

Select Committee on Economic Affairs

Finance Bill Sub-Committee

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

Monday 24 February 2020

3.25 pm

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

Evidence Session No. 2

Heard in Public

Questions 13 - 25

Witnesses

I: Abigail Agopian, Principal Tax Adviser, Confederation of British Industry (CBI); Lorence Nye, Senior Policy Adviser, Federation of Small Businesses (FSB); Andrew Chamberlain, Tax Policy, Association of Independent Professionals and the Self-Employed (IPSE); Julia Kermode, Chief Executive, Freelancer and Contractor Services Association (FCSA).

II: Matthew Abraham, Supply Chain Director, Oil & Gas UK; John McVay OBE, Chief Executive, Producers Alliance for Cinema and Television (PACT); Dr Iain Campbell, Secretary-General, Independent Health Professionals' Association (IHPA).

Examination of witnesses

Abigail Agopian, Lorence Nye, Andrew Chamberlain and Julia Kermode.

Q13 The Chair: Welcome to the Committee. I find this a quite interesting, if slightly complicated, subject, which the Committee enjoys getting its teeth into. I am very grateful to you for your evidence.

Perhaps I could start with a very general question, which is whether you think businesses will be able to manage the additional responsibilities that will fall upon them with the change, and whether they are being provided with enough—or even adequate—support, education, advice and guidance from HMRC, whose initiative this is.

Julia Kermode: I have some figures from a webinar that HMRC has done for businesses to help them prepare for the changes. There were some straw polls during the webinar that took place last week. Of those who answered the straw polls, 50% on the webinar were not confident in making status determinations; 49% so far had taken no steps whatsoever to prepare for the changes; and 41% did not know how many individuals they were currently engaging through an intermediary. All those figures together clearly demonstrate that businesses are in no way, shape or form ready for this change in the rule.

The Chair: What was the date of that?

Julia Kermode: It was 19 February, just last week.

Lord Bridges of Headley: In today's *Financial Times*, there is a story with the headline: "Rishi Sunak promises to be fair over IR35 tax changes". It quotes the Chancellor as saying that a review will bring in "some tweaks and improvements to make sure the transition is as seamless as possible". What tweaks and improvements would be necessary to address those percentages?

Julia Kermode: It is clear that there has not been enough education. HMRC's education programme was probably put on hold partly due to the election, which is something none of us can control, but the fact is that there is not enough knowledge, and people are not prepared from a business perspective. Businesses that are prepared are spending a lot of money to get ready and get in specialist advisers. Do not forget that this is very specialist tax law and even advisers do not always agree on its outcome.

The Chair: Mr Nye has just joined us. Welcome to the Committee. I asked a general question as to whether businesses were equipped to deal with this and were getting enough support from HMRC. Does anyone have anything to add? There is no need to repeat the same point.

Abigail Agopian: From the CBI perspective, business readiness varies quite significantly across businesses. Large businesses are probably more prepared, or are as prepared as they can be in the absence of final legislation, than smaller businesses, but generally the delay in publishing updated guidance—it was published only at the beginning of February—with final legislation still outstanding, is a significant issue. Generally, with a reform of this significance, businesses would ideally like to see final legislation a year in advance, but they might not see it until 17 working days before the reform is introduced.

The Chair: We have had some evidence that big businesses have prepared in advance simply by saying to all the subcontractors: "You are employed or you are no longer associated with us". Do you agree?

Abigail Agopian: For businesses, certainty and simplicity are key. This reform, especially given that we do not have final legislation, has not

provided that certainty and simplicity, so I can see why some businesses perhaps have to take that approach to managing it.

The Chair: Is that a yes?

Abigail Agopian: I cannot comment on individual businesses; it varies very much between them.

The Chair: I am not asking you to comment on individual businesses; I am asking the CBI what collectively big businesses are doing.

Abigail Agopian: It is mixed. Each business is looking at its contractor populations and the risk.

The Chair: What is the mix?

Abigail Agopian: It has been reported in the press that some businesses are taking the position that they will not necessarily engage with as many contractors as they did previously.

The Chair: Does the CBI not know what percentage of its members are reacting to this in that way?

Abigail Agopian: I do not have a percentage.

The Chair: Could you write to us to provide that information?

Abigail Agopian: Yes.

Julia Kermode: I have a bit of information to help on that point. A survey was done this weekend by a large recruitment firm, SThree. It surveyed 1,500 contractors. Of those who responded to the survey, 45% said that their clients had not been using reasonable care in determining whether they were inside or outside IR35, and 18% said that their clients had banned personal service companies. That is a percentage for you from that survey this weekend.

The Chair: Other colleagues want to come in. Mr Chamberlain, do you want to comment on the general point?

Andrew Chamberlain: On the general point, we understand that particularly in the banking sector many household-name banks have taken the view that they will not engage with contractors anymore. It is pretty clear, although they do not always say it explicitly, that that is because of these rules coming in. It is also likely that the fact that they do not have simplicity and certainty, because we do not have the final legislation, has fed into that and they decided to take that approach.

Our members are the contractors, the freelancers, who are likely to have their tax position changed by these decisions. When we surveyed them, two in five, 39%, indicated that their clients were not planning to assess the individual freelancer engagements, but they will either make a blanket determination that everyone is inside IR35 or they will stop engaging contractors altogether.

Lorence Nye: I support that. Anecdotally, we have heard from members that firms they were originally contracted or engaged with have taken the completely risk-free approach of saying that will no longer be the case and they can either be on payroll or lose their engagement.

Q14 **Baroness Kramer:** You have covered the question I was going to raise. The issue was raised about the adequacy of available education and information. If you were able to sit down and work your way through the webinars and information, to what extent would you be in a position of certainty as a company to make the decisions, or does the instruction itself leave a very wide grey area where discretion, judgment and subjectivity appear to be involved?

Abigail Agopian: This is a very complex area of tax law and it is predominantly based on case law rather than legislation, which adds to its complexity. We recognise that HMRC has taken significant steps to improve its check employment status for tax tool, which has been of assistance, and the updated release of November 2019 is welcome.

There are still areas of uncertainty in that. That tool cannot always give you an answer, so we would welcome further guidance in that area. We would also welcome further guidance on some of the specific questions that have to be asked or answered within the tool. A good example is financial risk. You may take a different view of what constitutes financial risk, so some guidance on how to answer that question would be very helpful. I do not think you can say what the answer is with absolute certainty in every case. Obviously, cases vary in their complexity across the board; some are more clear-cut than others.

Andrew Chamberlain: I agree with that and go slightly further. The difficulty is that the case law is disputed, for example in the interpretation of mutuality of obligation, which I know we do not want to get into; we will be here for ever if we start talking about that.

The Chair: Indeed. Before we started, I asked how mutuality of obligation was defined and everyone looked at their shoes.

Andrew Chamberlain: It is somewhat disputed. HMRC takes one view and the courts have given a different view. To answer Baroness Kramer's question, it is very difficult for a client to say with certainty whether IR35 should apply to a particular engagement. There is always the risk that HMRC could come along at a future date and disagree, and say, "We think you've got this wrong", and you are left with a huge tax liability. For these reasons, we can see why clients would be very nervous about applying these rules and perhaps are tempted to say, "Let's just not engage any contractors at all anymore".

Baroness Kramer: The risk and the benefit are completely asymmetric.

Andrew Chamberlain: Yes.

Baroness Kramer: The risk is very high and the benefit quite limited.

Lord Desai: I am puzzled by this. There was something in existence that was complex but understood by enough people to indulge in behaviour that a lot of us thought was unfair to the taxpayer. They were finding ways to avoid paying a certain tax that people outside their remit were paying. Businesses understood what they were doing. HMRC is proposing a correction to that behaviour and suddenly everybody says that they do not understand the law. They understood it before perfectly well and there was a lot of manipulation.

