



NEWEFIN Project

New Employment Forms and Challenges to Industrial Relations – Reference:
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COUNTRY REPORT: IRELAND

ANTHONY KERR & ROB MOONEY

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Introduction – Ireland and New forms of Employment

This report presents a brief statistical overview of the state of the Irish labour market, and the findings from the research projects exploring precarious and new forms of employment in Ireland. We then proceed to analyse the findings of the interviews conducted with a number of key stakeholders working actively in the area of employment in Ireland from different perspectives. We complete this report with some insights and suggestions for potential future developments in legislation and strategic policy interventions in this area.

Ireland and the labour market

The story of the Irish labour force is one of rising peaks, troughs, and stalwart resolutions towards resurgent growth. This is demonstrated in the overall figures for employment over the past 20 years.

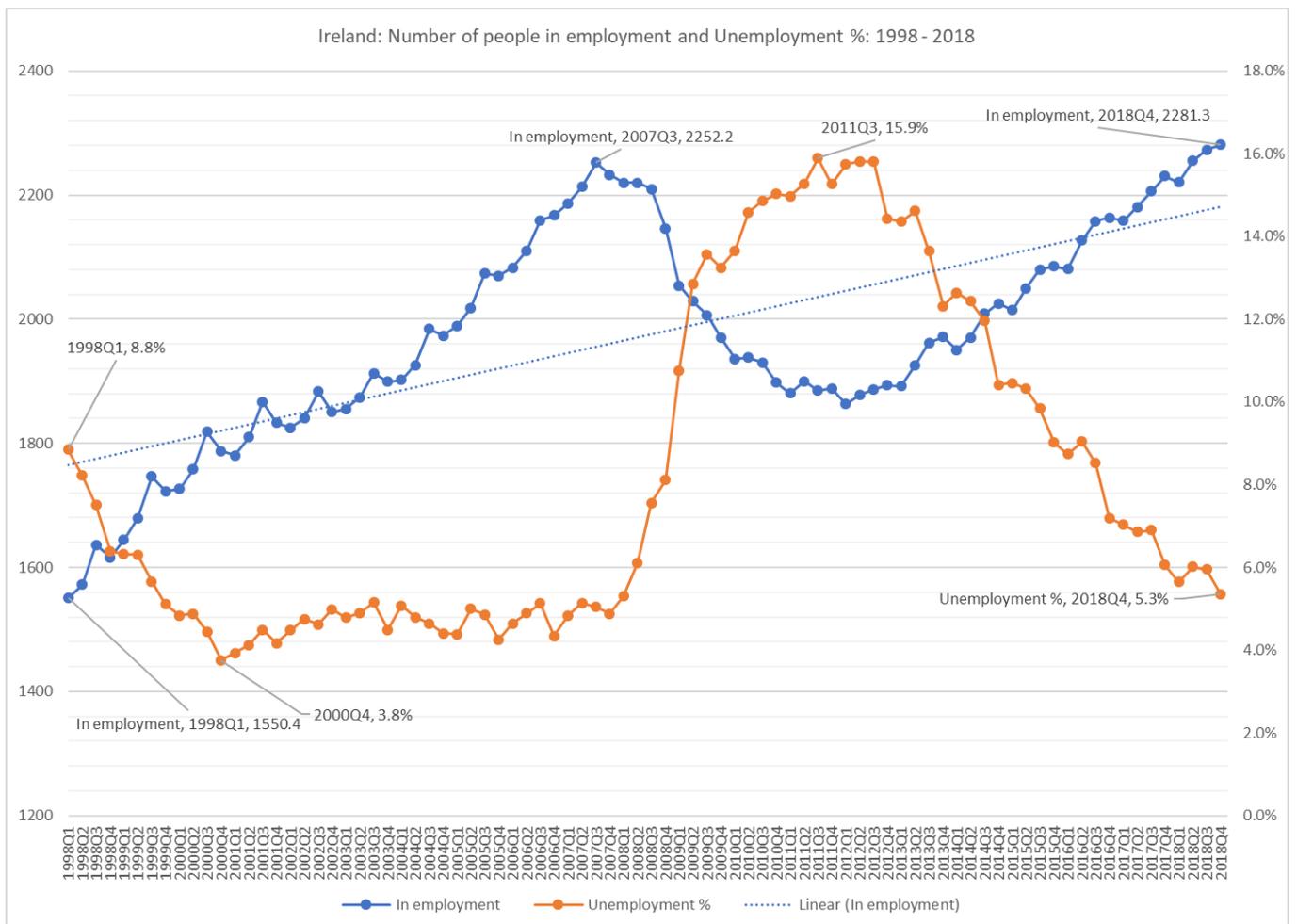


Figure 1: Ireland: Employment Figures 1998 – 2018 ¹

Employment in Ireland, in this period, went from a low of 1.55 million in Q1 1998 to a high of 2.25m in Q3 2007. Correspondingly there is a visible trend in unemployment from a low of 3.8 per cent in Q4 2000 to 15.9 per cent in Q3 2011, and to near full employment of 5.3 per cent in Q4 2018. While Ireland has experienced a radical change in employment and unemployment, the rates of those in certain types of employment tell a specific story.

¹ <https://www.cso.ie/en/statistics/labourmarket/labourforcesurvey/>.

The percentage of people in employment by total share of employment can be broken down as follows:

