

Rebecca Seeley Harris – Written evidence (OPR0031)

1. Introduction

1.1 I have been working as a consultant in employment status since 1999, with the advent of the IR35 legislation. I set up my own business Re Legal Consulting Ltd and I advise on any type of engagement that is not permanent employment whether it be a personal service company, a self-employed sole trader, an agency worker or a PAYE freelancer.

1.2 I work specifically with clients in both the private and the public sector, I do not work with contractors. I advise clients on how to make assessments under the off-payroll legislation and how to engage compliantly with an off-payroll workforce.

1.3 I was also seconded to the Office of Tax Simplification (an independent body of HM Treasury) as a Senior Policy Adviser to advise the government on employment and tax status. Reporting direct to the Chancellor, I was part of a small team of experts who drafted the Employment Status Review 2015, I then continued for several years to advise on the review of Small Company Taxation leading on the taxation of nano companies and the self-employed. I was also a representative on the Cross-Government Working Group on Employment Status and also published the review into the taxation of the Gig Economy.

1.4 I write regularly and present on the topic of IR35, offpayroll and employment status and more recently on the April 2021 reforms for off-payroll working. I am often quoted in the national press such as the Financial Times, the Telegraph and the Guardian and other professional publications and websites. I am a member of the Tax Faculty of the ICAEW and a consultant to the British Universities Finance Directors Group (BUFDG) and Urgent Health UK, amongst others.

1.5 I have also recently written a book called CEST Explained which, as the title suggests, explains HMRC's digital tool Check Employment Status for Tax.

2. Summary

2.1 My general opinion of the off-payroll legislation is that it is unworkable from the client point of view. As a highly skilled adviser in this sector, I find it almost impossible to give clients any certainty about the measures that they need to have in place to ensure that they will not fall foul of the legislation. There are no guarantees, so clients have to have to run the risk that one day HMRC may start an investigation and they will owe tax and possibly penalties. Case law is always changing so making an employment status assessment is constantly evolving depending on what the courts decide. This means that there has to be constant monitoring. It is an additional burden that business and organisations just don't need.

2.2 From my experience of working with the Office of Tax Simplification, I think that the Government simply doesn't understand business and that this is not a tax-motivated decision, it is far more complicated than that. The businesses that I work with are trying to comply but, this legislation and, indeed other legislation that affects employment status, is woefully inadequate and over complicated.

3. Questions

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

Answer:

3.1 It certainly has made it more difficult to hire people, but this is mainly because the contractors are refusing to work on payroll and the clients are finding it hard to make the correct assessments because employment status is so complicated to assess with any accuracy. The risks are so high if you get it wrong even if the client engages a professional adviser, there is no certainty.

3.2 Certainty is the biggest problem that the clients have because if they make the wrong decision, even if they have taken reasonable care, it could bankrupt their business if HMRC investigates years later and find that they should have been deducting tax.

3.3 I have clients with large projects who have the dilemma of either the contractor walking off the project if they are deemed on-payroll and putting the project at risk or HMRC coming after them if they pay the contractor off-payroll at a later date.

3.4 So, the client will end up either having to raise the fee to compensate the contractor, putting their project budget at risk, or losing the highly skilled contractor and having to hire someone less skilled or experienced.

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

Answer:

3.5 During my time on the Employment Status Review at the Office of Tax Simplification, we reported that the previous tool, the Employment Status Service, was not fit for purpose so, HMRC then came up with CEST. I was involved with the early workshop on CEST and was the only non-HMRC person on that workshop.

3.6 First of all, all my clients use CEST. This is partly because they do not want to have to pay for a private tool, also because it is seen as an HMRC requirement but, also because they have a professional adviser. I advise them that they can use CEST as a guide and that it is the only tool that HMRC will recognise. A lot of clients feel that they have to use CEST because otherwise, it will be a mark against them. Just to be clear, I do have to make my clients fully aware of the failings of CEST but that it is sufficient for the purposes of backing up an assessment. I would not advise any company to use CEST as their only method of assessment, i.e., without a professional adviser but, I would not advise anyone to use any tool without a professional adviser.

3.7 Herein lies the problem, companies have to engage a professional adviser to be able to make an assessment partly because it is so complicated and partly because HMRC don't give the clients the confidence that the CEST tool can make an accurate assessment on its own.

3.8 So, I have written a book called CEST Explained, which is a technical book that explains how I think HMRC have interpreted the questioning in the CEST

tool. The reason I had to write this book is because my clients do not understand the questioning in CEST and, if they are going to be able to answer the questions 'accurately' as HMRC require, they need to understand what HMRC are asking.

3.9 In using CEST, many of the outcomes are 'undetermined' which is when I have to make the determination with the client's approval (because the legislation requires the client to approve it). The tool is also generic in nature and derived from the construction industry so is slanted towards construction. CEST does not cope well with the knowledge industries where there is little equipment and unlikely substitution because they are highly skilled but, that doesn't mean they are not self-employed.

3.10 Some of the CEST questions could be tweaked to make more sense and some others included so the tool is more balanced. At present, it is heavily weighted in HMRC's favour. There appears to be a conflict of interest here because HMRC wants it weighted in their favour but, CEST is a tool provided by the government for the taxpayer client, so it should be more balanced really.

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

Answer:

3.11 Compliance cost for some clients has risen hugely. I could estimate anywhere between £10,000 and £100,000 could be spent on compliance in the first year. There will also be ongoing costs of training and monitoring through the year and assistance with undetermined assessments.

