although I am employed in one place I could describe myself as self-employed. Is this ambiguity created by the tax, or is it inherent?

**Siobhan Endean:** IR35 will be of great assistance in that it will put responsibility for paying tax and national insurance where it should be.

The difficulty is that it is very difficult in some cases to identify who the employer is, let alone whether or not the person is an employee or a self-employed worker. In implementing IR35 and making sure that employers take responsibility for paying tax and national insurance for their workforce, who are working for them—that needs to be part of the clarification—we need to be able to enforce that.

There needs to be better guidance. An ACAS statutory code of practice would be helpful, as well as research by sector to identify particular guidance. Patricia works with people in the entertainment and creative industries, a specific area where it would help to have guidance for genuine freelancers and self-employed workers.

We need to recognise where these sham contracts exist. In a large number of cases, people believe that they should be or are employed, and that that is the nature of their engagement. It would be helpful, particularly across the RTC, haulage and construction sectors, to have better guidance as well as more investigation into the working practices there.

Q45 **Lord Tyrie:** Ms Endean, it has been put to us that the proposed changes may lead to a new category of worker, employed for tax but without any corresponding employment rights. Do you agree? Do you think it would have deleterious effects?

**Siobhan Endean:** That is the crux of our concern. It is critical that while the implementation of IR35 and the correct source of tax and national insurance creates a determination of your worker status, you should get employment rights alongside that. That is really important. You need to enshrine the right of workers to challenge that status and ensure that there is transparency about who the employer is, along with action to ensure that companies do not find another way to avoid that employment relationship.

**Lord Tyrie:** How big a change to the labour market do you think the effect that I have just described, which has been put to us in evidence, might be?

**Professor Patricia Leighton:** Numerically?

**Lord Tyrie:** In whatever way you might have thought it through, probably as a percentage of the total number of self-employed.

**Siobhan Endean:** If you look across our economy at the gross of zero-hours contracts, which upwards of 1 million people are employed on, the question that needs to be asked is: do those people choose to work on

zero-hours contracts, or are they forced into that kind of non-employment relationship?

Perhaps from Patricia's perspective, there are people who are highly paid who choose specialised work and to be self-employed, but if you were to create a right to employment status and rights, that would make a massive difference to tackling bogus self-employment. I do not have exact figures for the impact of that, but we could do a bit more research and provide you with that information later.

**Lord Tyrie:** That would be worth having.

**Professor Patricia Leighton:** We have different levels relating to how many people would actually change how they work. The first result of that change would be a real sense of resentment and unfairness. People would say, "What's the point?" We have to bear in mind the amount of money that most self-employed people have to spend. I am self-employed and I know how much of my income I spend on outgoings that are to do with supporting myself—training and development, administration and the financial side. At least a third of my income goes on that. People feel that, "We are bearing risk and costs, so what's the point?"

Around 15% of our workforce is registered self-employed. That is in line with the European average; there is nothing very strange about the UK in that regard. What I think will happen depends on how umbrella companies and others in this market respond. I think there will be a decline in self-employment. If that decline means that people who have been forced to be self-employed set up limited companies—those who do not really want to be self-employed and are losing opportunities—that is no bad thing, but the core of self-employed people will stay.

Q46 **Lord Tyrie:** In your written evidence you made lots of interesting points, two of which struck me. One was your suggestion that self-employed staff act informally as consultants to the businesses they are working with; they provide advice, as you put it, through an intermediary, and they run the place as they use their wide experience for the benefit of the client. Do you think there are externalities—as an economist would call them—that will be lost as a consequence of this reform?

**Professor Patricia Leighton:** Let us say that you are genuinely self-employed. If you work for various clients, you have a residue of varied experiences. I went to a large company in the pharmaceuticals industry. It had a lot of self-employed people doing specialist tasks and sometimes more project work, because there are short-term things which people do, and longer-term projects where people have only one client. The HR director of this big company said, "They run the place. They just run the departments they're in. They are not the departmental head at all, but a problem pops up or an issue arises and somebody says, 'Ask Mary', or 'Ask John', who say, 'When I worked for Hays and I was sent by them', or 'When I did this and that I worked for so-and-so'". They are contributing to the dynamics of an organisation.

**Lord Tyrrie:** You seem to be suggesting that there are benefits beyond the transactional benefits from the labour market which could be at risk from this reform.

**Professor Patricia Leighton:** Absolutely. When you ask the client, rather than the individual, they are alert to that.

**Lord Tyrrie:** You make another point in your written evidence which I find significant. You said that self-employed people have higher levels of job satisfaction. Is that supported through extensive survey data?