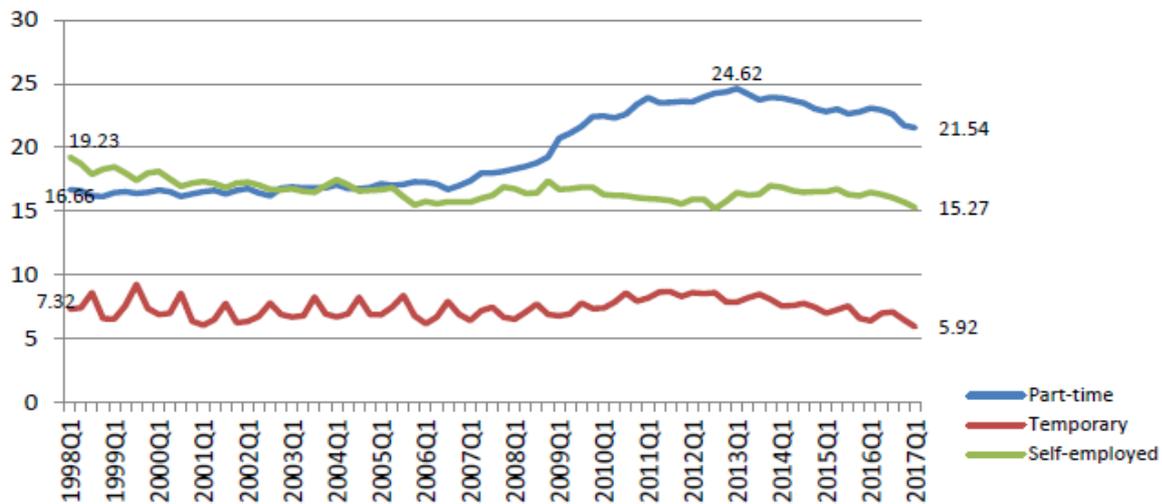


Figure 2: Trend in Employment Type Share of Total Employment, 1999-2017²

The data suggests that there were no significant changes in levels of self-employment or temporary employment in the Irish economy; even during the recession. The numbers in part-time employment, however, have changed quite dramatically. A 2018 Department of Finance report clearly states, however, that “There are no quantitative data on the incidence of disguised employment in Ireland.”³ Further, this data is compiled from the Quarterly National Household Survey / Labour Force Survey, which is based on the respondent’s self-perception and self-reporting of their employment type.

² Department of Finance, The use of intermediary-type structures and self-employment arrangements (2018) : <https://www.welfare.ie/en/downloads/ReportIntermediaryStructuresSelfEmploymentJanuary2018.pdf> .

³ *Ibid* 8. On 25 September 2019, the Minister for Employment Affairs and Social Protection told the Dáil that she was “re-allocating resources” to the issue “to understand, measure and quantify better the prevalence of false self-employment and obtain a sectoral analysis of its level of incidence”: <https://www.oireachtas.ie/en/debates/question/2019-09-25/47/> .

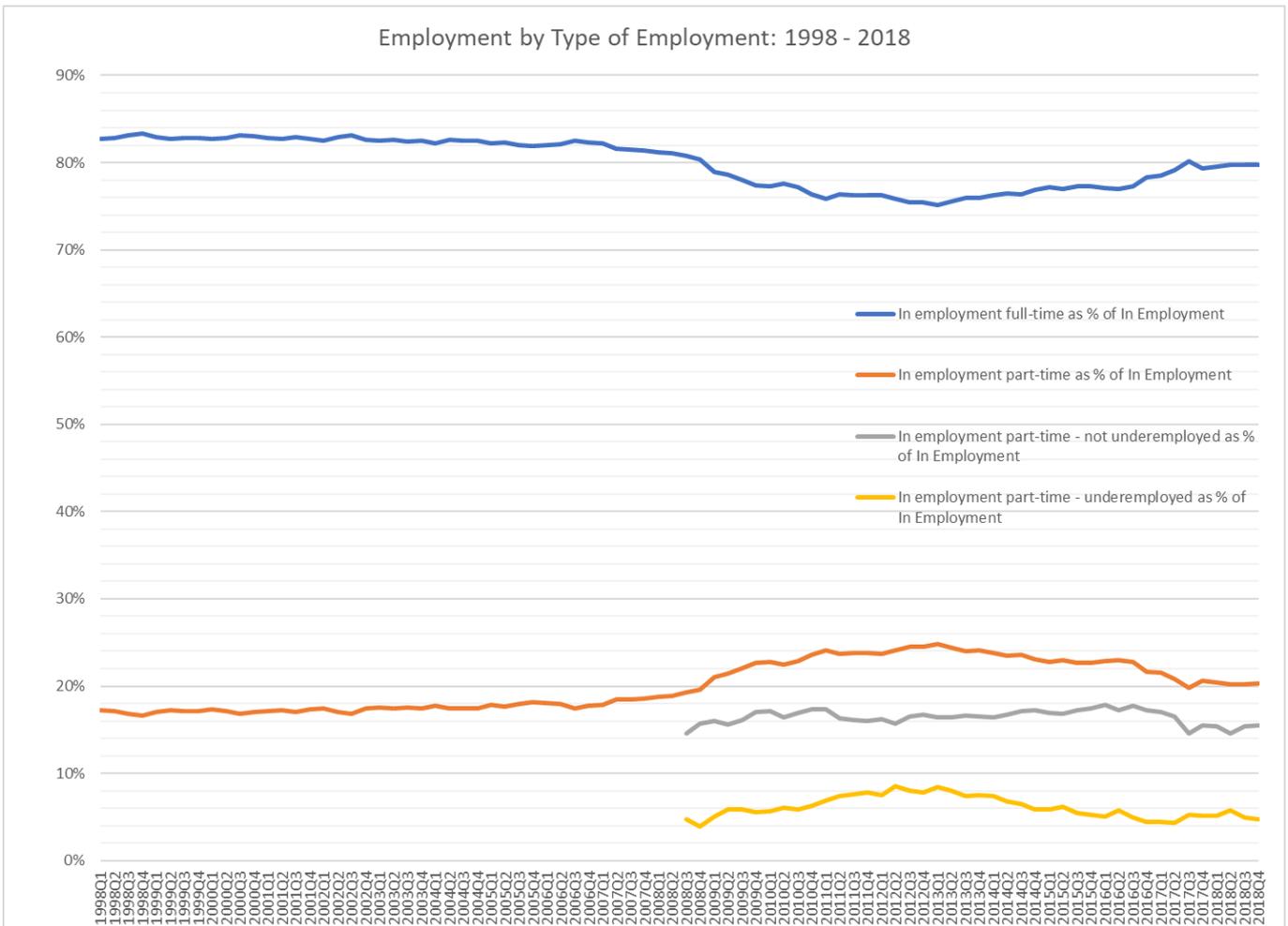


Figure 3: Ireland: Employment by Type of Employment: 1998 – 2018 ⁴

If we examine employment type over the same period from 1998 – 2018 by percentage of employment by type, we see a clear trend with part-time employment increasing (corresponding to a drop in full-time employment), and a marked increase of those underemployed. Unsurprisingly the numbers of people seeking full time employment remains high at an average of 82 per cent, with those seeking part time employment at 15 per cent, and only 3 per cent seeking work as self-employed.

⁴ <https://www.cso.ie/en/statistics/labourmarket/labourforcesurvey/>.

