

Association of Professional Staffing Companies (Global) Ltd – Written evidence (OPR0023)

Executive Summary:

Employment status law is complex and in a state of flux, reference the latest Court of Appeal case Professional Game Match Officials (PGMOL) v HMRC 2021 now remitted back to FTT.

OPW is exacerbating the effects of the current skills short, candidate led labour market, leading to higher job vacancies and wage inflation.

CEST remains an inappropriate tool for a complex legal assessment, leading to greater uncertainty which increases Engager caution.

Most Engagers remain uninformed or under educated on OPW and their statutory duties.

The rollout has led to heavy reliance on umbrella companies in the recruitment supply chain, concerning news given the inherent compliance risks HMRC are seeking to mitigate through the Finance Bill.

OPW has reduced flexibility, innovation, and productivity in the labour market. The supply chain is seeking to mitigate the impact through use of deliverables contracts and outsourced service.

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?

Our members in all sectors we support across the private sector; STEM, marketing and media, legal, finance and general professional, education, clinical and healthcare are reporting a very strong candidate led market which is indicative of skills shortages. Our members have been talking of skills shortages for many years, certainly since the Brexit referendum, and the shortage has been exacerbated by immigration rule changes, OPW and Covid-19, rather than created by them. The fundamental issue as reported by members across all sectors is the mismatch between skills in the working population, particularly amongst new graduates, and the highly specialised STEM and technical qualifications required by employers. The government is seeking to address this deficit through its Plan for Jobs, but this is a long-term issue, which needs short and mid-term mitigation.

The recent change to off payroll working rules (OPW) in the private sector has certainly added complexity to the hiring process and has made it more difficult for engagers to hire people with the right skills and expertise. This is for several reasons reported to us by our members:

- There is a candidate short market. OPW has contributed to job vacancies as experienced contractors, with the right skills and expertise, have made the choice to leave the contractor market due partly to lifestyle changes driven by Covid-19 but also due to a reticence to work inside IR35 or via an umbrella company or direct agency payroll following a career as a self-employed Personal Service Company (PSC) contractor. One of our largest cloud specialist recruiters states: "The cloud market which we specialise in

is a fast booming market so difficult to see if being in or out of IR35 has made an impact as job creation in this sector is just expanding daily, but we do see contractors who come up against a role inside or outside consistently choosing the outside role more and more. COVID has also helped to an extent as clients got used to remote working its brought European and ex pat workers far more into play. I would say we are seeing clients almost seeing this non-UK talent pool place as far more attractive post IR35”.

- The complexity and ever changing nature of employment status law most recently the PGMOL Court of Appeal case and the need to apply these complex, changeable legal principles to the ongoing factual matrix of a PSC engagement makes recruitment companies (usually the fee payer in a contractual chain) and the engager understandably nervous of their organisational capability and expertise to make an employment status determination (SDS) and to manage the assignment without falling foul of employment status law and HMRC’s application of OPW.
- The status determination process requires the engager to have knowledge of the PSC contractor’s business, legal expertise, understanding and experience in employment status decision making and a detailed understanding of the assignment itself both prestart and during the assignment. Despite HMRC’s roll out engagement programme and well written employment status and CEST guidance (ESM10000 and 11000) our members report general engager ignorance, across all size of business that the OPW rules either exist at all, or a complete lack of understanding of their statutory duties, how to fulfil them and the inherent tax risks in the OPW rules. This is across all private sector, but particularly prevalent in SME and mid-size businesses, who are not of a size to employ an in-house tax advisor or legal team. Members also report that clients receive poor quality advice from their external accountancy advisors who themselves may not understand the new rules, particularly as the status determination is a legal assessment of employment status, not taxation law.
- OPW has contributed to job vacancies, as it has reduced the flexibility of the UK labour market, leading to more permanent and temporary unfilled roles. This is because fixed term assignments previously promptly filled and performed by PSC contractors working outside IR35 are now being converted by engagers to much harder to fill permanent roles, being left unfilled due to candidate shortage or engager reticence in the hiring process, or the engager is managing without the skillset, with the knock-on effect on productivity. In the highly skilled STEM markets such as IT, life science, engineering, all identified as critical to increasing productivity and creating an innovation economy fit for the 21st century, business has long benefited from accessing highly skilled technical expertise on an “as needed” basis delivered by independent contractors, rather than incurring the expense of a permanent hire (where there may not be a full time role) or the much higher expense of traditional consultancy services, such as the global accountancy practices provide. This route to market has been seriously hindered by OPW.
- Introduction of the OPW combined with the increase in demand for highly desirable skill sets, has seen a rapid increase in daily rates demanded by

contractors (both outside IR35 and PAYE), additionally it has led to a rise in attrition with contractors readily leaving for roles determined as outside IR35. Members across sectors such as IT and haulage and logistics report that the skills remain available however the rate and contract tenure need to be much more attractive to encourage workers to engage. A long established SME recruiter of drivers, based in the Midlands, with multiple clients, reports that contractors are refusing to work PAYE, insisting on outside IR35 contracts, and increasingly large retailers are bowing to the pressure or some recruiters are ignoring the inside IR35 SDS and taking the tax risk as fee payer, leading to a distortion of the marketplace.

