Select Committee on Economic Affairs

Finance Bill Sub-Committee

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

Monday 2 March 2020

3.20 pm

Watch the meeting:

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. 3 Heard in Public Questions 26 – 40

Witnesses

I: Bill Dodwell, Tax Director, Office of Tax Simplification (OFS); Karen Thomson, Administrative Burdens Advisory Board (ABAB).

II: Stephen Ratcliffe, Member of Legislative & Policy Committee, Employment Lawyers Association; Keith Gordon, Barrister, Temple Tax Chambers; Caroline Colliston, Member of Tax Law Public Policy Sub-Committee and LBTT Working Group, Law Society of Scotland.

Examination of witnesses

Bill Dodwell and Karen Thomson.

Q26 **The Chair:** Mr Dodwell and Ms Thomson, welcome to the Committee. We are very grateful that you are here. Ms Thomson, I gather you had some trouble getting here due to a landslide, so well done for arriving on time. We hope that the Committee will not create a landslide with our report. We are extremely grateful to you for coming. If either of you want to make a general statement right at the beginning, you are very welcome to do so.

Bill Dodwell: No, that is fine.

Karen Thomson: No.

The Chair: Therefore, I will ask you about the IR35 rules. They have

been around for 20 years now, and both the verbal and written evidence that we have had so far suggests that they have not worked out quite as intended. Do you agree, and why do you think that is?

Bill Dodwell: Yes, I agree. The history goes all the way back to Sir Geoffrey Howe, who considered introducing rules to provide that engagers were responsible for dealing with the tax of those they engaged. That was dropped, but the rules came back when Chancellor Gordon Brown introduced them. Originally, the plan was to put the responsibility on engagers through discussion, representations and consultation. It ended up with the responsibility resting on the individuals.

According to HMRC—I think there is some evidence behind this—a large number of companies owned by individuals providing services are not compliant with the legislation. Essentially, the legislation requires the individual to ask themselves, "Is what I am doing quasi employment?" If they decide that it is, their personal service company is essentially obligated to operate Pay As You Earn tax and national insurance. HMRC believes that the vast majority of individual companies are not compliant with that obligation.

Underlying all this is the fact that we are relying on a pretty unclear test for who is employed and who is self-employed. It is easier to see this at the two extremes, but for the people in the middle—the freelancer population—it remains very unclear. We at the Office of Tax Simplification would like to see clarity provided for individuals—they are our main concern—and businesses through some form of statutory test. We accept that that would not be simple and straightforward. None the less, if the end result is clear, that reduces a lot of the confusion and chaos that we currently see in the system.

The Chair: I wonder how realistic the idea of a statutory test is. You say that it would not be clear. Looking at the case law and so on, I cannot imagine how it would be done. Do you think you would be able to write it?

Bill Dodwell: But would you need to enact exactly what the current case law says? A better answer might be to ask about occupations and decide which sort of characteristics you would want to determine today, thinking about modern approaches, working conditions and that sort of thing. What would you like to know today to decide whether somebody is self-employed or not?

Karen Thomson: I recently came to know IR35. As a payroll professional, I was never impacted by this as it concerned individuals. However, come 2016, with the public sector rules coming into force, in 2017 I had to learn rather fast what all this is about. The rules are very complex. I do not think they have worked as well as they could have done, but that is down to the complexities.

I agree with Bill about a simple test, which I will come back to later. I appreciate that it may not always be simple, but I cannot understand why the Revenue, the Treasury or whoever should deal with this cannot say in a layman's way, "This is your status. If you match all these criteria, you are this. If you match all those, you are this". Whether or not you take case law into account as it stands remains to be seen, but why can Parliament not make that decision?

The Chair: So, in simple terms, can either of you provide the Committee with a draft of what that might be?

Bill Dodwell: No. I will tell you why. You need to decide whether you want television presenters to be treated as self-employed or employed. Do you want IT contractors to be treated as employed or self-employed? You have to go through it in that sort of way and reach some form of consensus.

At the heart of this, we obviously have an unclear test, but we also have a massive cost difference, including the value of rights. Employment rights are quite different from self-employment rights and, as you well know, the tax and national insurance treatments are massively different between the two. When you have those two economic forces saying, in effect, "Let's have a lot of self-employed people, because it will be cheaper" and you have an unclear test, the result is some element of chaos.

Lord Desai: Would it be possible to say that if you are self-employed your income will be variable, but if you are employed your income may be less variable? Being self-employed is a risky thing. Therefore, if you are self-employed, your income should be assessed over three or four years and you should be taxed accordingly. Would that be a way around the difficulty of distinguishing between employment and self-employment?

The suspicion is that these people are all employed but they are just paying a different amount of tax. That is what people are unhappy about. Let us face it, people have found complications because it saves tax. People are ingenious. From the point of view of revenue, would it be an improvement if they defined self-employment that way for tax purposes?

Bill Dodwell: I am not sure that it would. That is because, even in employment, there are some occupations in which income can vary enormously. I am thinking not just of so-called zero-hours contracts but of bonuses. There are a lot of occupations in which people are paid a relatively small, modest salary and quite a substantial bonus, which really goes up and down. I am not sure that a definition based purely on variability would work.

Lord Desai: But if bonuses cannot go up and down, they are not bonuses but salaries.

Bill Dodwell: They go up and down in the sense that you might have been paid a £25,000 bonus last year, but this year you might be paid nothing, or £5,000. That is what I mean about a bonus being higher one year than the next.

Lord Desai: If that is the case, you cannot distinguish at all between employment and self-employment. Are you saying that there is no way of defining those two categories separately?

Karen Thomson: Not on variable income. Outside ABAB, my day job is running a payroll bureau. I see what goes through from so many different clients and there is a huge amount of variable income there. In 2000, when this was first brought in, you may well have had good reason to have that justification, but variable income is now very much part of the situation for salaried workers and weekly-paid workers. It is not static as it once was.

Baroness Kramer: In this definition—we are trying to work towards a definition of what self-employment and employment are—would you align employment rights along with the tax analysis, so that, for both categories, you were in either one place or the other? Would that make sense?

Bill Dodwell: As I am sure you know, there are three sets of employment status—full employment, workers, and self-employment—but for tax we have just two: employment and self-employment.

Baroness Kramer: Yes, but I am talking about a relatively blank sheet of paper.

Bill Dodwell: In principle, yes, it would make everyone's life much more straightforward if they knew where they were for tax, national insurance and employment rights, or if we had a different system for all of that.

Q27 **Lord Tyrie:** Mr Dodwell, the OTS previously considered switching responsibility for applying the rules to the client, but then withdrew that as an idea. Would such a course of action work now?

Bill Dodwell: I think there is evidence from the public sector implementation that it has pretty much worked, and I expect that it is capable of being made to work now. As I said in my evidence to the Committee, we at the OTS are not really in the best position to talk about precise business readiness now versus some future date, for example. But, yes, we think it is perfectly possible for engagers to know whether the relationship they have is ultimately one of quasi employment or not.

Lord Tyrie: On a scale of 0 to 10, in which 0 is simplification and 10 is further complexity, how do the Government's current proposals score? That is for additional value.

Bill Dodwell: What the Government wish to do with this is raise quite a lot of money.

