

Ibec submission to the Joint Oireachtas Committee on Employment Affairs and Social Protection on the issue of false self-employment

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Introduction and context

Ibec thanks the Joint Oireachtas Committee for the opportunity to address the issue of false self-employment. Situations of false self-employment arise where a working relationship is misclassified as a contract for services or commercial agreement when it should - according to well-established tests of common law – be considered a contract of service or a contract of employment. False self-employment can arise in a variety of contexts. It can arise where a commercial agreement between parties develops over time and what started as a genuine case of self-employment has morphed into a relationship more akin to one of employment. It sometimes arises where a *de facto* employer wishes to avoid the rigours of the employment rights legislation. It can also arise where a highly qualified individual whose skills are much sought after in a buoyant jobs market insists on being treated by a would-be employer as self-employed for their own purposes, often for the personal freedom it allows them and for favourable tax treatment. It is important to make one thing clear – it is not always an act perpetrated by business against individual workers, which is the common subtext to discussions on the subject¹.

Ibec opposed to false self-employment

¹ See opening statement of the Assistant Secretary, Department of Employment Affairs and Social Protection to this Committee in November 2019: “False or bogus self-employment as we know arises where an employer wilfully and wrongly treats an employee as a self-employed contractor in order to avoid tax and social insurance contributions and other employment rights which attach to employment”.

For the avoidance of any doubt, Ibec is manifestly opposed to the practice of false self-employment. It provides a competitive advantage to those who would flout the law at the expense of the majority of compliant individuals and businesses who observe existing tax and employment rights legislation. Individuals who are falsely described as self-employed may be at greater risk of exploitation and left vulnerable when the working relationship is ended. However, based on evidence referred to below, the practice of false self-employment is not as widespread a problem as has been suggested before this Committee, and where it does arise, there is an existing legal framework to address it, provided it is invoked.

Identifying the issue under consideration

One of the specific challenges in addressing the issue is in identifying what it is we are measuring when we speak of false self-employment. Upon examination of some of the prior debates on this issue, we note references to “non-standard employment” which can include fixed-term and part-time work, in which circumstances the individual is usually engaged on a contract of employment. It is important that we distinguish false self-employment from various forms of flexible working which nonetheless generally involve a contract of employment. It is unhelpful to conflate different forms of contract of employment in a debate to address a specific, net issue, namely that of false self-employment.

Ibec is concerned that a narrative is developing in relation to self-employment – even genuine self-employment – to suggest that it is somehow an inferior form of work by comparison with a contract of employment. This is a persistent narrative which has the potential to become very damaging to the Irish economy. It is vital for both the business community and for individuals that Ireland has a legislative framework that facilitates and encourages entrepreneurship. It is important that we do not prohibit own account self-employment for all practical purposes. The reality is, despite assertions from some interest groups to the contrary, not everyone wants to be an employee.

Furthermore, depending on the response to the issue under discussion before this Committee, policy makers may inadvertently create a framework which removes –

for all practical purposes - genuine self-employment as an option for individuals operating in Ireland. Blunt, over-simplified legislation with draconian penalties such as have been proposed in the recent past² will cause clients and customers to flee from self-employed service providers, for fear that they will find themselves captured by the proposed new laws. It will damage small, indigenous businesses most, and drive consumers of goods and services towards large, well-established companies, in respect of whom no consumer could be accused of being the “employer”.

Prevalence of false self-employment

Despite assertions to the contrary, the prevalence of false self-employment cannot be as widespread a problem in Ireland as some assert. This is because we know that the number of self-employed in Ireland amounts to 14% of the total working population³. This represents a decrease in those described as self-employed from the 15.3% measure published the previous year⁴. Within that figure, many of those working people will be genuinely self-employed in professional activities such as those engaged in by practising barristers, chartered accountants and medical GPs, and trades such as plumbers, electricians and carpenters. It is also worth noting that the January 2018⁵ joint report from the Department of Finance and Department of Employment Affairs and Social Protection states that this figure is well within the average rate of self-employment in the EU.

It is vital that we reflect on the fact that the scale of the issue cannot be as large as is suggested. It is also vital that we acknowledge that many of those people who form that 14% are willingly and happily self-employed, some of whom took time and trouble to establish businesses on their own account. Some self-employed people will have left positions within companies, where they were retained as employees on contracts of employment, deliberately to avail of the flexibility and autonomy, as well as the opportunity to grow their earnings, that self-employment can provide.

