



Unite submission to HMRC consultation on Tackling Construction Industry Scheme Abuse

This submission is made by Unite, the UK and Ireland's largest trade union with over 1 million members across all sectors of the economy including manufacturing, financial services, transport, food and agriculture, construction, energy and utilities, information technology, service industries, health, local government and the not for profit sector. Unite also organises in the community, enabling those who are not in employment to be part of our union.

Executive Summary

- **Unite demands urgent reform of the law on employment status for the purposes of statutory employment rights;**
- **Unite calls for the Construction Industry Scheme and other exploitative models of bogus self-employment in construction to be outlawed;**
- **Unite calls on the UK Government to legislate to embed direct employment and national industrial collective agreements in the construction sector;**

- **Anyone subject to significant control, supervision or direction in relation to their work should be deemed to be employed for tax and employment rights purposes;**
- **Workers who are not clearly and genuinely identifiable as self-employed should be directly employed and in receipt of employment rights;**
- **Care must be taken to ensure that those in the supply chain understand their responsibilities;**
- **HMRC needs effective resources to ensure employment status compliance within the private sector construction supply chain;**
- **Transparency and identification are required throughout construction supply chains to support means to prevent abuse of the Construction Industry Scheme.**

Introduction

1. Unite understands that this HMRC consultation is concerned with preventing abuses of the Construction Industry Scheme (CIS). Unite's policy is to oppose the misuse of the CIS scheme and our response is focused upon the need to simplify the system of employment in the construction sector. Any remedial measures introduced while the scheme remains in place allowing the misclassification of construction workers' employment status are at best a sticking plaster and it is our view that fundamental employment rights reform is necessary.
2. Through years of experience and case work on behalf of our construction members we are clear that the use of the CIS leads to construction workers being exploited and underpins a system of bogus self-employment in the sector. While the day to day employment situation of CIS construction workers is reflective of an employee or worker they are wrongly classed as self-employed for tax and employment purposes, undermining their rights and limiting financial returns to the Treasury from construction industry employers and agencies.

CIS employment status undermining construction

3. It is not only Unite that views false self-employment as a barrier to progress in the construction sector. The Construction Leadership Council (CLC), bringing together industry leaders and co-chaired by the UK's Minister for Business and Industry identified in the 2018 Strategy and Action Plan a need to:

“Encourage action to reduce the number of workers not in direct employment, especially false self-employment which is a clear barrier to employers investing in training. Industry needs to collaborate to encourage all public and private sector clients to consistently mandate direct hire practices in their supply chain.”¹

¹ <https://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2018/07/Skills-2018-Strategy-Action-Plan-July-2018-v2.pdf>

4. Unite believes there should be only one definition provided by legislation to define workers, all of whom must have full employment rights. There is an immediate need for this to happen. The definition should be at least as encompassing as that applying to “whistleblowers”², such that anyone who is engaged by an organisation to work, when the terms on which an individual is engaged are substantially determined by the organisation, should fall within the definition.

5. A person’s entitlement to employment rights is determined by their employment status; under the current framework individuals fall into one of three categories:
 - **Employees**, who are entitled to the full range of employment rights: the National Minimum and Living Wage, annual leave, rest breaks, maternity, paternity and adoption leave, the right not to be treated less favourably as a part-time worker or fixed-term employee, the right to request flexible working, protection from discrimination at work, minimum notice periods, collective redundancy consultation, statutory redundancy pay, protection from unfair dismissal and TUPE (protected rights for employee transfers).

 - **Workers**, who are entitled to some but not all employment rights: the National Minimum and Living Wage, annual leave, rest breaks, the agency workers regulations, and protection from discrimination at work.

 - **Self-employed people**, who have no entitlement to employment rights beyond basic health and safety and the anti-discrimination framework. The statutory definitions of employees and workers are set out in the Employment Rights Act 1996, but these are very brief and have been supplemented by case law. Employees and workers now have a day one right to a written statement of the main terms and conditions of their employment, but those designated self-employed are not.

6. The Covid-19 pandemic and necessary policies put in place by the Treasury to support business and workers across all sectors of the economy laid bare the

² Section 43K(1)(a) Employment Rights Act 1996

current situation in the construction sector³. Some one and a half million construction workers were at risk of being placed into poverty as they did not qualify for the Job Retention Scheme due to their employment status. The scale of the prevalence of CIS is shown in HMRC's response to a Freedom of Information request from Unite that identified 163,800 construction workers registered through the CIS scheme across the UK in the 2019/20 tax year.