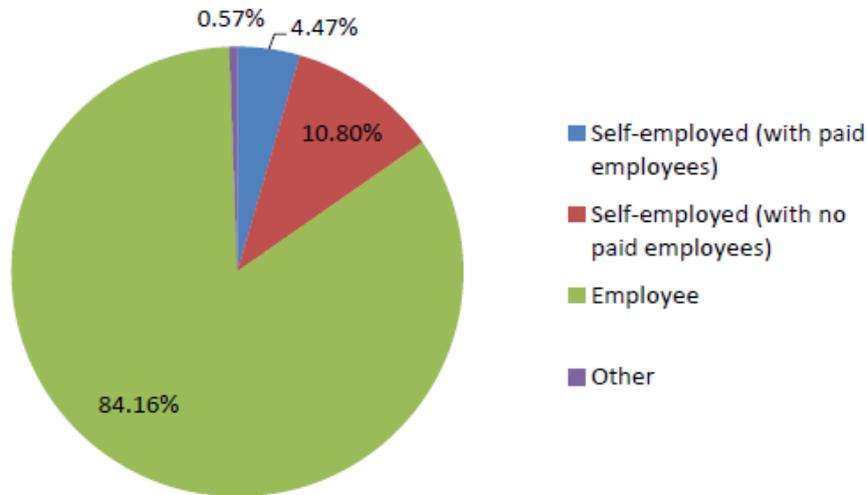


Figure 4: Composition of Employment 2017⁵

The report takes into account two types of self-employment: self-employed with employees and those without employees or ‘own account workers’.

⁵ Department of Finance, The use of intermediary-type structures and self-employment arrangements (2018): <https://www.welfare.ie/en/downloads/ReportIntermediaryStructuresSelfEmploymentJanuary2018.pdf>: 10 .

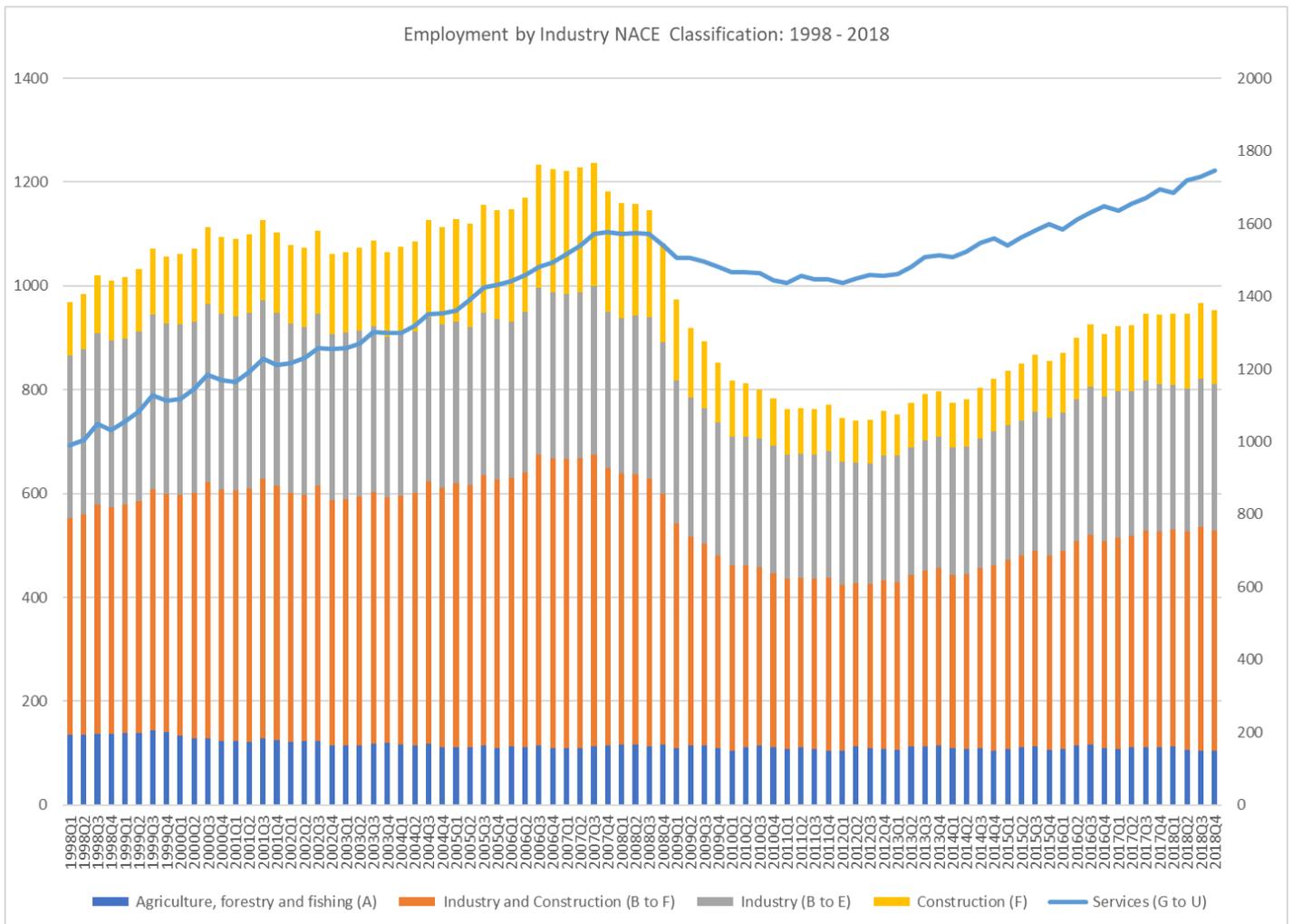


Figure 5: Ireland: Employment Figures by Industry 1998 – 2018 ⁶

Figure 5 clearly illustrates the impact of the recession in Ireland between 2008 and 2013 on the various industrial sectors within the Irish economy. We can see that the most highly impacted sectors were industry and construction (individually and separately), with services being less impacted.

⁶ <https://www.cso.ie/en/statistics/labourmarket/labourforcesurvey/>.

