

## Off-Payroll Working: Contractor lifts lid on HS2's non-compliant IR35 practices



One of the country's key infrastructure projects is struggling with severe staff shortages due to the [off-payroll tax in the public sector](#), while many contingent workers, who remain on the project, have been forced into false employment.

Construction contractor James Horabin, who worked a succession of contracts on the Government's High Speed 2 (HS2) project, terminated his contract after the HS2 hierarchy imposed unlawful blanket assessments on its contractors in response to the April 2017 changes.

"HS2 is having major struggles recruiting people," says Horabin. "Many of the individuals HS2 needs are rightfully refusing to work on the project because of the blanket rules imposed. All of a sudden, genuine contractors are being forced into umbrella companies and subject to tax hikes of 30%, with no justification provided. It's no wonder nobody wants to work on HS2."

### HS2 issues contractors IR35 ultimatum

Horabin disclosed to ContractorCalculator an email that HS2 had circulated to its contingent workforce in March 2017 – one month prior to the implementation of the reforms. The message clearly demonstrated the [non-compliant blanket approach](#) which many public authorities are believed to have adopted, yet which HMRC denies is a problem.

The email read: 'HS2 considers that it is likely that the majority of assignments will be within the scope of IR35', before issuing contractors with an ultimatum consisting of two options:

- Work through an umbrella company or agency's PAYE
- Undertake a permanent or fixed-term employment contract with HS2.

Despite HS2's responsibility to take '[reasonable care](#)' and assess its contractors for IR35 on a case-by-case basis, Horabin explains that management made assertions for the entire contingent workforce based on a single legal recommendation:

"HS2 sought a legal opinion from Eversheds solicitors, who suggested that we were all caught by IR35 due to the supposed role that we were fulfilling. Our actual circumstances and working arrangements were completely overlooked. The decision was ridiculous, and took no account of the fact that I run a company, which, as part of its business, provided services to HS2."

### Professional contract review not enough to turn HS2's head

Horabin claims that his working practices, while working on HS2, left him well outside of IR35. This claim was vindicated when he secured a contract review from Qdos Contractor in September 2016, before renewing his HS2 contract for six months. Horabin conclusively passed every aspect of the review, which highlighted that he:

- Had the right to provide a substitute stated in his contract (he had exercised this right previously)
- Had control over the provision of services
- Was able to terminate the contract before completion of services
- Had to correct defective work at his own cost and had business insurance.

Though this had provided the Department for Transport (DfT) with the necessary assurances it needed to treat his engagement as outside of IR35 before the reform, his contract review was dismissed by HS2 following the reforms.

HS2 had informed contractors that it would consider conducting an IR35 assessment via HMRC's Check Employment Status for Tax (CEST) tool for contractors, which could provide strong evidence to suggest that their working arrangements were outside of IR35. Somehow, Horabin's contract review wasn't deemed sufficient.

"HS2 had a copy of my Qdos certificate, which demonstrated beyond doubt that I wasn't caught by IR35, yet didn't see fit to even conduct its own assessment," says Horabin. "By this point, I had already decided to walk and had claimed wrongful termination."

## **HS2 denies non-compliant practices**

ContractorCalculator contacted HS2 for comment on its adoption of the new Off-Payroll tax rules. In a statement provided, a spokesperson maintained that HS2 had taken the necessary measures to provide a fair assessment for each of its contractors:

"The nature of a project like HS2 means that contractors play a valued and important role in developing many varied and specialist aspects of Britain's new high speed rail network. As we move forward we will continue to employ people from across the whole work force including those in self-employment to deliver this crucial infrastructure investment.

"We carefully considered how the changes to IR35 affected self-employed people working on the project alongside our obligations to abide by the legislation. Our decisions made on whether a self-employed contractor could continue to be classified as self-employed followed a rigorous process of guided assessments by contractors' line managers of their actual present and future working practices and relationship with HS2.

"We are confident that we have processes in place to support our workforce but are always looking to learn and improve."

## **30% pay cut for contractors forced into umbrellas**

However, the statement provided by HS2 contrasts sharply with the account provided by Horabin, who recalls a conference call that he, HS2 and other affected contractors attended:

"We reminded HS2 management that they were required to take reasonable care in making their assessments. Incredibly, they denied this, and simply reiterated the legal position that they had sought."

Though roughly 50 contractors were involved in the conference call, the same determination was made for all contractors throughout HS2's supply chain, with recruiters such as Atkins, CH2M and Turner & Townsend all instructed to have their contractors placed on a payroll. As a consequence, all parties had to face the impact of contractor walkouts.

"Some of my colleagues stayed on and worked through umbrella companies," Horabin adds. "I'm still in touch with a project manager who has done so, and I've never heard anybody complain so much about their finances in my life. He managed to negotiate a 15% uplift in his rate, but it hasn't come close to covering the tax hit. Going under an umbrella in the first place resulted in a 30% drop in income for him."

## **'I won't be working in the public sector again'**

Fortunately for Horabin, claiming wrongful termination meant HS2 immediately relinquished his covenants, enabling him to seek work elsewhere straight away: "I was lucky in that I was back contracting within a month after leaving HS2. Other contractors haven't been so fortunate.

"I had to take a cut in my rate, so my company's profitability reduced, but the loss pales into insignificance when you consider the reduction

in pay I would have suffered had I continued working for HS2.

“Unsurprisingly, I’m currently contracting in the private sector. As is the case for many other contractors, the new Off-Payroll tax rules have meant that I won’t consider working in the public sector again.”

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