7. Unite quickly identified that this provided the opportunity for the UK Government to act swiftly and we proposed that the Coronavirus Job Retention Scheme be extended to the self-employed, including the million-plus bogusly self-employed (CIS) in the construction industry. Unite maintains our demand that the UK government extend the wage protection scheme to protect all construction workers trapped in various forms of bogus self-employment and exploitative employment models.⁴
8. It would have been simple for the government to extend wage protection to CIS workers as they have tax payments deducted at source and forwarded to HMRC providing government with a means of identifying transactions and payments being made. We welcomed the Self-Employed Income Support Scheme (SEISS) as a means of providing protection, however maintain that those working through bogus self-employment models in construction should have been swiftly classed as employees and had their jobs and incomes protected.⁵
9. The central problem is the bogus self-employment means of engagement of workers in the construction sector. This sees employers refuse to accept the obligations they have to those engaged under their management, supervision and control. This is the silver bullet in this debate, and there needs to be decisive action

³ <https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme>

⁴ <https://unitetheunion.org/news-events/news/2020/march/mccluskeys-call-to-chancellor-end-bogus-self-employment-to-make-your-support-scheme-work/>

⁵ *ibid*

taken to simplify the definitions of workers and those classified as self-employed. The continuation of the Construction Industry Tax Scheme (CIS) is in our view maintaining the exploitation of workers being classed as self-employed eroding their employment rights and entitlements.

10. Bogus 'self-employment' in construction means workers are deprived of basic employment protections. In the construction industry it places workers outside of the pay rates and conditions of industry-wide collectively bargained arrangements.
11. Bogus self-employment is a contributory factor to the type of working practices adopted in construction and the impact of these on the physical and mental health of the workforce. Without the protection of employee status workers are without a collective voice and subject to an unequal power relationship in the workplace. Unite has undertaken a survey of all our construction members, a significant number of whom work through the CIS system, on the impact of working conditions upon their physical and mental health.⁶ The results were distressing and deeply worrying, highlighting that:

- **1/3 of respondents say that they have less than 10 hours between shifts starting and finishing**
- **Almost 60% consider that they work long hours**
- **Three quarters of respondents say long hours impact on physical health**
- **Almost 60% said long hours impact upon their mental health**
- **Over 80% say they are regularly tired at work**
- **40% say that they do not consider that they have sufficient rest breaks**
- **Two thirds said that their working hours have increased in the last three years.**

Scale of the problem in construction

⁶ <https://unitetheunion.org/campaigns/burning-the-candle-at-both-ends/>

12. A Freedom of Information request made by Unite found that 1.03 million construction workers were paid via the CIS scheme in 2018/19⁷. The vast majority were classed as self-employed and paid on a weekly basis. These workers are utterly dependent upon engagement through the many rungs of the construction sector supply chain and are being systematically denied employee status while contractors escape tax and employment liabilities associated with supporting employees.
13. Unite demands a simplification of the law so that employment rights cover all workers and not only employees. It is already the case that if a person is subject to direction and control in relation to their work then that person is regarded as an employee of the person or organisation who is doing the directing and control, regardless of what contractual arrangements may be in place. However, the monitoring and enforcement by government agencies in construction is non-existent leaving the worker themselves to challenge their own employment status, and in doing so, very often lose work and face the prospect of being blacklisted.
⁸Construction workers reflect the sector of the economy that are most impacted by this governmental failure to monitor and control employment relations.
14. In the context of such change, there can be alignment of tax and employment law, so that all those who benefit from employment rights are treated as employees for tax purposes. This will greatly benefit the Treasury, working people and provide a level playing field for good employers. Meanwhile, there should be no circumstances in which those who are taxed as employees do not have full employment rights.
15. Unite has a straightforward list of demands that should be implemented across the construction sector by government intervention: The policies are:

⁷ <https://www.3dpersonnel.com/blog/2020/03/call-for-cis-workers-lifeline-as-mass-layoff-fears-intensify>

⁸ <https://www.pbctoday.co.uk/news/planning-construction-news/blacklisted-construction-workers/56969/>

- **National collective bargaining through industrial agreements to be adopted and adhered to on all construction projects;**
- **All workers to be directly employed and not falsely self-employed;**
- **An end to bogus self-employment, umbrella companies and other forms of exploitative employment models;**
- **The adoption of the highest levels of health and safety;**
- **Construction unions and their representatives to be given full and fair access to the workplace.**

16. Unite welcomes the principle of enshrining the right of any worker to challenge status determination within the sectoral supply chain. Furthermore, we would support the view that this right should be underpinned by legislation.

17. It is vital therefore that HMRC has the necessary tools and finances including a 100% accurate online status test, to ensure that workers currently operating through often bogus self-employment structures have the correct employment status classification. This must be reflective of their employment relationship that is visible through day to day activities in their workplace.