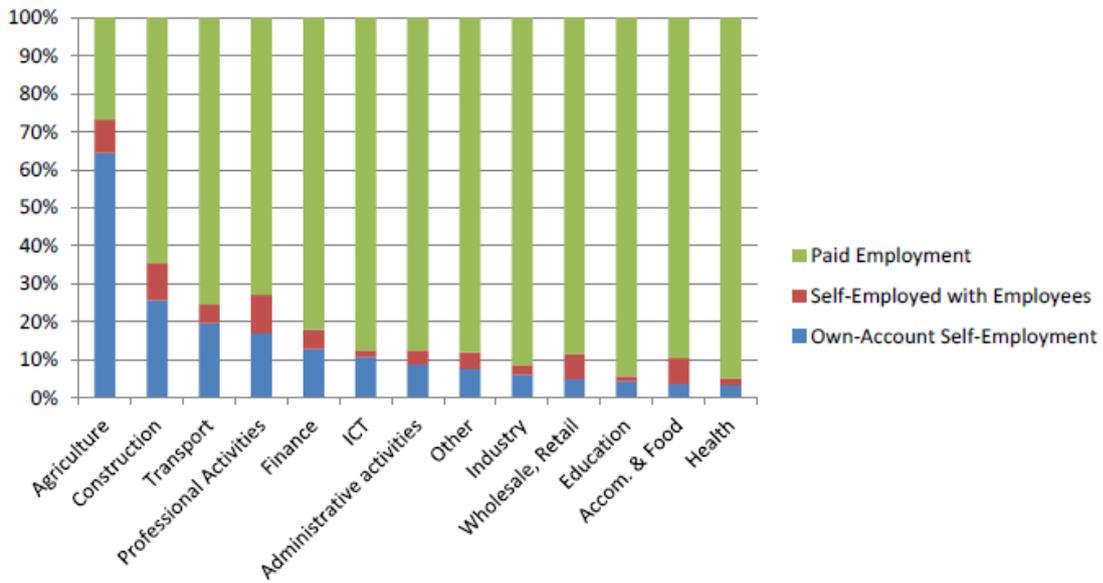


Figure 6: Self-employment Share of Total Employment (Q1 2017)

Figure 6 shows that agriculture has a disproportionately large percentage of those who identify as own account self-employed.

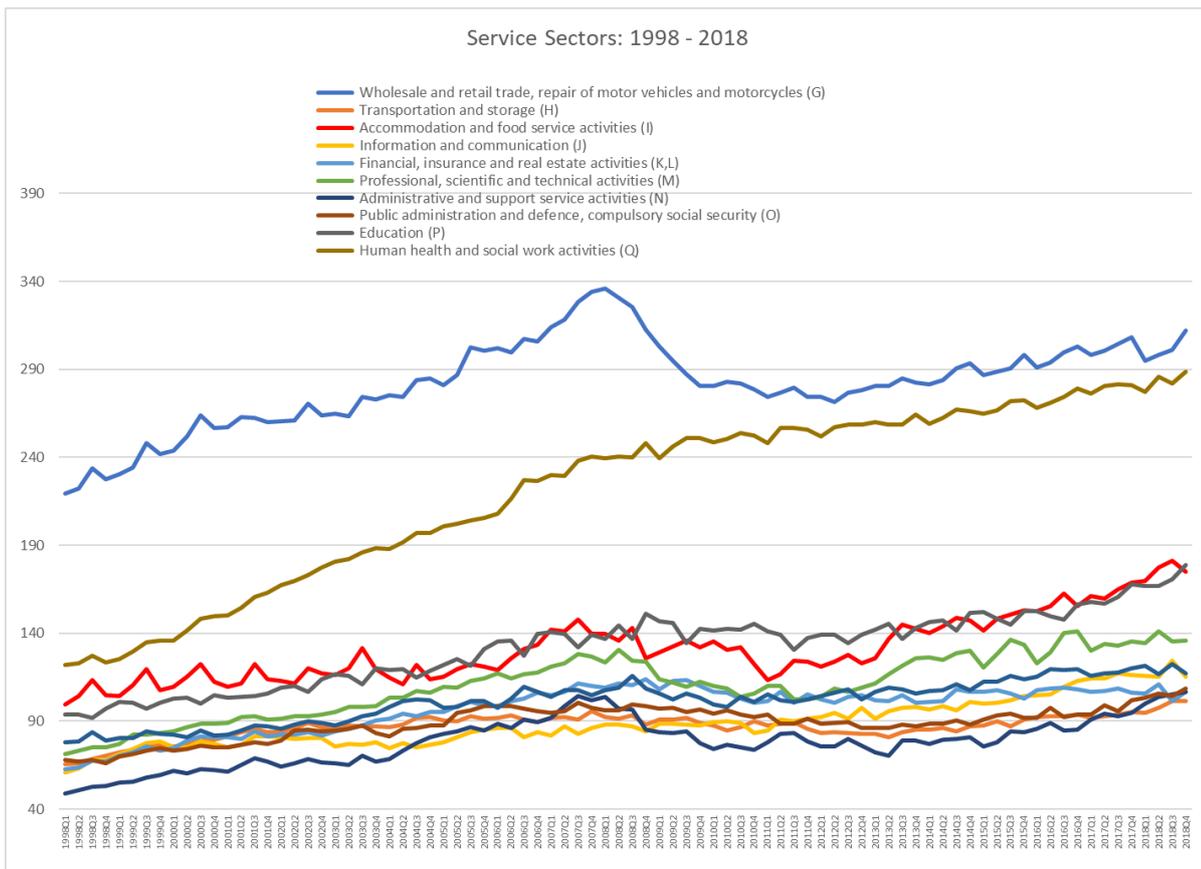


Figure 7: Ireland: Employment by service sectors: 1998 – 2018⁷

⁷ <https://www.cso.ie/en/statistics/labourmarket/labourforcesurvey/> .

If we take a closer look at the services sector, we can see that all service industries were impacted by the recession (with the notable exception of public administration and defence), with wholesale retail and trade services demonstrating the greatest decline. This is of particular interest as the empirical research suggests it is these sectors in which individuals in new forms of employment may be open to exploitation. The Department of Finance report states:

“While the trend in the levels of self-employment at an aggregate level do not give rise to any significant concern, the trend at sectoral level does show some changes in the composition of employment within sectors that are worthy of note with seven out of the fourteen major sectors showing an increase in the share of self-employment from 1999 to 2017, and ten from 2007 to 2017. The overall trend masks a reduction in self-employment between 1999 and 2017 in some traditional high-employment sectors such as:

- Accommodation and food services (from 16.43% to 8.08%);
- Retail and wholesale sectors (from 17.46% to 10.74%).

The same period (1999 – 2017) saw an increase in sectors such as construction, ICT and ‘Other NACE activities’ (which includes sport, the arts, gambling and computer repairs). It is worth noting, however, that in more recent years the trend has been a decrease in self-employment in all sectors with the exception of ICT and ‘Other NACE activities’.”