As an ordinary citizen, I read about that and get very angry. It is unfair to people who do regular jobs for pay and then suddenly become self-employed. Everybody understands what is going on. It is only when we try to correct it that somebody says, "Oh, my God. It's so difficult we can't understand it". I do not understand this. Either people knew what they were doing and were manipulating it and it is being corrected, or they did not understand it. Suddenly, they do not understand it when the tax is being collected.

Julia Kermode: One of the main problems is not related to freelancers or contractors and the tax they are paying because, do not forget, their income is taxed on a corporate basis. They are paying dividend tax when they draw money out of the company; they are also paying corporation tax at the end of the year, and VAT.

The major problem is employers' national insurance costs. That is what is not being paid when a business engages a freelancer through their own limited company, so it is not about tax avoidance by that individual. A survey by the business department in 2016 looked at the nature of self-employment. The project was called Understanding Self-Employment. Fewer than 1% of the self-employed people who responded to that piece of research cited tax benefits as a reason for working for themselves. I would definitely dispel that theory.

The Chair: For Lord Desai's benefit, what is happening is that large employers are using contractors and they do not have to pay employers' national insurance, so they avoid it. Faced with these new changes, they try to recover the cost by putting that liability on to the subcontractor by cutting the amount of the contract or alternatively by saying they will not continue with the arrangement. Does that summarise it?

Julia Kermode: Yes, it does. I would not want you to think that businesses are avoiding paying employers' national insurance by engaging freelancers. It is just not a tax that they have to pay by going that route; they often want skills on tap for particular projects, and those skills come in on a short-term basis.

The Chair: You avoided the trap.

Lord Bridges of Headley: I have a quick question on mutuality of obligation and CEST. Mr Chamberlain, in your very good written evidence you say that the lack of any questions on mutuality of obligation in CEST is a fatal flaw. I take it, therefore, that you think that, unless that is

addressed by the Chancellor when he talks about tweaks and improvements, CEST is fundamentally flawed. Could others comment on the specific point about mutuality of obligation and CEST as well?

Andrew Chamberlain: That is absolutely right. HMRC takes the view that mutuality of obligation is always present in any contract. If there is a contract in place, there are mutual obligations on the parties; but there is a range of views, some of which have been mooted by judges in the courts, that it has to extend beyond that and that the obligations must establish that it is something that points to a relationship of employment. Because CEST does not test for that, it can never give an accurate picture of the true status of the engagement under question.

Q15 **Lord Tyrie:** Can I begin with one general matter that touches on the point Lord Desai made earlier? Would the panel agree—I start with Ms Agopian, if that is the correct pronunciation; the “ian” at the end sounds Armenian to me—that old tax rules are generally well understood and new rules often by definition are not? It is thus understandable that a new approach is likely to be less well understood, and therefore less fully obeyed initially.

Abigail Agopian: We should remember that these are not necessarily new rules; they are a reform as to where liability sits. Previously, if the decision was incorrect, the tax liability sat with the personal services company and now it sits with businesses. IR35 is not necessarily a well-understood area of tax law. That takes us back to the point that a lot of the decisions are based on case law, which evolves over time. HMRC has taken a number of cases to court.

Lord Tyrie: It is the case law that provides certainty over time.

Abigail Agopian: The case law develops over time, so that is where a lot of the difficulties lie.

Lord Tyrie: Can I take you to the cost of the proposed change to the working of the rules, or however you describe it? The Government’s estimate is £14 million. Has the CBI made an estimate of its members in order to establish their view of the cost?

Abigail Agopian: I do not have the full implementation cost across the whole economy to give you. When we initially responded to the reform and the consultation in 2018, we raised the point that many businesses indicated that the system costs and changes required alone could be in the region of hundreds of thousands of pounds.

Lord Tyrie: Per company.

Abigail Agopian: Per company. Having spoken to businesses in the last few weeks as we have started to progress and they have started to incur those costs, that still seems to be in the right ballpark. Businesses have given indicative figures ranging from £100,000 to upwards of £700,000, and a lot sit at the higher end of the range.

Obviously, it is the large businesses that have provided those costs, with probably thousands of contractors on payroll, but if you take that £14.4 million and split it across the 60,000 engagers and 20,000 recruitment agents that HMRC expects to be impacted, it works out at £180 per entity affected. I struggle to see how with such a complex area of tax law anybody with even one or two contractors could implement this for £180. If we just look at the large business costs, that £14.4 million will be wiped out very quickly.

Lord Tyrie: That is a helpful, clear reply. It takes us to the point that we appear to be getting evidence that £14 million is an underestimate. We now need to move towards a more realistic estimate based on evidence that could come from your members. Would you be prepared to try to put in place a survey? While you are thinking about that question, did you get a chance to read the letter from the ICAEW?

Abigail Agopian: Briefly, yes.

Lord Tyrie: I apologise. You saw it only a few moments after I did. It looked at six large firms and came to the conclusion on the basis of evidence from them that the cost is £3 million. That is £3 million for just six firms, leaving 59,994 engagers so far unsurveyed.

Abigail Agopian: Yes.

Lord Tyrie: I think I can say on behalf of the Committee that we would be very grateful if you could make that estimate. The next issue seems to be to find out what the counterparty costs to your members might be. What view do others on the panel have of the likely cost?

Julia Kermode: It varies. I saw someone's social media post earlier today that indicated that, if they were previously on £600 a day, they would have to increase their rate to £1,000 a day to continue to take home the money they currently take home. Those are particular circumstances and they vary widely. My colleagues may have more information.

Lord Tyrie: Would you be able to make a survey for us of what your members think the cost might be?

Julia Kermode: Definitely.

Lord Tyrie: Mr Chamberlain?

Andrew Chamberlain: As this policy is all about moving responsibility for determining IR35 away from contractors, who are our members, to other parties in the supply chain, it seems likely that there may be a saving for our members. Previously, they may have had to have their contract reviewed to ensure that it was compliant with IR35; indeed, they would have tax investigation insurance if they were unlucky enough to be picked on for an investigation. They may be able to make savings by not having those things, not initially, because they are still liable for the previous six years, but as that period diminishes.

Lord Tyrie: There may be long-term savings.

Andrew Chamberlain: Yes. However, we fear that the cost for them will arise because too many of them will be put incorrectly into IR35 because of the issues around uncertainty and clients being unwilling, somewhat understandably, to take the risk of saying, "IR35 does not apply to this engagement". People will be put into a tax bracket that is not the appropriate one for them, and they may find that the employer's NI cost will be pushed on to them and they will be paying considerably more in tax than perhaps they should be.

Lord Tyrie: None the less, it might be helpful if we could see the likely straight-line effect: the saving you would anticipate were there to be no behavioural effects of the type you described.

The Chair: That is quite an important point, because the figure quoted by the Revenue is a net figure, is it not, not a gross one?

Lord Tyrie: We would be grateful for that. We are also interested in any estimate of the behavioural effects of change, but it will be a difficult calculation based on a number of no doubt tendentious assumptions. By all means, let us have a look at that as well.

Andrew Chamberlain: Sure.

Baroness Kramer: I am not sure that the £14.4 million is a net figure, because it is said to be a one-off cost.

The Chair: Baroness Kramer, you are usually right, but I read somewhere that the estimate by the Revenue was based on the fact that there would be savings for some contractors and that had to be offset against the costs for businesses. Does anyone on the panel know about that?

Abigail Agopian: I have a figure. The annual cost is £5.3 million, which it nets off. The £14.4 million is not a netted figure.

The Chair: There we are. Baroness Kramer is quite right. What is the net cost?

Abigail Agopian: The implementation cost is the £14.4 million with no netting off, and the annual cost is negligible.

The Chair: Is the £14.4 million the total cost to business after taking account of the savings that will arise, or not?

Abigail Agopian: The £14.4 million is the total cost to business for implementation of the reform.

The Chair: That is already taken off the savings, is it?

Abigail Agopian: No. It is a one-off cost for setting up systems. HMRC has done another calculation on an annual basis of how much it will cost

business to administer the reform, and that is netted off against the saving to contractors.

