

Tithe an Oireachtais
Houses of the Oireachtas

# An Coiste um Choimirce Shóisialach, Forbairt Pobail agus Tuaithe agus na hOileáin

## Tuarascáil – Scrúdú ar Fhéinfhostaíocht Bhréagach

Meitheamh 2021

# Joint Committee on Social Protection, Community and Rural Development, and the Islands

## Report – Examination of Bogus Self-Employment

June 2021

33/SPCRDI/02/2021

**TITHE AN OIREACHTAIS**

**AN COMHCHOISTE UM CHOIMIRCE SHÓISIALACH, FORBAIRT POBAIL TUAITHE AGUS NA HOILEÁIN**

**Tuarascáil**

# Scrúdú ar Fhéinfhostaíocht Bhréagach

**Arna foilsiú Meitheamh 2021**

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**HOUSES OF THE OIREACHTAS**

**JOINT COMMITTEE ON SOCIAL PROTECTION, COMMUNITY AND RURAL DEVELOPMENT AND THE ISLANDS**

**Report**

# Examination of Bogus Self-Employment

**Published June 2021**

**33/SPCRDI/004**

# Contents

## CATHAOIRLEACH'S FOREWORD

The Joint Committee on Social Protection, Community and Rural Development and the Islands have undertaken an examination of the issue of Bogus Self-Employment.

This was an issue that was also considered by the Joint Committee on Employment Affairs and Social Protection in the last Dáil/Seanad.

Bogus Self-Employment, as the Joint Committee understands it, refers to situations where a worker, who is acting as an employee, is misclassified as self-employed largely for PRSI purposes.

This can have long-term effects on those workers' contributions records and ultimately their ability to access certain social protections. As such, the Joint Committee felt it was important to complete the work initiated by the previous Committee to ensure that this important issue was addressed.

I would like to thank all the witnesses and stakeholders who provided information to both the Joint Committee and the previous Committee, either through oral hearings or written submissions. I would also like to thank Deputy Joan Collins T.D. who acted as our rapporteur on this report for her hard work and dedication to the topic, and the staff in the Committee Secretariat for their assistance.

The Joint Committee has made 13 recommendations throughout the body of the report and is committed to ensuring these recommendations are implemented to create positive change for those effected by the practice of Bogus Self-Employment.

The Joint Committee will continue to engage with both the Minister, and the Department of Social Protection, throughout our Work Programme, and it is my intention that we will seek regular updates from the Department on the implementation of the recommendations set out in this report. The Joint Committee will also welcome and consider further submissions from interested parties following this publication.

**Denis Naughten T.D.**

**Cathaoirleach**
**Joint Committee on Social Protection, Community and Rural Development and the Islands**
**16 June 2021**

## RECOMMENDATIONS OF THE COMMITTEE

The Committee has made the following recommendations: -

1. The Committee recommends that the *Code of Practice for determining employment or self-employment status of individuals* and the use of intermediary arrangements, which includes personal service companies and managed service companies, is updated and placed on a statutory footing by the end of 2021 as stated by the Department of Social Protection;

2. The Committee recommends that the Department of Social Protection should run an advertisement campaign informing the public that they can apply to have their employment status redetermined if they are aware that they were impacted by the use of 'test cases' previously;

3. The Committee recommends that the Department of Social Protection, in conjunction with the relevant stakeholders, examines whether the registration of individuals as self-employed in the first instance requires greater documentary evidence to be provided by the main contractor or employer;

4. The Committee recommends that a dedicated and appropriately resourced employment status unit is established in the Workplace Relations Commission to examine and provide determinations on employment status cases regardless of whether they relate to social insurance, employment rights or tax obligations;

5. The Committee recommends that the relevant Departments, in conjunction with the Office of the Revenue Commissioners, develops a target of inspections to be carried out annually to ensure consistent levels of inspection and compliance. Targets should be developed for each unit that carries out employment investigations;

6. The Committee recommends that the Department of Social Protection, in conjunction with the Central Statistics Office, develops a framework for collecting data on areas of employment where there is a potential or known risk of bogus self-employment in the medium to long-term;

7. The Committee recommends that all applicants to the relevant body for classification of employment status receive a decision within six months;

8. The Committee recommends that a standard definition of the word 'employee' and 'worker' is developed and applied to all pieces of employment legislation;

**9.** The Committee recommends that in its work to update the *Code of Practice for Determining Self-Employment Status*, it ensures that the next iteration of the *Code of Practice* acknowledges, and can be applied to, workers engaged in platform working and the gig economy. The Committee further recommends that the Department should engage with the relevant stakeholders in developing this update;

**10.** If the Department finds that current employment law or the *Code of Practice* cannot address the specific employment circumstances of platform workers, the Committee recommends that the Department identify other measures through which employment legislation can be applied to platform workers;

**11.** The Committee recommends that the Department of Social Protection, in conjunction with the Department of Enterprise, Trade and Employment, develops anti-victimisation and blacklisting legislation with the aim of publishing such legislation within six months of receipt of this report;

**12.** The Committee recommends that the period for employers to pay backdated PRSI contributions that they previously avoided is increased from six months to six years. That would mean that the *Workplace Relations Act 2015* be amended to allow adjudication officers and the Labour Court consider breaches of employment enactments for up to 6 years rather than the generally 6 months; and

**13.** The Committee recommends that the Department of Social Protection responds to the recommendations in this report in the first instance and keeps the Committee appraised of progress on an annual basis thereafter.

## INTRODUCTION

During the course of the 32nd Dáil and 25th Seanad the then Joint Committee on Employment Affairs and Social Protection met seven times with a number of stakeholders to examine the issue of bogus self-employment. Due to the level of work undertaken during this time, and the importance of the topic, the Joint Committee on Social Protection, Community and Rural Development and the Islands determined that it was important to complete that work using the information provided to the former Joint Committee on Employment Affairs and Social Protection and additional information provided to the current Committee.

Bogus self-employment refers to situations where a worker, who is acting as an employee, is misclassified as self-employed for PRSI purposes. Employees are classified as Class A workers for PRSI purposes. This requires their employer to pay a PRSI contribution on their behalf which then applies to their contributions record. Self-employed people are classified as Class S workers and do not receive employer contributions to their PRSI record. Both Class A and Class S workers' pay a 4% PRSI contribution from their income. Workers who are misclassified as self-employed rather than as employees can experience difficulties accessing certain social protections due to the lack of PRSI contributions paid on their behalf by their employer. The Department of Social Protection informed the Committee that self-employed (Class S) contributors are not able to receive the following: Illness Benefit, Carer's Benefit, Health and Safety Benefit and Occupational Injuries Benefits. Therefore, as the Committee understands it, workers who are misclassified as self-employed are unable to obtain these benefits also. Other consequences workers experience when they are misclassified as self-employed is a lack of access to employment rights, union participation and collective bargaining. These issues were consistently highlighted by the workers' representative groups that provided information to the Committee.

Workers can be misclassified as self-employed for a number of reasons. However, as the Committee understands it, bogus self-employment refers to when an employer deliberately misclassifies a worker as self-employed to avoid their employer obligations under both the tax regime and employment law. The extent of bogus self-employment in Ireland is largely unknown, however, it is estimated that approximately 12% of Ireland's workforce are classified as self-employed with no employees. However, this is not an indication that these workers have been misclassified. Similarly, the cost of bogus self-employment, through avoided employer PRSI contributions is also unknown. However, a submission by the Irish Congress of Trade Unions (ICTU) in 2016 estimated that it has cost the Exchequer approximately €600 million in recent years[1]. It is also acknowledged that certain industries experience higher instances of self-employment and therefore, it is assumed, potentially higher instances of bogus self-employment.

[1] submission_on_bogus_self_employment_march_2016.pdf (ictu.ie)

Baring these issues in mind the Committee has focussed on three key areas regarding the process and legal position of bogus self-employment. These are: -

1. Scope section determinations and the remit of the section,
2. The current legal position of employees in Irish employment law, and
3. Anti-Victimisation and Current Deterrents.

The Committee examines these issues in more detail in the body of the report and has made 13 recommendations it believes can assist in reducing instances of bogus self-employment going forward.

## SCOPE SECTION DETERMINATIONS AND THE REMIT OF THE SCOPE SECTION

Workers who believe that they have been misclassified as self-employed can seek a determination on their employment status from the Scope section in the Department of Social Protection (the Department). The Department informed the Committee that determinations are made based on the facts of the individual case with reference to social welfare legislation and the *Code of Practice for determining employment or self-employment status of individuals (Code of Practice)*. In 2019 the Scope section received 60 requests to determine a worker's employment status. If a worker and/or their employer disagrees with the determination reached by the Scope section the decision can be appealed through the Social Welfare Appeals Office (SWAO). In 2019 the SWAO received 29 such appeals. If a worker or the employer is not satisfied with the outcome of the appeal, the decision of the SWAO can be appealed to the High Court.

In 2019 the previous Committee was informed that the *Code of Practice* was due to reviewed and updated. The Department also stated that the *Code of Practice* was due to be put on statutory footing. In 2021 the Department provided the Committee with an update stating that it is continuing the update and revision of the *Code of Practice* and that it expects that it will be published and placed on statutory footing in late 2021. The Committee is of the opinion that the time to place the revised *Code of Practice* on a statutory footing by the end of 2021 must be achieved.

**Recommendation:**

1. The Committee recommends that the *Code of Practice for determining employment or self-employment status of individuals* and the use of intermediary arrangements, which includes personal service companies and managed service companies, is updated and placed on a statutory footing by the end of 2021 as stated by the Department of Social Protection.

The Committee was made aware of concerns in relation to so-called 'test cases' potentially being used to determine an individual's employment status by either the Scope section or the Social Welfare Appeals Office (SWAO). While the Department of Social Protection and the SWAO stated that they do not use such test cases, the Committee is firmly of the opinion that all cases for determination must be treated solely on the merits of each individual case. The Committee also remains concerned that 'test cases' that may have been used previously are still affecting workers that were included in them. The Committee is of the opinion that the Department should take action to resolve the issue of past legal decisions informing subsequent scope determinations and the impacts they continue to have.

The committee is of the view that the various tests/diagnostic tools that have emerged from case law of the superior courts in conjunction with the updated code of practice and the actual circumstances of an individual should be central to deciding a person's employment status.

**Recommendation:**

2. The Committee recommends that the Department of Social Protection runs an advertisement campaign informing the public that they can apply to have their employment status redetermined if they are aware that they were impacted by the use of 'test cases' previously.

The Committee also heard from a number of stakeholders that there may be benefits to changing the registration of workers as either employees or self-employed/contractors in the first instance. Currently, individuals who are registered as self-employed by their employers are responsible for proving that they are in fact working as employees. The Committee was informed by a number of witnesses that they would be in favour of alternating this practice to require the employer to provide proof that those they are engaging as sub-contractors are not acting in an employee capacity. While the Committee acknowledges that this would be beneficial to those who are wrongly misclassified as self-employed, it is of the opinion that this type of change warrants further scrutiny.

**Recommendation:**

3. The Committee recommends that the Department of Social Protection, in conjunction with the relevant stakeholders, examines whether the registration of individuals as self-employed in the first instance requires greater documentary evidence to be provided by the main contractor or employer.

The Committee was informed that the Workplace Relations Commission may preliminarily determine employment status if a worker is seeking a remedy under employment legislation. The Department also informed the Committee that the WRC has responsibility for promoting and encouraging compliance with employment legislation. The Committee heard the opinion from a number of organisations that the WRC could be a better way to determine whether a worker has been correctly classified as self-employed as the WRC examines and determines issues surrounding workers' rights. The WRC also has the power to provide adjudication services for disputes in workplace relations. During discussions the Committee heard from employee representative groups that had taken cases to the WRC on behalf of workers who were misclassified as self-employed while working for sub-

contractors on State projects. The *Public Procurement Guidelines for Goods and Services*[2] state that Contracting Authorities have the discretion to exclude candidates from competing in public procurement competitions if they can demonstrate violations of labour law obligations. The Committee is of the opinion that WRC adjudications could be used to demonstrate violations of labour law and preclude such companies from the public procurement process in the future.