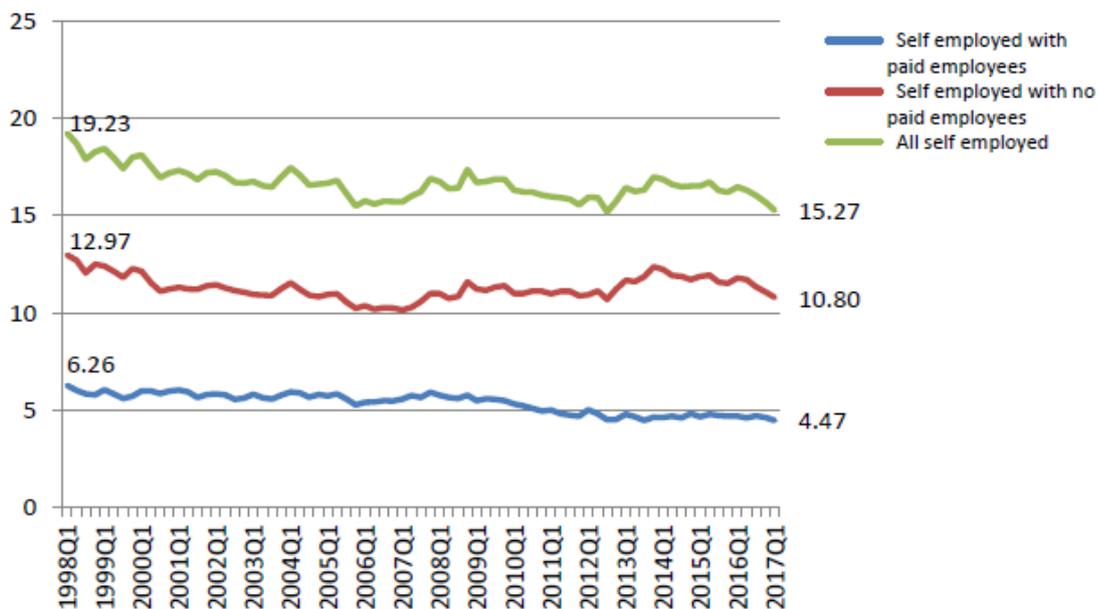


Figure 8: Share of Self Employment as % of Total Employment ⁸

Overall, these trends, the report suggests, can be interpreted as meaning that “the overall level of self-employment is falling [and] there are more people now working as sole agents on their own account, potentially as dependent or disguised self-employed workers”.⁹

⁸ Department of Finance, The use of intermediary-type structures and self-employment arrangements (2018) : <https://www.welfare.ie/en/downloads/ReportIntermediaryStructuresSelfEmploymentJanuary2018.pdf>: 13.

⁹ *Ibid* 14.

One of the main issues remains the capacity to accurately identify the number of persons in self-employment who are in positions of bogus or false self-employment.

The core challenges that need to be addressed in this area in Ireland are the requirement to have a clear definition of employee or worker, self-identification, and the capacity to identify and capture information about those persons who are in positions of exploitation through research to establish reliable data. Similar issues arise in capturing 'gig' or 'platform' economy data.

New forms of employment in Ireland: quantitative measurement versus legislating for the floor

From the point of view of the State, the risks are not only to their citizens of the country, and immigrants who may find themselves in exploitative situation, but also include potential and significant losses of tax revenue. The Department of Finance report states the following:

“the potential loss to the Exchequer for a person engaged in work at a rate equivalent to the average industrial wage (€37,500) amounts to c €5,000 p.a. ... rising to c €8,000 p.a. at a payment level of €60,000 and c €15,000 at a salary of €100,000.”¹⁰

While it is not possible to accurately quantify the number of persons in these forms of employment, estimates by Revenue suggest that:

“the number of people employed under [Personal Service Company] and [Managed Service Company] arrangements is of the order of 15,000, with average annual receipts per contractor of €60,000. If the relationship between the end user and say 50% of the individuals involved is effectively in the nature of a contract of service, and if the PAYE system was applied by the end user, the estimated gain to the Exchequer would be of the order of €60 million per annum. If the figure was 25%, the estimated gain to the Exchequer would be of the order of €30 million per annum.”¹¹

The Department of Finance also received 24 submissions as part of a public consultation. Overall, the submissions suggested some mixed opinions about the situation; some suggested that it appeared that these forms of employment were increasing, others argued that there was no definitive data indicative of an increasing prevalence of self-employment/intermediary employment. There was some agreement, however, that these forms of employment were part of the labour market; just not quantifiable in a clear way. It is worth noting that, unlike in the UK, there is no legislation preventing the exploitation of these forms of intermediary arrangements for tax and employment rights avoidance.

A number of academic studies have been carried out since 2015 have explored this from both quantitative and qualitative approaches.

Research exploring Contingent Employment in Ireland

The three studies presented here include:

- A Study on the Prevalence of Zero Hours Contracts among Irish Employers and their Impact on Employees carried out by Limerick University in 2015.
- A Study into New Forms of Employment conducted on behalf of Eurofound by University College Dublin in 2015.

¹⁰ *Ibid* 19.

¹¹ *Ibid* 20.

- A publication in 2018 by the Economic and Social Research Institute on Measuring Contingent Employment in Ireland.

The main findings of each report are presented in the following section.

A Study on the Prevalence of Zero Hours Contracts among Irish Employers and their Impact on Employees

In 2015, the University of Limerick undertook a study entitled *A Study on the Prevalence of Zero Hours Contracts among Irish Employers and their Impact on Employees*.¹² Their key objectives were to provide hard data defining the prevalence of zero hours contracts in the Irish economy and the manner of their use. Further, they were tasked with examining the impact of zero hours contracts on employees and to make evidence-based policy recommendations to the Irish Government.

Their key findings include that zero hours contracts (as previously defined within the meaning of the Organisation of Working Time Act 1997) did not represent a significant proportion of the workforce in Ireland; however, 'If and When' contracts were found to be prominent.

“Both types of contract involve non-guaranteed hours of work. The fundamental difference between the two is that individuals with a zero hours contract are contractually required to make themselves available for work with an employer, while individuals with an If and When contract are not contractually required to make themselves available for work with an employer. If and When hours arise in different forms in employment contracts. In some contracts, all hours offered to an individual are on an If and When basis. In other contracts, there is a hybrid arrangement whereby employees have some guaranteed hours and any additional hours of work are offered on an If and When basis.”¹³

There is, however, no commonly used national or international definition of low hours working. This study confirms that by their nature it is difficult to collect accurate information on If and When contract work.

Low working hours arise in various employment contracts. While self-employment is prominent in agriculture and ICT, certain areas of employment lend themselves more readily to If and When contracts, namely sales and personal services occupations as they are more likely to work constantly variable part-time hours. If and When hours and low working hours are prevalent in the accommodation/food and retail sectors and in certain occupations in education and health. Further, a higher proportion of women work constantly variable part-time hours. Employees with constantly variable working hours are more likely to work non-standard hours (i.e. evenings, nights, shifts, Saturdays and Sundays).