The Chair: What is that number?

Abigail Agopian: That is a cost of £5.3 million; it has netted off the £5.3 million.

The Chair: Is that number consistent with the £3 million in the letter to which Lord Tyrie referred?

Abigail Agopian: I think the £3 million comes out of the £14.4 million.

Lord Tyrie: It is of the same type, the same character, but the implication of the letter must be that £14.4 million is a considerable underestimate of the total cost.

Abigail Agopian: Yes. To clarify it, HMRC has provided two costs, one being a one-off system set-up cost and what we are incurring now, and the other being the annual running costs.

Lord Tyrie: There is an opportunity for the CBI to give us clarity as well as accuracy. They very rarely travel together. I think that in this area we need it. Mr Nye, you have not been allowed to say a word for some time.

Lorence Nye: I have two quick points. One is that the cost we have focused on for our members is for lost contracts. We are concerned mainly about contractors in our membership who have multiple contracts where they are being forced into a more employment-type relationship, and they ultimately have to make a choice. There are a couple of anecdotal examples of that.

A point was made earlier about complexity. We are finding that the complexity is driven by the test itself. The fact that employment status is complicated is why people are having difficulty navigating it when they have not had to ask those questions beforehand. It is about getting clarity on things that are not well defined in law currently, such as precisely what control is and whether or not two people doing the same test in the same circumstances have a different interpretation of what control means. I feel as if I am the only person at FSB who knows this inside out. There are very few people in HR departments at large banks who would have any idea. The space to get over is the questions people normally do not ask, because they are either employed or self-employed.

Lord Tyrie: That is what is going to create the uncertainty to which I referred earlier.

Lorence Nye: Exactly.

Lord Tyrie: I have understood that point. To finish, it would be very helpful if Ms Agopian could think carefully about what she presents to us on both the annual and the one-off cost, and the gross and the net, because it might become an important aspect of the whole debate, so

that we can clearly see what the Revenue estimates the cost to be and what the cost to businesses and those affected is likely to be.

- Q16 **Lord Monks:** In the positions of some of the representative bodies that you represent, there has been an argument for another year's delay. The CBI, the Federation of Small Businesses and others have been pressing for that. As a representative body, would you be worried about the reaction of members who are compliant, are ready for it and have spent some of the money and so on? Would that be a problem?

Abigail Agopian: Six months ago, we were very clear that across our membership base most members would welcome a delay. We are now in an unfortunate position where, delay or not, neither is going to be ideal; there are pros and cons in both. Many members would still very much welcome a delay, for good reason given the lack of final legislation and the guidance having only just been published, as well as a number of other areas that need to be worked out before the reform comes in.

Many members have spent significant amounts of money on this already, as you alluded to, and have had to make decisions on what they do with contractors. Sometimes those have been quite difficult decisions, so for those members a delay now might not achieve the benefit it would have achieved months ago.

Lord Monks: If you stick to that position, would the members of the organisation be reasonably content with the scheme as it is, even if some of them would like a lot more time to adjust their systems? Are they reconciled to the fact that they will have to do it none the less, as is rather confirmed by the Chancellor in the *Financial Times* today?

Abigail Agopian: Businesses very much support and understand the rationale behind the IR35 reform. It is right that the Government are looking at compliance in this area. However, the CBI has always called for a more holistic approach, looking at the outcomes of the Matthew Taylor review and having unambiguous rules around determining employment tax status, which we have touched on before. Those points should have been addressed before we looked at reform in the private sector.

The Chair: It sounds as if you are saying that it should be abandoned until that has been done.

Abigail Agopian: We would have preferred a much more holistic review ahead of this reform rather than just going ahead with the reform.

Lord Desai: If a tax cut was given, businesses would respond very quickly and there would be no problems.

Julia Kermode: My organisation would support a delay, provided that something is done in the meantime before the changes come about. HMRC needs to deal with the tax avoidance schemes that we see at the moment. Lots of offshore schemes are targeting contractors aggressively at the moment, promising them increased income that is impossible to achieve within UK tax law. HMRC is very well aware of those and says

that it is taking action, but it is not enough. We need action to be taken to prevent contractors being sucked into those schemes. They will get large tax bills. It is not too different from the loan charge fiasco we have just experienced. I would make a plea for proper enforcement action on those avoidance schemes.

Andrew Chamberlain: It should be delayed for all sorts of reasons. We advocate abandonment of the policy altogether, but from where we are right now a delay would be a very welcome step forward, not least because we do not have proper answers to the issues about employment status that were raised in the Matthew Taylor review.

There is the problem of umbrella non-compliance. Many umbrellas are entirely compliant, but they are competing against others that are not and are pushing people into what are called disguised remuneration schemes. In part, that was how we ended up with the loan charge. IR35 initially came out in 2000 and pushed people, many of whom should probably have known better, into those sorts of arrangements.

Notwithstanding the Chancellor's speech over the weekend, which was reported in the *FT* this morning, there is still an issue. He acknowledges that this is going to be complicated and difficult for businesses to comply with, which is why he is beginning to suggest things like, "We won't be too heavy-handed", but businesses need certainty. What he should say is, "This is a bit messy. We haven't thought it through properly yet. A review is still outstanding; we are waiting for that to report". In the *FT* today, we are told that there will be further tweaks by the Chancellor. How long will businesses have to cope with these new rules? Not very long at all.

If there was a 12-month delay, it would give us a chance to look at the policy again. Like everyone else here, we completely agree that everyone should pay the right amount of tax; we are not here to advocate tax avoidance or people getting around the rules that are in place, but we believe there are better ways of doing it than this. This policy will do more harm than good in our opinion.

Lord Monks: What is a better way?

Andrew Chamberlain: IPSE developed something called a freelancer limited company with EY a few years back. It was designed to target specifically the problem of IR35. The idea is that it would be a limited company like any other, but it would be tailored to freelancers and it would be transparent, so that people could say they were freelancers. Once you have created that and people are inside that bracket, you can come up with tax rules that everyone is broadly happy with.

The problem right now is that the rules currently say, "If you fit this type of arrangement and the vagaries of the mutuality of obligation apply or do not apply, it is perfectly fine for you to pay tax in this way, but if we change it a little bit, in ways no one really understands, you must pay tax in this way". It would be better to say, "People who are contracting are

valuable to our economy, but we may need to adjust how they pay tax because we might not have got that quite right, so let's identify who they are and apply a fairer and more transparent tax regime".

Q17 **Lord Rowe-Beedoe:** I am fascinated by this, because the core of it all is that it is too hurried, which is what all of you are saying in another way, and the detail has not been properly evaluated and discussed. What is preventing HMRC, God forbid, delaying this?

Julia Kermode: That is a good question.

Lord Rowe-Beedoe: Is it potential revenue loss?

Julia Kermode: That is my opinion. I think it is the revenue side of things. HMRC has stated that the public sector reforms were successful and delivered an increase in compliance by virtue of the fact that more payroll taxes were taken. I argue that that does not demonstrate an increase in compliance; it demonstrates an increase in people being put on payroll, perhaps incorrectly, so I dispute that particular figure. Why does HMRC not delay? It is probably due to the revenue side of things.

Lord Rowe-Beedoe: Are we in such need, for a few months?

Julia Kermode: Look at the cost to business and individuals.

Lord Rowe-Beedoe: That is what I am saying. I mean not we as individuals but the Government. Are the Government in such need? I find it very ill thought through.

Going back to contractors, can I have your comments on whether the new rules will allow them to challenge a client's determination of their status?

Andrew Chamberlain: There are provisions in the legislation as amendments to the previous chapter 10, the public sector rules that came out in 2017, where you could not challenge it at all. If the end client determined that IR35 applied, the contractor did not even know who had made that decision. The rules have been changed to address that, but we are very concerned that what is called the client-led dispute resolution service will do very little to amend an incorrect decision. It is unlikely that a big client, once it has made a decision, will overturn it simply because the contractor says, "I think you've got this wrong. Have you considered X, Y and Z?" The client will just say, "Yes, we have considered it and we still think that IR35 applies".