The Department also informed the Committee that the Department of Social Protection, the Office of the Revenue Commissioners (Revenue) and the Department of Enterprise, Trade and Employment/WRC are already in the process of establishing an interdepartmental group to assess how employment status determination could be streamlined between the three bodies. The Committee acknowledges that any amalgamation of the individual functions currently carried out by each organisation needs to be carefully considered. However, the Committee is of the opinion that having a dedicated unit in the WRC to manage and oversee the classification of workers and employees would be the most optimal solution.

**Recommendation:**

4. The Committee recommends that a dedicated and appropriately resourced employment status unit is established in the Workplace Relations Commission to examine and provide determinations on employment status cases regardless of whether they relate to social insurance, employment rights or tax obligations.

The Committee was also informed that the Department undertakes both random and targeted inspections. It also works with the Joint Investigations Unit (JIU) in Revenue, to ensure that workers are correctly classified for PRSI purposes. Targeted inspections appear to achieve substantial results. The Committee was informed that a JIU inspection of the construction industry in 2018 resulted in 500 workers being reclassified as employees and €62 million being recovered for the Exchequer.

The Committee was also informed that in quarter four 2019 the Department established the Employment Status Investigations Unit (ESIU) to focus on detecting and investigating false self-employment. The Department explained that the ESIU proactively targets both employers and specific sectors to determine PRSI compliance. Areas of employment where the ESIU have carried out inspections include the construction industry, meat processing, retail, fitness and the language training sector. The Minister for Social Protection stated in the Dáil, in response to a Parliamentary Question (PQ), that since it began its operations the ESIU has recovered approximately €279,000 in PRSI savings. The Department separately explained that the ESIU is just one aspect of its PRSI

[2] Office of Government Procurement – Public Procurement Guidelines for Goods and Services (ogp.gov.ie)

compliance activities. The total amount recovered due to employer inspections more broadly in 2019 was €5.3 million and in 2020 savings of over €1 million were made.

The Committee is also of the opinion that due to the level of information available to Revenue that they are best placed to lead investigations into industries and companies that are at high-risk of engaging in bogus self-employment and that this should be taken into consideration when targets are developed.

**Recommendation:**

5. The Committee recommends that the relevant Departments, in conjunction with the Office of the Revenue Commissioners, develops a target of inspections to be carried out annually to ensure consistent levels of inspection and compliance. Targets should be developed for each unit that carries out employment investigations.

The Committee is of the opinion that in recognition that the extent of bogus self-employment in Ireland is largely unknown, further work should be done by the Department of Social Protection, in collaboration with the Central Statistics Office and other relevant bodies to establish more structured and consistent data collection on the levels, trends and patterns related to bogus self-employment and to properly identify the scale and scope of the kinds of work in Ireland that engages in bogus self-employment. The Committee is of the opinion that this work would further support more targeted inspections and facilitate a feedback loop of information between inspections and research and data collection.

**Recommendation:**

6. The Committee recommends that the Department of Social Protection, in conjunction with the Central Statistics Office, develops a framework for collecting data on areas of employment where there is a potential or known risk of bogus self-employment in the medium to long-term.

The Committee was informed by some witnesses of Scope cases that can take up to four or five years to be resolved. The Committee is of the opinion that such timeframes are unacceptable.

**Recommendation:**

7. The Committee recommends that all applications to the relevant body for classification of employment status receive a decision within six months.

## CURRENT EMPLOYMENT LAW

The Committee was informed that Ireland has a substantial amount of employment legislation that is designed to protect both workers and employers. However, the Committee was informed that the words 'employee' and 'worker' are not consistently applied throughout employment law, leading to different interpretations of these words in different pieces of legislation. The Committee notes that Ireland is not unique in having no singular definition of these words. However, while the Committee acknowledges that using consistent definitions of the words 'employee' and 'worker' throughout employment law would not eliminate bogus self-employment, it is of the opinion that it would allow for consistent applications of each piece of employment legislation.

**Recommendation:**

8. The Committee recommends that standard definitions of the words 'employee' and 'worker' are developed and applied to all pieces of employment legislation.

The Committee was also informed that current employment law is based on 'employees' and 'employers'. The Committee is concerned that this fails to capture the position of platform workers or workers involved in the gig economy who often do not have a well-defined employment status. As the Committee understands it, and for the purpose of this report, platform working refers to the practice where an individual who is assumed to be self-employed fulfils a contract of service that they obtain through a digital third-party platform. The absence of a defined employment status for these workers has implications for social insurance coverage as well as employment protection and income security (for example, minimum wage, sick pay, predictable hours). The Committee wishes to express its stance that anyone engaged in self-employment, through platform working, the gig economy or in other circumstances must be entitled to minimum payments based on both the Joint Labour and Minimum Wage Agreements. Given the precarious nature under which platform and gig economy workers currently work, the Committee is of the opinion that these workers must not be excluded or left out of employment rights and legislation and that the law must be robust enough to capture this group of workers. The Committee is also of the opinion that the *Code of Practice* must recognise and be

applicable to these workers as well. The Committee acknowledges and welcomes the information provided by the Department that the review of the *Code of Practice* was partly undertaken to ensure that issues surrounding platform working and the gig economy were addressed.

**Recommendations:**

9. The Committee recommends that in its work to update the *Code of Practice for Determining Self-Employment Status*, it ensures that the next iteration of the *Code of Practice* acknowledges, and can be applied to, workers engaged in platform working and the gig economy. The Committee further recommends that the Department should engage with the relevant stakeholders in developing this update;

10. If the Department finds that current employment law or the *Code of Practice* cannot address the specific employment circumstances of platform workers, the Committee recommends that the Department identify other measures through which employment legislation can be applied to platform workers.

## ANTI-VICTIMISATION AND CURRENT DETERRENTS

The Committee recognises that the number of applications to the Scope section for a determination of employment status remains low, particularly when compared to the estimates of how many workers misclassification potentially effects. The Committee heard from various employee representatives and groups that many workers fear engaging with the Scope section for fear that they will be 'blacklisted' and denied work in their respective industries in the future. The Department informed the Committee in 2019 that anti-victimisation would form a key part of any future employment legislation and that it was working with the Office of the Attorney General to develop this legislation. In April 2021 the Department informed the Committee that it is consulting with the Department of Enterprise, Trade and Employment on the development of anti-victimisation provisions for workers who wish to query their employment status and that the availability of an appropriate legislative vehicle will be an important factor in the publication date of such legislation. However, as this legislation was being explored as early as 2019, the Committee is of the opinion that it must remain a priority.

**Recommendation:**

11. The Committee recommends that the Department of Social Protection, in conjunction with the Department of Enterprise, Trade and Employment, develops anti-victimisation and blacklisting legislation with the aim of publishing such legislation within six months of receipt of this report.

The Committee also remains concerned that current deterrents are not strong enough to stop prevent employers from intentionally misclassifying workers as self-employed. The Committee acknowledges that if a worker is reclassified as an employee that their employer is liable to pay the backdated PRSI contributions that they previously avoided. These are then added to the employee's contribution record. The Committee notes that under the *Workplace Relations Act 2015*[3] that employer's found to have wrongly classified someone as self-employed are liable to backdate the PRSI contributions they avoided for a period of six months. The Committee is of the opinion that avoided PRSI contributions should be backdated by a period of six years as this would act as a stronger deterrent.

**Recommendation:**

12. The Committee recommends that the period for employers to pay backdated PRSI contributions that they previously avoided is increased from six months to six years. That would mean that the *Workplace Relations Act 2015* be amended to allow adjudication officers and the Labour Court consider breaches of employment enactments for up to 6 years rather than the generally 6 months.

The Committee is of the opinion that the above recommendations would act as deterrents to employers misclassifying individuals as self-employed. However, the Committee also acknowledges that these changes would not necessarily make it easier for an individual to request an employment status classification from the scope section, especially without personal support. The Committee is of the opinion the opinion that that workers can best progress their right under employment and social welfare legislation by exercising their constitutional right to become a member of a trade union.

[3] Workplace Relations Act 2015

## Appendix 1 Committee Membership

Deputy Jackie Cahill – Fianna Fáil

Deputy Joe Carey - Fine Gael

Deputy Marc Ó Cathasaigh – Green Party

Deputy Joan Collins - Independent 4 Change

Deputy Éamon Ó Cuív – Fianna Fáil

Deputy Paul Donnelly – Sinn Féin

Deputy Charles Flanagan – Fine Gael

Deputy Claire Kerrane – Sinn Féin

Deputy Denis Naughten – Independent – Cathaoirleach

Senator Paddy Burke – Fine Gael

Senator Róisín Garvey – Green Party

Senator Paul Gavan – Sinn Fein

Senator Eugene Murphy – Fianna Fáil

Senator Mark Wall – Labour

## Appendix 2 Committee Orders of Reference

**94.** (1) The Dáil may appoint a Select Committee to consider and, if so permitted, to take evidence upon any Bill, Estimate or matter, and to report its opinion for the information and assistance of the Dáil. Such motion shall specifically state the orders of reference of the Committee, define the powers devolved upon it, fix the number of members to serve on it, state the quorum, and may appoint a date upon which the Committee shall report back to the Dáil.

(2) It shall be an instruction to each Select Committee that—

*(a)* it may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders;

*(b)* such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil;

*(c)* it shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Order 125(1) [1]; and

*(d)* it shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

(i) a member of the Government or a Minister of State, or

(ii) the principal office-holder of a State body within the responsibility of a Government Department or

(iii) the principal office-holder of a non-State body which is partly funded by the State,

Provided that the Committee may appeal any such request made to the Ceann Comhairle, whose decision shall be final.

(3) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice to the Business Committee by a Chairman of one of the Select Committees concerned, waives this instruction.

**Scope and Context of Activities of Select Committees**

**70.** (1) The Seanad may appoint a Select Committee to consider any Bill or matter and to report its opinion for the information and assistance of the Seanad and, in the case of a Bill, whether or not it has amended the Bill. Such motion shall specifically state the orders of reference of the Committee, define the powers devolved upon it, fix the number of members to serve on it, state the quorum thereof, and may appoint a date upon which the Committee shall report back to the Seanad.

(2) It shall be an instruction to each Select Committee that—

*(a)* it may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders;

*(b)* such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Seanad;

*(c)* it shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Order 108 (1) [1]; and

*(d)* it shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

(i) a member of the Government or a Minister of State, or

(ii) the principal office-holder of a State body within the responsibility of a Government Department, or

(iii) the principal office-holder of a non-State body which is partly funded by the State,

provided that the Committee may appeal any such request made to the Cathaoirleach, whose decision shall be final.

## Functions of Departmental Select Committees (DSO 95 and SSO 71)

**95.** (1) The Dáil may appoint a Departmental Select Committee to consider and, unless otherwise provided for in these Standing Orders or by order, to report to the Dáil on any matter relating to—

*(a)* legislation, policy, governance, expenditure and administration of—

(i) a Government Department, and

(ii) State bodies within the responsibility of such Department, and

*(b)* the performance of a non-State body in relation to an agreement for the provision of services that it has entered into with any such Government Department or State body.

(2) A Select Committee appointed pursuant to this Standing Order shall also consider such other matters which—

*(a)* stand referred to the Committee by virtue of these Standing Orders or statute law, or

*(b)* shall be referred to the Committee by order of the Dáil.

(3) The principal purpose of Committee consideration of matters of policy, governance, expenditure and administration under paragraph (1) shall be—

*(a)* for the accountability of the relevant Minister or Minister of State, and

*(b)* to assess the performance of the relevant Government Department or of a State body within the responsibility of the relevant Department, in delivering public services while achieving intended outcomes, including value for money.

(4) A Select Committee appointed pursuant to this Standing Order shall not consider any matter relating to accounts audited by, or reports of, the Comptroller and Auditor General unless the Committee of Public Accounts—

*(a)* consents to such consideration, or

*(b)* has reported on such accounts or reports.