² Previously proposed section 20 amendment to the then Employment (Miscellaneous Provisions) Bill 2017

³ QNHS Q4 2018 www.CSO.ie

⁴ QNHS Q1 2017

⁵ “The use of intermediary-type structures and self-employment arrangements: Implications for Social Insurance and Tax Revenues” January 2018, Department of Finance, Department of Employment Rights and Social Affairs

It is also important to properly assess the figures referred to above, as within that group, a significant proportion are self-employed but also employers in their own right. In fact, the number of individual self-employed people - described in the 2018 report as “own account” workers, is smaller, at 10.8% of the total workforce in 2017⁶. This has now dropped further to 9.8% in late 2018. Among this number will be included those referred to above as deliberately and willingly self-employed.

Existing legal framework

Ibec notes the call for increased regulation of the employment relationship – a desire to adopt a short and simple statutory definition of what constitutes a contract of employment or a brief definition of “employee”.

Ibec acknowledges that it is important that there is a legal framework in place to firstly, allow us to correctly identify false self-employment where it arises and secondly to provide a remedy or a sanction to deter people from engaging in this practice. As we will outline below, there is already such a framework in place:

Common law tests

There are several common law tests which are applied by the courts on a case-by-case basis to establish the correct classification of a particular working relationship. These include the following:

- The control test: the extent to which an individual is under the control of another person;
- Enterprise test: whether the person is performing services as a business on his/her own behalf with an opportunity to make a profit;
- Mutuality of obligation test: the extent to which there is an obligation on the parties to offer and accept work;
- Integration test: the extent to which the individual is integrated into the workforce of an organisation.

⁶ Page 14 of the joint report

All employment rights legislation provides an opportunity for an incorrectly designated self-employed person to challenge their status and have it corrected as a preliminary issue in proceedings. For example, if someone believes that they are misdescribed as self-employed, they can issue proceedings under the Organisation of Working Time Act 1997 through the WRC or on appeal to the Labour Court and assert their rights as an employee under that legislation. The issue of their employment status is likely to be addressed at the outset of the proceedings, but both the adjudication officers of the WRC and members of the Labour Court have jurisdiction to apply the legal tests referred to above and issue a legally binding decision that the individual is an employee, if the evidence supports that conclusion.

Anti-penalisation provisions

It has been suggested that this remedy is insufficient in some cases, as there exists a fear of possible retribution from the employer in certain instances. By way of response to this, it is important to note that there exist powerful anti-penalisation provisions within employment rights legislation, including the Organisation of Working Time Act referred to above, which provide remedies where such instances arise. These remedies include the employer being required to take a particular course of action and/or pay up to two years' remuneration. It is also possible, in the case of penalisation in the form of termination of employment, to invoke the Unfair Dismissals Acts 1977 to 2015 which are available to individuals who assert that they have been dismissed by reason of their participation in civil proceedings. The usual time limit of one year's service does not apply in such cases and the remedies available to the complainant include re-instatement in their role.

Ibec respectfully submits that there is no higher protection or remedy that can be conferred over and above the remedies already on the statute books. Therefore, calls for additional regulation of the contract of employment are misplaced. This Committee will have heard the submissions made by Professor Michael Doherty

of NUI Maynooth last month⁷ where he stated that the default status of an individual before the WRC is almost always that of employee. Contrary to the view often promoted as to how employment rights legislation is enforced, that default position has also been the experience of Ibec before employment rights bodies.

SCOPE

The above “working time” example is but one of a range of scenarios in which an employee can assert their employment status, but they are not confined to this route alone for the correct identification of their status. It is also open to them to make an application to the SCOPE section of the Department of Employment Affairs and Social Protection and have the insurability of their employment for social welfare purposes determined by a deciding officer.

Deciding officers rely on the same common law tests outlined above when determining an individual’s employment status. At no point in time has any stakeholder advanced an argument that there was a specific element missing from the common law tests which prevented decision makers from reaching a decision on the status of an individual or caused them to reach an incorrect conclusion.

As this Committee has heard from the Assistant Secretary from the Department of Employment Affairs and Social Protection, it is a potential criminal offence for an employer to incorrectly classify an employee as self-employed, or to aid or abet an individual in misrepresenting their employment status under sections 251 and 252 of the Social Welfare Consolidation Act 2005. Penalties on conviction include a fine and/or a possible custodial sentence. The Assistant Secretary’s statement to this Committee last November outlined instances of joint inspections carried out by her Department in conjunction with those from the Revenue Commissioners.