What is needed is access to some sort of independent arbitration service, or indeed the courts, but that would be resource intensive. There is a practical problem about implementing something like that, because you would end up with thousands of little IR35 inquiries. As we know, they go on for years. It is difficult, but the client-led dispute resolution service will not be particularly helpful in addressing the core concern that someone may have got a status determination wrong.

Lorence Nye: The contractor might be disincentivised from even raising the issue. If it is a client they value or a contract they are desperate for, they will probably just put up with it.

The Chair: It is David versus Goliath without the slingshot.

Lord Rowe-Beddoe: Your answers are very interesting. Do you think HMRC is doing enough to notify people of the requirements and how they are to fulfil those requirements? In your opinion, is it doing enough?

Julia Kermode: No.

Andrew Chamberlain: No.

Lord Rowe-Beddoe: Any advance on no?

Abigail Agopian: As I pointed out, the refinement of the CEST tool and the year's delay in the use of that tool are very welcome, as are some of the things in the guidance published at the beginning of February, but there are still many more things that need to be dealt with.

Q18 **Lord Bridges of Headley:** If you were advising the Chancellor and he is saying, "I want to create a Britain fit to compete in the digital economy and the gig economy outside the EU", would you say to him, "You must proceed with this policy"?

Abigail Agopian: For those purposes, no.

Lorence Nye: Absolutely not.

Andrew Chamberlain: Absolutely not.

Julia Kermode: Absolutely not.

The Chair: What would you tell him to do?

Andrew Chamberlain: There have been a couple of consultations.

The Chair: You mentioned your scheme. I think the Committee would like to see that. It was rejected as part of the consultation. For what reason?

Andrew Chamberlain: They said it was out of scope. There were three other ideas that were out of scope as well, which were not our ideas, but I think each of them would merit greater consideration than the policy we have now. One of them, for example, was to introduce something like an engager's tax.

I think we are all in agreement that the employer's NI is what we are talking about, which is missing when there is a self-employed or contractor arrangement. One thing you could do is put an obligation on a hiring organisation to pay something like an engager's tax when engaging a contractor, which would be a bit like employer's NI. Once you have created it, Chancellors can adjust the rate here and there, but it would be very transparent and obvious. It would probably push the contractor's

rate down a bit as well, but that would balance out over time and there would be no problem with the mutuality of obligation and all those difficult tests; it would simply be that. That is not IPSE policy, but that idea is out there and it is attractively simple.

The Chair: Whose idea was it?

Andrew Chamberlain: I am not sure. The think tank Demos came up with a similar idea in a report.

The Chair: Perhaps you could write to the Committee about that.

Andrew Chamberlain: I will send it.

Baroness Kramer: You are talking about what kinds of remedies might work significantly better. In your view, should employment rights and tax on employment be linked issues that work together as a whole?

Andrew Chamberlain: Yes. My view is that that would be the desirable thing. Right now, we have a situation where a client will say to a contractor, "We're satisfied that this relationship is a bit like employment. We want to control the work you do. We will not let you send a substitute and all the rest of it. However, we are not going to employ you. We'll just ensure that you are put on to a payroll somewhere, and therefore we're satisfied".

If the end client is saying, "What we want is an employee", they should employ someone. If they do not want that, they should be a contractor and the rights and the tax should all go in one thing. The aforementioned Matthew Taylor review talked about aligning employment rights and tax. The Government are committed to looking into that in their Good Work plan, but we have not heard very much more about it. That is the kind of thing they should be doing ahead of this.

Lord Bridges of Headley: At the weekend, the Chancellor said that he thought the approach suggested by the Government was fair, but, to be clear, you are saying that it will create a new unfairness in employment rights.

Andrew Chamberlain: Yes.

Lord Bridges of Headley: The fairness argument is not one that can play both ways.

Andrew Chamberlain: Correct. I do not think it is fair.

Julia Kermode: It puts lower-paid people in a very vulnerable position if they are being taxed as an employee and are getting no rights whatever. For a long time, we have been talking about everyone in the UK labour market having minimum rights, et cetera. This is a massive step back and it is fundamentally unfair for that reason.

Lord Desai: From previous evidence, it turns out that this bulk is either very low-paid or very high-paid people. Low-paid people definitely suffer

from the unfairness in contracting, but high-paid people are getting away with murder. I am sorry for using that expression.

The Chair: I do not think we have any evidence of that.

Lord Desai: If they implement it, they will collect about £3 billion. A sum of £3 billion is being lost to the country. Who is getting it? Has anybody done any analysis on that? Who is getting this £3 billion that HMRC is not getting? Somebody must be getting it.

Andrew Chamberlain: HMRC is saying that individual taxpayers are getting the benefit of that because they should be paying the tax and, indeed, perhaps the higher-end organisations that would be paying employer's NI, et cetera. I am not sure that I have seen a particularly well-argued justification for where some of those figures come from.

Lord Desai: You do not think it would make £3 billion.

Andrew Chamberlain: It may well make money, but the claim at the moment is that the Revenue is losing that money. In order to make that case you have to make an assumption about the number of non-compliant IR35 engagements that currently exist, but IR35 is so difficult to determine in any one engagement. Indeed, if you look at HMRC's recent record at the tribunal, it has lost many more cases than it has won. HMRC's view of what is caught by IR35 is not always caught by IR35. You have to question the premise on which it has based a calculation such as that. It may be that there are not so many IR35 core engagements out in the world as HMRC believes there are.

The Chair: Picking up Lord Desai's point, is it not possible that you get the extra money by imposing a national insurance charge that would not otherwise have been imposed, so the contractor is cutting the cost of his contract, and the Revenue is taking a slice of the contractor's income?

Andrew Chamberlain: That is indeed the ultimate position.

The Chair: Going back to the question about being able to complain, and Mr Nye's point, if you are a small operator and are up against a large organisation, you are not going to upset them and get into a row with them about that, but if it turned out subsequently that the determination had been wrong, how would you determine liability for the national insurance, and how would that get returned to the small operator?

Julia Kermode: It is a very good point. We were talking to HMRC about this at our last members' meeting. HMRC says that anyone who is paid on payroll and feels they have been overtaxed can reclaim that, but it is not clear and there is no easy process to reclaim it. If I was found to be inside IR35 and tried to reclaim overpaid taxes, I might get my tax back, and the employer would presumably get the employer's national insurance back, but if that has come out of my rate I have no chance of getting that bit back at all.

Andrew Chamberlain: It is very hard to unravel this, particularly given that currently you have to wait until the end of the tax year to do it, and then you would spark an investigation. That would rumble on for a couple of years and then you would eventually find that IR35 did not apply at all. However, as you say, probably most of the tax would be employer's NI and paid by someone else, so you would have to get that back at a county court. It is very difficult to imagine how it would happen.

Julia Kermode: It is okay: HMRC told our members that it is not insurmountable.

Baroness Kramer: There is nothing in writing; there is no record in situations where the client has said, "I owe X in employer's national insurance contributions for you and I am taking that out of the money that I pay you". There is nothing that explicitly tracks that, so I fail to see how that money could be reclaimed.

The Chair: I know that some members of the panel have to leave at 4.15, which leaves us with four minutes. Would it be fair to summarise your evidence by saying that, given that the Government's policy is about simplifying the tax system, this is perhaps a challenge?

Andrew Chamberlain: Yes.

Abigail Agopian: Yes.

The Chair: Thank you so much.

Examination of witnesses

Matthew Abraham, John McVay and Dr Iain Campbell.

The Chair: Welcome. I think you listened to the earlier part of the evidence. Thank you for the very comprehensive written evidence that you provided for us, which I really enjoyed reading yesterday afternoon. Thank you, Mr Abraham, for your comments on oil and gas. They have only just arrived so I have not had a chance to read them, but the Committee is very appreciative.