**Professor Patricia Leighton:** Yes.

**Lord Tyrrie:** That suggests that there is a wider welfare benefit, beyond the economic benefit, to maintaining self-employed status. It seems that you are saying that the effect of anything that puts the sector at risk is lower entrepreneurship and a lower overall level of welfare or happiness. Is that what you are saying in your written evidence?

**Professor Patricia Leighton:** When I argue about costs and other things that are borne, I look at who bears the cost of sickness levels among the self-employed compared with employees. Self-employed people tend to be sick less often, probably because they get more job satisfaction and enjoy their work. If you look at the relationship and its context and who the beneficiaries are, this is not just about money.

Q47 **Lord Monks:** We are interested in exploring the relationship between employment status and tax and national insurance status. Some of this was covered in the Matthew Taylor review in 2018. He recommended that the two, at least over time should be brought together more coherently.

I am interested in the latest changes that the Government is pushing through, which will come into effect very shortly. Are these a good step in that direction? Will they have practical effects on this disparity between the two columns of employment status, and tax and insurance status?

**Siobhan Endean:** From our perspective, at least you will know who is paying your tax and national insurance; it is the person who has claimed that they are giving you this determination of your worker status. There are benefits to that, but what is of real concern is that this would be employment only for tax purposes, not for employment rights purposes, as there is in the public sector at the moment. There is a danger of creating a new classified group of workers without employment rights. We would be concerned about that, which is why we are keen to ask you to look at this again.

The other issue for us is guidance to employers pointing out that there are people who are genuinely self-employed and that they need to recognise who is genuinely self-employed. When the IR35 rules came in for the first time in the public sector, there was a lack of understanding on the part of public sector employees that if you are genuinely self-employed, working for a different group of people and able to determine what work or service you provide them, you are genuinely self-employed.



There are two categories: if you are employed you pay tax and national insurance through PAYE; if you are self-employed you pay your own tax and national insurance. It is hard to see in that situation where the IR35 rules would be put into place. We think it is important that those payroll companies are outlawed. It has to be the organisation you work for that pays your tax and national insurance if you are actually employed.

**Professor Patricia Leighton:** We have already seen reactions from individuals to IR35. You will get alignment between tax and employment rights if there is a departure in significant numbers of individuals into the employee category. It will coincide with broader political discussions about access to employment rights in the next year or so. There might be alignment, therefore, caused not so much by IR35 as a technical device but because people will give up self-employment.

The latest figures on people responding first to changes in the public sector and now to the anticipated private sector changes is that significant numbers have said that they are giving up being self-employed. Whether that means they will get a job as an employee is another matter, because you create your own role as a self-employed person and you have to find somebody else who is prepared to give you work if you are an employee.

I cannot say with certainty what the effect would be, but looking at this topic as a tax or fiscal measure without looking at the implications for the labour market is a mistake, because individuals see them as interconnected and glued together.

**Q48 Lord Monks:** Could I ask Siobhan about the coronavirus and its possible effect on self-employed workers? I am thinking not of the highly paid specialists that Professor Leighton has been talking about, but of the drivers, warehouse staff and so on who have been put on these contracts. What is their future if an Italian-style lockdown takes place in this country? Are you in dialogue with the Government on this?

**Siobhan Endean:** We wrote to the Government yesterday, asking for statutory sick pay to be provided from day one for all workers. Currently if you are self-employed, the access you have is in relation to universal credit.

**Lord Monks:** That is all workers, not just all employees?

**Siobhan Endean:** Yes. It is to take action to ensure that the self-employed, and all workers, have access to statutory sick pay from day one, because if you are self-employed you are unlikely to take time off, particularly at this time.

A lot of these self-employed workers are bogus self-employed workers. We think that a whole range of benefits, such as statutory paternity pay, should be extended to self-employed workers. That would be helpful to them. We are concerned about what is happening in relation to the coronavirus at the moment, but statutory sick pay is an immediate issue that could be addressed.

Q49 **Lord Rowe-Beddoe:** The Treasury told us that the object of these rules was to ensure fairness between the two sorts. From your evidence, and from other evidence, it is obvious that there are few examples of fairness, and that the implementation of these rules will not increase that fairness. Is that correct?

**Siobhan Endean:** At least you would know who was paying your tax and national insurance and who your employer was. From that perspective, it would be helpful. There would be more transparency in relation to pay rates; you would know what you were earning and what was being creamed off by a personal service company.

One of the difficulties is that workers need to know what tax liabilities they have. We are concerned about the fact that if you do not pay the correct tax and national insurance during the year, you may end up with a large tax bill at the end of that year. Providing that certainty in relation to paying the right tax and national insurance will help.

However, if you have no security of employment, when it is obvious that this is the one company that you work for every day, then I do not think that is fair.