(5) A Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann to be and act as a Joint Committee for the purposes of paragraph (1) and such other purposes as may be specified in these Standing Orders or by order of the Dáil: provided that the Joint Committee shall not consider—

*(a)* the Committee Stage of a Bill,

*(b)* Estimates for Public Services, or

*(c)* a proposal contained in a motion for the approval of an international agreement involving a charge upon public funds referred to the Committee by order of the Dáil.

(6) Any report that the Joint Committee proposes to make shall, on adoption by the Joint Committee, be made to both Houses of the Oireachtas.

(7) The Chairman of the Select Committee appointed pursuant to this Standing Order shall also be Chairman of the Joint Committee.

(8) Where a Select Committee proposes to consider—

*(a)* EU draft legislative acts standing referred to the Select Committee under Standing Order 133, including the compliance of such acts with the principle of subsidiarity,

*(b)* other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,

*(c)* non-legislative documents published by any EU institution in relation to EU policy matters, or

*(d)* matters listed for consideration on the agenda for meetings of the relevant Council (of Ministers) of the European Union and the outcome of such meetings,

the following may be notified accordingly and shall have the right to attend and take part in such consideration without having a right to move motions or amendments or the right to vote:

(i) members of the European Parliament elected from constituencies in Ireland,

(ii) members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and

(iii) at the invitation of the Committee, other members of the European Parliament.

(9) A Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department consider—

*(a)* such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and

*(b)* such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select: Provided that the provisions of Standing Order 130 apply where the Select Committee has not considered the Ombudsman report, or a portion or portions thereof, within two months (excluding Christmas, Easter or summer recess periods) of the report being laid before either or both Houses of the Oireachtas.

**Functions of Departmental Select Committees**

**71.** (1) The Seanad may appoint a Departmental Select Committee to consider and, unless otherwise provided for in these Standing Orders or by order, to report to the Seanad on any matter relating to—

*(a)* legislation, policy, governance, expenditure and administration of-

(i) a Government Department, and

(ii) State bodies within the responsibility of such Department, and

*(b)* the performance of a non-State body in relation to an agreement for the provision of services that it has entered into with any such Government Department or State body.

(2) A Select Committee appointed pursuant to this Standing Order shall also consider such other matters which –

*(a)* stand referred to the Committee by virtue of these Standing Orders or statute law, or

*(b)* shall be referred to the Committee by order of the Seanad.

(3) The principal purpose of Committee consideration of matters of policy, governance expenditure and administration under paragraph (1) shall be—

*(a)* for the accountability of the relevant Minister or Minister of State, and

*(b)* to assess the performance of the relevant Government Department or a State body within the responsibility of the relevant Department, in delivering public services while achieving intended outcomes, including value for money.

(4) A Select Committee appointed pursuant to this Standing Order shall not consider any matter relating to accounts audited by, or reports of, the Comptroller and Auditor General unless the Committee of Public Accounts -

(a) consents to such consideration, or

*(b)* has reported on such accounts or reports.

5) A Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Dáil Éireann to be and act as a Joint Committee for the purposes of paragraph (1) and such other purposes as may be specified in these Standing Orders or by order of the Seanad: provided that the Joint Committee shall not consider-

*(a)* the Committee Stage of a Bill,

*(b)* Estimates for Public Services, or

*(c)* a proposal contained in a motion for the approval of an international agreement involving a charge upon public funds referred to the Committee by order of the Dáil.

(6) Any report that the Joint Committee proposes to make shall, on adoption by the Joint Committee, be made to both Houses of the Oireachtas.

(7) The Chairman of a Joint Committee appointed pursuant to this Standing Order shall be a member of Dáil Éireann.

(8) Where a Select Committee proposes to consider–

*(a)* EU draft legislative acts standing referred to the Select Committee under Standing Order 116, including the compliance of such acts with the principle of subsidiarity,

*(b)* other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,

*(c)* non-legislative documents published by any EU institution in relation to EU policy matters, or

*(d)* matters listed for consideration on the agenda for meetings of the relevant EC Council (of Ministers) of the European Union and the outcome of such meetings,

the following may be notified accordingly and shall have the right to attend and take part in such consideration without having a right to move motions or amendments or the right to vote:

(i) members of the European Parliament elected from constituencies in Ireland,

(ii) members of the Irish delegation to the Parliamentary Assembly

of the Council of Europe, and

(iii) at the invitation of the Committee, other members of the

European Parliament.

(9) A Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department consider—

*(a)* such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and

*(b)* such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select: Provided that the provisions of Standing Order 113 apply where the Select Committee has not considered the Ombudsman report, or a portion or portions thereof, within two months (excluding Christmas, Easter or summer recess periods) of the report being laid before either or both Houses of the Oireachtas.

## Powers of Select Committees (DSO 96 and SSO 72)

**96.** Unless the Dáil shall otherwise order, a Committee appointed pursuant to these Standing Orders shall have the following powers:

(1) power to invite and receive oral and written evidence and to print and publish from time to time—

*(a)* minutes of such evidence as was heard in public, and

*(b)* such evidence in writing as the Committee thinks fit;

(2) power to appoint sub-Committees and to refer to such sub-Committees any matter comprehended by its orders of reference and to delegate any of its powers to such sub-Committees, including power to report directly to the Dáil;

(3) power to draft recommendations for legislative change and for new legislation;

(4) in relation to any statutory instrument, including those laid or laid in draft before either or both Houses of the Oireachtas, power to—

*(a)* require any Government Department or other instrument-making authority concerned to—

(i) submit a memorandum to the Select Committee explaining the statutory instrument, or

(ii) attend a meeting of the Select Committee to explain any such statutory instrument: Provided that the authority concerned may decline to attend for reasons given in writing to the Select Committee, which may report thereon to the Dáil, and

*(b)* recommend, where it considers that such action is warranted, that the instrument should be annulled or amended;

(5) power to require that a member of the Government or Minister of State shall attend before the Select Committee to discuss—

*(a)* policy, or

*(b)* proposed primary or secondary legislation (prior to such legislation being published). for which he or she is officially responsible: Provided that a member of the Government or Minister of State may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil: and provided further that a member of the Government or Minister of State may request to attend a meeting of the Select Committee to enable him or her to discuss such policy or proposed legislation.

(6) power to require that a member of the Government or Minister of State shall attend before the Select Committee and provide, in private session if so requested by the attendee, oral briefings in advance of meetings of the relevant EC Council (of Ministers) of the European Union to enable the Select Committee to make known its views: Provided that the Committee may also require such attendance following such meetings;

(7) power to require that the Chairperson designate of a body or agency under the aegis of a Department shall, prior to his or her appointment, attend before the Select Committee to discuss his or her strategic priorities for the role;

(8) power to require that a member of the Government or Minister of State who is officially responsible for the implementation of an Act shall attend before a Select Committee in relation to the consideration of a report under Standing Order 197;

(9) subject to any constraints otherwise prescribed by law, power to require that principal officeholders of a—

*(a)* State body within the responsibility of a Government Department or

*(b)* non-State body which is partly funded by the State,

shall attend meetings of the Select Committee, as appropriate, to discuss issues for which they are officially responsible: Provided that such an office-holder may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil; and

(10) power to—

*(a)* engage the services of persons with specialist or technical knowledge, to assist it or any of its sub-Committees in considering particular matters; and

*(b)* undertake travel;

Provided that the powers under this paragraph are subject to such recommendations as may be made by the Working Group of Committee Chairmen under Standing Order 120(4)(a).

**Powers of Select Committees**

**72.** Unless the Seanad shall otherwise order, a Committee appointed pursuant to these Standing Orders shall have the following powers:

(1) power to invite and receive oral and written evidence and to print and publish from time to time –

*(a)* minutes of such evidence as was heard in public, and

*(b)* such evidence in writing as the Committee thinks fit;

(2) power to appoint sub-Committees and to refer to such sub-Committees any matter comprehended by its orders of reference and to delegate any of its powers to such sub-Committees, including power to report directly to the Seanad;

(3) power to draft recommendations for legislative change and for new legislation;

(4) in relation to any statutory instrument, including those laid or laid in draft before either or both Houses of the Oireachtas, power to –

*(a)* require any Government Department or other instrument making authority concerned to –

(i) submit a memorandum to the Select Committee explaining the statutory instrument, or

(ii) attend a meeting of the Select Committee to explain any such statutory instrument: provided that the authority concerned may decline to attend for reasons given in writing to the Select Committee, which may report thereon to the Seanad, and

*(b)* recommend, where it considers that such action is warranted, that the instrument should be annulled or amended;

(5) power to require that a member of the Government or Minister of State shall attend before the Select Committee to discuss–

*(a)* policy, or

*(b)* proposed primary or secondary legislation (prior to such legislation being published), for which he or she is officially responsible: provided that a member of the Government or Minister of State may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Seanad: and provided further that a member of the Government or Minister of State may request to attend a meeting of the Select Committee to enable him or her to discuss such policy or proposed legislation.

(6) power to require that a member of the Government or Minister of State shall attend before the Select Committee and provide, in private session if so requested by the attendee, oral briefings in advance of meetings of the relevant EC Council (of Ministers) of the European Union to enable the Select Committee to make known its views: Provided that the Committee may also require such attendance following such meetings;

(7) power to require that the Chairperson designate of a body or agency under the aegis of a Department shall, prior to his or her appointment, attend before the Select Committee to discuss his or her strategic priorities for the role;

(8) power to require that a member of the Government or Minister of State who is officially responsible for the implementation of an Act shall attend before a Select Committee in relation to the consideration of a report under Standing Order 168;

(9) subject to any constraints otherwise prescribed by law, power to require that principal office-holders of a –

*(a)* State body within the responsibility of a Government Department, or

*(b)* non-State body which is partly funded by the State,

shall attend meetings of the Select Committee, as appropriate, to discuss issues for which they are officially responsible: Provided that such an office-holder may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Seanad; and

(10) power to-

*(a)* engage the services of persons with specialist or technical knowledge, to assist it or any of its sub-Committees in considering particular matters; and

*(b)* undertake travel;

Provided that the powers under this paragraph are subject to such recommendations as may be made by the Working Group of Committee Chairmen under Standing Order 107(4)(a).

## Appendix 3 Witnesses

The following witnesses engaged with the former Joint Committee on Employment Affairs and Social Protection: -

### 8 NOVEMBER 2018

| Department of Employment Affairs and Social Protection | |
|---|---|
| Ms Patricia Murphy | Assistant Secretary General – HR, Facilities & Estates Management, Employment Rights Policy, PRSI Policy & the Scope Section |
| Mr Seán Reilly | Principal Officer – PRSI Policy, Scope Section & PRSI Refunds |
| Mr. Dermot Sheridan | Principal Officer – Employment Rights Policy |
| Mr. Jim Lynch | Divisional Manager, Mid-West Division |
| Mr. Christopher McCamley | Assistant Principal Officer – Scope Section & PRSI Refunds |

### 31 JANUARY 2019

| Irish Congress of Trade Unions | |
|---|---|
| Ms Patricia King | General Secretary |
| Mr. Billy Wall | Chair of the Congress Construction Industry Committee |

| SIPTU | |
|---|---|
| Ms Karan O'Loughlin | Divisional Organiser |

| National Union of Journalists | |
|---|---|
| Mr. Seamus Dooley | Irish Secretary |

| Fórsa | |
|---|---|
| Mr. Brendan O'Hanlon | Assistant General Secretary |

## 14 FEBRUARY 2019

| National University of Ireland Maynooth | |
|---|---|
| Prof. Michael Doherty | Professor of Law |

## 28 MARCH 2019

| Construction Industry Federation | |
|---|---|
| Ms Jean Winters | Director - Industrial Relations and Employment Services |
| Mr. Conor O'Connell | Regional Director |

| Ibec | |
|---|---|
| Ms Maeve McElwee | Director – Employer Relations |
| Ms Rhona Murphy | Head of Employment Law Services |

## 20 JUNE 2019

| Irish Airline Pilots Association | |
|---|---|
| Mr. Evan Cullen | President |

| UNITE | |
|---|---|
| Mr. Thomas Fitzgerald | UNITE Regional Officer |
| Mr. Robert Kelly | Regional Organiser |
| Ms Colette Godkin | Branch Secretary – English language Teachers' Branch |

## 24 OCTOBER 2019

| |
|---|
| Mr. Martin McMahon |

## 5 DECEMBER 2019

| Department of Employment Affairs and Social Protection | |
|---|---|
| Mr. Tim Duggan | Assistant Secretary General |
| Ms Clare Dowling | Principal Officer |

| Social Welfare Appeals Office | |
|---|---|
| Ms Joan Gordon | Chief Appeals Officer |
| Mr. Brian Duff | Deputy Chief Appeals Officer |

## Appendix 4 Links to Meeting Transcripts

The following links are to the engagements the previous Joint Committee on Employment Affairs and Social Protection held on the topic of Bogus Self-Employment: -

1. 8 November 2018,
2. 31 January 2019,
3. 14 February 2019,
4. 28 March 2019,
5. 20 June 2019,
6. 24 October 2019, and
7. 5 December 2019.