Q19 **Baroness Kramer:** Thank you, and welcome. I think Mr McVay and Dr Campbell have some experience of how the change in arrangements has worked in the public sector. We have heard from HMRC that it has been extremely successful. Can you give us your point of view on the implementation and operation of the off-payroll rules in the public sector?

Dr Iain Campbell: I am not surprised that HMRC says that in its view it has been very successful. It only has one metric, which is what its tax take has been, on its assessment. What we are seeing on the ground is that all the genuinely self-employed people in that cohort cannot in fact get that status. Individual assessments do not occur and blanket determinations are applied to thousands of workers at once—entire

professions in various engaging organisations—when the law should say that you get individual assessments with reasonable care in every instance.

Indeed, our organisation judicially reviewed NHS Improvement on that very point, and a number of others, and won on each count settled in the pre-action phase. Part of the guidance that we co-authored with them was that you should get individual assessments with reasonable care. This occurred only months before a webinar was organised with HMRC and its IR35 lead, Mark Frampton, who came in and basically undermined our settlement agreement by saying that all workers should be blanketed. He said that on seven occasions. We can provide you with a recording if you wish; we have a full recording of the webinar, which was leaked.

Baroness Kramer: That would be very useful.

Dr Iain Campbell: There was no caveat given—

The Chair: Excuse me one second. We need to take advice on whether we can accept that in evidence.

Dr Iain Campbell: No problem.

The Chair: They are house rules, rather than any inhibitions.

Dr Iain Campbell: Not at all. You are welcome to it if you can accept it; we will be very glad to give it to you. It is about 300 megabytes, so we would need to make arrangements.

Baroness Kramer: If there is a transcript, that might be acceptable, whatever the rules are.

Dr Iain Campbell: We are currently working on it.

The Chair: Perhaps you can work that out with the clerk offline.

Dr Iain Campbell: No problem. In that webinar, on all the occasions bar one, there was no caveat given; it blanket assessed all the workers at once. In case law, you are supposed to take an overall view of the big picture. We talk about painting the full picture, and stepping back and looking at the entire engagement. Under the legislation, the duty arises on a per contract basis, and you are supposed to look at the way the company is set up. How can you tell whether the individual has adequate shareholding even for the legislation to apply without looking at it on an individual basis?

HMRC essentially came along and said, “Look, you are all caught”, and the unfortunate reality is that there are perishingly few healthcare workers—doctors, nurses and even dietitians and pharmacists working within the NHS—who actually escape the legislation. Those people have no job security and can be disposed of in a one to four-hour notice period, and they can make losses against that. Indeed, I personally have

made a loss on contracts that I have taken, when I had commitments to accommodation costs.

As a medic, I am never sorry to see the health service recruiting doctors; that is great news. But when that happens, and you have travelled across the country and paid for accommodation and you end up making quite a considerable loss, in that case, on an engagement, you are in business and you have an account, so you are at financial risk in the engagement you are taking. That is not a theoretical risk; it is a practical risk that happened. The Revenue disregarded all that and led people along the line that there should be one assessment for each class of worker that finds them all caught. He did not say, "finds them all caught", but that was the general thrust of it.

Again, as you discussed before on mutuality of obligation and all that sort of thing, to be frank about it, HMRC was being dishonest. It took a case law test from another area of law with a similar name, which can bamboozle lay people, so to speak. Contract law has a concept of mutuality of obligation, and HMRC used that definition, but that is a test for whether a contract exists, not for the nature of the contract. Contract law says, "Is there a mutuality of obligation?" That is why you get peppercorn payments and all that sort of thing to satisfy it. Literally, a peppercorn can satisfy that test, whereas in employment law what we are really looking at, to put it simply, is security of contract—security of your role or your job. That test looks for an irreducible minimum, and whether it is sufficiently strong to render one party master and the other servant.

By supplanting one test with the other, HMRC overlooked one of the key factors in what constitutes genuine self-employment: are you at risk? Is your home at risk? Could you end up suddenly with no work? If you fall sick, as happens in life, and you cannot get any work for six months, what happens? Those are the financial risks that HMRC is trying to disregard by deliberately trying to omit mutuality of obligation.

That gives you a flavour of where we are coming from. I am sure we will discuss it in more detail shortly, but suffice it to say we are not best impressed with how things have gone. We think there is a danger to patients, because workers will not travel. They will not fly across the country as they used to do, to cover shifts at short notice, and that fuels rota gaps. Of course, those are multifactorial, but it is a major contributing factor. We have evidence that we can supply you with later, if you wish to delve into more detail about the degree to which that has occurred.

The Chair: That would be very helpful.

Baroness Kramer: Mr McVay, do you want to add anything?

John McVay: Thank you, Baroness Kramer. As Lord Forsyth said earlier, you are seldom wrong, but I actually do not represent the public sector. I represent the private sector, for TV companies across the UK.

Baroness Kramer: It was more that you had a perspective.

John McVay: Yes, we definitely have a perspective.

The Chair: But you represent the BBC.

John McVay: No, I do not.

The Chair: You do not have BBC members?

John McVay: No, the BBC is not in my membership. We are all private sector members.

Baroness Kramer: My apologies.

The Chair: We were both wrong.

John McVay: As I said, you are very seldom wrong, and my apologies for correcting you.

I set up the Creative Industries Council, and I was the sector lead for the sector deal under the previous Government's industrial strategy. The creative industries represent over 70,000 SMEs across the UK; they are growing at twice the rate of the UK economy and creating more jobs—freelance jobs—than the rate in the economy. My sector, the film and television industry, has long used freelance and self-employed craft and technical people to work on various films, TV programmes, adverts, et cetera.

The big problem this throws up is that at any one time we may end up in conflict with the people we want to employ. I may deem them to be a properly self-employed contracted company, because I am of the size of the company that has to make that determination, but another company of my size might determine that they are not, which would cause conflict, as we heard in the previous session. Of course, many of my smaller member companies are below the threshold, so they will not be subject to making those determinations, but they will hire people who are determined by others. The conflict will come when someone says, "I used to work on this programme. However, because I was determined to be a certain employment status, I put my rates up to cover the additional burden and I am now going to apply those rates to other subsequent jobs as well".

We worry considerably, not just in my sector but across the creative industries, that the change will be inflationary. Of course, that may be what the Revenue is looking for in seeking to get more revenue for the public purse, but it will put a real burden on SMEs across the country at a time when they are seeking to grow their businesses and become more global.

If we are making a TV programme, my production company might employ only 10 full-time staff, but if we get a commission from the BBC, I might go on to hire 300 people to make that production. Next year, I

may not be hiring 300 people. I may not have any work, because I did not get a commission. When you are working in the creative industries, you have no advance order book; you generally have a very low number of fixed employees, and you hire in contractors and self-employed freelancers to complete the work, whether it is in fashion or film and TV. That is how we remain efficient and competitive.

We are very concerned that it will create confusion for the people we would like to hire and will be a burden on employers. It will be a burden. Worse than that, we may be in dispute with HMRC. If I have hired Dr Iain Campbell Ltd, say, and have deemed that he is actually an employee, but someone else has deemed that he is not for a similar job on another production, the Revenue may take a dispute with the employer. By the time we end that dispute, and I have to pay the Revenue for whatever costs it deems have not been paid, Dr Iain Campbell might have gone bust, and I may not be able to recover my liabilities from Dr Iain Campbell, who may have had the benefit. That is a horrible confusion for everyone concerned.

The Chair: How will you resolve it?

John McVay: I would go to your earlier point. Some alignment of employment law would be very rational.

The Chair: But as the system is now, how would you resolve it?

John McVay: Generally, the burden was always placed on the person presenting—

The Chair: No. With the new rules after April, how would you resolve it?

John McVay: I do not see how we can resolve the problems that I have just outlined, under the current HMRC guidance.

The Chair: If I were you, I would resolve it by assuming he was employed.