While employer organisations argue that 'If and When' hours and low hours suit employees (e.g. students, older workers, and women with caring responsibilities), the main advantage of If and When contracts to employers is flexibility. Trade unions and non-governmental organisations (NGOs) argue that there are significant negative implications for individuals working If and When hours which include: unpredictable working hours; unstable income; employment contracts which do not reflect the reality of the number of hours worked; insufficient notice; a fear of being penalised for not taking work; difficulties accessing social welfare benefits.

¹² <https://dbei.gov.ie/en/Publications/Publication-files/Study-on-the-Prevalence-of-Zero-Hours-Contracts.pdf> .

¹³ *Ibid*: x.

Overall the report found that a significant issue was the ambiguity about the employment status of the individual working in 'If and When contracts': "there is no mutuality of obligation between an employer and individual with If and When hours (i.e., there is no obligation to provide work or perform work), there is a strong likelihood that individuals in this situation are not defined as employees with a contract of service. Consequently, questions arise on the extent to which they are covered by employment legislation."¹⁴

The report recommended a suite of changes, which are summarised here under three main heading: legislation, employer organisations and the government.

Legislation

- The Terms of Employment (Information) Acts 1994 to 2012 should be amended;
- Section 18 of the Organisation of Working Time Act 1997 should be repealed;
- That legislation be enacted to provide that:
 - (i) For employees with no guaranteed hours of work, the mean number of hours worked in the previous six months (from the date of first hire or from the date of enacting legislation) will be taken to be the minimum number of hours stipulated in the contract of employment.
 - (ii) For employees with a combination of minimum guaranteed hours and If and When hours, the mean number of hours worked in the previous six months (from the date of first hire or from the date of enacting legislation) will be taken to be the minimum number of hours stipulated in the contract of employment.
 - (iii) A mechanism will be put in place whereby, after the minimum number of hours is established, employers and employees can periodically review the pattern of working hours so that the contract accurately reflects the reality of working hours.
 - (iv) Where after six months an employee is provided with guaranteed minimum hours of work as per (i) and (ii) above but is contractually required to be available for additional hours, the employee should be compensated where they are not required by an employer in a week. The employee should be compensated for 25 per cent of the additional hours for which they have to be available or for 15 hours, whichever is less.

Employer / employee relationships

- An employer shall give notice of at least 72 hours to an employee of any request to undertake any hours of work.
- An employer shall give notice of cancellation of working hours of not less than 72 hours.
- There shall be a minimum period of three continuous working hours where an employee is required to report for work.
- Employer organisations and trade unions which conclude a sectoral collective agreement can opt out of the legislative provisions so that they can develop regulations customised to their sector.

The Government / state organisations policy and strategy

- The Government examine further the legal position of workers on If and When contracts with a view to providing clarity on their employment status.
- The Department of Employment Affairs and Social Protection put in place a system that provides for consultation with employer organisations, trade unions and NGOs, with a view to examining social welfare issues as they affect workers on If and When contracts.

¹⁴ *Ibid*: xii.

- The Government develop a policy for an accessible, regulated and high-quality childcare system that takes into account the needs of workers on If and When contracts and low hours.
- The Government establish an interdepartmental working group to allow for greater cooperation between government departments on policies which affect patterns of working hours.
- Central Statistics Office have a rolling Quarterly National Household Survey Special Module on Non-Standard Employment which would include questions on non-guaranteed hours.

Only some of the legislative recommendations were implemented by the Employment (Miscellaneous Provisions) Act 2018 (on which see below).

[Eurofound: New forms of Employment in Ireland Case study reports¹⁵](#)

This research, conducted at a similar time period to the Limerick study, examined the practice of casual, or on-call, work in Ireland. According to the research findings, new forms of employment (and in particular zero hours and If and When contact work) are labelled and defined in different ways by different stakeholders. This in itself leads to potential exploitation. It is exacerbated by the lack of clarity found among respondents as to what legislation governs what type of work and employment. There are many types of on-call work in Ireland and the one that was most prevalent in this research was zero hours work.

The terminology used in practice for referring to on-call work in Ireland varies, which was evidenced from the respondent interviews. For example, participants referred to full-time staff as ‘contracted’, ‘permanent’ or ‘core’, while on-call workers are often referred to as ‘on-call’, ‘relief’, ‘temporary’ or ‘part-time’. A dichotomy exists between those employees that are called when needed, and those that are regularly required to show up for work. Further, this is not well defined in the Organisation of Working Time Act 1997 (described in more detail below).

The study confirmed that there is a lack of hard data in relation to the prevalence of zero hours contracts as they occur in the Irish labour market: respondents were unable to provide, and the Central Statistics Office (CSO) does not collect, information about casual work through their main research mechanisms - the Quarterly National Household Survey (QNHS).¹⁶ Interviewees were of the opinion that the impact of on-call contracts was beneficial to the local labour market, that it creates jobs in settings (such as residential care) and that some businesses would not exist without a flexible workforce. Other interviewees were of the opinion that precarious forms of employment like this would only have a negative impact on Ireland’s economic recovery. Others felt that precarious employment impacted on the health and wellbeing of the individual as, by its nature, it creates a context whereby the financial instability may negatively influence the psychological wellbeing of the individual.

“The trend emerging from these interviews is that these types of contracts afford employers flexibility and pragmatic solutions to industry specific settings that may require the use of short-term staff on relatively short notice, such as in residential care settings or seasonal work. They provide employers with the ability to respond to sudden increased demand without overcommitting financially by hiring permanent staff. ...The research suggests that there are certain circumstances in which both employee and employer can mutually benefit from on-call staffing. For instance, if employers were incentivised to hire on-call staff on more regular and predictable contracts in terms of working time, such as a banded hour

¹⁵ [https://www.eurofound.europa.eu/sites/default/files/page/field_ef_documents/62 - ef1461 - ie - casual work - organisation of working time act 1997.pdf](https://www.eurofound.europa.eu/sites/default/files/page/field_ef_documents/62_-_ef1461_-_ie_-_casual_work_-_organisation_of_working_time_act_1997.pdf) .

¹⁶ <http://www.cso.ie/en/qnhs/releasesandpublications/qnhs-calendarquarters/> .

contract for on-call employees, it might allow for the flexibility that many employers (and some employees) require, while also providing more stability for employees. As elaborated by the state representative, the way toward a sustainable solution to the debate about on-call work is through attempts to ensure mutual benefit for employers and employees.”¹⁷

This research suggests that on-call working arrangements have a positive effect for the employers in terms of business performance, whereas opinions as to the effects on the employees were mixed and heavily dependent on the circumstances of the individual; whether they were skilled, educated, etc. This would impact their capacity to avail of favourable remuneration in the context of selling their employment, knowledge of their rights and their relationship with their employer. There remains a lack of quantitative and qualitative data exploring the incidence of contingent employment in Ireland.