Lord Tyrie: But that is not what you are set up to do. The OTS survives on simplicity and simplification, so I would like to know your view on that point alone.

Bill Dodwell: I think they are transferring what should be a calculation of the test that individuals should be carrying out—HMRC considers that they are not—and moving that responsibility to the engager. The larger engagers may have several thousand contractors and will be able to classify them in one, two or three different categories. They will be able to do that in that sort of way. In some ways, once this is up and running, there is the opportunity for efficiencies through that.

The other aspect is that it will ultimately be easier for individuals to know where they are, although I accept that transition will always be hard.

Lord Tyrie: So from the OTS's point of view, it is a simplification measure and it will raise some more money. That is what I just heard.

Bill Dodwell: No. May I reverse the order of those questions? It is to raise more money and put the responsibility on to the engagers, who are better placed to handle it.

Lord Tyrie: I am not saying what the purpose is, but that the effect will be to simplify and raise more money. That is the OTS's conclusion. Is that right or wrong?

Bill Dodwell: No, I think you are putting words into my mouth slightly.

Lord Tyrie: Sorry, I have never done that in all the years I have been on committees.

Bill Dodwell: It is clear that this is a measure to raise money. However, as I said at the start, if there was a better, clearer, proper test, that would be a genuine simplification. That is what we would really like to see.

Lord Tyrie: I will have one more go on this point. I think it was Colbert who said that the purpose of every tax system is to raise the maximum amount of money with the minimum amount of hissing. On a scale of 0 to 10, how would you rate the hissing?

Bill Dodwell: There is a certain amount of hissing, that is for sure. The question is whether this is a transitional hiss or one that will carry on in the medium term. My suspicion is that some of the hissing is really down to the fact that some people would rather not pay some tax and national insurance that they look like they are now faced with. That is one of the consequences of having a tax and national insurance system with such a big difference between the freelancer and the fully employed worlds.

Lord Tyrie: Is it realistic to exclude small businesses?

Bill Dodwell: Yes, it is. The fact that the small business has to confirm that it is small in the labour supply chain is a good thing, so that at least

the agencies and other companies providing workers know what they are dealing with. That is helpful.

Lord Tyrie: That is where the hissing is, as it stands.

Bill Dodwell: I assume that, when they excluded small business, the Government thought that they would rather not impose this obligation—it is clear that it is an obligation on engagers—on the smallest companies, which might have the fewest resources.

Lord Tyrie: Ms Thomson, you have listened very patiently to these exchanges. Would you like to add anything?

Karen Thomson: Speaking not from an ABAB point of view but from a ground perspective, the recent announcement that small businesses need in effect to declare that they are small to those they are working with in the supply chain is a good, positive move. However, listening to small businesses that are working with bigger suppliers that, to be frank, can quite often dictate what may or may not happen, I have heard some concerns anecdotally. The majority of my clients are small, just to be clear. They are struggling with knowing whether or not they are small. You have the criteria, but lots of questions arise from that.

Let us not forget medium-sized businesses as well. While large businesses probably have more resource to be able to understand this—they will be engaging with the likes of the big four and so forth for support—medium-sized businesses are not that big, except at the top end of that category. They are struggling with this and knowing when it applies to them. That is just down to the complexity of the rules. Clearly, excluding small business is a good thing from an admin burden point of view, but they still have to know what is going on in order to know that they are excluded and to know what their liabilities or obligations are to those they are working with in the supply chain. That seems to be the biggest problem that we have.

Lord Bridges of Headley: Mr Dodwell, I would like to pick up on Lord Tyrie's point. I obviously do not want to go into the details of private discussions you may have had with the Treasury but, as the independent adviser to the Government on tax simplification, in the current review have you submitted your views on how this process—the next manifestation of IR35—can be simplified in terms of implementation and the tools used? Have you had a role in that review?

Bill Dodwell: No, we were not consulted as part of the review, the results of which were published last Thursday.

Lord Bridges of Headley: Does that strike you as typical or normal? As a layman, it seems odd to me that they have an independent adviser on tax simplification sitting in the Treasury and, when there is lots of noise in the media about how this is a very complex process, they have not walked down the corridor to ask you for your views.

Bill Dodwell: I think they have announced operational policy. That is very much a matter for HMRC. It is not something which the Office of Tax Simplification would get heavily involved in.

Q28 **Lord Bridges of Headley:** I understand that. Moving on to the CEST tool itself, do either of you think that it is a simple device to use? Secondly, is it fit for purpose?

Karen Thomson: I can honestly say that the improvements made to CEST in the last three months have been significant, which is extremely positive. However, I come back to the point about those using CEST. If you are an expert in this area, such as a high-level tax adviser, you would potentially understand the company set-up that you are dealing with and you would have more knowledge about the questions that it asks. However, what is beginning to happen in the real world is that it is people like me, or procurement managers or whoever, who are being asked to help with the CEST. Not every business has a tax adviser sitting there.

For these people, it is not a lack of knowledge, but this is not the area that we deal with from a company business perspective, and you have to know quite a bit about the PSC or company to be able to answer the questions. This is where the timing is perhaps not great, because businesses are now trying to sort out how to go about this process of getting what they need. However, when you have that information, the CEST itself is very good. Is it still flawed? I would say that it is, because it still will not deliver a determination on every occasion. That will not help the businesses that I am working with. Where do they go then?

The Chair: Going back to Colbert, to what extent has the thing gone beyond hissing? Has the goose actually been killed? I can see that, rather than getting involved in the bureaucracy of deciding whether you, Karen Thomson, meet the criteria, a larger business might just say, "Look, come and join us as an employee, or we will find someone else". Is there any evidence of that happening?

Karen Thomson: Last week alone I was with three companies that were looking at this. The first has decided that it will not work with PSCs full stop. It just will not engage with them at all. The second would engage if it was operating through an umbrella company; in other words, if Pay As You Earn and everything else was taken care of. It did not want to know. So there were three companies last week, and one the week before. Among the companies I have been to see, there is a lot of this.

The other possibility is that they are willing to take them on as employees, but the contractors themselves are saying, "No, thanks", because the salary they are put on is effectively lower than what they have been earning. One of the problems with that for the business is equal pay. If you have a male contractor, let us say, and a female counterpart, the company may say, "We want you to be an employee", but it cannot pay that contractor what he has been used to without uprating the female employee, if the job is equal. There are a lot of

complexities when companies are looking at taking contractors on as employees.

There are also other complexities. One company was struggling because the three contractors it had had walked away. They were not interested. The company was then working with lawyers and looking at how contracts could be worded to use CEST to come out with the conclusion that it wanted: namely, that the contractors were outside IR35.

It is fair to say that companies are doing a lot at the moment not necessarily to evade the rules but to find the best ways of keeping the people they want to keep. The contractors have incomes and lives; if they could work for a small chain and keep doing what they are doing, why would they work for the large and medium-sized businesses?

Q29 **Lord Monks:** May I take you back to the clear-test demand that you voiced? Is there no clear test that you could apply? Did Geoffrey Howe, Gordon Brown or whoever not look for a clear test but not be able to find one? There is the Treasury's wish to raise more money, and HMRC's demand that something is done about the growth explosion of freelancing and the amount of tax avoidance that has been going on. They feel that we have reached a position in which something must be done and this is the best that they have been able to come up with.

