



Unite Submission to HM Treasury and HM Revenue & Customs False Self- Employment in the Construction Industry Consultation

1. Executive Summary

- 1.1 Unite welcomes governments intention to address false self employment in the UK construction industry.
- 1.2 Unite would concur with the observation that, despite previous efforts and initiatives, there has been no significant progress in addressing the proliferation of false self-employment in the industry.
- 1.3 Unite believes that false self-employment is a significant barrier to the future growth and prosperity of the UK construction industry.
- 1.4 Unite is extremely concerned about the failure in the proposals to automatically confer employment rights on workers who are deemed to be in receipt of employment income. Deeming workers to be employees effectively for tax purposes whilst failing to confer employment protections and benefits on them is inequitable and illogical.
- 1.5 Unite believes that, in respect of the proposed measures, there needs to be a joint and several obligation on both the 'payer' and the 'engager' to ensure that workers have their employment status correctly classified.
- 1.6 Unite also has some concerns and suggestions about the criteria it is proposed will be used to determine whether an individual will be deemed to be in receipt of 'employment income'.

2. Introduction

- 2.1 This submission represents the views of Unite the Union. Unite is the UK's largest trade union with approximately 2 million members working in a raft of industrial sectors including construction, energy,

manufacturing, engineering, transport, information technology, finance, local authorities and the National Health Service.

- 2.2 Unite is now the sole or joint signatory union to every significant national collective agreement across the whole of the UK construction and contracting industry and also throughout the construction products supply chain.
- 2.3 In addition Unite represents skilled craft workers operating in both the public and private sector, in local authorities, the National Health Service, and housing associations, as well as those workers currently employed direct by labour organisations.
- 2.4 The central policy of Unite in respect of the UK construction industry is that operatives should be directly employed under the terms of their respective national collective agreement.
- 2.5 Unite welcomes the initiative shown by government to address the growing prevalence of false self employment in the UK construction industry.

3. The Industry

- 3.1 Unite is extremely concerned about the shift away from direct employment in the UK construction industry.
- 3.2 Such developments not only have a detrimental impact on taxation revenue but also threaten the sustainable supply of skilled operatives to the UK construction industry.
- 3.3 It is well known that construction is one of the most transient industries in the UK economy with a myriad of employment practices. The negative stereotypical image of construction in general and the perception of (at best) tenuous employment have a detrimental impact on recruitment and retention in the industry.
- 3.4 As suggested in recent research undertaken for the London Development Agency, “the prevalence of self-employment and temporary agency workers, with varying terms and conditions of work, result in less stability and limited overall responsibility for workforce development”.¹
- 3.5 But it is not only the issue of recruitment of operatives into the industry, or their retention, that is of concern. Although seasoned workers appreciate the cyclical and transient nature of the demand for their skills, the ever continuing reduction of opportunities for direct employment are a real threat to the long term growth and stability of the industry.

¹ The Construction Industry in London & Diversity Performance – February 2007

- 3.6 Anyone involved in the industry should be concerned about the growing influence of the employment agency. For example 77% of the mechanical & electrical operatives working on the Emirates Stadium were agency staff.² Even those detached from the day to day workings of the industry cannot fail to be alarmed by such observations as, “50% of site electricians supplied by agencies”.³
- 3.7 It is the experience of Unite that these organisations are devoid of a long term commitment to the industry, further they only serve to drain away funds that would be better invested in the development of skills and apprenticeships.
- 3.8 Shady employment practices that exist in parts of the industry may well entice and coerce workers into false self-employment. But it needs to be clear that whilst such workers may well see a marginal increase in their net pay, they will never be better off in the long term compared to their counterparts who are fortunate enough to be directly employed under the terms of their respective national agreement, as avoidance of class 1 NI contributions will impact on their rights to the future payment of state benefits such as jobseekers allowance, state pension and incapacity benefit.
- 3.9 As many major contractors have given up their direct employment of labour (in an ongoing effort to increase margins) so they have abandoned their commitment to training. In doing so these employers are failing in their obligation to the future of the industry and ignoring the UK governments objectives following such reviews as the Leitch Report⁴.