ESRI: Measuring Contingent Employment in Ireland

The ESRI report, *Measuring Contingent Employment in Ireland*, addresses this deficit by “measuring the incidence of contingent employment in Ireland, assessing the extent to which this is changing over time and profiling the individuals most likely to be contingent workers”.¹⁸

It was in this context that the Workplace Relations Commission (WRC) asked the Economic and Social Research Institute (ESRI), using Quarterly National Household Survey (QNHS) / Labour Force Survey (LFS) data, to establish: how many people are currently in contingent employment; whether the numbers had changed over time; and, where those workers were employed.

The ESRI defined the contingent workforce as those on a temporary employment contract or acting as a free-lancer. The ESRI found that temporary workers are distributed through the economy, regardless of educational level, and across both large and small employers, and is concentrated in the 15-24 age group. The numbers in the second category have been increasing steadily since 1998 albeit accounting for only 2 per cent of total employment in 2016. The profile of free lancers is more heavily concentrated in the 45-54 age category, more likely to be male and more likely to be educated to third level.

In comparison to the EU:

“Taken as a whole, the characteristics of temporary contracts in the EU 27 are much more consistent with those of low or minimum waged jobs relative to the Irish case. This conclusion is supported by the results from a wage equation model which demonstrated that, after controlling for a range of other factors, temporary workers in Ireland experienced a pay penalty of approximately 17% in 2014 relative to their permanent counterparts. While the pay penalty incurred by temporary employees in Ireland during 2014 was substantial, it was less than half the comparable EU 27 estimate for the same period.”¹⁹

Employees on temporary contracts:

- do not suffer from lower levels of job satisfaction relative to their permanent counterparts;
- place much greater weight on the opportunity to gain experience and a much lower emphasis on job security and pay;
- freelancers tend not to change status over the short term, with almost 20 per cent of temporary workers changed status by the following quarter;

¹⁷ *Ibid*: 7.

¹⁸ https://www.workplacerelations.ie/en/Publications_Forms/Research/Measuring_Contingent_Employment_in_Ireland.pdf : 14.

¹⁹ *Ibid*: 12.

- 53 per cent of those moving out of temporary employment moved into permanent employment while 42 per cent became unemployed or inactive.

The ESRI report suggests that the percentage of workers in temporary employment increased from 7.2 in 2008 to a peak of 8.7 in 2011 and has dropped back down to 7.1 as of 2016. Similarly, in 2008 10.3 per cent of worker were self-employed without employees, rising to 11.3 per cent through the height of the recession and coming to 10.4 per cent in 2016. Over the longer term, the ESRI have projected that by 2025 contingent employment will have increased by only 1 per cent of total employment, with most of that increase being driven by a rise in the number of free lancers.

Reasons for the existence of new forms of employment

There is some debate in Ireland as to whether contingent employment and/or employment in the gig economy are ‘new’ forms of employment in themselves. Rather, the opinion seems to be that they are a new form of an existing issue; that of the challenge of the definition of the employee – employer relationship and its implications for employment, tax and social welfare legislation. There was consensus around the fact that new means of employment have emerged in the guise of the bogus or false self-employed, in zero hours contracts, and ‘If and When’ contracts, and through platform work such as the gig economy. However, the existing research, political debates and the opinion of interviewees who took part in this study reflect significant lack of quantifiable information about the prominence and extent of the issue.

There is an inherent division between those who accept that, although the data is, in itself, not representative, it is nevertheless reliable and those who believe that this is a matter for legislation as these forms of new employment open employees, or workers, to exploitation. A similar division emerged during the presentations to the Joint Oireachtas Committee on Employment Affairs and Social Protection in January and March 2019, with members of the Committee accepting that there was “not enough data on the scale of the problem we face”.²⁰

Therefore, the reasons are complex, and it is not possible to state categorically that there was an emergence and growth of these forms of employment in the recession or thereafter.

Political discussions in recent years regarding new forms of employment

The political debates on the matter have become more frequent in the last two years. During a Dáil debate on 20 February 2018,²¹ Deputy Willie O’Dea asked the Minister for Employment Affairs and Social Protection to clarify her plans to deal with the issue of bogus self-employment. Further, Deputy Willie Penrose enquired as to the Minister’s plans

“to conduct a study to determine the number of persons who are in these arrangements due to the reliance on data based on a self-described determination in the CSO Quarterly National Household Survey in which persons may not realise they are, in fact, self-employed.”

Deputy Penrose specifically brought into question what the Minister was going to do in the context of challenges to the reliability and validity of the CSO data regarding the self-employed. The Minister responded:

“Bogus self-employment arises where an employer wrongly treats a worker as an independent contractor in order to avoid tax and social insurance contributions. There are

²⁰<https://www.kildarestreet.com/committees/?id=2019-03-28a.2036> .

²¹<https://www.oireachtas.ie/en/debates/questions/2018-02-20/40/> .

already robust arrangements in place for dealing with complaints of bogus self-employment. Social welfare inspectors inspect a wide range of businesses, as part of their ongoing compliance operations. Inspections are also undertaken jointly with other agencies, including the Revenue Commissioners and Workplace Relations Commission. Where evidence of non-compliance is detected, this will be pursued.

Officials also investigate specific cases referred to my Department's SCOPE section. This section determines employment status and the correct class of pay-related social insurance, PRSI. Where misclassification of workers as self-employed is detected, the correct status and class is determined, and social insurance arrears are collected as required under the law. Under the Social Welfare (Consolidation) Act 2005, there are specific offences in relation to employment contributions. On conviction, fines and or imprisonment can ultimately be imposed.

Any worker who has concerns about his or her employment and/or PRSI status should contact my Department and the matter will be investigated. This can only happen with the co-operation of the worker.

Data from the recent CSO Quarterly National Household Survey record 312,000 individuals as self-employed in 2017, or 15% of total employment. This is consistent with the average levels of self-employment within the EU. There is no evidence of a significant change in the level of self-employment over the past 16 years, since we started collecting the data.

The classification of a worker for PRSI purposes can be complicated by the use of intermediary employment structures referred to by Deputy O'Dea. Revenue estimates that there are some 15,000 people employed using structures such as personal service companies and managed service companies. I consider these figures to be reliable and have no plans for additional studies of the numbers involved.”²²

In response, Deputy Penrose suggested the following:

“Bogus self-employment is a scourge of many industries, hitting the construction industry, the gig economy and the IT sector particularly hard. The figures that were postulated and arrived at in the study to which the Minister refers are difficult to believe. There is very little real information on the number of people who might be in so-called false self-employment. The report relies on CSO figures, but the CSO quarterly national household survey relies on self-reporting. This means that if people tell the CSO they are employees that is how they are recorded. For all we know, it might be false self-employment, but they think they are employed.”