Is there a better solution? You spoke about a clear test, but we are nowhere near establishing what that could be in this spectrum, from genuine freelancers to genuine employees. There are an awful lot of people in the middle who are very hard to place on that spectrum.

Bill Dodwell: I am not sure that there is quite such an absolute difficulty. However, take the position of residence in the UK, which, like the question of employment versus self-employment, was a matter of case law built up over a long period of time with contradictory decisions and all that sort of thing, just as we see today.

Some years ago, the Government decided that it would be sensible to have a statutory test. It took them three years of consultation and working through it to come up with a statutory test. They went through lots of debates and all sorts of different factors, and the result is that you now pretty much know whether you are UK resident for the purposes of tax.

For us, that is a simplification. It is quite a complicated process to go through, unless you are a person like me who obviously lives and works here, for whom the answer is straightforward. Having an answer at the end that everyone can rely on is a good thing. A similar process would need to be carried out to develop a test for employment versus self-employment.

Going back to Baroness Kramer's point, I also think that trying to link employment rights and employment status with tax and national insurance has to be a good answer. Again, we have seen lots of cases in which people are essentially trying to claim quasi-employment rights

although they are treated as self-employed people for tax, and their engager, the person who took them on and provided their services to the market, did not know what was happening. That cannot be helpful from anybody's perspective.

Lord Monks: One piece of evidence that we have had introduced a different point from any that I have noted before. If this goes through, you would have a category of people who would be employees for all tax and insurance purposes but who would have no employment rights. So a two-tier labour force is beckoning—alarmingly, from a trade union point of view, which is where I come from—as far as that is concerned. That strengthens the argument that I think you are making for treating this in a holistic fashion.

Bill Dodwell: The only additional point to make is that there is demand from business for some form of flexibility. There are clearly cases in which people are being engaged solely to work on a project for six or 18 months, that sort of thing, and then that person disappears once the project has been completed. For employment law reasons, you could deal with that as a fixed-term contract if you wanted to. Naturally, that brings employment rights with it during the term of the contract. That may end up being one of the answers that people reach through all this.

The Chair: That presupposes that the person providing the services is agreeable to doing that.

Bill Dodwell: Yes, of course, but that person gains employment rights, including holiday pay, sick pay and all the other things that a contractor would not typically get under their arrangements.

Karen Thomson: While I accept that there is an unfairness for the individual who is paying the same tax and national insurance as an employee but not getting employment rights, from an admin burdens point of view, if you were to give that person employment rights, how would you calculate their sickness and holiday pay? That is already an extremely complex matter for employees with variable hours, zero-hour contracts and so on. I am mindful that you would need to be very careful and look at that whole area in order to make that work. It is difficult now, so giving employment rights would place an even bigger burden on businesses, although I accept that there is an unfairness.

The Chair: We need to move on.

Lord Rowe-Beddoe: Fairness is the word that just alerted me. We have been told that the Treasury believes that these measures will mean greater fairness between employees and PSCs. I do not think that was borne out by what you said.

Karen Thomson: It would increase fairness from a tax and national insurance perspective, but not from an employment rights perspective.

Lord Rowe-Beddoe: That is rather important, is it not? It is being ignored. Would you agree?

Bill Dodwell: It is not covered by the proposals. Of course, we have had off-payroll-working rules for the public sector since 2017. This would at least bring those together. People in the private sector have been speculating for some years that the public sector rules would be extended to the private sector, and here we are.

Lord Rowe-Beddoe: I find it horrifying when I hear you say these sorts of things about legislation that is about to come into force. I will say no more.

The Chair: Did you want to raise a question about the administrative burden?

Q30 **Lord Rowe-Beddoe:** Yes, thank you, Lord Chairman. Is the administrative burden of all this manageable for the individual?

Karen Thomson: Do you mean now, under the existing rules?

Lord Rowe-Beddoe: Do you consider it manageable?

Karen Thomson: If the individual contractor is using an agent to assist them—for example, if they are using an umbrella company and it understands the rules, or if they have an accountant or what have you—I imagine that they are better supported and the burden may therefore be less. If they are using umbrella companies, they will have a cost burden because they will be paying the employee's national insurance and pension contributions and normally an admin fee for the service.

However, I come back to the fact that the rules are complex. Whether you are an individual, a small business, a medium-sized business or a large business, how burdensome it is will depend on the level of support that you have. As I said before, the larger businesses will tend to have the big four and the like to support them with anything that is happening, but that is not so much the case for small and medium businesses because the cost would probably be prohibitive. However, in saying that, the guidance has improved over recent months.

Again, the difficulty, and I say that as a layman—I am reading it, and I have learned over the past two years, and I would say that I am fairly competent with the IR35 rules—is that the guidance is just not timely enough. However, one could argue that HMRC has had some constraints over the last 12 months with the other political agendas that have been there. I can say that the guidance coming out is much more user-friendly. It is going in the right direction.

The Chair: There was a 5% allowance, was there not? That has disappeared.

Karen Thomson: Yes.

The Chair: I find that difficult to understand, because more of what used to be done by HMRC is being passed on to others, but the allowance is disappearing. What is the logic of that?

Karen Thomson: I do not know. I suppose I can understand the disappearance of the 5%, for whatever political or other reason, for the individual taxpayer to assist them with the cost of an umbrella company or whatever it might be. As for medium or large businesses, I suppose the Government do not believe that they need that 5%. They are getting the hike of employer's national insurance, plus they are going to pay the apprenticeship levy on these individuals. Of course, do not forget that they are losing the employment allowance, or de minimis aid as it is now, from April. There is quite a big cost going on to business that is not on HMRC and is now potentially no longer on the individual.

Q31 **Baroness Kramer:** Picking up on the point about the administrative cost, I think the number we have seen from HMRC is that the one-off set-up cost will be about £14.4 million, which strikes me as a rather low number. What are your thoughts? Is that a reasonable number for the set-up costs?

Bill Dodwell: May I make a general comment on this? HMRC has to produce its calculation of the cost for business using something called the standard cost model. This has existed for more than 20 years. It has some form of international validation. It was put in place by external consultants advising HMRC at that time. It has not really moved forward or been updated, and there is the general feeling that it is not capable of producing a decent estimate of the private sector costs of adopting whatever measure comes its way. It would be great if a better way of estimating costs were to be found.

The Chair: Ms Thomson, would you like to comment on how realistic the costs are?

Karen Thomson: The £14.4 million figure seems relatively low to me, but please do not ask me for another number; an accountant I am not. However, you have to take into account the educational costs and the time required to do all these statements. Some employers have thousands of these contractors—you could argue that they should be employees—and they may be putting them on payroll. They obviously have the increased costs of national insurance and so forth, and of course there will be all the queries.

On using the cost model, as you can imagine, in my profession, RTI was very much at the forefront of where those numbers just did not add up, so I am a little cautious anyway about numbers produced using the same cost model.

Baroness Kramer: Are you getting any evidence that people are using blanket determinations as a way to keep the cost down, or are they really doing an individual assessment for every single PSC that they have on their books?