4. National Collective Agreements

- 4.1 Longstanding national agreements between employers associations and the trade unions facilitate excellent employment relations in an industry that is prevalent with small employers. These employers do not have the resources or administrative capacity to provide a range of benefits for their employees.
- 4.2 Such national agreements cover the full range of occupational groups in the UK construction industry. Within the agreements benefits are provided by industry regulated independent bodies including:
- B&CE - Building and Civil Engineering Holidays Scheme Management Company
 - ECIBA - Electrical Contracting Industry Benefits Agency – (for the Electrical Joint Industry Board)

² Building Magazine – 14th July 2006

³ Contract Journal – 4th May 2006

⁴ Prosperity For All In The Global Economy, World Class Skills - December 2006

- Holiday Pay & Benefits Scheme (for the Joint Industry Board for Plumbing Mechanical Engineering Services)
 - Welplan (for the Heating, Ventilation, Air Conditioning and Refrigeration industry)
- 4.3 Currently such benefit packages within a number of these national agreements provide for a range of industry financed provisions for directly employed workers, including:
- Pension Provision
 - Sickness Benefit
 - Permanent & Total Disability Waiver
 - Death Benefit
 - Accidental Death Benefit
 - Medical Healthcare
 - Occupational Health Assessment
 - Occupational Health Care
 - Holiday pay
- 4.4 Without doubt one of the most essential aspects of industry provided benefit schemes is the provision of pensions. The contribution of these schemes to the construction industry cannot be overlooked, especially when we consider that only 38% of employers in the industry make any form of pension provision.⁵
- 4.5 Unite is mindful of that fact that in October 2012 government intends to effectively remove the funding stream for such provisions, by ending the National Insurance Contribution (NIC) disregard in relation to holiday pay schemes in the construction industry.
- 4.6 Unite believe that such a development will act as a significant incentive to move away from direct employment.
- 4.7 This view is articulated in detail in the KPMG April 2009 publication *Impact assessment of the removal of the Holiday Pay Schemes NIC disregard* which should be given full consideration alongside the development and timing of the proposed measures.

5. False Self-Employment

- 5.1 Unite welcome the governments intention to address the growing pervasiveness of false or 'bogus' self-employment in the UK construction industry.
- 5.2 For the reasons stated above Unite strongly believe that bogus self employment (and the raft of tenuous employment practices that have been allowed to evolve) is a significant barrier to the future growth and

⁵ Employers Pension Survey - DWP

prosperity of the UK construction industry. This is even more concerning when we consider the fact that it is the construction industry which provides the built environment infrastructure on which the rest of the economy is based.

- 5.3 Whilst Unite recognises the role and jurisdiction of HM Treasury and HM Revenue & Customs, insofar as their primary concern is that of ensuring tax compliance, it is concerned that it is not the intention of government to necessarily confer employment rights on workers even if they are deemed to be in receipt of employment income.
- 5.4 In this respect Unite is mindful of the statement in the consultation document that, "Government hopes that the tax changes would also engender a more appropriate treatment of workers throughout the industry, leading to a culture of responsible employers applying employment rights and providing training opportunities".⁶ It should go without saying, but in Unite's experience employers rarely comply with any criteria which are likely to increase their operating costs without suitable financial incentives or legislation.
- 5.5 That said, Unite recognises that there are still a significant number of bona fide employers engaged in the UK construction industry, indeed many are represented by their employer bodies and are signatories to the national collective agreements referred to earlier in this submission.
- 5.6 It is certainly not the intention of Unite to speak for employer bodies in this submission, however it believes that the measures as outlined in the consultation will be broadly welcomed by such organisations as they seek to address and rectify the unfair competitive advantage currently being enjoyed by businesses who have circumnavigated their Pay as You Earn (PAYE) and National Insurance (NI) obligations.
- 5.7 Whilst these complex forms of tax avoidance and evasion are indeed a significant motive behind the move away from direct employment, Unite would support the observation that there are also other considerations, such as the avoidance of holiday pay and pension contributions, behind the proliferation of false self-employment.
- 5.8 In the consideration of measures to address false self-employment Unite would urge government to be mindful of the fact that there is in effect a whole industry in itself which has grown out of the savings derived from avoiding full tax and NI compliance, and the associated obligations of genuine employment. This is amply demonstrated by a number of trade journal headlines along the lines of "Thousands in tax danger from alleged £6 million fraud".⁷