Ibec understands that the Minister for Employment Affairs and Social Protection intends to establish a stand-alone body with enhanced resources to investigate

⁷ See Committee debate 19th February 2019

claims of false self-employment more efficiently. Initiatives such as these are likely to be of assistance in reducing and ultimately eradicating false self-employment where it arises. As previous submissions to this Committee have noted, the consistency of approach will be critical to ensuring the success of this measure. Ibec notes the progress of the Protection of Employment (Measures to Counter False Self-Employment) Bill 2018, a Private Members' Bill which is now at Committee stage in the Seanad. It is vital that any legislation proposing to codify existing legal tests on employment status properly reflects the common law tests outlined above which take into account the nuances which can sometimes be associated with determining whether a contract is one of employment.

The current framework

The common law tests referred to above have evolved over time, and adjudicators and judges will sometimes remark that identifying whether someone should be considered an employee can be a nuanced exercise. The complexity associated with identifying a contract of employment in some cases appears to be a source of frustration to some, who are eager to adopt a short and unambiguous definition of what constitutes an employee. The difficulty with adopting such an approach is that it risks capturing a range of activities which neither party to the contract ever envisaged to be an employment relationship. Throughout the discussion on false self-employment, no one has suggested a specific proposed change to the current legal framework that would not have a significant distorting impact on the Irish economy. Such changes may result in people carrying out work piecemeal for private individuals, such as window cleaners, sole practitioner professionals and others being considered the employees of their customers. This may arise even in circumstances where the customers are themselves full-time employees of other organisations. We need to consider very carefully the implications of changing the basic components of an employment relationship.

*Revenue Commissioners' Code of Practice*⁸

As part of their role in the collection of taxes and duties, the office of the Revenue Commissioner is motivated to identify instances of false self-employment. However, in the joint report on the use of intermediary type structures referred to above the Department of Finance noted that there is no evidence that there has been any significant change in the level of self-employment and temporary employment in the economy in recent years. From the report, it is clear that even during the recession of 2008 to 2012 the share of employment that was accounted for by self-employment was relatively stable.

They noted that the overall share of “own account” self-employment was at the time of the report at a relatively low level and in fact lower than it was in 1999.⁹ This is contrary to the narrative that self-employment is rapidly increasing, due to growth in the so-called “gig” economy. Own account self-employment fell from 12.6% to 10.5% between 1999 and 2007, increased again to 12.4% during the recession before falling back again to 10.8% at the start of 2017. Since then that figure has fallen further to 9.8%¹⁰.

The report does not offer specific reasons for this increase in own account self-employment during the recession. However, it is possible or even likely that some individuals who lost contracts of employment through redundancy in the course of the recession were in a position to take on some work on the basis of a commercial agreement. In other words, in an economy where very few employers were hiring across a range of sectors, those who had skills that lent themselves to doing work on a self-employment basis did so, perhaps rather than emigrate or endure the wasting of their skills and experience following the termination of their employment. It likely meant also that when the economy recovered, the individuals in question were in a better position to access new contracts of employment, as they could demonstrate recent work experience in their chosen field of work.

⁸ Code of Practice for Determining Employment or Self-employment Status of Individuals, 2007

⁹ “The use of intermediary-type structures and self-employment arrangements: Implications for Social Insurance and Tax Revenues” Page 14

¹⁰ QNHS Q4 2018

Ibec respectfully submits that it is a positive thing that Ireland's employment law facilitates individuals adapting to changing economic circumstances in this way.

The code of practice issued by the office of the Revenue Commissioner and last updated in 2007 encapsulates the various common law tests referred to above. It provides a user-friendly guide to what constitutes a contract of employment for the purposes of Irish law. However, in their January 2018 report, the Department of Finance acknowledges that commercial relationships can vary over time, and what might have started as a bona fide contract for services may evolve into something more akin to an employment relationship.¹¹ Those who examine business relationships on a regular basis can see the wide spectrum of arrangements that arise, and that it is not simply a question of exploitation of *de facto* contracts of employment. The code is currently under review by an inter-departmental group.

Tax reform

It has been asserted by some that reform of the taxation system might reduce or remove the incentive for individuals to be classified as self-employed. While the effects of employment status on tax and PRSI due are evident from the 2017 annual report from the Office of the Comptroller and Auditor General, Ibec believes that there is an absence of specific evidence as to where instances of false self-employment are arising and why they arise. There is no hard data to support the contention that the motivation to become self-employed is mainly tax avoidance.