Karen Thomson: Interestingly, it was the public sector ones that were doing blanket determinations. Clearly, at the moment, private sector companies are still trying to work their way through this to see what they

will need to do. However, as I said before, anecdotally there are cases of companies saying that they are just not going to bother at all.

Certainly, in my profession, we like black and white and the fact that, if we put everybody through on the payroll, we know we cannot be wrong. There is a bit of concern about that. People are frightened of getting things wrong, so having the relaxation of the softer landing over the next 12 months while people work their way through this is at least something. Will that happen? Possibly.

Baroness Kramer: A blanket assessment might mean not getting it wrong in the eyes of HMRC in terms of raising maximum revenue, but it is certainly getting it wrong for the genuinely self-employed who are captured in error. Do we have any sense of how big those errors have been in the public sector?

Bill Dodwell: Whether in the public or private sector, any engager that engages several hundreds or thousands of contractors is bound to use a limited number of contractual models. It will not have an individual one for literally every contractor. So having some form of blanket assessment is fairly inevitable in this scenario. I would have thought that having more than one, to deal with different types of scenario, is likely to be ideal.

Q32 **Lord Desai:** Obviously HMRC feels that it is losing some money and that that money was with the people who are complaining right now about the new rules. Was that money going to some people but is now being divided, and there are some people who will benefit and some who will pay? Is it a redistributive thing between employees, employers and the self-employed, or is it a net loss completely and nobody in the private sector gains? That cannot be true.

Bill Dodwell: I do not think that adopting these rules gives anybody a benefit. The question is whether you are subject to them, in which case the tax and national insurance will increase, or whether you are not subject to them, in which case they will not.

Lord Desai: Obviously the feeling is that some people are conveniently getting themselves classified the wrong way and are therefore not paying the tax. HMRC is saying to pay the tax, so is it that somebody is gaining and somebody losing in the private sector?

Karen Thomson: If they are deemed to be inside IR35, they will be paying Pay As You Earn and national insurance when they may not have paid the same rates had they themselves declared themselves to be outside it. That is important; if they believed—we have already talked about the complexity of the rules as they are—that they were outside IR35 and they have operated in that manner, they may be worse off by now being inside IR35 and being put through on the payroll without any benefits, effectively.

Based on the assumption that this has been done to have fairness in the tax system, you could argue that the Treasury will in fact increase its revenue, because people will pay more tax and national insurance than if

they had deemed themselves to be outside. This just places the responsibility on the client.

Lord Desai: But some people are saying that if they have to shift their status they will get paid less, so the employer gets a benefit.

Bill Dodwell: They will not be paid less; they will receive less money, as tax and national insurance will have been deducted. That is the critical point.

Lord Bridges of Headley: I want to come back to the OTS's aims. You produced a document last year that said: "The OTS aims to improve the administrative process—which is what people actually encounter in practice—as well as simplifying the … rules". Does this IR35 process that we have just been discussing help you to achieve your aims: an improvement in people's experience and the simplification of the rules as things currently stand?

Bill Dodwell: Our view is that you will get a better experience of process if we have a new clear test, as opposed to trying to keep the old muddled test, with its contraindications and its complexities, and then just move who is supposed to operate it from one set of people to another. That is all we are doing here; we are not simplifying. Well, arguably we are simplifying it for the thousands of contractors at a cost to the smaller number of engagers, so once you are through the transition that may be true. But, ultimately, clarity in the test is really what is needed.

Lord Bridges of Headley: So from your vantage point, how do you think this prepares our economy for the gig economy and the need for a very flexible workforce within that economy?

Bill Dodwell: That is an extremely good question. It is one that we at the OTS have looked at generally. The biggest single thing that we find people want is clarity and understanding: how do you pay your tax, how do you pay your national insurance, what benefits do you get from all that? That is the first thing that is critical.

There is a whole series of other steps which certainly the OTS would like to see adopted. We did a report on reporting and paying tax that came out on 31 October; it is on our website. The ultimate question there was whether third-party reporting could help individuals to understand their tax affairs. The single biggest thing that we recommended up front was more investment in HMRC's personal tax account, which is really good, but, frankly, improving it, unifying it with the business tax account, adding in a calculation facility, and adding in a payment facility would really help people in this category precisely by dealing with their tax affairs for them.

Lord Tyrie: Taking you back, Mr Dodwell, to an earlier point that you made, I understand that when a new tax proposal is published, HMRC has to publish a tax information and impact note, which forms part of the OBR's overall calculations, so it is quite an important assessment. You

have just told us that, in working out the costs of these measures, a standard cost model is used that is in effect little more than a fiction; you did not use that word, and I would not dare put words into your mouth, but from your description it sounded like something that certainly one would not want to rely on or come anywhere near relying on. Is that correct?

Bill Dodwell: I think the evidence is that the standard cost model does not work well in understanding private sector costs and giving a view as to whether they go up or go down with the result of a tax or national insurance change.

Lord Tyrie: So we have a standard assessment of the cost, fed into a total tax impact assessment that itself is unreliable. You are sitting in the OTS thinking about which bits of the tax system and its administration might need improvement. Do you not think this is something that you might want to turn your mind to as an institution?

Bill Dodwell: Thank you. I will take that away, if I may. It is not easy to see how a better job would be done other than by spending quite a lot of money in updating the standard cost model to make it much more modern, much more up to date, more attuned to today's administrative process.

Lord Tyrie: When HMRC gets it wrong, quite a lot more money will get spent by people than would be spent finding out what the effect was in the first place.

Bill Dodwell: There are two aspects. The first is how much the tax yield is. I believe that is the bit that is confirmed by the OBR when it goes into the Red Book. The cost of implementation—namely, the cost to HMRC, which I think it is quite good at understanding—and the costs for the private sector, which I think it is less good at understanding, I am not sure play any part in any of that.

The Chair: Would another way of putting it be that they do not really care what the costs are for the private sector, because all they are concerned about is what revenue they are going to achieve and what their costs will be? Is that what you are saying?

Bill Dodwell: That is not exactly what I was saying—

The Chair: It sounds very much like it to me.

Bill Dodwell: —but I entirely understand the point you are making.

Lord Tyrie: You say that it is not exactly what you are saying, but it is nearly what you are saying. That is why you used the word "exactly".

Bill Dodwell: If the costs were £50 million versus—did you say £14.4 million?—surely the country, the Minister's Government, would still have gone ahead with this, because it is supposed to be raising £1 billion, or something like that.

Karen Thomson: While I agree entirely about the costs, I do not think it is fit for purpose now. Because HMRC have committed to a review of this in six months' time, if they use exactly the same criteria they used to get the £14.4 million number, whether it is right or wrong, they will have another number. If that number is higher, we will have been right to be cautious and to say, "Actually, the burden is much higher". If the number is lower using the same test, whether it is an accurate test or otherwise we will at least have a different number.

Bill Dodwell: You will have a comparative number, essentially.

Karen Thomson: A comparative number, yes. It will serve its purpose in six months' time with a review.

Baroness Kramer: Two erroneous numbers are more useful than one erroneous number.

Karen Thomson: Purely from the perspective of a trend. Will it go up or will it go down, basically? That is as far as it would go.