## Appendix 5 Submissions received from Stakeholders on a Draft Report Circulated before Publication

### MS JEAN WINTERS, DIRECTOR, CONSTRUCTION INDUSTRY FEDERATION

CONSTRUCTION INDUSTRY FEDERATION

Construction House, Canal Road, Dublin 6. Tel: 01-4066000. Fax: 01-4966953. E-mail: cif@cif.ie. Website: www.cif.ie

16 April 2021

Mr Paul Kelly
Principal Clerk
Joint Committee on Social Protection,
Community and Rural Development, and the Islands
Leinster House
Dublin 2

Re : **Draft Report: Bogus Self-Employment**

Dear Mr Kelly

I refer to your letter of 16 March last in connection with the above.

Please find attached the response from the CIF on the draft report.

If the Joint Committee requires clarification on any aspect, please feel free to contact me.

Yours sincerely

Jean Winters

Jean Winters
Director
Industrial Relations & Employment Services

**Recommendation 1:**
**The Committee recommends that the Code of Practice for Determining Self-Employment Status is updated and placed on a statutory footing, as stated by the Dept of Social Protection, without delay.**

We agree with this recommendation. We understand the complexities involved in updating the current Code of Practice. However, a Code of Practice that sets out in as clear and unambiguous terms as possible the distinction between *direct employment* and *self-employment* is required to assist the parties. Placing the Code on a statutory footing will give it greater weight and significance.

**Recommendation 2:**
**The Committee recommends that the Dept of Social Protection considers extending the remit of the Scope section to determine whether the misclassification of a worker was intentional and that these findings be recorded and published annually.**

We have serious concerns regarding extending the remit of the Scope section to make determinations on the *intention* of the parties. There are likely to be a myriad of reasons for the misclassification of a worker, including a request by a worker to be classified as self-employed, a genuine misinterpretation of the Code of Practice, the duration of the work to be completed, a relationship that started on a genuine self-employment basis that changed over time, etc. There are often complex, legal issues involved in determining the status of a worker. Making a determination on the intention of the employer, and publishing records annually, is likely to be wholly subjective. Like other sectors in the economy, the construction industry was very severely affected by the recession from 2008 to 2016 and many employees who were made redundant during that time set up small businesses in order to survive. The majority of these workers came back into the industry as direct employees when the recession ended, but some decided to continue in business on their own accord and are now employers in their own right.

The CIF is supportive of sub-contracting and self-employment only where it operates in accordance with all guidelines and regulations. The CIF strongly objects to extending the Scope Section to determine whether the misclassification of a worker was intentional, and that these findings be recorded and published annually. The consequences for the employer where a finding of misclassification arises are substantial, and these costs cannot be recovered retrospectively. This is a deterrent in itself without the necessity to publish findings on the intentions of the parties.

**Recommendation 3:**
**The Committee recommends that, if the remit of the Scope section cannot be extended to adjudicate on such matters, the Dept of Social Protection, in conjunction with the relevant bodies, considers removing PRSI classification determinations from the Scope section and transferring these functions to the Workplace Relations Commission.**

The CIF has no objection to this recommendation. We are supportive of the work undertaken by the WRC to date on promoting and encouraging compliance with employment legislation.

**Recommendation 4**

**The Committee recommends that the Dept of Social Protection, in conjunction with the Office of the Revenue Commissioners, develops a target of inspections to be carried out annually to ensure consistent levels of inspections and compliance. Targets should be developed by each unit that carries out employment investigations.**

The CIF has no objection to this recommendation. To further enhance compliance in this area, we propose that the Dept of Social Protection and the Office of the Revenue Commissioners work with the relevant organizations involved in specific industries, where appropriate, when campaigns are being considered. This will assist those organisations in promoting awareness and compliance among their membership.

**Recommendation 5:**

**The Committee recommends that the Dept of Social Protection, in conjunction with the Central Statistics Office, develops a framework for collecting data on areas of employment where there is a potential or known risk of bogus self-employment in the medium to long-term.**

The construction industry is characterized by a system of contracting and sub-contracting. A main contractor who has entered into a contract with a client will ensure the building is handed over to the client in accordance with the Building Regulations. Sub-contractors may be engaged who are specialists in their particular field, i.e. mechanical and electrical contractors, plastering contractors, painters and decorators, etc. These specialists, who employ craftspeople who have completed a statutory apprenticeship through Solas, complete their element of the project and move on to the next project. From an employee's perspective, continuity of employment is more protected where their employer is moving from site-to-site and working for a number of different main contractors.

The CIF's concerns regarding Recommendation 5 are as follows:

- The construction industry may be unfairly identified as a sector *"where there is a potential"* risk of bogus-self employment purely because the sector is built on a system of contracting and sub-contracting
- What will the data be used for?
- Who will the data be shared with?

The construction industry could be unfairly identified as an area of employment where there is "potential" risk purely because it operates on a necessary system of contracting and sub-contracting. This could have negative connotations for the industry. We believe that the focus should be on awareness, compliance, inspection and enforcement across all sectors of the economy.

**Recommendation 6:**

**The Committee recommends that all applicants to the Scope Section for classification of employment status receives a decision within six months.**

The CIF agrees with the above recommendation.

**Recommendation 7:**

**The Committee recommends that a standard definition of the word "employee" is developed and applied to all pieces of employment legislation.**

The CIF has no objection to the above recommendation and requests that we are consulted when a draft definition is proposed.

**Recommendation 8:**
**The Committee recommends that in its work to update the Code of Practice for Determining Self-Employment Status, it ensures that the next iteration of the Code acknowledges, and can be applied to, workers engaged in platform working and the gig economy.**

While this recommendation is not of particular relevance to the CIF, we have concerns about introducing measures which would make the labour market more rigid by removing the flexibility that many workers who work in this area require. We are supportive of a framework that balances the need to encourage entrepreneurship, that provides flexibility for both parties, while at the same time ensuring that individual workers are not exploited.

**Recommendation 9:**
**If the Department finds that current employment law or the Code of Practice cannot address the specific employment circumstances of platform workers, the Committee recommends that the Department identify other measures through which employment legislation can be applied to platform workers.**

The CIF has no objection to this recommendation and proposes that it be consulted on discussions in this area.

**Recommendation 10:**
**The Committee recommends that the Dept of Social Protection continues to develop anti-victimisation legislation with the aim of publishing such legislation by September 2021.**

No worker should be penalized for raising concerns in this area. The CIF, therefore, has no objection to the introduction of anti-victimisation legislation and proposes that it be consulted on the proposed legislation.

**Recommendation 11:**
**The Committee recommends that the Dept of Social Protection examines whether there is a potential to develop a penalty system for employers that intentionally misclassify workers as self-employed.**

CIF is opposed to the remit of the Scope Section being extended to determine whether the employer acted intentionally in misclassifying a worker as self-employed for the reasons set out at Recommendation 2.

Determining the correct classification of workers by the Scope Section can involve complex, legal issues and, therefore, are not always 'black-and-white'. Where a determination of misclassification is found, the employer is faced with substantial costs in terms of lost PRSI to the Dept of Social Protection, together with other costs associated with employment protective legislation, such as holiday pay and a penalty for the non-provision of a contract of employment. These costs cannot be

recovered by the employer and will act as a penalty in themselves without the need for additional penalties to apply.

END
16 April 2021

## MS JOAN GORDON, CHIEF APPEALS OFFICER, SOCIAL WELFARE APPEALS OFFICE

OIFIG NA nACHOMHARC
LEASA SHÓISIALAIGH

SOCIAL WELFARE
APPEALS OFFICE

Mr. Paul Kelly
Principal Clerk
Joint Committee on Social Protection,
Community and Rural Development, and the Islands
Leinster House
Dublin 2
DO2 XR20

31st March 2021

**Ref: JSP CRDI-i-030**

Dear Mr. Kelly,

I refer to your correspondence dated 16 March 2021 seeking my observations on the confidential draft report of the Joint Committee on Social Protection, Community and Rural Development, and the Islands entitled 'Bogus Self-Employment'.

In the first instance, I would like to express my gratitude for the opportunity to provide my observations.

In this respect I wish to outline that the role of the Social Welfare Appeals Office is to determine appeals against decisions of Deciding Officers/Designated Persons of the Department of Social Protection. The legislation governing the appeals process is contained in the Social Welfare Consolidation Act 2005 and Regulations made thereunder. In determining the status of a worker for social insurance purposes, Section 300(2) of the 2005 Act gives statutory power to Deciding Officers of the Department to determine questions relating to the insurability of employment for social insurance purposes. All such decisions can be appealed under the provisions of Section 311 of the 2005 Act. Appeals relating to insurability of employment cover a range of issues including directors of companies, family employments, partnerships and public sector employments. The number of cases involving the determination as to whether a person is employed under a contract of service or a contract for services is relatively small. The Office does not categorise cases as 'bogus self-employment' or 'false self-employment' as such descriptions denote an intention of fraud a question that can only be determined by the courts. This Office is only concerned with determining if a worker is correctly classified as an employee or a self-employed person.

As the role of the Office is confined to determining appeals as provided for in the 2005 Act and as the recommendations outlined in the draft Report are of a policy nature they fall outside of the direct remit of the appeal process and are primarily matters for the Department

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of Social Protection. The views expressed below are therefore my own and are confined to those recommendations that directly relate to the decision making process.

The successful implementation of the recommendations will depend on workers feeling safe to make a complaint or seek a determination coupled with a robust decision making process and inspection regime.

I would therefore generally welcome the recommendation that the code of practice is updated and placed on a statutory footing. I would also agree that legislation should be introduced to prevent victimisation of workers who seek an official determination of their status. I understand from comments made by the Department and the Minister that steps are being taken in relation to both of these matters. The difficulty I foresee with placing the code on a statutory basis is the extent to which it will be possible to avoid being over prescriptive such that no discretion is left to decision makers to apply new principles emerging from the Courts. It is clear that decisions in this area cover a multitude of working relationships and the case law from the Courts, both national and international, continues to evolve reflecting the evolution of working relationships such as platform workers. Cases also vary considerably as regards the degree of complexity of the arrangements that exists between the company and the worker/s. Any legislation should reflect this reality.

While not disagreeing with Recommendation 2, I am of the view that determining whether the misclassification of a worker was intentional will not be without its difficulties and the level of proof required to demonstrate 'deliberate intent' will not be easy and could be counterproductive.

I note the recommendation to centralise all decisions regarding self-employment/employment status within one body. While a case could be made for such an approach it would however require very careful consideration given the breadth and depth of knowledge that would be required across fields such as employment law, taxation law, social welfare law and company law. It would also involve a fundamental change whereby responsibility for determining the tax and social welfare status of an individual would be devolved to an agency other than the Revenue Commissioners or the Department of Social Protection. This would obviously require legislative change and, in all likelihood any standardisation would also have knock-on consequences for the entitlements and tax liabilities of individuals.

Yours sincerely,

Joan Gordon
Chief Appeals Officer

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## MR. TIM DUGGAN, ASSISTANT SECRETARY GENERAL, DEPARTMENT OF SOCIAL PROTECTION

Mr Paul Kelly

Principal Clerk

Joint Committee on Social Protection, Community and Rural Development, and the Islands

Leinster House

Dublin 2

DO2 XR20

14th April 2021

Your ref: JSPCRDI-i-029

Dear Mr Kelly,

I refer to your correspondence, dated 16th March 2021, seeking the observations of the Department of Social Protection on the confidential draft report of the Joint Committee on Social Protection, Community and Rural Development, and the Islands, entitled: 'Examination of Bogus Self-Employment'.