While no doubt, within the cohort of contracts that are misclassified there are those who wish to benefit from the favourable tax treatment, Ibec believes that this is just one of a range of possible incentives. Ibec believes that in other cases, incentives such as the freedom to set one's own working hours or a desire on the part of some businesses to avoid the legal responsibilities otherwise associated with being an employer are also possible incentives. Before Ibec could endorse tax reform that might operate as a disincentive to utilise the services of someone self-employed in favour of a larger corporation, we would need to be sure that the move was evidence based and would in fact operate to reduce the number of misclassified contracts.

¹¹ Page 8

Culture

With regard to remedies available to individuals who believe they have been misclassified as self-employed, it has been suggested that a culture of fear of retribution prevents individuals from invoking the statutory rights available to them. Ibec believes that any such fears are largely misplaced, and where such situations arise, there are legal remedies in place to address them as outlined above.

An extensive media awareness campaign was organised by the Department of Employment Affairs and Social Protection in 2018. The Assistant Secretary of that Department shared the outcome of the campaign with this Committee and noted that if individuals are reluctant to come forward for any reason, inspection is an alternative method of identifying and correcting misclassification of employment.

Ibec agrees with this approach and is happy to support the cooperation of the business community in facilitating such inspections. Ibec notes that negative inferences were drawn by some deputies who participated in the November 2018 meeting of this Committee, suggesting that a website that attracted thousands of contacts should have resulted in more outcomes from the SCOPE section. The low rate of progression from accessing the website to formal complaint to the SCOPE section should not automatically be ascribed to a negative culture associated with the making of such complaints of which there is no hard evidence. In some cases it may well be that those who sought clarification as to the structure of a true contract of employment satisfied themselves that they were in fact correctly classified as self-employed.

Proposed policy response

Ibec notes, in addition to taxation reform referred to above, some of the other proposed policy changes to address the issue of misclassification of status. Some have proposed introducing a third category of “worker” which would attract some but not all of the statutory entitlements and protections available to employees. Ibec notes the view of Professor Michael Doherty that the introduction of this new status

risks introducing more complexity and litigation – something that Ibec believes would not be of advantage to any of the stakeholders in this issue.

Ibec also notes suggestions to introduce “chain liability” where the legal responsibility for incorrect application of employment law may be visited on a client or customer in certain circumstances. Ibec’s concern is that such measures allow non-compliant individuals and businesses to escape legal responsibility which is visited instead on compliant organisations. Ibec is also aware of concerns that such measures risk making it more difficult for a complainant to identify who in fact is responsible for the vindication of their employment rights. We cannot support such a proposal.

At this point in time, the response to the issue of false self-employment where it arises has to be stronger enforcement of existing laws and sanctions/remedies. Ibec does not believe that a case has been made to change in the law in any way which would reduce the number of falsely self-employed individuals. Even if fear of retribution is dissuading people from invoking existing laws, more severe sanctions than those that already exist isn’t necessarily going to fix that issue, to the extent that it exists.

Conclusion and next steps

Ibec notes the concerns expressed about practices of false self-employment arising and that in some instances it is localised in specific sectors. We are of the view that the existing legal framework is appropriate and robust enough to address any such instances. The only question which may arise relates to inspection and enforcement. Rather than propose a wholesale shift in the determining factors of the contract of employment, Ibec suggests that a better approach would be to

- continue with a balanced and impartial awareness campaign on what constitutes a contract of employment
- ensure existing inspection mechanisms and facilities are adequately resourced
- support the genuinely self-employed by reducing and removing the disadvantages of self-employment through access to maternity benefit, illness

benefit and jobseekers' allowance (most of which are already in train or actioned)

Ireland's economic success is in part based on how we regulate our labour market. This will be a key factor in determining our ability to attract and retain jobs in the economy. Businesses need to be able to compete successfully in international markets. A balanced relationship between the employer and employees is essential, as is an acknowledged role for those who are self-employed.

Our focus must be on providing well designed and stable labour market regulation that allows for flexibility – enabling employers to respond to changing business demands, while also creating opportunities to build decent work for those wishing to vary their levels of participation in the workforce.

In a globally competitive economic environment, we need labour market policies that support the development of workplaces that are driven by dynamic science and technology. We need flexibility in our working practices, flexibility to engage, whether directly or collectively, and we need to be able to attract the talent needed to sustain strong economic growth.

None of this should come at the expense of employment rights. But equally, before we regulate an already heavily regulated labour market further, we need at least to come from a position of being able to identify the nature and scale of the challenge we are trying to fix.

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