John McVay: But he may say, “I don’t want to be employed. I want to be treated as a contractor”, and I may agree to that, because he is the only person who can do that job for that production.

The Chair: But if you wanted to limit your risk, you would not agree to it.

John McVay: I would not agree to it, but he might be the only person I could hire to do the job—for example, he might be a specialist director of photography for a drama that is costing £20 million to make. There is also a burden on the employer that way, in that there are only a limited number of people at a certain level.

If I say, “I want to make you an employee”, and he says, “No, I don’t want to be treated like that”, I may say, “Okay”, to facilitate the production, because these are time-based prototypical products. At some

future point, the Revenue might say, "No, that was wrong", and I might end up in dispute with the Revenue. If I cannot recover the costs I then have to pay to the Revenue, because he no longer exists as an entity, that is a huge cost, and a huge unknown to business, particularly at a time when, for my sector, we are the number two audio-visual economy in the world. That is a real burden being placed on fast and competitive businesses seeking to export that product to global markets.

To your other point about our current trading status as we go through Brexit, we should be doing everything to advantage our competitive businesses.

The Chair: Sorry, Baroness Kramer, I interrupted your questions.

Baroness Kramer: No, I am sure other people want to come in on this issue.

Lord Desai: One thing that has emerged from what you have said is that a genuinely self-employed person faces uncertainty of employment, so there is a risk element to genuine self-employment that is not there if you are signing some sort of contract but you are really employed. Have you thought of any way you could make that distinction in tax law?

Dr Iain Campbell: You are going towards what we have suggested as an alternative solution for this. We can look at all the case law tests, which, by the way, are brilliantly thought out; the judiciary has done an excellent job. But you need a specialist, and that means you need to hire experts. To suggest that normal clients are competent to do this when HMRC gets it wrong is verging on ridiculous.

We suggested that you need to create statutory terms of employment and self-employment, with certain terms that might be implied in the contract automatically by an election made around, say, contract security and all that sort of thing. That would abolish a lot of the uncertainty, but then you have the question of people who might elect to become self-employed under such a system but perhaps would not appear to be so if a court were to consider it. I think we are talking about a minority, and a small minority in our view, but certainly it exists.

The solution we have proposed to that is very similar to what IPSE suggested to you only 10 minutes ago. We suggest that you sample 10,000 or 1,000 contractors and get them professionally assessed by an expert well versed in the case law. Do not rely on HMRC; that is the first rule. Work out the true scale of disguised employment, to use HMRC's term, and then put a levy on all contracts to recoup about the same amount. You would have almost no administrative burden in so doing, in that most of the money avoided is employers' NICs, and you give certainty of contract to everybody.

That is a more efficient solution, with less admin and less burden. I think it is far fairer, and I do not think that contractors would object to it. Obviously, if you charge the client a certain amount, that will be passed

on to the contractors, because that is how economies work; there are market forces involved. The amount will probably be a small percentage. That is probably how we would handle it, were we in a position to set the rules, which unfortunately we are not.

The Chair: Mr Abraham, you have not said anything. Do you want to say anything?

Matthew Abraham: No. So far, my two colleagues on my left have covered everything.

John McVay: It is encouraging to see so many sectors speaking with one voice.

Q20 **Lord Bridges of Headley:** Mr Abraham, in your evidence, for which we thank you, you say that the cost to members has been significant. Is the HMRC's estimate of the one-off costs at £14.4 million accurate or an understatement? What do you think about that for your members?

Matthew Abraham: Our members have spent a significant amount of time, money and effort hiring other people to assess this, to work out the best possible options for all parties in our supply chain. I do not just represent the oil and gas companies; I also represent all our supply chain members. I am here as supply chain director for Oil & Gas UK. In that regard, the costs are incremental across the whole chain.

We looked at the amount of effort that we are putting in to try to work out the best way of handling the changes, and we tried to put a number on it, but all we ended up with is that thousands and thousands of man hours have been put into it so far. By the time you work out the costs of that, it is unlikely that the current estimates are correct.

John McVay: We do not have a hard number, but we agree, particularly for medium-sized companies. ITV, our commercial broadcaster, has a large production entity, much like the BBC, which hires thousands of freelancers on many different projects and programmes all over the country, filming here and around the world. British freelancers have been hired on those shows. The overall burden for processing all that will be way in excess, probably just for the creative industries, of what HMRC suggests.

Dr Iain Campbell: The thing about the administrative burden is that there is a burden of actual compliance, which is extremely onerous, verging on almost impossible to achieve properly, and the reality, which is that the admin burden is so much that people will simply not comply.

Lord Bridges of Headley: I was very interested, in your written evidence, that you cite the CEO of the Colchester trust as saying that it is down 100 additional nursing shifts per week, as a result of IR35. Is there further evidence from the NHS of that kind of impact, putting aside the costs?

Dr Iain Campbell: Yes. The thing to bear in mind is that much of the pain is concentrated in the hospitals that are hardest to recruit for. If you go looking for evidence from central London hospitals that are all very oversubscribed and have no problem attracting trainees, those hospitals are probably not struggling, and that is what they will tell you, but that is simply because they already have enough substantive workers. The pain is felt in rural areas, the hard-to-get-to areas, where they struggle to attract substantive staff and contract workers.

I was looking through NHS Professionals data, the system that agencies subscribe to. I know it is labelled NHS, It is actually a company, but as far as I understand it is semi-publicly owned. Hospitals advertise vacancies through NHS Professionals. We looked at fill rates, which have dropped by 50% and in some cases by up to 75%, at various hospitals, at a time of contemporaneous surge in demand. So what you are seeing is any reduction in spend there is probably down to the fact of not hiring workers. Any fool can spend less money on healthcare by hiring fewer workers; you are effectively buying less healthcare. They have reduced the number of workers they are getting in, and demand responds to it by going up.

These reforms are making it difficult to attract people, and the primary reason is that people are not commuting due to expenses. Think about what would happen. I get a phone call: "There's a hospital struggling. Can you go there?" I do not do A&E, but that might be a good example, or there is an intensive care unit somewhere. The worker buys a plane ticket and flies across the country, or perhaps goes by train, whichever it is. They pay for accommodation, which might be privately in hotels or hospital accommodation, where it is available, but there is a charge for that. Workers are not willing to do that, because there could be tens of thousands of pounds of expenses against which business losses can be made, which, effectively, are footed from your own post-tax pocket.

If the job is cancelled, as has happened—one to four-hour notice periods are the norm—that is a loss you make. It is much easier to stomach that as a pre-tax business expense, which in my view it really is, than to foot it from your own pocket. That applies equally to those on big incomes as it does to those who are, say, dietitians or some of the less skilled or, below that, unskilled health workers doing contract work. Even in cleaning and catering, they end up footing that themselves.

There is a real injustice in expenses, and it is hindering service delivery. We have recently discovered from a Freedom of Information Act request that that data is passed back to NHS trusts, which is, of course, the point at which we can obtain it through freedom of information. We should be able to supply you with more information and data in the next few weeks or so, barring, shall we say, obstruction to the requests.

The Chair: That would be very helpful. We would very much like to see the impact on the NHS, or anywhere else in the public sector.

Lord Bridges of Headley: Looking at the public sector's experience of

this, can you remind the Committee about the time it took to get notice to implement it? Can you remind us of the timescale for the time between when the final details were known and the implementation date? What was that period?

Dr Iain Campbell: Do you mean for the public sector reform?

Lord Bridges of Headley: Yes.

Dr Iain Campbell: I do not recall exactly, off the top of my head, but it must have been announced around 2016, or those were the first sounds of it. I am going from memory, so I may be slightly off. In about 12 months, we had an idea of what was going on.