I am grateful for the opportunity to provide the following observations, which follow the sequence of the report and its 11 recommendations and I apologise for the slight delay in furnishing this response to you.

**Introduction**

In the second paragraph, the Committee might wish to note that employees are generally classified as Class A contributors under the PRSI system. This involves the employee paying a contribution rate of 4% and their employer paying a contribution of between 8.8% and 11.05% depending on the level of earnings, i.e. a total contribution rate of between 12.8% and 15.05% for employees. A business is not obliged to pay any PRSI in respect of self-employed contractors it engages.

Self-employed individuals are generally liable for Class S PRSI, which involves a contribution rate of 4% (or a minimum payment of €500 per year for those who earn at least €5,000 per year), which is lower than the total contribution rate paid on behalf of employees in Class A.

Self-employed workers who are Class S contributors are now covered for a range of benefits such as: the State Pension (Contributory), Widow's, Widower's or Surviving Civil Partner's Pension (Contributory), Guardian's Payment (Contributory), Maternity and Adoptive Benefits, Paternity Benefit (from September 2016), Treatment Benefits (from March 2017) and Invalidity Pension (from December 2017), which also qualifies them for Partial Capacity Benefit. Class S contributors are also eligible for the Jobseeker's Benefit (Self-Employed)

and Parents' Benefit schemes, which were introduced in November 2019. In addition, they may qualify for the Covid-19 Pandemic Unemployment Payment and the Covid-19 Enhanced Illness Benefit introduced in March 2020.

The benefits currently not available to self-employed contributors are: Illness Benefit (apart from the Covid Illness Benefit), Carer's Benefit, Health and Safety Benefit and Occupational Injuries Benefits.

Accordingly, self-employed contributors are now covered for most of the benefits available under the social insurance scheme. They can receive approximately 93% of the value of all benefits paid by the Social Insurance Fund.

Full details of PRSI, its application, rates and benefits are available on the Department's website at https://www.gov.ie/en/publication/80e5ab-prsi-pay-related-social-insurance/.

Improvements in the benefits available to self-employed contributors were introduced without an increase in the rate of PRSI chargeable to the self-employed. The 4% Class S PRSI rate is unchanged since January 2011 and the minimum charge of €500 is unchanged since January 2013.

On a separate point, the Committee might wish to note in relation to the second sentence of the third paragraph that it is probably more correct to state: "when an employer deliberately misclassifies an employee as being self-employed" rather than "a worker as self-employed". This is because a worker can be either an employee or a self-employed individual.

The Committee might consider providing a more complete reference than that provided in Footnote No.1. I would suggest something in the main text like: "In a submission to the Committee, ICTU estimated that it has cost the Exchequer approximately €600 million in recent years."

And finally, I would note that the sentiment of the last sentence on Page 1 would not withstand scrutiny. A higher prevalence of self-employment in a particular industry would not necessarily translate into a higher instance of false self-employment. Many sectors where self-employment is the norm (for example, farming or hospital consultancy) are never mentioned by commentators as likely sources of false self-employment.

**Scope Section Determinations and the Remit of the Scope Section**

With regard to the first paragraph, it should be noted that Scope Section makes determinations based on the facts of each case, with reference to social welfare legislation, caselaw and the '*Code of Practice for determining employment or self-employment status of individuals*'.

**Recommendation 1**

Work on revising the Code of Practice has been finalised by the interdepartmental working group (comprising the Department of Social Protection, the Revenue Commissioners and the Workplace Relations Commission). The revised document is being shared with the social partners with a view to publication in the coming weeks. The Code is expected to be placed on a statutory footing as soon as possible, subject to the exigencies of the legislative timetable.

**Recommendation 2**

Misclassification of an employee by an employer can occur for a number of reasons, including a lack of understanding of a complex area, a change in circumstances in the employment relationship over time, a request by the worker to be treated as a self-employed contractor or indeed an intentional act to evade PRSI and the employment rights obligations of an employer. The main focus of the Department is compliance and to detect, quantify and tackle false self-employment, whatever the reason. The intention of the parties is rarely something that can be discerned with certainty.

Seeking to determine if the misclassification of a worker was intentional would not be without its difficulties given the level of evidence-based proof required. This would likely result in a considerable level of appeal and possibly court proceedings. Accordingly, it could be counterproductive in terms of reaching speedy conclusions on employment status determination cases and in getting "employer" acceptance of those "employee determinations".

**Recommendation 3**

Currently, employment status may be determined as a preliminary matter by the WRC when a worker is seeking a remedy under employment rights legislation. It may be determined by the Revenue Commissioners for tax treatment purposes and it may be determined by the Department of Social Protection for PRSI purposes. Therefore, there is no single forum in which it is determined as a standalone matter with ramifications flowing across the range of purposes. The Department of Social Protection, Revenue and the Department of Enterprise, Trade and Employment/WRC are already in the process of establishing an interdepartmental group to assess how employment status determination could be streamlined between the three bodies. However, it is clear that any such change needs very careful consideration because of the potential implications for employment, taxation, social welfare and company law and practices – as well as to the timelines for determinations in each case.

**Recommendation 4**

The Department's inspectorate carries out targeted investigations based on data analytics, sectoral profiling and cases referred by workers, employers, other Departmental scheme areas and Revenue. It liaises with Revenue Inspectors as part of the Joint Investigation Unit. When the Employment Status Inspectors target employers for inspection, consideration is given to the following:

- Whether the employment type is likely to have marginalised, low-paid workers who are vulnerable to exploitation for educational, literacy or other reasons;
- Whether the employment type is one where it has potential for a knock-on, deterrent effect on other employers;
- Whether tackling a particular employer has the potential to resolve a legal question that will have knock-on effects for other employment types;
- Whether public funds are flowing to the employer;
- Whether there is a political focus on a particular sector or employer.

**Recommendation 5**

The Committee might note that, from 1st January this year, a new European regulation on social surveys – Regulation 2019/1700 – became law. It affects a number of surveys – the most significant being the Labour Force Survey (LFS). The LFS is a longitudinal, quarterly survey, and is the official measurement of employment and unemployment in the State. It is also the official source for the number of employees versus self-employed persons in the State.

In addition to methodology and sampling changes from the Regulation, a number of new variables will be collected in the LFS. Of particular note for the Committee is the 'MAINCLNT' variable. This variable will indicate the number and importance of clients for self-employed people for the preceding 12 months. It should thereafter be possible to quantify the number of 'economically dependent self-employed' individuals (defined as self-employed without employees AND who have either only one or one main client AND whose (one or main) client decides the working hours). It should also be possible to disaggregate this by sector of employment, but this would be dependent, ultimately, on the sample size.

This new data will assist the Department in targeting employment status investigations because false self-employment, where it exists, is understood to be present within the 'economically dependent self-employed' category.

The new data will likely not be available until Q2 2022 at the earliest, as it is designated as an annual variable in the new regulation, and this has implications for how and when the CSO must collect the data on this variable.

Analysis of existing available CSO data shows a fairly steady level of self-employment and self-employed individuals who have no employees. Over a 20+ year period, labour market surveys show that self-employment is a steady proportion of the labour market and is not significantly growing.

**Recommendation 6**

Employment status cases are complex both in their investigation by a Social Welfare Inspector and their determination by a Scope Deciding Officer, and can take longer than most other types of Scope cases. However, the majority of employment status cases are determined by Scope within six months. Cases taking a number of years to be resolved as referred to by the Committee are extremely rare and would likely involve a difficult investigation stage, a protracted appeal process and/or court proceedings. Every effort is made to expedite these and other Scope cases and additional resources have been allocated both to Scope's Deciding Officers and to the inspectorate in recent years.

**Recommendation 7**

The Committee might note that Ireland is not alone in having no single, clear legal definition of terms such as 'employee', 'self-employed', 'employment relationship' etc. Neither the EU nor the ILO has succeeded in encapsulating these terms in a singular way either. In Ireland, and many other jurisdictions, a person's employment status is determined by a consideration of both the written or oral contract and the operational reality behind the contract.

However, any consideration of amending employment legislation to introduce a standard definition of the word 'employee' would be a matter for the Department of Enterprise, Trade and Employment.

**Recommendations 8**

The emergence of new forms of work in the platform/gig economy can pose a challenge in determining whether a 'contract *of* service' or a 'contract *for* services' exists because traditional lines between employers and workers are becoming blurred.

One of the reasons why a revision of the '*Code of Practice for determining employment or self-employment status of individuals*' was undertaken was to ensure that the situation of platform/gig economy workers was specifically addressed. Although the method of engagement of these workers might be different from traditional methods because of the use of modern technology, they will still be categorised as being either an employee or self-employed. Unlike in certain other jurisdictions, this binary approach continues to apply in Ireland. The essential legal tests or factors set out in the Code are still relevant to deciding whether a 'gig worker' is an employee or is self-employed.

Many workers in the digital economy are genuinely operating in an autonomous, independent, self-employed capacity. Others, however, can be deemed to be engaged as employees in a contract of service situation.

In determining the employment status of such workers, the same approach is taken as with other workers to decide if they are employed under a contract of service, or a contract for services, and each case must be considered in the round and entirely on its own merits.

Work on revising the Code of Practice has been finalised by the interdepartmental working group (comprising the Department of Social Protection, the Revenue Commissioners and the Workplace Relations Commission). The revised document is being shared with the social partners with a view to publication in the coming weeks. The Code is expected to be placed on a statutory footing as soon as possible, subject to the exigencies of the legislative timetable.

**Recommendation 9**

See Recommendation 8 above regarding the *Code of Practice*.

As regards the Committee's comments on the inclusion of platform workers in employment legislation such as minimum wage and predictable hours and agreement mechanisms in industrial relations legislation, these matters fall under the remit of the Department of Enterprise, Trade and Employment. Employees who work for platform companies would

automatically be protected by the full suite of employment rights legislation and self-employed contractors would enjoy some protections, such as health and safety legislation.

As regards the Committee's comments on social insurance coverage for such workers, we would note that platform workers are in any event insurable either as employees or as self-employed workers. The observations under **Introduction** above refer - that is, self-employed contributors are now covered for most of the benefits available under the social insurance scheme.

The Committee may be aware that the European Commission Work Programme 2021 announced a legislative initiative on improving the working conditions of platform workers by the end of 2021. This initiative will support the implementation of principles contained in the European Pillar of Social Rights. As part of this initiative, it recently launched a first phase consultation with the European social partners requesting their views on the possible direction of EU action to strengthen the conditions of platform workers.

**Recommendation 10**

Work is continuing in consultation with the Department of Enterprise, Trade and Employment on the development of anti-victimisation provisions for workers who wish to query their employment status. The availability of an appropriate legislative vehicle will be an important factor in the publication date.

**Recommendation 11**

The Social Welfare Consolidation Act 2005 already contains a range of penalties for employers who commit PRSI-related offences. The introduction of a specific offence of the wilful misclassification of employment status is being progressed, subject to the availability of a suitable legislative vehicle.

I hope the Committee will find the above helpful in finalising its report. I note that you have also sought the views of the Chief Appeals Officer of the Social Welfare Appeals Office and I understand she is responding to you separately.

Yours sincerely,

**Tim Duggan**

**Assistant Secretary General**

## MR. MARTIN MCMAHON

TO: Joint Committee on Social Protection, Community & Rural Development & the Islands

Ref: JSPCRDI-i-026

# OBSERVATIONS ON THE CONFIDENTIAL DRAFT REPORT

During the 32nd Dáil, the then Joint Committee on Employment Affairs and Social Protection met seven times with 'stakeholders' to examine the issue of bogus self-employment. Prior to my appearance at the Committee, a number of stakeholders including the Revenue Commissioners, The Department of Employment Affairs & Social Protection, IBEC & ICTU had already addressed the Committee.