⁶ False Self Employment in Construction: Taxation of Workers – July 2009

⁷ Contract Journal – 16th September 2009

6. Employment Terms

- 6.1 Determined largely by its nature there has always been a prevalence of genuine sole traders operating in UK construction industry.
- 6.2 The transient nature of the industry coupled with significant and cyclical fluctuations in demand means that workers can move between genuine self employment and direct employment over their working careers.
- 6.3 Over many years Unite, and its predecessor Unions, has maintained that there are those in the industry who have sought to erode the employer/employee relationship for the sole purpose of reducing the marginal cost of labour.
- 6.4 Unite would agree with the observations alluded to in the consultation document that such a dynamic has led to a disproportionately high number of operatives being classified as being self employed, where there is in effect an employment relationship.
- 6.5 In practical terms there are criteria which define whether there is an employment relationship such as mutuality of obligation, whether the operative incurs any financial risk, takes direction and supervision or is paid at an hourly rate. However Unite would concur with the assertion that the distinction between being categorised as employed or self employed can depend largely on how these facts are presented and the reality of the situation is often concealed or difficult to ascertain.

7. Consequences of False Self Employment

- 7.1 Unite would fully endorse the statement in the consultation document that false self-employment has a number of serious consequences.
- 7.2 Clearly the very fact that the consultation has been issued by HM Treasury and HM Revenue & Customs would indicate that the risk to the Exchequer of false self employment, alongside the potential for market competition to be distorted, are the primary concerns.
- 7.3 Unite is concerned with these consequences. As an organisation that represents workers in every aspect of the UK construction industry it is also equally (if not more) concerned with the consequences on the individual worker of being encouraged into false self-employment.
- 7.4 The consultation rightly identifies the consequences which arise from an individual not making the correct level of NI contributions, namely their lack of entitlement to future benefits and full state pension.
- 7.5 In addition to these financial concerns are the consequences of large numbers of workers in the industry not enjoying the traditional employer/employee relationship.

- 7.6 Unite would encourage government to consider that the lack of such a relationship fails to confer on the individual worker the appropriate employment law rights and protections and also fails to provide them with a clear career structure for future development.
- 7.7 In this respect Unite is in full agreement with the consultation statement that, “false self employment may also contribute to a culture of employers neglecting their wider responsibilities in accordance with employment law. There is also a risk of failure by the industry to invest in training and skills for the future”.⁸
- 7.8 It should also be reiterated at this point in the consultation response that Unite believe a significant number of workers are often given little or no choice as to how they are engaged. Based on the anecdotal evidence provided by our members the numbers of workers to actively pursue false self-employment without any coercion from the ‘engager’ are in the significant minority.
- 7.9 Unite is encouraged that government is mindful that the proliferation of false self-employment has serious implications for the provision of training and the future availability of skilled operatives.
- 7.10 In the current economic conditions it may seem incongruous to refer to skills shortages, however the fact remains that the UK construction industry is set to create around 125,000 jobs between 2011 and 2014, it also needs to be considered that significant numbers of workers are set to leave the industry in the next ten years through retirement.⁹

8. Voluntary Compliance

- 8.1 Unite would concur with the observation that, despite previous efforts and initiatives, there has been no significant progress in addressing the proliferation of false self employment.
- 8.2 Unite believes that for the issue to be addressed with any level of success concurrent measures must be put in place to encourage the expansion of direct employment.
- 8.3 Unite would remind government of its obligation in this respect as the largest single client of the UK construction industry. Active steps could be put in place, through the use of robust procurement policies, to encourage main contractors to increase their use of directly employed workers and apply a sustainable ratio of apprentices to those craftspeople. Furthermore if such main contractors were to take active responsibility for their respective supply chains, then significant inroads could be made into reducing the disproportionately high levels of self-employed workers.

⁸ False Self Employment in Construction: Taxation of Workers – July 2009

⁹ Construction Skills Network Interim Report – July 2009

- 8.4 Whilst Unite recognises the significant redeployment of resources which have taken place in the past in an attempt to ensure compliance, it would highlight the fact that the transient nature of the industry means that such resources are never sufficient.
- 8.5 Similarly an expectation that any significant number of employers or 'engagers' can be encouraged to correctly classify their workers in such a way that increases their labour costs is inconsistent with the current nature of the industry.
- 8.6 In terms of the consultation document, government is right to identify the expansion in the use of intermediaries (in most cases labour agencies) as being used to disguise the real relationship between the engager and the operative, in effect employer and the employee.