However, a problem that a lot of contractors had was that they looked at it, and if they were relatively switched on they would read around some employment status case law and think, "That's obviously not me. I have no problem". They need to look a bit deeper to see the subtly coercive nature of what is going on, where they divorce the liable party, or the one with the risk element, from the one with the benefit, and then hand the decision to the one with the risk. What do you think they are going to do? They make risk-averse decisions. Whereas it ought to be a matter of fact, in reality, if you give them the decision, they are going to say, "What exposes my business? What is my interest?"

Lord Bridges of Headley: You had 12 months. Mr Abraham and Mr McVay, given what we know now and the fact that the Chancellor said over the weekend that he was going to make tweaks and improvements, what tweaks and improvements would satisfy you to make sure that this could be implemented in the current timeframe expected?

Matthew Abraham: We have made three separate submissions on this so far. From the work that has been done, it is very difficult to understand the definitive end status of everybody involved in this. Companies are making decisions as best they can as to who is going to be affected in different ways. We are seeing differences of opinion in that, so it would be good to have some certainty on the tools that say how people should be affected. Based on HMRC's own statistics, only 85% can be guaranteed, so pushing that towards certainty would make a significant improvement on the situation that we have at the moment.

From our members' perspective, where we are right now, with six weeks to going live on implementation, it is very last minute. We have spent a lot of time and money trying to get ready for it. I refer to some of the previous evidence that you have heard in this session. It is unfortunate now that we are where we are, but, as it stands, we have ambiguity among our members as to whether they are prepared to go ahead with the system as it is and live with it, or ask for an extension, to take it from here. It is one of those two situations; we are caught between two stools.

John McVay: For us, from testing the determination and the tools, they tend always to say that someone is employed, when generally that is not

the case; they are working on multiple contracts for employers on very different productions all over the country. One of the major problems is getting clarity of determination for employers and employees so that they know how they will be treated. We do not want conflict with the highly skilled individuals we want to hire to work on our productions, and this will throw up more conflict. There was a previous comment about what we should be doing now that we are coming out of the EU. Probably we should be reforming our whole tax base to make it simpler and clearer for the British public and businesses to understand. This does not seem to be one of the ways to do that.

Baroness Kramer: Can I ask a very quick question on the contractors themselves? Dr Campbell, you said that a number of hospitals, particularly in the less popular regions of the country, now cannot find people to employ. Are those people simply stopping working, or are they selling their services elsewhere? We have been picking up anecdotally, or I have, that a number of operations are basically seeking to employ their specialists outside the UK as a way to get around this, Ireland being one of the popular places to do it. Are you seeing any of that?

Dr Iain Campbell: As ever, that is a very insightful question. We would obviously say “engaged”, avoiding the word “employed”, which is in this context slightly loaded. You have absolutely cut straight to the heart of the matter. Many people are working less, so they undertake fewer hours, which obviously is very counterproductive from HMRC’s point of view. These are people who in many instances earn a lot of tax per hour, so if you encourage them to undertake less work you are not going to make as much money as you would otherwise, especially so as, once they reach certain levels of income, there is tapering of the personal allowance and that sort of thing. Obviously, that again further disincentivises them from work.

Cutting hours is one major thing. The other thing is that a lot of workers have plain left. The Office for National Statistics data that I forwarded to you, attached to the evidence, showed that 12,000 medics have left the country, and that includes surgeons. They are working abroad, we say as a result of this; there is no effect from Brexit in the first year and then, straight after the reforms came in, the drop occurred. That is the other side of it and, again, we lose tax take from that.

Those are the two sides of it: working less and working abroad. We live in a global world and, regardless of the Brexit thing, workers will migrate. We should be thinking about how we can attract people here and make it a good place to come and undertake work, helping our health service, rather than disincentivising that.

The Chair: What about the argument that by employing contractors, as opposed to full-time employed people, the health service has to spend vastly more money than it would otherwise have to spend?

Dr Iain Campbell: So there is, to put that in context, an argument there to an extent. Of course, the reason why there is that differential is that

there is a monopsonistic buying force, effectively, in the health service, and a monopoly on training. The result is that health professionals are remunerated far below their market worth, and that is where the differential occurs. You should treat your substantive staff better, and the way to address it is through market forces, not rate caps. You need to look at training more and make the working conditions better.

The other side of it is that if we could recruit the workers we would not have need for the locum cover anyway. It is about maintaining safe levels, and if you do not you are actually going to drive rates up, because working conditions get more stressful. It is a response to market forces. I hope that makes sense.

John McVay: We are not dealing with this yet but, to your point, we work in a very mobile industry. The UK is undergoing a boom in film and television and is attracting very highly skilled people to work and invest in our labour market. If their preferred status is not as attractive, they will go offshore and work somewhere else. That is inevitable. We are in a global industry.

The global television industry is now worth \$500 billion. It is the biggest entertainment sector on the planet, and people seek high-quality individuals much as they seek high-quality doctors or other British personnel. That is not good for our economy; we want to attract and retain those people in the most favourable way, because there are plenty of other competing countries that would like to attract them, including, in my sector, Ireland.

Q21 **Lord Monks:** From the three different sectors that you represent, is there some recognition that HMRC may have a point about the present situation? Given the flexible labour market and what has been done, there are significant ways around discouraging people from paying their tax, and more particularly, perhaps, their national insurance. There is a major problem of employee-based arrangements being undermined. The construction industry, where that has clearly been the case, is a classic, although I know you do not represent that sector; regular employment has become a small minority experience. Do you see any virtue at all in the HMRC approach? Maybe the Revenue has a point, and we have to find a way of addressing it that is fairer than the current situation.

John McVay: In my sector, a lot of this debate started because the BBC changed the employment status of a number of employees to personal service companies, which has not been a happy story for them, shall we say. My view is that generally, if you are working full-time for one employer, you are an employee. The BBC people were employees who went through a change of tax status to become personal service companies.

I do not think that any of us is arguing that we should not pay appropriate tax or national insurance contributions. It is about coming up with a system that is fair, is not a huge burden on business and actually moves us forward. That is what we all seek. We all invest in and benefit

from the infrastructure in our country, from education, roads and all the other things that we rely on as businesses. I do not think that any of us does not want to pay appropriate tax. But that takes me to another point: British media companies are competing against global media companies that do not pay tax here. Maybe HMRC and the Government might want to spend a bit more time thinking about how they would pay appropriate tax to an economy that they benefit from as well.

- Q22 **The Chair:** Can you help me? I am thinking about the point you just made about how, if someone is employed to do a job, clearly they are an employee. I am thinking about some of the brilliant cameramen who sit for a whole month to get an insect to do something, which will then become 10 seconds in one of the David Attenborough programmes that have become such fantastic earners for our country. Such a cameraman will be in high demand, because it is a huge skill. Without personalising it, they are probably going to be self-employed.

John McVay: They will, inevitably.

The Chair: From what you said earlier, they might spend three months in Uganda, say, pointing their camera at some gorillas, and they might be working for one of your members—

John McVay: Or the BBC.

The Chair: Or the BBC. But, to my mind, they are not really employed, because they are a contractor who is providing a specialist service.

John McVay: Yes, and generally they bring specialist equipment as part of that contract.

The Chair: If I am doing that work, I have done fantastic films and I am in demand all over the world and you say to me, "I want you to be employed", I am going to tell you to—

John McVay: You will be quite impolite about that, I imagine. Not yourself, Lord Forsyth, obviously. That would be a slight on your good manners. But that would be the conflict. I would be put in a position as the producer, whoever I produced for, of saying, "Take it or leave it", and that person could say, "I'll leave it. I'll go and work for HBO or Discovery".

The Chair: To take Lord Monks's point about the abuses on construction sites and everything else, how do we resolve this?

John McVay: There is a value chain. You are the cameraman, and you make me an award-winning, very distributable and sellable show about the life of the mayfly on English chalk streams. I am a fly fisherman, so that is relevant to me.

The Chair: So am I. Now you have got me interested.