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

Answer:

3.12 HMRC has published a lot more educational material including webinars but, the main problem is the complexity of employment status in the first place. Businesses are expected to understand the vagaries of case law to be able to make day to day business decisions on whether to engage someone off-payroll or not.

3.13 At present, one particular sector that I work with is being heavily affected by the PGMOL v. HMRC case that has just been heard in the Supreme Court. They are having to interpret what the judge has said in order to be able to establish whether they can continue to engage their workforce off-payroll.

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

Answer:

3.14 The Single Enforcement Body was not accounted for in the Spending Review so I am assuming that, without funding, it will not go ahead. This is

particularly frustrating because I have been campaigning for the regulation of umbrella companies and the protection of umbrella company workers.

3.15 Many contractors have been forced into umbrella companies because of the introduction of the off payroll working legislation or OP21. Engagers are not willing to take the risk of making an assessment for OP21, so the contractors are now engaged via an umbrella company instead. This is also because some unscrupulous recruitment companies may make profit out of the contractor going through an umbrella company.

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

Answer:

3.16 HMRC should be pursuing the promoters of the scheme not the individual. All the compliance activity is being focussed on making the contractor pay after they have been part of a scheme, as if they understood what they were doing and deliberately joined an avoidance scheme. HMRC should be doing more to stop the scheme promoters.

Industry sectors

4. Urgent healthcare sector

4.1 I work with a number of companies that have private contracts with the NHS to provide out of hours services for GP, dentists, 111 clinical advisers and pharmacists, etc. I also work with the Urgent Health UK (UHUK) membership organisation, and they have asked me to feedback my experiences and their worries to you.

4.2 They are paid a set amount by the NHS to deliver this service to the public. Without these private sector companies providing these services, the NHS would find it almost impossible to provide the out of hours (OOH) and emergency healthcare services that the public need.

4.3 The problem is that since the advent of the off payroll reforms these OOH services have a dilemma. They cannot afford to provide these services if they have to put the doctors on-payroll, they are simply not paid enough by the NHS but, the consequences of getting the decision on employment status wrong could bankrupt them in later years. Either way, the public will suffer.

4.4 HMRC are currently investigating three of these OOH services and they have been under investigation for between 4-7 years that, in itself, is unacceptable. HMRC have taken a considerable amount of time to give a Reg 80 determination presumably because they don't have a very strong case. These cases are also currently being stayed pending the outcome of the PGMOL case, so the decision is being held up even longer.

4.5 These critical services are being put in an intolerable situation especially in the last couple of years having had to deal with frontline Covid, CQC audits and this new tax legislation.

4.6 One member service gave me the following feedback:

“Our major concern isn’t so much of the financial implications but more about the ability to provide services as we strongly believe that the significant majority of our GPs would not work on a payroll basis [but, in any case, we believe they are self-employed].

The risks are that for most of our GPs this is secondary employment. A majority already have substantive ‘employment’ elsewhere either as a salaried GP or as a partner in practice. If they then have another ‘payroll type role’ they believe their individual tax position will be compromised. Generally speaking, they will be unaware of the employer's NI implications, and their own tax affairs, they are dedicated to providing patient care. We sense a resistance to it becoming harder for them and the GP being worse off because of it.

There is already a shortage of this scarce resource and in our current position, we are vulnerable to GP’s choosing to work elsewhere.

GPs would be reluctant to be in a salaried post due to the ad hoc way in which they work i.e. a GP does not have a regular rota commitment; they select shifts to fit their primary employment/lifestyle. Salaried in this type of situation would not work. Each year we require circa 55,000 hours of sessional GP’s. That is 28 FTE doctors. We currently cannot recruit 1 on a salaried basis. And the signals for GPs accepting payroll-based employment on a sessional basis are not good.

We are really worried about the risks of there being insufficient GPs to take care of the growing number of patients needing our services.”

5. University sector

5.1 I work with a number of universities and the British Universities Finance Directors Group (BUFDG). These organisations have been subject to the public sector off-payroll legislation since 2017.

5.2 The main problem they are having is simply distinguishing whether an individual is off-payroll or not. The university is looking at all sorts of different types of engagement from IT contractors and business analysts to lecturers and examiners. All will have different scenarios and different pieces of legislation to deal with depending on how they are engaged. These will not only be limited companies but also self-employed.

5.3 One of my university clients has a large very important project in progress and is very concerned that the contractors will walk off the project if they are put on payroll but, it would blow the budget if they had to increase the costs at this stage. Some of the contractors are more than likely off-payroll but, some are borderline or undetermined. This causes a lot of anxiety because in 22% of cases the CEST output will be undetermined. It is then up to the professional adviser to figure out whether the nuances will take it outside of IR35 or not but, the consequences of getting the decision wrong are severe.

5.4 So, in some cases, it may be necessary to do a voluntary disclosure but, there is no real guidance on who should be liable under these circumstances. The university is using an agency but, the agency could turn around and say the university has not taken reasonable care and that the liability is with the university and not them as the fee-payer. So, the university is unclear whether they need to do the voluntary disclosure or not but, if they don’t do it, they could incur penalties.

5.5 This is, again, an intolerable situation for these law-abiding organisations to be in.

Unresolved questions

There are also a number of unresolved questions that I have asked HMRC which could cause significant problems for my clients. These are both connected to what happens in the event that there is a discovery that the client should have paid the contractor on payroll. HMRC needs to get a lot better at communicating and listening to those that work in the sector.

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