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?

- The accuracy of any given CEST tool result, is wholly dependent on the engager's level of understanding of employment status law and how to apply that law to the factual matrix of the assignment and the PSC contractor's business – the "whole picture" approach as referred to in case law and by HMRC. This requires the engager (and their advisers) to invest in legal advice on the structure of their PSC engagements, particularly in respect of issues around "control" over the contractor's services and oversight processes.
- Our members report that many of their clients simply are unwilling to carry out an SDS despite their statutory duty or are completely bewildered by the CEST tool and accompanying HMRC guidance. They require a high level of support from their recruitment partners to upskill and educate their key staff, which APSCo seeks to support with client focussed guidance.
- There is a lack of trust in the tool across all sizes of client and all sectors. Further in order to use the tool one needs to read HMRC guidance, which is their view of the law, rather than an independent legal opinion. There are well-respected commercial entities, some of whom are APSCo Trusted Partners offering OPW assessments and/or taxation insurance covering OPW tax risk. These are providing the specialist specific advice lacking in CEST or obtainable from generalist advisors. However, recruitment supply chain history amply shows that where there is a supply chain commercial opportunity, driven by taxation changes, new advisors crop up offering specialist services, some more creditable than others, leading to more supply chain risk.
- The lack of trust in CEST is due to a number of factors:
- Employment statuses' main tenets are personal service, mutuality of obligation and control. The tool ignores mutuality of obligation and the way the tool is structured can "encourage" engagers to over-rely on the right of substitution as the reason for an outside IR35 output. This is a high-risk strategy, unless the right of substitution has been actually exercised, which many engagers are unwittingly adopting.

- CEST can be effective for clear cut cases, mainly those where there is clear evidence both of lack of control and a business operating on its own account. For a non-expert user, it is appropriate as a general employment status checker, not a tool to assess a complex legal test, with onerous legal and tax consequences.
- In terms of improvements to be made; the fundamental problem is non expert engagers are required to undertake a specialist legal assessment. There will always be limitations to the CEST tool as HMRC are seeking to condense a complex expert assessment of multiple legal factors into a simple to use flexible tool. One member states: "clients don't understand or want to use the CEST tool so we are doing the SDS's with the clients on the phone with Kingsbridge's tool, the client then review that data and approves it as true and correct - I personally find the CEST tool difficult to navigate as someone who understands the market!"

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?

- Our members report that larger engagers had to incur significant initial compliance costs to review and understand their use of PSC contractors, to set up a process to manage the SDS process and to restructure how they use contractors' services. This required systems changes, new software, new contracts with providers such as IR35 assessors and taxation insurance, legal and compliance training of their personnel both subject matter experts and managers of the flexible workforce. Smaller organisations are incurring these costs on a more piecemeal "needs must" basis as they recognise their need for flexible support, particularly given the challenges in hiring. Our view is that HMRC have grossly underestimated the cost of compliance business incurred and is continuing to incur.
- Due to supply pressures and contractor pressure costs have increased for clients.

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?

- HMRC did make significant effort in the months running up to go live of OPW to publish guidance and hold events targeted at engager, recruiters, and contractors. HMRC are still holding webinars although, members report that engagers and contractors may not be accessing HMRC events.
- HMRC have started compliance investigations, targeting the largest engagers in the financial and oil and gas sectors, perhaps earlier than expected. Despite their reassurances that they are keen to help business to comply this has created nervousness in the market across both engagers and recruiters. Recruiters expect to be contacted as the "fee payer" in the chain once these investigations commence in earnest as the

party with primary liability for the unpaid taxation and NICs if HMRC reassess status of an assignment.

- The legislation requires the deemed employer/ fee payer (usually the recruiter) to pay the full tax and NICs due on the assignment income plus penalties and interest on a reassessment with no set off. This is even though taxes such as income, corporation and dividend and NICs may have already been paid on the assignment income by the PSC and/or the contractor. This results in double taxation, but the legislation does not apply recognised principles used in other similar situations, known as Demibourne. This is unfair and we consider in breach of HMRC's code to tax fairly.
- Members call for additional support from HMRC for the engagers to understand what constitutes the appropriate care and attention when making a determination. It is partly through this lack of clarity engagers revert to an extremely risk averse approach, increasing costs and potentially missing out on the very best talent.
- From the perspective of the "Fee-Payer" being the recipient of a determination from the client still comes with an element of ambiguity around what the actual working practices are. It isn't within the gift of the fee-payer to control the actual working practice, resulting in the inheritance of a tax risk that is difficult to fully control
- Ongoing updates from HMRC to help clarify their position on several key points help. Attendance at a few of the HMRC events highlighted an ongoing level of ambiguity around the interpretation of their own questions, leaving fee payers and engagers with the responsibility of interpreting the very same questions without clear guidance.