Lord Tyrie: We came close to a promise from the OTS that it would take a look at how to improve all this, even though it is very difficult.

Bill Dodwell: I shall take lessons.

The Chair: On that note, I thank both of you. That concludes the first session. We now move on to the second session.

Examination of witnesses

Stephen Ratcliffe, Keith Gordon and Caroline Colliston.

The Chair: I welcome the panel to the Economic Affairs Committee. I think you heard the previous session. We probably want to cover some of the same ground and will start with a question from Lord Desai.

Q33 **Lord Desai:** We have had this proposal in the public domain. Do you think the problem is that it is too complex for businesses to do the adjustments to the response? Or is it that, whoever does it, it will be a problematical rule because the rule itself is complex?

Keith Gordon: I will take the baton and answer that. Are we looking at the test on whether or not someone ought to be employed or self-employed?

Lord Desai: Yes.

Keith Gordon: In my view, it is just too difficult, whoever does it. The evidence is the number of cases currently going through the tribunals with conflicting responses. Last week, I think, Eamonn Holmes lost a case—this has been widely published—whereas, a year ago, Lorraine Kelly won hers. Superficially, the facts are more or less identical. The

Revenue generally has a pretty bad success rate when it comes to litigating IR35.

While there are clear cases of abuse, which the IR35 rules were meant to tackle 20 years ago, most of the cases that are fought are in a grey area, because life is complicated. Whether you or your employer are assessing your status, or whether the Revenue is judging it after the event, the whole exercise is fraught with such difficulty that one ought to go back to the drawing board.

Caroline Colliston: I tend to agree. Certainly, the Law Society of Scotland very much looks for alignment between employment rights and taxing rights.

Lord Desai: We are getting the message again and again that there is some kind of joint determination. Let me push this a little further. Is the complexity increased because this distinction between the two tax regimes exists? Are people inventing complexities? Would those complexities go away if the rules were tightened up?

Keith Gordon: Again, I would go back 20 years. My understanding is that the growth of personal service companies was driven by large end users, the clients, who wanted a flexible workforce—I have no problem with that—and the ability to avoid the risks of employment law and employment rights. The flexible workforce probably did not want all the employment rights an employee would have; they were happy to be flexible. But then the Revenue comes along and says, "We don't like the fact that we think someone is an employee and should be taxed as such". The limited companies were interposed, effectively to protect the end user from any challenge at any quarter.

When IR35 was announced back in 1999, the selling point was that people were not paying tax, but they were also not getting employment rights. I agree with what was said in the previous session: you cannot have people being forced down a tax regime without the plus sides. I cannot speak for whether people want the employment rights or not, but forcing them down a tax route without the commensurate employment rights just seems wrong to me.

We have the advantage of having the Taylor report, which was published a few years ago and which looks at employment status generally. Spending time looking at IR35, which is just one part of the issue, seems silly. There should be a complete overhaul of employment and tax law as part of it, because they are pretty much part of the same thing. If looking at tax alone, one should consider the possibility of taxing people roughly the same amount, irrespective of the legal format in which they provide the work. Why should the employed, the self-employed and people taking dividends out of limited companies, who are all doing the same kind of work, be taxed at very different levels? There are an awful lot of questions that need to be asked. IR35 sort of identifies a problem without realising what the underlying causes of the problem are.

Stephen Ratcliffe: I agree with that to a large degree. The truth of the matter is that any test that is designed to deal with an almost infinite number of models of employment, and self-employment is going to be complex. With the greatest respect to what Keith just said, I think it is right that HMRC is fighting the hard cases. There is a spectrum in this world. Some people are very obviously self-employed, some are very obviously quasi employed and should be paying the appropriate taxes but are not in some cases, and then there is a group in the middle. Unless HMRC fights those difficult cases, we will never take all the cases to a greater degree of clarity.

There are certainly some who would lobby for a codification of the determination of whether one is an employee or self-employed. There is a lot to commend that, but ultimately we will still end up in a position in which we have one test that we seek to apply to an infinite number of developing forms of employment and self-employment.

Caroline Colliston: It should not be lost that there are differing rules for tax and NIC. They do not align, so that makes it even harder for business and the contractor to understand their obligations and what might be deducted.

The Chair: Could you elaborate on that a little?

Caroline Colliston: For example, there are differences when there is an international aspect in the engagement. Taxation applies, but NICs may not, and that often requires specialist advice and time for consideration. Business needs to be able to do that on the monthly payroll under the real-time information system, but the complexity of RTI, payroll and now these rules makes this a very complex piece for business to operate in.

Q34 **Baroness Kramer:** How realistic is it to expect businesses to make a determination that meets, for example, the reasonable care test which HMRC asserts that this system achieves?

Stephen Ratcliffe: We can answer that in two ways. First, it is difficult to understand what reasonable care means. Many have pointed out that we need some clear guidance on that. That determination is precisely what end users have had to do for many decades in circumstances in which an individual is engaged personally and directly. Ignoring the circumstance of a personal service company, if I as an "employer" engage someone personally, but on a self-employed basis, I have to apply exactly the same test that we are talking about, and I always have.

Baroness Kramer: But do you have the same knowledge pool as the personal service company would have in its possession if you are sitting there as the engager?

Caroline Colliston: I do not think you would, because you would not necessarily know without asking the PSC what the facts are: how many other engagements might they have, do they take financial risk, and how does the contract sit alongside that? In reality, are they working for other people at the same time as they are working for you?

Stephen Ratcliffe: We have seen this even in the sense of identifying whether a company is a PSC. How does one know who holds a 5% or more beneficial interest in a company? There are some giveaways—if, for example, the individual is a director, you might be able to see that they are a majority shareholder on Companies House—but with many companies it is very difficult for an end user to identify whether the entity even is a PSC in the first place.

Baroness Kramer: How does this square with blanket determinations?

Keith Gordon: It is worth remembering that, back in 1999, the original plan was for the engager to operate IR35, and there was lobbying by large business that transferred the burden of IR35 compliance to the personal service company, which in effect is to the worker. The justification given then was that the worker had a greater knowledge of his or her wider work, which is exactly what Stephen was saying.

I always felt at the time that that was inappropriate, because the worker would have the least resources to fight HMRC—or the Revenue, as it was in those days—and because, as Stephen has said, if it were not for the personal service company it would be the employer or the engager who had to make that judgment. There are a lot of mixed messages going around on this matter.

Caroline Colliston: Reasonable care is also a very difficult concept when it is not laid down fully. There are some examples in the updated guidance, which is very helpful. It was released on Thursday, and it is an ever-evolving piece. This is the fourth update to be released in draft, and it remains in draft. That guidance is for revenue inspectors, as stated on HMRC's website, and it will not definitively cover every example that business will face. It gives a utopian example of an employer that has used the CEST tool faithfully, has input everything accurately, the result is that they have taken reasonable care because they have issued their statement to the contractor and notified down the chain, and tax is paid appropriately.

However, let us start to scratch away at that and look more deeply at how the CEST tool works in those circumstances and how finely these questions pivot. I spent a very interesting Saturday afternoon going through the CEST tool and looking at one particular aspect. One answer, out of the whole plethora of answers, changed the result from "outside" to "inside". Looking at the difference between the two questions, I am not sure that that many businesses would fully understand the difference between the two.