18. The reality is that only by forcing companies to comply with legal obligations and embedding a culture of direct employment, supported by collective bargaining will the government collect the taxation returns due from the construction sector, and all workers, including migrant workers, receive dignity and respect in employment.

19. Unite has flagged up examples of low paid workers in construction being coerced into using personal service companies and other labour market intermediaries, as a pre-condition of being given a job.

This can lead to:

- **A lack of transparency about who the employer is and who is responsible for making sure that a worker is paid and receives their basic workplace rights;**
- **A lack of transparency about pay rates. Pay rates will often differ from what is advertised as labour market intermediaries can charge a fee to process payments;**

- **Workers will not be entitled to any basic employment rights, including holiday and sick pay;**
- **Workers being at risk of significant tax liabilities. Some working people will be unaware of the tax liabilities that arise through the use of labour market intermediaries such as personal service companies and umbrella companies.**

Case studies symptomatic of construction industry engagement process:

Bogus self-employment and umbrella companies

Unite has won a potentially ground-breaking legal victory at the employment appeal tribunal (EAT) in the battle against bogus self-employment and the use of payroll companies. Unite took the case on behalf of pipefitter Russ Blakely against the employment agency On-Site Recruitment Solutions Limited and payroll company Heritage Solutions City Ltd.

The case was for the unlawful deduction of wages and employer's national insurance contributions as well as the non-payment of holiday pay. This is the first time that an employment appeal tribunal has considered a bogus self-employment appeal involving the use of a payroll company.

Unite appealed the case to the EAT, after the Reading employment tribunal rejected the case, wrongly finding Mr Blakely was not a worker.

The EAT case was heard in early December 2017 but Unite only recently received the appeal court's written judgment. The fact that the decision was made at the EAT means that it is binding on all employment tribunals and must be applied in other cases.

The employment appeal tribunal found:

- *The tribunal was wrong to decide that Mr Blakely was not a worker*
- *When determining whether there was a contract (part of the test of whether someone is a worker) the tribunal must consider the intentions of the worker and all surrounding circumstances, not just the intentions of the employer*
- *There was a contract between Mr Blakely and On-Site (the agency) - importantly, the use of a payroll company did not circumvent this relationship*
- *Mr Blakely (and therefore other agency workers being paid through payroll companies) could be a worker of the agency, the payroll company or both. The*

possibility of being a worker of more than one body provides the opportunity to dramatically reduce the amount of umbrella/payroll company rip offs.

Munnelly Cases:

Unite's Strategic Cases Unit are taking forward a case on behalf of 42 Unite members lodged against five different Munnelly companies (Munnelly Support Services Ltd, Munnelly Group plc, Bishopgate Contracting Solutions Ltd, Munnelly Security Services Ltd and Guardior Security Ltd).

The claims which were filed at the Watford employment tribunal in and following March 2019, challenge the workers' employment status (arguing they are bogusly self-employed) and claim unlawful deduction of wages in respect of the management company margin, which is deducted from the workers' wages, and the lack of holiday pay. In some cases Unite is also pursuing the Munnelly companies for the deduction of apprenticeship levy and employer's national insurance contributions from pay, as well as breaching the right to paid holidays.

Consultation Questions

Q1: Are there other circumstances where HMRC should allow an employer to claim CIS set-offs later in a tax year following HMRC correction of an EPS return?

Unite does not support the current CIS scheme. Through years of experience and case work of our construction members we are clear that use of this scheme leads to construction workers being exploited and underpins a system of bogus self-employment in the sector.

While the day to day employment situation of CIS construction workers is reflective of an employee or worker, they are wrongly classed as self-employed for tax and employment purposes, undermining their rights and limiting tax returns to the Treasury from construction industry employers and agencies.

Q2: Do you have any comments on the interest and penalty consequences of HMRC making these corrections to an EPS return?

Please refer to our response to Question 1.

Q3: Are there other sources of evidence HMRC should accept as proof that a CIS deduction on account of tax has been made?

Please refer to our response to Question 1.

Q4: Do you have any comments on HMRC being able to disregard certain evidence in deciding to use the correction power?

Please refer to our response to Question 1.

Q5: Is 14 days the right amount of time for the employer to provide evidence of CIS deductions suffered?

Please refer to our response to Question 1.

Q6: Is 14 days the right amount of time for the employer to correct the return?

Please refer to our response to Question 1.

Q7: If not, what timescale do you suggest?

Please refer to our response to Question 1.

Q8: Does this review and appeal process provide adequate protection for subcontractors making errors?

Please refer to our response to Question 1.

Q9: Should other safeguards be considered in relation to these powers? If so, what should those safeguards be?