In my evidence to the Committee, I presented evidence of the unlawful use of 'Test Cases' by the Department of Social Welfare to label workers en masse as self-employed. None of the other aforementioned 'stakeholders' who preceded me saw fit to inform the Committee about the use of test cases despite the undeniable fact that they all knew about the use of test cases and had all previously met in the Employment Status Group in 2000 where a decision had been taken to continue with the use of test cases contrary to the case law handed down from the higher courts which specifically precludes the use of test cases. For example, the Revenue Commissioners have recently confirmed to the Pubic Accounts Committee that all couriers have been labelled as self-employed by the Revenue Commissioners since 1995 based on a single decision by an Appeals Officer of the Social Welfare Appeals Office which was described by the former Secretary General of the Department of Social Welfare as a 'Test Case' (Documentation already supplied to the Committee). This evidence is irrefutable.

That a previous meeting on the issue of test cases between the aforementioned 'stakeholders' took place in 2000 has been confirmed in a Dáil reply from former Minister Doherty as follows:

*"The Chief Appeals Officer has advised me that the discussion in relation to the use of 'test cases' before the Joint Committee on Employment Affairs and Social Protection on 5th December 2019 related to a particular set of circumstances dating back to the early 1990s where a number of cases involving a number of employers in a particular sector were selected as so called 'Test Cases'. This approach was a precursor to the subsequent development on a tripartite basis of the Code of Practice for Determining Employment or Self-Employment"*

Although the Committee was established to examine the issue of bogus self-employment, none of the 'stakeholders' who preceded me, presented the full truth to the Committee. This denied the Committee the opportunity to fully examine the issue of bogus self-employment yet this is not recorded nor reported anywhere in the Draft Report and is a matter of serious concern. That the aforementioned 'Stakeholders' withheld pertinent information from the Committee should be a matter of serious concern to the Committee and MUST be acknowledged in the Final Report.

# On the specific draft 'Recommendations' of the Committee

**Draft Recommendation Number 1 –**

'The Committee recommends that the *Code of Practice for Determining Self-Employment Status* is updated and placed on a statutory footing as stated by the Department of Social Protection, without delay'

Observations –

The so called 'Code of Practice' is, in legal terms, 'The Fruit of the Poisonous Tree'. The true factual position as revealed in a letter from the Public Accounts Committee (below), is that the Code of Practice came about as a result of a hastily convened meeting sometime between the 15th of July 2000 and the 9th of August 2000 in direct response to my request for a formal insurability of employment determination to the Scope Section.


Chathaoirligh
te um Chuntais Phoibli
aighean
ha Cliath 2
iell@oireachtas.irlgov.ie

**Office of the Chairman**
**Committee of Public Accounts**
Leinster House
Dublin 2
☎ (01) 618 3730/3041
Fax 618 4147


12 April, 2001

Mr. Martin McMahon

Ashbourne
Co. Meath

Dear Mr. McMahon

I enclose, for your information, a copy of an article from the Revenue Commissioners' publication *"Tax Briefing, Issue 43 – April, 2001"*. The article relates to the Report of the Employment Status Group set up under the auspices of the Programme for Prosperity and

I believe its contents may be of interest to you in light of the case you yourself are making (in fact, I believe your case was one which gave rise to this Group's formation and I know it was certainly discussed at some of the Group's meetings!).

Anyway, I hope this is helpful.

Regards

Jerome Flanagan
Office of the Chairman

Telephone: 6183831
E-mail: jflanagan@oireachtas.ie

My request for a formal insurability of employment request threatened the existing unlawful 'Test Case' used to label all couriers as self-employed and also the Special Tax Agreement between Revenue and Courier Company employers to label all couriers as self-employed by default. Just 2 years previously, the Denny case had confirmed long standing case law which specifically precluded the Revenue Commissioners, Dept. SW and the SWAO from making decisions on a group and class basis. My specific case, that I was an employee and not self-employed, was discussed by the stakeholders at the Employment Status Group while it was sub judice and a decision was taken by the Revenue Commissioners, Dept. Finance and IBEC that "The Status Quo Should Remain", the status quo being the unlawful use of test cases to label workers as self-employed by group and or class. The Department of Social Welfare Representative at this meeting of 'Stakeholders' in the Employment Status Group, Mr. Vincent Long, subsequently significantly altered the Scope Decision that I was an employee and instructed the Appeals Office to accept a Social Welfare Inspector's Report which later proved to have been entirely falsified by the Social Welfare Inspector. This was not the only direct interference in the sub judice appeal by Mr. Long and multiple further examples are also available.

The true factual position regarding the so called 'Code of Practice' is that the 'Code of Practice' is a 'tick box' exercise which allows the Dept. SW, the Revenue Commissioners and the Social Welfare Appeals Office to continue to ignore case law and to continue to use unlawful test cases to make insurability of employment decisions by group and class. The fact that the Dept, of Social Welfare's Representative at the Employment Status Group went on to directly interfere with the evidence presented to the Appeals Office by the Scope Section is a very serious matter and one which should have been referred to the Garda Siochana a long time ago.

Mr John O'Donnell
Deputy Chief Appeals Officer
Social Welfare Appeals Office
D'Olier House
Dublin 2

Re: Insurability appeal by Securicor Omega Ltd (AP 0014917 - SC1010/00) Employment of Martin McMahon Motorcycle Courier

The attached appeal submission is transmitted for your attention please.

The submission consists of a summary of the main facts / background to the case in addition to a statement by the Deciding Officer on the grounds of appeal (as required under the legislation).

All relevant file papers are also transmitted for consideration by the Appeals Officer.

for Vincent Long
Deciding Officer
Scope Section
11 November 2000

JOPE APPEAL

AP 00/14917
SAP 98/00
SC 1010/00

PPELLANT (ER): Securicor Omega Express Ltd., Ballymount Rd Lr, lkinstown, Dublin 12

COUNTANT: Kieran Ryan & Co, Chartered Accountants, Upper Mount St, Dublin 2

PLOYED Person (EP): Martin McMahon, Co Meath

DECISION OF DECIDING OFFICER: From 2 August 1997 to date is insurable under the Social Welfare Acts for all benefits and pensions at PRSI Class A provided the weekly earnings are at least £30. If the earnings fall below £30 a week, Class J applies. Tab H

BACKGROUND:

- Request for insurability decision from Martin McMahon. Mr McMahon outlines his case in great detail - he believes he is employed under a contract of service. Tab A

- Letter dated 13.7.00 from Sean Moran, Senior Business Manager, Securicor Omega Express to all Couriers.
  - seeking personal details of couriers
  - hours of employment specified - risk of 'reprimand' and loss of 'bonus' etc. Tab B

- Memo from Fintan Farrelly HEO, Scope Section to Colm O'Connor SWI - requests investigation into this case and sets series of questions to be addressed by Mr McMahon and Securicor. Tab C

- INS 1 form completed by ER (Securicor Omega Express) Tab D
  - Q 5 - paid per mile
  - Q 6 - f/t hours
  - Q 8 - No holiday pay etc.
  - Q11 - EP not subject to control but subject to direction
  - Q12 - EP may be assigned to other tasks by ER
  - Q13 - EP not subject to dismissal but 'would not be given work'
  - Q14 - EP is free to undertake similar work for other ERs
  - Q16 - EP supplies motorcycle & liable for insurance etc.
  - Q18 - EP can lose or gain financially (Economic Reality test)
  - Q19 - Personal service NOT required - EP could send substitute

- INS 1 form completed by Martin McMahon. - Tab E
  - Q 5, Q 6, Q 8, Q12, Q 16 - as above (ER's version)

Conflicting responses to ER's version
- Q11 - EP IS subject to control, direction etc.
- Q13 - EP subject to dismissal
- Q14 - EP NOT free to undertake similar work for other ERs
- Q18 - EP can NOT lose or gain financially (Economic Reality test)
- Q19 - Personal service IS required - EP could NOT send a substitute

- SWI report of 22-Aug-00. Tab F
  - Both ER and EP seen and Deciding Officer's questions addressed
  - Some clarification on the areas of discrepancy on INS 1 form replies
  - EP happy with S/E status for income tax purposes
  - Couriers occasionally asked to perform other duties (unload trucks)

3) DECIDING OFFICER'S MEMO DATED Dated 6 August 2000 Tab G

- The DO lists the points in favour of both a contract of service and contract for service.

He concludes that a contract of service exists on the basis of:-
- the level of control exercised by the company over the EP
- the EP must sign on each morning and may be reprimanded if he leaves early
- the EP is subject to dismissal
- the EP may be taken from one job and put on another
- there is a bonus scheme on operation - not consistent with self-employment
- no evidence to suggest that the EP is in business on his own account
- not possible for him to undertake other work in view of extent of monitoring by ER

EP is integral to the ER's business and is not in business on his own account. Ownership of the motorcycle does not make him self employed. The DO is satisfied that the EP is employed under a C/O/S and insurable at the Class A/J rate of PRSI.

4) APPEAL Dated 26 Sept 2000 Tab I

Appealing on the grounds that Mr McMahon was engaged by the company under a contract for service. Mr McMahon is regarded as a supplier of services under a contract for service. Reference made to unspecified case law.

5) DECIDING OFFICER'S COMMENT ON APPEAL CONTENTIONS

The DO considers that the level of control, direction etc. exercised by the employer in this instance are not consistent with self-employment status. The EP is required to render personal service; may be reprimanded if he leaves early and the operation of a bonus scheme all point towards C/O/S status. The EP does not enjoy the level of independence normally associated with a person who is in business on his own account.

The DO would like to be given an opportunity to see and comment upon any further written submissions made by the ER before the oral appeal hearing

for FINTAN FARRELLY HEO
DECIDING OFFICER
10.11.00

Important Note:

Copies of all papers have been furnished to the Accountant (Kieran Ryan) as requested in appeal letter. However a typed version of the EP's original letter dated 17.7.00 was supplied - with certain sections of original omitted - see TAB A.

In Conclusion on this draft 'Recommendation':

The so called 'Code of Practice' is in direct conflict with case law, it is a cover-up of serious wrong doing by the Department of Social Welfare which denied me and continues to deny all other workers forced into bogus self-employment, any possibility of fair procedure. The Department of Social Welfare, the Revenue Commissioners and the Social Welfare Appeals Office must declare the Code of Practice null and void immediately and publicly apologise to all affected workers for denying them their employment rights through the use of the so called 'Code of Practice'.

**Draft Recommendation Number 2-**

'The Committee recommends that the Department of Social Protection considers extending the remit of the Scope Section to determine whether the misclassification of a worker was intentional and that these findings be recorded and published annually'

Observations –

Ample evidence exists to show that the use of bogus self-employment by employers is intentional. Not only is it intentional, it is encouraged and facilitated by the Dept. Social Welfare, the Revenue Commissioners and the Social Welfare Appeals Office. This results in substantial losses to the exchequer and the PRSI fund. Bogus self-employment is 'cheating' people out of their rightful employee rights and has led to a looming so called 'pensions crisis' which is more accurately a failure to collect employers PRSI crisis which spans over 40 years and has never been resolved. The attitude of the Dept of Social Welfare in this matter exposes the hypocrisy of the Dept. which engaged in a 'Social Welfare Cheats Cheat us All' campaign some years ago. The true factual position is that the Dept. has absolutely no interest in pursuing white collar social welfare cheats who cheat the Department out of many multiples of the cost of claimant cheats.

In Conclusion on this draft 'Recommendation' –

Bogus self-employment should be treated no differently to claimant fraud.

**Draft Recommendation Number 3-**

'The Committee recommends, that if the remit of the Scope Section cannot be extended to adjudicate on such matters, the Department of Social Protection, in conjunction with the relevant bodies, considers removing PRSI classification determinations from the Scope Section and transferring those functions to the Workplace Relations Commissions'

Observations –

Blanket private hearings and the lack of provision to take evidence on oath by both the Workplace Relations Commission and the Social Welfare Appeals Office are repugnant to the constitution.