That is a difficulty when one looks at reasonable care. It comes down to the person understanding the use of the tool and being regarded in hindsight by HMRC as having used it properly and reasonably.

Baroness Kramer: Is reasonable care a duty to HMRC or to the worker? What I hear you describe is a constant, "Will they satisfy HMRC that they have used reasonable care?", in determining that this is a self-employed

situation. I doubt that HMRC will come back and say, "Actually, you have said this person is employed, and that's all wrong". It will be one way. Do they have any duty of care? Is there some standard?

Caroline Colliston: HMRC expects you to take reasonable care in your compliance obligations and, if you fail to do so, various culpability tests apply with penalties. So the reasonable care test is quite well used within the tax world, and it is the basis on which certainly I have been interpreting it. I am happy for colleagues to tell me differently.

Keith Gordon: I would expect that to be the same thing. It is a one-way street. And CEST is a one-way street.

The Chair: On that, Ms Colliston, I looked at the CEST tool. The questions demand a degree of subjective judgment, and the way a taxman answers a question might be different from the way a businessman who perhaps is not a lawyer might answer it.

This is where the difficulty arises. You are saying that when it comes to the row that you got this wrong and did not use the CEST tool properly—and this might be several years down the line—you will find it very difficult to argue with the Revenue. I think Baroness Kramer's question was whether there was a duty of care on the part of the Revenue to make sure that people are properly educated and understand these points. If there were, I am not sure I could see how they could carry it out.

Baroness Kramer: It goes slightly beyond that, because if I was, for example, a worker, the engager would determine that, for tax purposes, I am indeed employed. It is the employer who nominally then pays the employee's national insurance, which is the tax in question. If I then try to challenge that, I as a worker have no recompense, because there is no recognition that my income was reduced in order to offset the costs of paying that national insurance.

It seems to me that in a situation in which every party is protected by the notion of reasonable care that I ought in some way to be protected by the use of that concept, but I am not picking up in any of the discussions.

Keith Gordon: I do not think there is anything like that.

Q35 **Lord Monks:** Taking us to a slightly different topic—it has been touched on a little—the HMRC recently conducted a review of the arrangements that you mentioned: the changes that have been made in certain respects, the new measures involving light-touch regulation in particular, and other arrangements that might make this a bit more user-friendly than it seems at the present time.

Do you have any assessment of this recent announcement? Obviously it is miles short of fusing employment law and the tax system, which you have talked about. But on a more prosaic level, do you have a good opinion of these changes? Do you think they will be useful, or fairly worthless?

Caroline Colliston: It is welcome that business is going to get a soft landing, but the reality of tax compliance is that it is not immediate and it is not within one year of legislation landing. So while payroll happens monthly, there is a true-up annually where compliance occurs. Then, obviously, one has corporation tax returns that go in within the year after the end of the accounting period. So it is only a few more years, a few more audits, down the track before the Revenue will possibly start to pick up on things. Payroll inquiries do not happen with great frequency, so employers do not know exactly when they will be selected to be inquired into, and they must retain that evidence as part of their payroll records.

Equally, there will be the benefit of hindsight at that point, by which point the soft landing has gone. Even the specific part of the manual that talks about the soft landing is very clear on the soft landing for tax. What remains at the bottom of that is a statement that inspectors should pursue employers for NICs in arrears. That may be amended again in the light of this, but again that leaves confusion in the mind of the taxpayer as to the extent of the soft landing.

Keith Gordon: I will comment on a couple of points. There is one part of this review that I welcome: the clarification as to contracts that are already in place now in respect of work done before 6 April. The Revenue has clarified that it will not apply new IR35 to existing work, even if payment is made in the new tax year. That is a good thing.

As for the reasonable care soft landing, I am sorry to sound cynical but I do not think it is worth a great deal other than a few good headlines. First, it covers only penalties, so it does not actually protect the employer for tax or national insurance that should have been deducted, so that becomes an additional cost that is effectively equal to 100% of the underpaid tax, leaving aside the penalties.

Secondly, the soft landing for penalties is unless there is evidence of deliberate non-compliance. In an area such as this, my view is that an employer will take one of two courses of action: either put their head in the sand, which is deliberate non-compliance so they will not be protected from penalties in any case; or do their best with a difficult job, in which case they should not have to have a penalty in the first place. So while it looks good, kind and benevolent to say that there will be no penalties for the first 12 months, frankly I do not think it is generosity once you look at it and scratch beneath the surface.

Lord Tyrie: Just to be clear, do you think this is a content-free piece of public relations?

Keith Gordon: Effectively, yes.

Stephen Ratcliffe: There is one development in that updated guidance that is quite significant, and it would have been helpful for it to happen rather earlier: the point about the territorial scope of the legislation. It seems that it will no longer extend to end-user clients who are entirely offshore and do not have a presence in the UK. That is a big change that

has not been widely spoken about. It is something our clients have been taking advice about for some time now, so it is quite unfortunate that it came at this late stage.

The Chair: On that point, perhaps I misunderstood it, but when I read that over the weekend, I thought, "Doesn't that open the opportunity for people to go offshore and provide contracts offshore to get round these rules?"

Stephen Ratcliffe: Speaking only to the client base that I deal with, there is no suggestion that that will be operated as a loophole.

The Chair: I was not asking whether your clients would do that, but is it a loophole?

Stephen Ratcliffe: In principle, it could be. However, I would ask what the solution to that is where you have an entity that is offshore and has no presence here, and from which it seems to me HMRC therefore has no route to claim. HMRC has made it very clear that the idea that you might offshore your PSC in the hope of avoiding this legislation simply does not work—that has been clear for a long time—but it seems that end-user clients who engage PSCs who are offshore and have no presence here will be excluded from the legislation.

Baroness Kramer: If, for example, you are a film company that creates a special purpose vehicle for the purpose of making a particular film, we are now saying in effect, "If you make a film in Ireland, France, Germany or wherever else, you can use the great skills of your British crew without incurring the additional tax. If you decide to make the film within the UK, you are now at a severe tax disadvantage". Is that what they are trying to achieve?

Stephen Ratcliffe: No, that is not correct. This is not about where the work is done; it is about where the entity sits.

Baroness Kramer: But you could set up a special purpose vehicle anywhere.

Stephen Ratcliffe: That is correct, but if the point is that we might be able to establish it in Germany and make the film in Germany, there is just as great if not greater exposure to social security bills if you do not do that correctly in Germany as there is in the UK.

Baroness Kramer: But Ireland would be a good one.

Q36 **Lord Bridges of Headley:** I do not want to get too heavily back into the points you were making about the CEST tool, but overall do you think the tool is fit for purpose? That is the first question.

Secondly, is it possible, given the points that you raised verbally and in your evidence—for which, many thanks—ever to get a tool that is fit for purpose to delineate and clarify this kind of contractual relationship, given the complexities?

Stephen Ratcliffe: Is it fit for purpose? I would say no, simply because it does not give an answer in every case.