9. Legislation

- 9.1 Unite agree with government that the current measures adopted to address the growth of false or 'bogus' self-employment in the UK construction industry are failing.
- 9.2 Unite believes that the introduction of legislation which starts from a position of assuming individuals are employees and the allows specific criteria to be applied to deviate from this assumption is a significant step forward from where we are now, in respect of addressing bogus self-employment.
- 9.3 However, Unite also has a number of significant reservations about whether or not such legislation will be sufficiently robust. It would remind government that there are currently substantial profits being made by those organisations whose primary objective is to circumnavigate their taxation responsibilities, such profits are unlikely to be given up lightly.
- 9.4 Furthermore, legislation will need to be adaptable to the unique structure of the construction industry, insofar as it will have to accommodate for the fragmented supply chain which exists.

10. The Criteria

- 10.1 Unite would cautiously support the assertion that the three defined criteria are reliable indicators of genuine self employment, namely that the operative provides either their own plant and equipment, all the materials for the job or employs other workers.
- 10.2 In addition Unite welcomes the suggestion to include the criteria of VAT registration, on the basis that this is met in addition to at least one of the other three criteria.

- 10.3 Caution must be observed when defining the criteria to ensure that they are sufficiently robust, as the beneficiaries of false self-employment have consistently proven their ability to exploit loop holes.
- 10.4 As Unite is clearly in favour of eradicating false self employment in the UK construction industry it is keen to see that the proposed criteria are as rigorous as possible. In this respect there may be scope to consider further stipulations within the deeming criteria.
- 10.5 In reference to the three defined criteria in the consultation document, Unite cannot envisage any situation whereby a worker fails to meet any of the criteria and can still legitimately claim to be self-employed.

11. Application of the Statutory Criteria

- 11.1 Unite has serious reservations about the proposal that the defined 'payer' will be responsible for the application of the statutory criteria.
- 11.2 Whilst there may well be practical considerations in respect of the application of PAYE and NICS, Unite believes that such a situation has the potential to create a conflict of interests.
- 11.3 The consultation has correctly identified the existence of intermediaries in the industry which exist for the purpose of incorrectly classifying workers as self employed and avoiding full PAYE and NICS compliance.
- 11.4 It is now proposed that such intermediaries who potentially derive a direct financial benefit from false self employment are to be responsible for the classification of workers as being in receipt of employment income. Needless to say Unite is not convinced that such organisations will be suitably motivated to apply the criteria objectively.
- 11.5 Unite believe that there needs to be joint and several liability on both the payer and the engager to ensure that workers are correctly classified in respect of their employment status.

12. Conclusion

- 12.1 Unite is mindful that government will receive a number of consultation responses claiming that the proposed solutions to address false self employment are overly onerous on an industry that is reliant on a transient and flexible workforce. Similarly it will be claimed that such measures will inevitably lead to an unsustainable increase in costs to an industry already facing hardship as a result of the current economic downturn.
- 12.2 Such arguments may appear to have some consistency. However Unite would claim with significant justification that the current state of the industry, where bona fide employers are consistently

disadvantaged by the absence of a level playing field, needs to be addressed as a matter of urgency.

- 12.3 It should also go without saying that Unite is extremely concerned that the consultation proposes that workers will be deemed to be employed for the purpose of their tax status only. Unite wholly disagrees with the contention expressed by government in the consultation, that tax changes will 'engender' a better treatment of workers in the industry. Amongst other things, the simple fact of the extent and degree to which certain employers have sought to avoid their workers being classified as employees thus far is very strong evidence to the contrary.
- 12.4 Consequently, Unite believe that suitably robust measures must be put in place at the earliest opportunity to stamp out the proliferation of dubious employment practices designed with the dual purpose of denying employment status to thousands of UK based construction workers and circumnavigating tax and national insurance responsibilities.
- 12.5 As the largest single client of the UK construction industry government must act to ensure that procurement policies are consistent with the introduction of such measures.
- 12.6 Unite believe that the proliferation of false self-employment and the engagement of operatives through intermediaries, such as agencies, has negatively impacted upon the industry's tradition of craft apprenticeship training. If government is to achieve its policy objective of world class apprentices action must be taken to eradicate the proliferation of tenuous employment practices.
- 12.7 In conclusion Unite would welcome the opportunity to engage in dialogue with government, as occurred through our involvement in the Construction Employment Forum, in an effort to assist the government in achieving its aim to eradicate false self employment in the UK construction industry.

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