5. To what extent has the introduction of the new rules generated disputes between engagers and contractors concerning the status of contractors *vis à vis* the rules and how successfully or otherwise have these been resolved?

- At the inception of the OPW challenges to the engager determinations were more frequent than they are now. It was evident that organisations had not implemented a robust approach to managing determinations in the appropriate way. PSC workers often articulated a different level of "actual" working practice than had been determined by the engager.
- More recently challenges to the original status are now few and far between, with contractors believing that the engagers are unlikely to move away from their original determinations, preferring to err on the side of caution, perhaps due to their lack of confidence in interpreting the questions posed by CEST or other tools provided in the market.
- More issues are arising from previous PSC contractors being required to work via an agency worker payroll or employed by an umbrella company (with the appropriate worker and employment rights), namely payroll solutions, rather than outside or inside IR35. Financial Services organisations prior to the introduction of the new rules chose to change their operating models and policies and excluded PSCs from being engaged anywhere in the supply chain. Many PSC contractors were forced

down the Umbrella company route and the clients chose to enter into new contracts and re-negotiate rates which effectively resulted in a reduction to the contractor's rate.

6. What behavioural effects have resulted from the introduction of the new rules in the private sector in terms of the arrangements adopted in hiring contractors?

- Engagers are undertaking a SDS assessment and deciding the status of the role before a recruiter undertakes a candidate search, meaning for many that are inside IR35 the candidate understands the role will be via a payroll at point of application.
- Engagers are reticent to engage contractors.
- Umbrella companies are dominating the engagement and supply of contractors via recruitment companies. APSCo have Trusted Partner members who are umbrella companies and members must maintain a compliance assessment via either Professional Passport or the FCSA codes. It is a self-regulated industry, yet to be brought within the remit of BEIS and APSCo have long called for a statutory code of practice to replace the industry managed codes. There is no barrier to entry, resulting previously in unaccredited companies purporting to offer employment services, but setting up tax avoidance structures, leading to the Loan Charge issues. HMRC is seeking to address this risk by increasing transparency of such companies under investigation in the draft Finance Bill proposals referred to below.
- Engagers, recruitment businesses and contractors are adapting to OPW and in particular "outside IR35" assignments, by increased use of deliverables and statement of work services, to support a PSC business providing services on its own account. Such service provision helps to sustain a flexible, productive, innovative labour market, but is only a positive step if the delivery of the services and engager's behaviour is consistent with the written contract and the intention of the parties.
- Many clients, unwilling to bear the unknown risk of OPW and the potential longtail liability in their accounts, are turning to much more costly, less flexible "outsourced" consultancy solutions and there is evidence of this trend in the public sector.
- There is a risk that engagers and recruitment businesses are entering into inappropriate "outsourced service" contracts, believing them to be outside scope of OPW, but creating a longtail OPW tax risk primarily for the engager who will be the deemed employer in any HMRC assessment for failing to take reasonable care in applying the rules.

7. 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?

- Currently governance over employment rights, compliance and taxation obligations is owned by multiple departments including BEIS, HMRC and

Home Office. Transferring governance over minimum wage to BEIS and concentrating responsibility within a single enforcement body should improve policy, guidance, and enforcement, leading to fairer treatment of the lower paid. However, this will require significant financial commitment from government, and we are concerned that the Employment Bill is not sufficiently prioritised.

- Governance of the taxation legislation applicable to umbrella companies and the recruitment supply chain sits with HMRC – lack of control over the umbrella sector leads to workers being paid via tax avoidance schemes, leading to a personal liability. This is unfairly affecting the lowest paid as those least sophisticated in understanding the structure and focussed on increasing their take home pay. HMRC and BEIS are cooperating far more effectively on these compliance challenges than in the past, with other joint initiatives such as ASCOR's JobsAware. However, APSCo's view is that HMRC have far more enforcement options and evidence at their disposal than they are currently using. Members are frustrated that HMRC are focusing resource on the "low hanging fruit" of OPW compliance across FTSE 250 companies, which could be focused on cleaning up the umbrella company supply chain.

8. 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?

- We, along with many other representative bodies have long fought for more HMRC transparency to mitigate the risk of individuals continuing to fall foul of schemes under investigation. It will be very useful information for engagers, their supply chains (including recruitment companies) and their advisors, if the information is in a searchable, maintained format, which can be assimilated into compliance checks and associated software systems. Workers providing their services through recruitment companies, particularly those who are members of trade associations such as APSCo, will be precluded from providing their services through such promoters as they will be excluded from recruiter's Preferred and Assured Supplier Lists. However, there is not the same extent of supply chain control with direct hiring with the engagers or platform hiring.
- It is difficult for HMRC to directly target workers, particularly the lower paid, without expenditure on social media and search engine advertising, to counter the ready availability of commercial information online promoting such schemes.

One of our insurance Trusted Partner members states: "The power for HMRC to present a winding up petition against companies involved in the promotion of tax avoidance where it is against the public interest should deter all but the most determined minority. The naming and shaming of not only promoters of tax avoidance but also those associated with promoters through control and influence is also welcomed."

15 November 2021