Keith Gordon: It is not fit for purpose. I ran the facts of the Albatel/Lorraine Kelly case through it, and while the judge said that it was not a borderline case but was clearly self-employment, CEST came up with a different response. I think that was about the facts of the case rather than the skill of the advocate. There is a lot of criticism about the mutuality of obligation. I do not know if you want to come to that now.

Caroline Colliston: It is not fit for purpose.

Lord Bridges of Headley: So none of you thinks it is fit for purpose. Could you ever make one that was fit for purpose, given everything? I especially remember reading in your evidence about the complexities around the cases that you have been dealing with. Could you ever create one, or is it just a virtual impossibility given the complexity and the need for legal clarity?

Keith Gordon: You have already heard the example of the statutory test for residence, which I think is a nightmare. The lack of definition previous to 2012-13 worked until the Revenue reneged on its own guidance. As far as statutory employment tests are concerned, it will meet another layer of complexity that needs to be looked at across the board regarding employment status. Because you cannot legislate for it, you would not be able to get a computer to programme for it. It is too nuanced.

Stephen Ratcliffe: The question was whether it could ever be fit for purpose. It depends what you are trying to achieve. If you are trying to achieve a system whereby the answer that you get will accord with every individual judgment in every individual case—judgments that are extremely nuanced and fact-sensitive—the answer is no. No test can ever do that and, frankly, neither can any lawyer. There is no lawyer who can say, "I guarantee you that in those difficult finally-balanced cases it will be this or that side of the line", because there is no line with that degree of clarity.

However, I think it is possible to create a tool that, while I and my colleagues might criticise it, lawyers being inclined to criticise things, gives an answer. Even though that may not be the same answer that you would get if you challenged it in the tax tribunals, it is still an answer, and I think gives the degree of certainty that is needed in order to make these laws work.

Caroline Colliston: There are commercial tools out there that other people are using. Whether they will be regarded as reasonable care or not remains to be seen. Some of those apply 19 levels of test, or "risks" as they call them. You could go on endlessly, based on the evidence of my colleagues here, but I think you could get to a place where you had some surety.

However, that takes a level of education and you are right that it is very difficult to get something that will be fit for purpose. HMRC says that 15% of the answers coming out of this tool will be in the grey area. The proof will be in whether that back-up support is there from HMRC with skilled technical tax people being available from HMRC to answer in those 15%—or more, if that proves to be the case.

Lord Bridges of Headley: As a final question, the press release that came out last week said the Government's measures are "designed to address concerns" and, I stress, "ensure the smooth implementation of off-payroll working rules". Given that the Government are therefore determined to press ahead with this, what else might they do to ensure smooth implementation, given the time that we have? Or, in your mind, is it virtually impossible to achieve the aim of smooth implementation, given where we are now?

Stephen Ratcliffe: We have a month. That is not sufficient time to implement the refinements which I think the CEST tool requires. Now, the refinements which I think it requires may be different from those which my colleagues think it does, but I think it is broadly accepted that we need a test that gives an answer in each case and which applies perhaps a greater degree of nuance than the existing one does.

Q37 **Lord Monks:** Tempting you into the forecasting business, we are getting a lot of evidence from contractors that reveals a great deal of anger as well as concern about what is to hit them very shortly. How do you assess what the public reaction to these proposals might be, given the many flaws that you have identified? When those become more evident publicly, do you have a feeling that the Government could be on the end of quite a major display of outrage from a significant part of the population?

Keith Gordon: It depends how many people in the public amount to significant enough to cause the Government concern. Your question was first phrased, "Will the public be concerned?" Well, the public are a lot wider than the contracting market.

Lord Monks: There are quite a lot of them.

Keith Gordon: There are a lot of them. The real problem, going back to what I said at the beginning, is that we have a tax initiative being used to solve a much wider problem in the work market. The idea of tax forcing people to adopt a situation that is less flexible than the market needs is not a good thing.

Lord Monks: Did either of the other witnesses want to add anything to that answer?

Stephen Ratcliffe: If you go to the online forums where contractors comment on these reforms, you see a lot of anger, but also a lot of acceptance. There are a great many contractors who have said on those forums, "I think I'll be taking home 20% less this year but, over the next two years, rates will probably increase such that, in a few years' time,

things will equalise". I do not know if that answers your question, but we have now got to a stage, one month prior to these reforms coming into effect, at which there is a degree of acceptance which we perhaps did not have a few months ago.

Caroline Colliston: The biggest concern for contractors is whether or not the "cost" of employer's NIC will be passed down to them through their rates. It is a significant number and will affect take-home pay. Being forced into an umbrella situation forces you into the hands of the unknown in many circumstances. You have less control and are not getting parity of rights from an employment perspective, just to ensure that the tax is safe.

There are mixed messages, but I would agree that the gentleman standing outside with his flag telling us that IR35 means he has no work is just a taster of what people are seeing. I know that recruitment agents are seeing a great change in their market. I spoke to two or three prior to coming today and have evidence that they have seen a massive reduction in their contractor roles and a levelling out of permanent and fixed-term roles.

Lord Monks: Is there a separate Scottish dimension at all? Are the Scottish Government excited about this change?

Caroline Colliston: This will apply UK wide.

Lord Monks: I know, but that does not stop them from intervening in all kinds of UK competencies. I just wondered whether they have expressed any views on this.

Caroline Colliston: Not that I am aware of.

Lord Monks: Okay, thank you.

Q38 **Lord Bridges of Headley:** I would like to ask a question that I asked the previous panel. From a legal perspective, how do you think this prepares us for the demands of the gig economy and the rights and obligations of workers and employees? Does this move help us?

Stephen Ratcliffe: I will start. From my perspective, it has no relevance to that question. This is a tax measure. I think this may be where I depart from my colleagues. There is certainly a healthy debate to be had about whether it is right that there should potentially be a different status for tax from the status for employment rights. It is right that that is debated, but this measure has nothing to do with employment rights; it is purely a tax measure.

Lord Bridges of Headley: But it will potentially introduce a situation in which there is a perceived unfairness.

Stephen Ratcliffe: I am not sure that it introduces a perceived unfairness. I think it merely reflects the fact that, when an individual is engaged via a personal service company, it is quite hard to establish

employment rights. That was always the case, but it does not stop individuals trying to assert those rights in some cases.

This is simply about tax; it is a different question. It is simply intended to better harmonise the treatment of an individual who, to all intents and purposes, may be working as an employee but is working through a different construct.

Keith Gordon: The gig economy focuses a lot of people into the worker category. I have no personal view on whether or not those people should be taxed as employees or self-employed people—they are treated as the latter at the moment—subject to my previous view that one should probably level out the playing field anyway. The whole test for employment in the tax context does not look at whether you are a worker or self-employed, but at the third category of employee.

In my view, it is quite strange—this is the example I often use—that someone driving a Pimlico Plumbers van, wearing a Pimlico Plumbers uniform and dealing with Pimlico Plumbers clients is considered to be self-employed. They are considered a worker, but they are nevertheless taxed as self-employed. However, somehow, there are a lot of individuals who the Revenue thinks are closer to their employer even though they are TV stars who have a lot more independence in how they carry out their work. There is an awful lot of perception error. I personally think that one needs a whole, holistic overhaul rather than cherry picking individual areas for reform.