John McVay: Good. It is a global success, and you are paid for that. You may also have shared in revenues from the sales of that programme,

depending on your particular negotiation, which you will pay tax on. I am BBC Worldwide, I sell that programme globally, and I am paying tax on that as well. There is tax paid on all the transactions involved in the original piece of work that you did, as well as you paying tax for the income you receive for the camera company you work for. Whatever those contributions are, and however people contribute, as an employer I am paying you a premium as a contracted company; you are getting some sort of benefit for that, as a company, and you will be paying tax appropriately for the contract I offered you.

Lord Monks: Who owns the camera?

John McVay: Often the camera is hired. I would hire the camera from Lord Forsyth, as part of the contract, but he would own the camera, and he would obviously make capital deductions for that piece of equipment, as anyone else would.

Q23 **Lord Rowe-Beedoe:** I would like to get some idea of the size of your representations.

Dr Iain Campbell: We have around 3,000 independent health professionals, including doctors, nurses and radiographers.

John McVay: In my sector, I represent independent production companies. We have about 550 companies across the UK, and global turnover is now in excess of £3.2 billion; more than half of that is non-UK earnings. The creative industries are worth £150 billion to the UK economy, with 70,000 SMEs, and the predominant employment status is freelance.

Lord Rowe-Beedoe: There are 70,000 SMEs.

John McVay: In the creative industries, but it is worth £150 billion to the UK economy.

Lord Rowe-Beedoe: What about oil and gas?

Matthew Abraham: With oil and gas, there are about 30 to 40 of the major oil companies plus, underneath that, the supply chain. We represent another 350 companies, and the oil companies as well, working with us. Beyond that, in the total SME organisation, you can get up to about 8,000 different companies that actually represent them. There is a vast number of individual traders beneath that.

Lord Rowe-Beedoe: Do you have some idea of that vast number?

Matthew Abraham: We think there are about 250,000 people employed in the entire industry, of which we are talking maybe 50,000 or so.

John McVay: I would like to add one point to the construction analogy. We are not in the construction industry; the people who work in film and television, in the creative industries, are highly skilled, creative people, who work on something because it is creatively engaging. They are not just making a plasterboard wall. They are doing animation for children's

films, for example; they are skilled graphics artists. They are not the same thing. When you say "freelance", there are very different types of activities.

The Chair: I do not know whether you have ever tried to build a wall, but there is some skill in it.

John McVay: I am not saying that there is not craft or skill in it, but creative people choose, because of their vocation and skills, to work on different things.

The Chair: It is in the nature of their employment.

Q24 **Lord Desai:** I am still trying to grapple with the idea of uncertainty of employment or variability of earnings being the mark of a genuinely self-employed person. It may be an exception in your case, Dr Campbell, where people may be self-employed as health professionals but they may have employment. Is there any way one can genuinely say that self-employment involves uncertainty, risk and variability of earnings, and therefore treatment for tax purposes should allow for that by averaging over three years, or something like that? That would allow for the uncertainty of income, as sometimes you do with creative professionals anyway. Would that somehow solve the problem?

Dr Iain Campbell: The case law which the legislation requires them to look at already looks at those aspects. Financial risk and being in business on your own account is what we are cutting into. The problem is that it is very difficult for clients to make such judgment calls. If they were more formalised in the way the decision was made, it might be useful, but the reality is that case law does a beautiful job of separating employment and self-employment. Some very learned judges have done some fantastic things in working out those tests.

The problem is that it requires someone equally learned and well versed to do it. If you could put that in a neat, succinct and easy-to-appreciate way and make people consider it, yes, it might be helpful. The difficulty will be what form of words is going to do it and whether clients are going to engage with it, because they have so much admin burden. That is why we suggested removing all ambiguity by making it a straight election, then having a contractor levy and charging them a set percentage. You will recoup the same and you will not need to deal with nuanced and difficult assessments.

Lord Bridges of Headley: This is a bit of a technical point, but, to come back to CEST and what we have just been talking about, can CEST ever really get around those nuanced legal points, especially if it does not address mutuality of obligation? I know that in your evidence, Mr Abraham, for which thanks, you say that it is too early to say whether you can make an assessment of its utility. I do not know what the others feel about it, but, especially on those points, is it fit for purpose, and what should be done about it?

Dr Iain Campbell: First and foremost, we usually start by talking about an overall approach. The case law is quite clear. If we go back to the oft-cited *Hall v Lorimer* case, which is one of the most cited case law examples, it says that we should not adopt mechanistic approaches and that, effectively, you paint a picture from an accumulation of brushstrokes and stand back and view the overall painting—I say that looking up at a big painting above me.

It is a very enduring metaphor. The problem is that it explicitly says that there should be no mechanistic approaches, but there is a machine running a mechanical tool running a flowchart, which weighs up the same outcomes equally every time, exactly as the case law says we should not do. Can the CEST tool be improved? It is the wrong approach to start with. All the guidance from case law suggests that you do not do that sort of thing.

Then you get into all the other things you have said. Mutuality of obligation is one of the best tools in case law, but it is never going to get the right result. If you input previous historical cases and work out what the answer would be, it gets the wrong answer, or it gets the right answer for completely the wrong reason.

The Chair: Have you done that? Can you give us some examples?

Dr Iain Campbell: I can forward you a detailed working through of all the main cases that have been looked at.

The Chair: That would be very helpful—something to read next weekend.

Dr Iain Campbell: To give credit where it is due, Lord Forsyth, that one was ContractorCalculator. I can forward it to you.

Matthew Abraham: On our side, when 15% come up already defined as an incorrect answer and then you go into other tools that have come on to the market, and tools that our members have developed to help, and they come up with different answers to the different situations again and again, no, it does not give us the way to go forward. The uncertainty is across the board. To talk about tax law and uncertainty seems a bit of a contradiction.

The Chair: Do you agree, Mr McVay?

John McVay: I concur. In my industry, we use multiple companies for creative industry tax credits, which go across games, film and TV. We have set up special purpose vehicles that exist only for the purposes of that production. They do not exist going forwards, so if there was any dispute with HMRC it becomes a horrendous burden and a legal accounting audit nightmare.

Overall, I refer to my previous comments. Everyone wants to make sure that we make our contributions to the Exchequer, but it has to be done in a way that is sensible and reasonable. We must also make sure that we

do not drive away or cause problems with inward investment. We are Europe's most successful audio-visual economy, and large amounts of investment in film—over £1 billion last year—come to this country because of our very clear employment practices.

- Q25 **The Chair:** Perhaps I could abuse my position by asking one final question. I appreciate that you have members who have different views about things, but in my head I am wondering whether people want the Chancellor to do his tweaks or to delay, or do they want him to say, "Do you know what? We've got into a tangle here. Let's start again and do something different"? Where are you on that?

John McVay: We should do something different. The coalition Government committed to the Office of Tax Simplification, and this seems completely contrary to that. This is not a simplification; it is more complexity and more burden. With where we are going in the world, there is an opportunity for any Government to look at our overall tax system.

I have three children who might be called millennials, and they, like more and more people, see self-employment as their future, with multiple contracts and careers. I think that is a good thing. We should have an economy that encourages people to be self-employed or to set up their own small business. When I was working on the sector deal in the industrial strategy, one of the interesting things was that the UK is number three in the world for setting up SMEs but number 13 for getting to scale, and a lot of that is about the burden placed on SMEs wanting to be flexible and able to compete in the global economy.

The Chair: Right, we get the picture.

Dr Iain Campbell: Lord Forsyth, you were on the money when you said that we should probably not roll this out but have a complete rethink. There are perhaps better ways of addressing it, so as not to have all this uncertainty about it and not to predispose clients to make risk-averse decisions. Nobody minds if somebody sticks their hand up and owns up to a mistake. That is statesmanlike.

The Chair: Mr Abraham, you have members who have spent a lot of money on getting this prepared, so what is your view?

Matthew Abraham: If there was to be a meaningful reconsideration of the actual facts, obviously for our members that would be appreciated, but if we were to have a delay just to come back to where we are now it would not be helpful.

The Chair: Thank you so much. That is really helpful.