Concerns regarding the operation of the Scope Section are valid particularly considering a Dáil reply from former SW Minister Varadkar in which he stated:

*"**A number of test cases** in relation to the Electricity Supply Board (ESB) Contract Meter Readers were investigated by Scope in recent years"* 38901/16

In Conclusion of this draft 'Recommendation' –

Although not perfect, the Scope Section is the best of a bad lot where determination of employment status is concerned, however, it does not have the authority to make determinations on the 'intent' of those abusing employment status. It is my recommendation that appeals of Scope Section decisions be referred directly to the Circuit Court and that legislation be passed to allow the courts to make determinations on the intent of those abusing employment status. Any other avenue of action is repugnant to the constitution.

**Draft Recommendation Number 4-**

'The Committee recommends that the Department of Social Protection, in conjunction with the Revenue Commissioners, develops a target of inspections to be carried out annually to ensure consistent levels of inspection and compliance. Targets should be developed for each unit that carries out employment investigations'

Observations –

The Revenue Commissioners conducted 360 construction site visits in 2020, 1,673 construction site visits in 2019 and 1,471 in 2018. Prior to the introduction of the so called 'Code of Practice' the Revenue Commissioners were instructed by the C&AG to carry out wide scale investigations in the Construction Sector. In 1998, 60,000 employment situations were investigated in the construction sector and 12,000 of those employment situations were reclassified as employees. In 2000, on the back of concerns from the Public Accounts Committee that misclassification was still rife in the

construction sector, the Revenue Commissioners were instructed to repeat the exercise. Again, circa 60,000 employment situations were investigated and circa. 12,000 were found to have been misclassified as self-employment. Following the introduction of the 'Code of Practice' in 2001, all wide scale investigations into misclassification of employees as self-employed ceased. The paltry number of investigations carried out ever since are nothing more than window dressing. The status quo of allowing employers designate employment status of workers based on precedents set in unlawful test cases with the full consent and assistance of the Revenue Commissioners, the Dept SW and the Social Welfare Appeals Office has rendered all such investigations meaningless. In order to properly tackle the issue of bogus self-employment inspections, the so called 'Code of Practice' must be removed altogether from the process and investigations must be scaled up in all sectors to the levels seen in 1998 and 2000. Only then can the Revenue Commissioners and the Dept. of SW claim to be serious in tackling bogus self-employment.

In Conclusion on this draft 'Recommendation' –

Were a similar number of investigations to be carried out today as were carried out in 1998 and 2000, the Revenue Commissioners and the Department of Social Welfare would not find a similar number of misclassifications. This is not because they do not exist, it is because the Revenue Commissioners and the Department of Social Welfare have abandoned the use of case law and have instead substituted a 'tick box' 'Code of Practice' which allows both to make insurability of employment decisions not based on case law but instead based on whatever is politically expedient. I recommend that the Public Accounts Committee demand a repeat of the exercises of 1998 and 2000 WITHOUT the use of the so called 'Code of Practice'. These exercises should be extended to all sectors.

**Draft Recommendation Number 5-**

'The Committee recommends that the Department of Social Protection, in conjunction with the Central Statistics Office, develops a framework for collecting data on areas of employment where there is a potential or known risk of bogus self-employment in the medium to long term'

Observations –

Both the Revenue Commissioners and the Department of Social Welfare already collect all the necessary data to identify where there is a known risk of bogus self-employment. There is absolutely no need to involve the CSO. The very purpose of the Control Exercises of the Department of Social Welfare is to identify risk areas in regard to claimant fraud. As bogus self-employment is costing the Department many multiples of claimant fraud, it would be prudent for some of the control exercises budget to be reallocated to identify bogus self-employment. Up until January 2019, the Revenue Commissioners routinely collected data through the use of the eRCT and the Special Tax Agreement with Courier Company employers which very easily identified bogus self-employment. Since 2019, the Revenue Commissioners have attempted to muddy the waters on the data collected by eliminating the tax deduction at source brackets previously operated in both sectors.

In Conclusion on this draft 'Recommendation' –

The Revenue Commissioners and the Department of Social Welfare have always had the data and capacity to identify risk areas of bogus self-employment. I recommend that a full and independent investigation be carried out by an external body into the failure of the Revenue Commissioners and the Department of Social Welfare to act on the bogus self-employment which is easily identifiable from the data they already collect.

**Draft Recommendation Number 6-**

'The Committee recommends that all applications to the Scope Section for classification of employment status receive a decision within six months'

Observations-

There is absolutely no reason why Scope Section decisions should take more than 6 weeks. If one removes meetings of 'stakeholders' to discuss sub judice decisions this is easily achievable. It is my experience that delays are entirely down to the Social Welfare Appeals Office and not the Socpe Section. As the SWAO is repugnant to the constitution and repugnant to natural justice, I again reiterate that Scope Section appeals should be referred directly to the Circuit Court. Provision already exists in legislation to allow for this action.

In Conclusion on this draft 'Recommendation'-

Justice delayed is justice denied. It is the SWAO which causes lengthy and unnecessary delays in Appeal hearings and not the Scope Section.

**Draft Recommendation Number 7-**

'The Committee recommends that a standard definition of the word 'employee' is developed and applied to all pieces of employment legislation'

Observations –

Twenty one years ago, the Union 'stakeholders' at the Employment Status Group claimed to be there in order to develop a standard definition of the word 'employee'. Twenty one years on and this is still a pipe dream. Not only is it a pipe dream, it will make absolutely no difference because the Social Welfare Appeals Office and the Department of Social Welfare have openly declared that they are not bound by legislation, including at this Committee. It is an exercise in futility to develop, in legislation, a standard definition of the word 'employee' when the Social Welfare Appeals Office, the Department of Social Welfare and the Revenue Commissioners already ignore existing legislation.

In Conclusion on this draft 'Recommendation' –

The Committee would be far better served in taking action to compel the Department of Social Welfare, the Social Welfare Appeals Office and the Revenue Commissioners to comply with already existing legislation. Then and only then, would the addition of further legislation be anything other than a futile time wasting exercise.

**Draft Recommendations Numbers 8 and 9-**

'The Committee recommends that in its work to update the Code of Practice for determining Self-Employment Status, it ensures that the next iteration of the Code, acknowledges and can be applied to, workers engaged in platform working in the Gig economy;'

&

'If the Department finds that the current Employment Law or the Code of Practice cannot address the specific employment circumstances of platform workers, the Committee recommends that Department identify other measures through which employment legislation can be applied to platform workers'

Observations –

On draft 'Recommendation' 8: Refer to observations on draft 'Recommendation' 1. The so called 'Code of Practice' is not case law. Case law already applies to workers in the gig economy.

On draft 'Recommendation' 9: Current employment legislation and case law make no differentiation between workers in the gig economy and workers in the wider economy. The same case law applies to all. The so called 'Code of Practice' does not because it is an anathema to case law specifically designed to deny workers fair procedure and recognition of their employment rights.

In Conclusion to draft 'Recommendations' 8 and 9 –

Employment legislation and case law already apply to workers in the gig economy, it is the use of the so called 'Code of Practice' which excludes workers in these employments from fair procedure and their employment rights. The so called 'Code of Practice' must be declared null and void immediately.

**Draft Recommendation Number 10-**

'The Committee recommends that the Department of Social Protection continues to develop anti-victimisation legislation with the aim of publishing such legislation by September 2021'

Observations –

It is the Department of Social Welfare itself which is guilty of victimising workers who seek insurability of employment decisions. Victimisation by the use of a so called 'Code of Practice' which exists only to deny workers their rightful employment status. Victimisation by dragging insurability of employment appeals out for years. Victimisation by engaging in cosy cabals to deliberately deny

workers their rightful employment status by the unlawful use of test cases and special tax agreements between employers and the state. The Department itself is the biggest creator of bogus self-employed persons in the state.

In Conclusion on this draft 'Recommendation' –

A full independent inquiry into the victimisation of workers by the Department must be established.

**Draft Recommendation Number 11-**

'The Committee recommends that the Department of Social Protection examines whether there is potential to develop a penalty system for employer that intentionally misclassify workers as self-employed'

Observations – Refer to observations on draft 'Recommendation' Number 2. Bogus self-employment, particularly State approved and facilitated bogus self-employment is fraud. Only the Department of Social Protection can call for a Garda investigation into this fraud. I have tried multiple times to get An Garda Siochana to investigate the deliberate misclassification of thousands of workers as self-employed by the State only to be told that unless and until the Department calls for a Garda investigation, it will not happen.

In Conclusion on this draft 'Recommendation' –

This 'Recommendation' by the Committee once again exposes a two tier attitude by the Department in its approach to welfare cheats. A full and independent inquiry is the only solution to the State facilitated and approved deliberate misclassification of employees as self-employed in order to evade PRSI and taxes.

# Overall Summary

I gave evidence to this Committee in good faith. This Committee has completely ignored the evidence I gave to the Committee. I do not accept any of the recommendations. I am not at all surprised by the failure of this Committee to properly address the evidence laid before it. The Department of Social Welfare has a vested interest in maintaining the corrupt status quo it created.

Very sincerely, Martin McMahon, the only actual worker to appear at this committee.

## PROFESSOR MICHAEL DOHERTY, MAYNOOTH UNIVERSITY

Maynooth University
National University of Ireland Maynooth

Maynooth University Department of Law
Roinn Dlí Ollscoil Mhá Nuad

06/04/2021

Dear Paul,

I commend the Committee on its work, and the very clear attention to detail paid to this important issue.

I fully endorse recommendations 1, 4, 5, 6, and 8.

In respect of recommendation 2, intentional evasion of taxation obligations is, of course, a criminal matter. While in some instances the fact pattern may be quite clear, I have some doubts as to whether it is realistic to ask the Scope section to determine 'intention' here.

In respect of recommendation 3, it should be noted that Ireland is a little unusual (in European terms) in separating out the State compliance function so fully when it comes to social security, on the one hand, and employment rights on the other. A greater meshing of the functions in some areas is, I think, a good suggestion. The situation that currently pertains is one where two different adjudicatory bodies (with quite different remits, training of members, and institutional histories) end up assessing the question of employment status, depending on whether the matter at issue is one of social security, or employment rights. A 'preliminary jurisdiction', vested in the WRC, to determine employment status would be preferable. Specific issues of social security, after this determination has been made, could then be dealt with by Scope.

I strongly endorse recommendation 7. The current 'patchwork' definitions of 'employee' scattered throughout the legislative framework are confusing, and lack a logical basis. In my view, a consistent and updated definition of 'employee' would address many issues relating to platform work. However, the issues raised by recommendations 8 and 9 may need further legislative attention. In this regard, the recent initiative of the European Commission, which seeks to improve the collective bargaining rights of certain self-employed workers (including platform workers) should be noted. Indeed, the Department might well consider how the sectoral bargaining process (via SEOs and EROs) might be used more effectively to protect the rights of platform workers.

With respect to recommendation 10, anti-victimisation legislation is welcome. However, it remains difficult for vulnerable *individuals* to take claims. Allowing the possibility for trade unions to take actions on behalf of members, or 'class actions' by trade unions, might be of benefit here. Similarly, extending collective bargaining rights to certain self-employed workers may be a mechanism that affords them greater protection.

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With respect to recommendation 11, see my comments re 'intention' in recommendation 2. However, there is an issue that should be considered by the Department.

I hope you find these comments useful.

Very best wishes,

Michael

Yours sincerely,

Professor Michael Doherty
Head of Department
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## MS PATRICIA KING, GENERAL SECRETARY, IRISH CONGRESS OF TRADE UNIONS


# Congress submission to the Joint Committee on Social Protection Community and Rural Development and the Islands

# Bogus Self-Employment

March 2021

Irish Congress of Trade Unions
31/32 Parnell Square
Dublin 1
www.ictu.ie

Congress has considered the draft report of the Committee on Bogus Self-Employment and would advise as follows:

We have noted the recommendations relating to increased resources to the Scope Inspectorate Division within the Department and measures to improve the terms of the Code of Practice and develop our Data Collection System.

While these measures may assist in identifying instances of the practice of Bogus Self-Employment by the employer we believe the Joint Oireachtas Committee should now consider issues arising for the State consequent on the following High Court Judgement which was delivered in December 2019, Karshan (Midlands) Limited (t/a Domino's Pizza) v Revenue Commissioners (2019) IEHC 894 delivered in December 2019.