Please refer to our response to Question 1.

Q10: Are there other options to disallow CIS deductions claimed on an EPS return that are not supported by satisfactory evidence?

Please refer to our response to Question 1.

Q11: Do you have other ideas that could protect the CIS from abuse?

Unite considers that the CIS scheme is a contributory factor in the exploitation and abuse of construction workers. Unite calls for straightforward policies to protect the employment rights of construction workers:

- **National industrial agreements to be adopted and adhered to on all construction projects;**
- **All workers to be directly employed and not falsely self-employed;**
- **An end to bogus self-employment, umbrella companies and other forms of exploitative employment models;**
- **The adoption of the highest levels of health and safety;**
- **Construction unions and their representatives to be given full and fair access to the workplace.**

Q12: Do you consider supply chain measures to be an appropriate response to this fraud?

No. An appropriate response would be to end the Construction Industry Scheme (CIS), enforce direct employment and PAYE across the construction sector and deal with the central problem of bogus self-employment. This is the silver bullet in this debate, and there needs to be decisive action taken to simplify the definitions of workers and those classified as self-employed. The continuation of the Construction Industry Tax Scheme (CIS) is in our view maintaining the exploitation of workers being classed as self-employed eroding their employment rights and entitlements.

Q13: What due diligence checks do you currently undertake on your subcontractors/suppliers?

Unite is responding to this consultation on behalf of our members working in the construction sector not as a construction sector employer.

Q14: When do you undertake these and why?

Please revert to the answer given in Q13

Q15: Would you consider undertaking such checks further down your supply chain? If not, why not?

Please revert to answer given in Q13

Q16: What action would you take if you were not satisfied following your due diligence checks?

Please revert to the answer given in Q13

Q17: Could a site registration system work in the UK?

Unite is aware that this system is in place in Ireland. Much greater levels of inspection of construction sites by enforcement bodies to effectively monitor employment status classification are required and we would be willing to participate in the development of proposals to consider how this could be achieved, including site registration. The test, track, trace strategy implement as part of the government's response to Covid-19 should lead to an increased awareness of main contractors of sub-contract chains and site level workers. This needs to be maintained and responsibility enshrined for the details of all sub-contractors within the supply chains of the sector to be available. Subject to GDPR rules this information can then be utilised to establish levels CIS engagement. Transparency and understanding of supply chains by the main contractor is the key factor in developing this process.

Q18: How much detail is needed for these reports to be effective?

The details required should include the details of all personnel on site and the means of engagement of each sub-contractor within the supply chain.

Q19: What burdens would such a process place on contractors?

Unite does not view it as a burden on contractors to engage in transparency in the workplace and developing a system of registration that identifies contracting processes within the supply chains on a construction site.

Q20: How could these burdens be mitigated?

Each contractor would have their own requirement to provide the necessary information to the tier one or management contractor. Therefore the shared process mitigates any overbearing process on an individual contractor or sub-contractor within the supply chain.

Q21: Would these two measures encourage better supply chain due diligence processes?

Yes. See above.

Q22: Do any of these supply chain proposals merit further consideration?

Yes. Ensuring that main contractors are aware of the practices within their supply chains is already a feature of Modern Slavery legislation in the UK for businesses with a certain level of turnover. This should be in place regardless of the length of supply chain and main contractors in the construction sector that work mainly in a process of collaboration with suppliers are aware of the chains of contracting. Unite supports HMRC having the ability to take necessary action against the main contractor should the due diligence required fail to remedy the situation.

Q23: Do you have other ideas that could help combat fraud in construction supply chains?

Trade unions have an important and substantial role in enforcing employment rights, preventing abuse, and being the first port of call for workers suffering exploitation. The government is obliged to encourage this role to comply with its legal obligations to promote trade unions and collective bargaining under the UN ILO Conventions 87 and 98. This is missing from the consultation document. As Unite stated in its response to the Taylor Review on this issue, enforcement of employment rights should be encouraged by the government as part of its legal obligations under these ILO Conventions. As we work towards a sustainable recovery from Covid-19, unions and employers need to work together at sectoral level, especially in sectors characterised by low pay and poor working conditions. In addition, the government must continue to engage unions and

employers in developing sectoral recovery plans, and should establish formal sectoral panels with representation from unions and employers for this purpose.

Q24: What impact will the changes have on your business?

N/A

Q25: Are there any specific impacts on small and micro businesses that are not covered in the impact assessment? If so, please provide details of the anticipated one-off and on-going costs and burdens.

N/A

Q26: Do you think these proposals will have any impacts on sub-contractors not already covered?

If so, please provide details.

N/A

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