Q39 **The Chair:** I do not wish to prejudice your chances of getting a plumber in the future, but can you help me with something? The statement that was issued confirms previous statements that HMRC will not use information from these reforms to open new inquiries into the pre-April 2020 position of affected personal service companies. What does that mean? Does it mean that, if it came to light that somebody was abusing the system as a result of these changes, HMRC would not go back and require them to pay the tax for previous years?

Keith Gordon: The churlish answer would be that you have to ask the Revenue what its statement means.

The Chair: What do you think it means?

Keith Gordon: I interpret it as meaning that the Revenue does not have the resources to investigate a whole load of people who have suddenly changed their status because their engager has taken the easy way out. I have little confidence that the Revenue will not say, in some cases, "You are employed now. What has changed?" and will therefore go back. The promise that it will not go back will probably not be worth much, because there is nothing you can do about it.

Stephen Ratcliffe: That is the very point of these reforms. The Revenue does not have the capacity to investigate 400,000 personal service company contractors.

The Chair: Another way of interpreting that would be to say that there are people who have used the system to avoid paying national insurance, effectively—it is mainly about that—and then there are people who have operated in an honest manner but are genuinely in complicated situations and who will genuinely find that they lose contractual arrangements because of these changes. They will be disadvantaged, perhaps losing revenue because the cost of the national insurance will be passed down the track, but people who have been abusing the system have been given a free passport from the Revenue that it will not seek to collect the national insurance or other tax that is due. Is that a wrong reading of this?

Caroline Colliston: It is highly complex. If the Revenue were to take it back six years, when you try to unwind a situation you can end up in a scenario in which you cannot get full recompense of NICs if it flips the other way. You also have to look at the fact that business was dealing with the law as it stood prior to 6 April; it needs a line in the sand to know where to go from. You can see why that has been done, but there are also national minimum wage implications and a plethora of other law.

If you start re-characterising individuals, you open up a huge amount of room for challenge in a period in which the record-keeping is probably not there because business has not had to do the test. There is no counter to it, so, to be honest, in that scenario you can see why it has had to do that. Business needs to be able to move forward and, with the best intentions, put the new legislation in place and adhere to it.

Q40 **Lord Rowe-Beddoe:** Recently—last week, I think—the Government announced the reforms and said that they had listened to the concerns raised by those whom they had interviewed. First, have they, in your opinion? Secondly, how can they possibly listen to those concerns and do something about them in the short space of time they have given themselves? Is this just public relations?

Keith Gordon: I am sure they have listened.

Lord Rowe-Beddoe: You are not very convincing, if I may say so.

Keith Gordon: Stephen mentioned one change; I mentioned another. Both are welcome. However, there is clearly someone driving this forward, whether it is the Treasury, Ministers or civil servants, and they do not want to row back. I think the consensus among us three is that business is not ready for 6 April.

I take a slightly different view from Stephen in that I see this as a stretch of road with a speed limit of 30 miles per hour. The authorities consider that some people are going above 30. My view is that if that is a real concern and you think something ought to be done about it, then invest in monitoring the speed. Do not try to put in a system meaning that everyone who drives along that stretch of road has to prove that they were doing under 30.

The Revenue is not allowing business to conduct itself in a commercial sense; it is actually fitting business into a straitjacket just to allow the Revenue to say, "We don't think that enough people are doing the right thing". As I have said before, the Revenue statistics in these cases are not brilliant, so how do we even know that the Revenue is right when it expresses concern about compliance to date?

Lord Rowe-Beddoe: May I ask one final question? I am not being personal in any way, you understand. In your experience as attorney, solicitor and so on, has there been an increase in business in your respective organisations on the question of IR35 in the last couple of years?

Stephen Ratcliffe: Definitely.

Lord Rowe-Beddoe: Substantial?

Stephen Ratcliffe: Absolutely.

Caroline Colliston: Yes.

Keith Gordon: I had the advantage of winning a high-profile case, which has attracted even more work, but even before that I was aware that the Revenue was looking at broadcasters in a particular way and there was an awful lot of work around that.

Lord Rowe-Beddoe: I am delighted for you.

Keith Gordon: I am not delighted, because I do not think individuals should have to endure that close scrutiny.

Lord Rowe-Beddoe: That was the point of my question. I knew what the answer was going to be. Would either of the others like to add anything?

Stephen Ratcliffe: I have found an influx of queries relating to IR35 the closer we get to 6 April, and my team is very busy with them. This goes back to my earlier point: you should not need employment lawyers or tax lawyers to tell you which side of the line you are on. To take Keith's analogy, this is not about a road with a 30 mile-an-hour limit; it is a road where the limit is whatever you consider to be in your control, and you should not need an adviser to tell you where that limit is.

Lord Rowe-Beddoe: No, you should not, particularly when, as I understand it, you are making it simpler—well, not you but the Government.

Caroline Colliston: There has definitely been an increase. Business is also trying to prepare rapidly and ensure that it has the correct policies, because contractors will not disappear off the face of the planet and businesses have to deal with them correctly, so they want to comply with the law and understand their obligations.

The Chair: There seems to be a bit of a pattern here with HMRC. This

Committee has looked at the implementation of Making Tax Digital and other matters, and again and again we see that consultation is actually about telling people what is planned, and the implementation is done in far too short a period for people. One has the impression that it is all about getting as much money as quickly as possible and listening to the hissing.

Lord Bridges of Headley: Following up on all this, hindsight is a wonderful thing, but with your experience of IR35, and certainly your experience of legal cases that you have had, how many of these problems—although the policy itself has been modified—could the Government and HMRC have foreseen, given that the policy was being rolled out through the public sector? How much of this concern, confusion and chaos do you feel could have been avoided, given your experience?

Keith Gordon: I would say that the problem arose when the Revenue started looking at IR35 again, I think six or seven years ago. Revenue officials seemed to have a particular view about employment status that in most cases has not prevailed in subsequent years. I remember reading the evidence that BBC representatives gave to the PAC. The BBC, for political reasons, was trying to take a lot of its talent off the payroll. I will not say whether that is a good or a bad thing, but the BBC therefore put people into limited companies. That is a natural consequence of taking them off the payroll. The BBC quite properly followed the Revenue's guidance as to who was employed and who was self-employed, and indeed there is published guidance for people in the film and television industry.

The PAC evidence seems to show that in about 2014 the Revenue moved the goalposts once and then did so again in about 2017. The BBC did not get unstuck because it was doing anything particularly wrong, from what I understand; it was that the Revenue said, "We're going to decide that people who were previously self-employed are now to be treated as employed".

As you would expect from a public sector broadcaster, the BBC was desperate to try to comply with the Revenue. In my view, the BBC took a supine attitude rather than saying, "Well, no, the law says X. We're not simply going to do what the Revenue wants us to". The whole problem was that the Revenue perceived there to be a problem, and it has built the 2017 rules and the 2020 rules as a solution to the problem that they perceived they had rather than the one that in my view existed, at least to that extent.

The Chair: On that note, I thank you very much indeed. I am delighted to hear that you are busy, and we are therefore even more appreciative of the fact that you have come to the Committee, although I am not sure whether the Committee will conclude that the reasons why you are busy are necessarily good ones. That concludes this session.