This judgement is significant for a number of reasons:

For the first time, it finds that there is 'no comprehensive statutory or common law definition of contract for service or contract of service'. It also noted that employers cannot utilise a 'tick Box' exercise when classifying workers but that each case must be looked at, based on the fact of the case, and a close scrutiny of the relationships between the parties carried out. Accordingly, the correct categorisation of employment status in any given situation is inherently fact specific. However, in the absence of legislative provision, this unfortunately means that individual workers will be forced to pursue costly civil cases.

Arising from all of the above, it is our considered view, that the only effective resolution to this long outstanding matter is the introduction of legislative measures whereby all workers are classified as direct employees, in the first instance, until proven otherwise by the employer.

ENDS

April 2021

# Unite response to draft report examining Bogus Self-Employment prepared by Joint Committee on Social Protection, Community and Rural Development and the Islands

Unite welcomes the opportunity to respond to the Committee's draft report examining bogus self-employment.

As we noted in our statement to the Committee in 2019, bogus self-employment is part of the larger phenomenon of precariousness – a phenomenon which will inevitably increase with the growth of the so-called 'gig' economy, or platform economy. Bogus self-employment is not only about employers or contractors seeking to avoid social insurance payments, although that is a major contributing factor, but it is also a tool used by employers to maximise flexibility in the utilisation of inputs, putting labour on a par with parts, tools, equipment and materials. The practice also undermines collectivism – since the worker is no longer part of a workforce, but instead an atomised individual provider of labour. In Unite's experience some employers also use bogus self-employment and other precarious forms of employment as part of an aggressive union-avoidance policy.

Bogus self-employment distorts those economic sectors where it is practised to the detriment of workers, compliant employers and the Exchequer. In addition, the non-payment of employer's PRSI – and the resultant loss of monies to the social insurance fund as well as the diminution of workers' social insurance entitlements – effectively externalises a portion of non-compliant employers' business costs to both individual workers and society as a whole.

With regard to the emergence of 'platform' or 'gig' working, the European Trade Union Confederation has highlighted the unequal power relationships in precarious working relationships – an inequality that goes well beyond the inequality implicit in all employment relationships:

*"The progression of platform work can be linked to the development of self-employment and non-standard employment relationships. A European initiative should therefore focus on the protection of all non-standard workers and workers in platform companies (including the self-employed), because a musician, a delivery man, a journalist or a cleaner are in the same situation. They are similar vis-à-vis: their "order giver"; the absence of or incomplete social protection; the difficulties to organise themselves and bargain collectively; and the inability to enforce their right to a decent income. Whether one is an employee, an autonomous or a (bogus) self-employed worker, one does not set the*

*rules of the game, neither with a traditional employer nor with the market. They are workers who have no real possibility of claiming their rights otherwise they will not be called back the next day"*[4].

As we emerge from the Covid-19 pandemic, addressing bogus self-employment and precarious employment, and ensuring that all workers have full access to employment rights and social insurance protections, is crucial to ensuring a sustainable recovery.

***1. The Committee recommends that the Code of Practice for Determining Self-Employment Status is updated and placed on a statutory footing, as stated by the Department of Social Protection, without delay.***

Unite welcomes this draft recommendation. The process of putting the non-statutory 'Code of Practice' on a statutory footing must of necessity encompass the important legal principles set out in court judgments, many of which seem to be ignored in individual Appeals Panel decisions. Unite further argues that we be given an opportunity to input into the new Statutory Code of Practice. Also we note that the Code currently does not take account of new forms of bogus self-employment such as platform work (as indeed noted by the Committee when discussing Recommendations 8 and 9). This needs to be addressed in the formulation of the Statutory Code of Practice which must be regularly reviewed and updated.

***2. The Committee recommends that the Department of Social Protection considers extending the remit of the Scope section to determine whether the misclassification of a worker was intentional and that these findings be recorded and published annually.***

***3. The Committee recommends that, if the remit of the Scope section cannot be extended to adjudicate on such matters, the Department of Social Protection, in conjunction with the relevant bodies, considers removing PRSI classification determinations from the Scope section and transferring those functions to the Workplace Relations Commission.***

***4. The Committee recommends that the Department of Social Protection, in conjunction with the Office of the Revenue Commissioners, develops a target of inspections to be carried out annually to ensure consistent levels of inspection and compliance. Targets should be developed for each unit that carries out employment investigations.***

Recommendations (2), (3) and (4) relate to the same issues: which statutory authority or authorities should be given responsibility for ensuring that workers are not misclassified.

It should be noted at the outset that Unite is concerned that employers are able to use the defence of 'unintentional' misclassification.

[4] European Trade Union Confederation. *ETUC Resolution on the protection of the rights of non-standard workers and workers in platform companies (including the self-employed).* Accessed 7 April 2021. https://www.etuc.org/en/document/etuc-resolution-protection-rights-non-standard-workers-and-workers-platform-companies

At present three agencies are involved in matters relating to bogus self-employment: The Scope section of the Department of Social Protection, which is seriously under-resourced; the Workplace Relations Commission; and the new Employment Status Investigation Unit.

In 2015, the National Employment Rights Authority was merged into the Workplace Relations Commission established to streamline Ireland's industrial relations system. When the WRC was established the then Employment Minister Richard Bruton said it would replace a system which he correctly described as *"characterised by forum-shopping, overlapping claims, delays, and a high degree of formality that often worked against early and easy resolution of claims"*[5].

Notwithstanding the establishment of the WRC over five years later matters relating to bogus self-employment are dealt with by different bodies – Scope, the WRC (which currently decides upon both the preliminary and substantive issues of employment and a worker's status) and the ESIU – and significant delays can arise in determining a case.

Therefore, Unite proposes that the in-house investigation, on-site inspection and adjudication functions relating to employment status currently carried out by these three bodies be merged into one well-resourced statutory unit under the auspices of the WRC, consistent with the enactment of the Statutory Code of Practice.

This would mean that workers would have access to one point of contact to assess whether or not their rights have been breached and to provide remedies in real time.

Unite argues that this would not only be easier to access for workers, but would also result in cost savings due to streamlining and the elimination of duplication. These savings should be invested in increased investigation and inspection resources.

In addition to these efficiency savings a well-resourced unit would be in a position to recoup significant monies. In his report[6] published in September 2018, the Controller and Auditor General noted that, in 2017, the Joint Investigation Unit (for which staff are drawn from the Department of Social Protection's Special Investigation Unit, Revenue's own Joint Investigations Unit, and the Workplace Relations Commission) initiated a campaign specifically focused on the construction sector, resulting in €60.2 million being recovered by the Revenue Commissioners and nearly 500 subcontractors reclassified as employees.

It is reasonable to assume that this represented just the tip of a non-compliance iceberg, and that a dedicated, well-resourced unit as proposed above would be able to recoup significant more monies – which in itself would deter employers from engaging in abusive practices. Consideration should also

[5] Workplace Relations Commission. *Bruton launches new era for employment rights and industrial relations*. 1 October 2015. Accessed 7 April 2021 https://www.workplacerelations.ie/en/news-media/workplace_relations_notices/bruton_launches_new_era_for_employment_rights_and_industrial_relations.html

[6] Comptroller and Auditor General, *Report on the Accounts of the Public Services 2017*. September 2018. Accessed 7 April 2021. https://www.audit.gov.ie/en/find-report/publications/report%20on%20the%20accounts%20of%20the%20public%20services/report-on-the-accounts-of-the-public-services-2017.pdf

be given to levying employers found to be in breach with a set percentage of any award made to a worker by the WRC, with the monies thus raised to be ring-fenced for the integrated unit.

Such a body should provide accessible information in a range of languages, bearing in mind that migrant workers are especially vulnerable to labour abuses.

***5. The Committee recommends that the Department of Social Protection, in conjunction with the Central Statistics Office, develops a framework for collecting data and data publishing on areas of employment where there is a potential or known risk of bogus self-employment in the medium to long-term.***

Unite welcomes this draft recommendation. Unions have significant on-the-ground knowledge of the areas where bogus self-employment is a current, emerging or potential issue, and should therefore be afforded an opportunity to input into the data collection framework.

***6. The Committee recommends that all applicants to the Scope section for classification of employment status receive a decision within six months.***

See our response and recommendation at (4) above.

***7. The Committee recommends that a standard definition of the word 'employee' is developed and applied to all pieces of employment legislation.***

Unite strongly welcomes this recommendation and further notes that there also needs to be a uniform definition of the term 'worker'. These definitions should be set out in the Statutory Code of Practice. Employment status in Ireland currently flows from the legal difference between a contract of employment (known as a 'contract of service') and a contract for services. A contract of employment applies to an employee-employer relationship. A contract for services applies in the case of an independent or self-employed contractor.

In this regard, the ETUC has noted that "*The presumption of an employment relationship is closely linked to the definition of worker, which is essential for the application of national labour legislation and for the national social partners to conclude collective agreements on employment and working conditions, while taking into account the general principles of the union legislation and case law established by the Court of Justice of the European Union. Based on this assumption a reversal of burden of proof is needed. Criteria should be based on ECJ decisions, or the California test or ILO conventions"*[7].

Unite argued in our original submission, and reiterates now, to the Committee that an employment relationship should be presumed to exist unless it can be proven otherwise: hence, the burden of proof in the event of a disputed relationship must be on the employer, rather than on the worker.

[7] European Trade Union Confederation. *ETUC Resolution on the protection of the rights of non-standard workers and workers in platform companies (including the self-employed).* Accessed 7 April 2021. https://www.etuc.org/en/document/etuc-resolution-protection-rights-non-standard-workers-and-workers-platform-companies

***8. The Committee recommends that in its work to update the Code of Practice for Determining Self-Employment Status, it ensures that the next iteration of the Code acknowledges, and can be applied to, workers engaged in platform working and the gig economy;***

***9. If the Department finds that current Employment law or the Code of Practice cannot address the specific employment circumstances of platform workers, the Committee recommends that the Department identify other measures through which employment legislation can be applied to platform workers.***

Unite believes that the legal tests and principles needed to determine the difference between a 'Contract of Service' and a 'Contract for Services' are already set out in a variety of judgments of the higher courts. As set out at point 4, what is required now is a Statutory Code of Practice encompassing these tests and principles with determinations henceforth being made by a properly resourced specific unit of the Workplace Relations Commission (WRC).

***10. The Committee recommends that the Department of Social Protection continues to develop anti-victimisation legislation with the aim of publishing such legislation by September 2021.***

Unite supports this recommendation and notes that victimisation can take the form of blacklisting by one employer or by a group of employers acting collectively and even across whole sectors. Unite regularly represent workers subject to sector-wide blacklisting.

In this regard we note anti-blacklisting regulations were introduced in the UK in 2010 and extended to Northern Ireland in 2014. Unite argues that specific anti-blacklisting legislation (as opposed to simple anti-victimisation legislation) should also be introduced in Ireland but that we should learn from the experience in the UK and Northern Ireland and ensure that such regulations -

- Grant an automatic right to compensation for any worker who discovers that they have been blacklisted; and
- Ensure that, where a blacklist is found to have operated, workers have an automatic right to be informed of their inclusion on such a blacklist.

***11. The Committee recommends that the Department of Social Protection examines whether there is potential to develop a penalty system for employers that intentionally misclassify workers as self-employed.***

As noted above, Unite is concerned that employers should not be able to resort to a defence of 'unintentional action'. We would also note that a penalty system would require primary or secondary legislation, which could prove cumbersome.

Instead, Unite argues that one effective deterrent would be to change the current time limitation periods for filing statutory employment claims, including claims in respect of bogus self-employment. Generally, the current time limit is six months which may be extended by the WRC for another six months in certain circumstances – still significantly less than the various time limits provided for in the 1957 Statute of Limitations. The cognisable period (i.e. the retrospective period to which a claim filed relates) is also six months in most cases.

Unite strongly argues that the limitation periods applicable to breaches of employment law should be no less than those applicable to other areas of contract law, which can have retrospection of up to six years.

Such changes would have no adverse implications for good employers but would act as a deterrent to poor employers and would help improve overall employment standards to the benefit not only of workers but also of compliant employers.

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