**Professor Patricia Leighton:** I agree.

**Lord Desai:** Is forced self-employment at the lower end of income and voluntary self-employment at the upper end?

**Siobhan Endean:** That is what I think.

**Lord Desai:** So the lower-paid person has no choice. If he does not sign the contract saying that he is self-employed, he will not get a job.

**Siobhan Endean:** That is right.

Q50 **Baroness Kramer:** I was talking to someone who is a church singer. That is not highly paid, but if this individual had to work through an umbrella company in order to meet IR35, losing 30% of an already small income, it would make her profession unviable. We are getting slightly trapped in the idea that someone on a low income is in disguised employment, and someone on a high income is a genuine freelance professional.

I want to explore whether people could come up with more effective definition, or are we a long way away from that?

**Professor Patricia Leighton:** We should remember that average incomes from self-employment are not high.

**Baroness Kramer:** Would you say that even if you excluded the disguised self-employed?

**Professor Patricia Leighton:** Look at where people have been forced to become self-employed. They are teachers, nurses, doctors and physiotherapists. They are skilled professionals, but they are not well-

paid. It would be wrong to equate high-skilled with high-paid. There is no evidence for that.

There is a lot of language around this topic such as “phoney”, “sham” and “disguised”, but there is no real evidence for that. I have seen no surveys, studies or investigations that tell us the percentage we are trying to address with this IR35 change. How big is the problem? We know about the problem Siobhan has highlighted—and it can be dealt with—where people are forced into a classification that does them little good, and which presents all sorts of other problems. That is what we should be looking at.

The language used to deal with the “problem” of IR35 suggests that I am a criminal and we are all on the fiddle and engaged in practices that are bad for society, the economy and the Revenue. When we make a change like this that will be very important, there should be better evidence of the scale of the problem. That is easy to identify to some extent from membership of unions and other organisations—I am sure you know about the contractor calculator—that gather data from members about their experiences.

We ought to have some sense of misclassification and the extent to which it is because of clients who require people to pretend they are self-employed—personally, I see them as victims—and the extent to which it is because there is genuine fraud. I have no idea. A study done in 1999 for the Department of Employment said, “We’ve done this and surveyed that, and we have no idea of the extent of wrong classification”. That has not been updated.

**Lord Desai:** The tax position changes after 1999 and self-employment doubles. Obviously, the costs and benefits of defining yourself as self-employed have changed. It is not that every self-employed person is suspect, but I share the suspicion that some people do this to avoid tax. It is a respectable operation; rich people do it and corporations do it. However, because the comparison is with other employees at an ordinary income level, the injustice seems to be greater. It is this perception that we are trying to understand. Is this a false perception, or are some people on the fiddle?

**Siobhan Endean:** Unite believes that people should pay their tax and national insurance—of course we do. However, there are some groups of self-employed workers who can get caught by the IR35 rules where they should not because they are genuinely self-employed sole traders who pay their tax and national insurance.

To come back to the issue that Baroness Kramer raised, particularly the church singer and why they are self-employed, it reminded me that our entertainment unions have asked us to raise the entertainment industry guidance on the HMRC website. They say that it is not fit for purpose and it would be helpful if it was fleshed out. It provides advice to self-employed workers, which is one thing, but also to companies. We would like to see trade unions engaged in developing that advice. That would be

helpful, but HMRC needs more resources to make sure that it can manage.

Q51 **The Chair:** The Government have said they are pressing ahead. Do you think they are right or wrong to do so? What else should they be doing?

**Professor Patricia Leighton:** I was taken with a press release from HMRC that said it was interested in a soft landing. It was not going to institute proceedings against people who have "got it wrong". I have no idea what "getting it wrong" is; it can only be wrong when it has been tested in a law court. HMRC is saying, "We're not that confident. We're going to let this bed in and see what happens". As a taxpayer, I am worried about that. I am very simple about this. You have a law, it comes in on 6 April and you expect that things are going to change. Then you have another statement by HMRC that says, "We need a soft landing". Somebody should stop and think.

**The Chair:** So you would favour delay.

**Professor Patricia Leighton:** Look at the criticisms. First, we have HMRC saying, "I'm not sure we've got this right", or at least it does not have enough confidence to say, "We're going to go bang on day one". Secondly, there is CEST, which is universally criticised and will apparently be applied. That is what employers are saying. There are rules that if they reach a judgment, it can be appealed against and they have to respond within 45 days. However, the test is a dog's dinner. Leave aside the other issues we have talked about: the relationship between the fiscal provisions, the tax provisions, rights at work, the effect on the labour market, etc.

**Siobhan Endean:** We think they are right, but they cannot do it in isolation. They should not underestimate the impact this will have, and they should think about it through the lens of a worker who goes to work and wants to know who they are working for.

**The Chair:** Thank you for coming.