This suggests that within political debate, as with social partners, opinion vacillates between a reliance on the quantification of the numbers in this form of employment, and the realisation that this not in itself realisable in terms of quantifiable data.

More recently, Deputy O'Dea, when introducing his Prohibition of Bogus Self Employment Bill on 27 March 2019, referenced “the growth of the so-called gig economy and the increased casualisation of work” as exacerbating the trend of increasing bogus self-employment.²³

²² *Ibid.*

²³ <https://www.oireachtas.ie/en/debates/debate/dail/2019-03-27/20/>.

Legal framework

Employment relationships fall into two broad categories, namely employment under a *contract of service* or under a *contract for services*. If the former, the person is an “employee” whereas, if the latter, the person is self-employed as an “independent contractor”. The difficulties presented in determining the employment status of “temporary agency workers”, in the main, have been addressed by the legislature deeming them to be employed under a contract of service with either the employment agency or the end-user/client depending on the statute.²⁴ The classification of a person as either an employee or an independent contractor is significant in a number of contexts.

- 1. Taxation:** income tax is required to be deducted by employers for all of their employees under the Pay As You Earn (PAYE) system and remitted on a monthly basis to the Revenue Commissioners. Self-employed individuals make an annual tax payment under the self-assessed system of tax collection. Through the deduction of certain work-related expenses, a self-employed person can have a smaller tax liability compared to an employee. A self-employed person operating through an intermediary structure can reduce their tax liability even further.
- 2. Social Insurance:** the total social insurance contribution (PRSI) paid in respect of employees amounts, in most cases, to 14.85 per cent of remuneration. In addition to the social insurance contributions payable by employees (generally 4 per cent), employees benefit from contributions paid on their behalf by their employers. Employers are required to pay contributions of between 8.6 and 10.85 per cent of the wages/salary paid to their employees. This gives employees the right to the full range of short-term benefits (*e.g.* in respect of unemployment) and long-term benefits (*e.g.* invalidity and old-age pensions). The total contribution in respect of self-employment is limited to the contribution of 4 per cent paid by the self-employed person on their earnings. This gives the self-employed the right to a reduced range of benefits.
- 3. Employment Rights:** employers are required to comply with a wide range of obligations in respect of their employees. Legislation such as the Unfair Dismissals Acts 1977-2015 only applies to “employees” and the self-employed are specifically excluded from the scope of those Acts. It is the case, however, that the scope of some employment protection legislation is extended beyond “employees” to include some of the self-employed. So, in the Employment Equality Acts 1998-2015 (which prohibit discrimination on a range of grounds such as gender, age, race, religion, sexual orientation and disability), “employee” is defined as not only including “temporary agency workers” but also individuals who agree with another person “personally to execute any work or service for that person”.
- 4. Bankruptcy and Insolvency:** when an employer becomes bankrupt or insolvent, it is necessary to establish who are employees and who are independent contractors for the purposes of determining the priority list of pay-outs from the remaining assets of the employer. Employees are preferential creditors whereas independent contractors hold no special ranking in the queue of creditors seeking payment. Employees are also entitled to the benefit of the Protection of

²⁴ See, for instance, s. 2 of the Organisation of Working Time Act 1997 and s. 13 of the Unfair Dismissals (Amendment) Act 1993 with the former deeming the agency to be the employer and the latter deeming the end-user/client to be the employer. On 19 August 2019, the Central Statistics Office issued Agency Worker Employment Estimates from the Labour Force Survey in respect of Q1 2019 showing that there were 50,400 employees who reported as being agency workers; accounting for 2.6 per cent of all workers in the State. 52 per cent of such workers were female, 43.3 per cent were aged between 15-34, and 72 per cent reported themselves as being in full-time employment: <https://www.cso.ie/en/releasesandpublications/er/lfsawee/lfsagencyworkeremploymentestimatesq12019/>.

Employees (Employer's Insolvency) Act 1984 establishing a guarantee fund in respect of unpaid wages and other entitlements.²⁵

5. Collective Bargaining: a trade union cannot engage in collective bargaining in respect of self-employed workers as to do so would be contrary to section 4 of the Competition Act 2002. So, in August 2004, the Competition Authority condemned an agreement between Irish Actors Equity (a registered trade union) and the Institute of Advertising Practitioners in respect of the terms and conditions under which advertising agencies would hire radio and television voice-over actors. The actors, being self-employed, were "undertakings" for the purposes of the 2002 Act and the union was acting as a trade association and not engaging in collective bargaining.²⁶ See below, however, the discussion of the Competition (Amendment) Act 2017.

In the event that a dispute arises as to whether a person is an employee or is self-employed, there are a series of tests which have been developed by the courts to aid in the identification of those who work under a contract of service. As the nature of work has changed over the past 150 years, so the tests have evolved from the straightforward "control" test of the 19th century to a more multi-faceted approach developed in the latter half of the 20th century which looks at the "economic reality" of the relationship, regardless of how the parties describe themselves. The evolution can be seen clearly from the 1998 decision of the Supreme Court in *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare*.²⁷

This case concerned the employment status of a "supermarket demonstrator" for the purposes of the company's social insurance contributions. The contract between the company and the demonstrator stipulated that she was self-employed and was not an employee of the company. In upholding a decision of a Social Welfare Appeals Officer that she was an employee, the Supreme Court said that whether a person was retained under a contract of service depended essentially upon the actual relationship between the parties and not their statement as to how liability for tax and social insurance should arise or be discharged.

The Supreme Court added that each case had to be determined in the light of its particular facts and circumstances and that the degree of control exercised over how the work is to be performed was not decisive, although it was still a factor to be taken into account. The Court went on to say:

"The inference that a person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her."

The key facts and circumstances in this case were that the demonstrator was provided by the company with the clothing and equipment necessary for the demonstration and made no contribution, financial or otherwise, of her own; the remuneration she earned was solely dependent on her providing the demonstrations at the time and in the places nominated by the

²⁵ The 1984 Act implements what is now Directive 2018/94/EC.

²⁶ Ref. E/04/002 (31 August 2004). The Authority threatened to fine the union up to €4 million if it sought to use the collective agreement.

²⁷ [1998] 1 I.R. 34.

company; and she was not in a position by better management and employment of resources to ensure for herself a higher profit from her activities.²⁸

During the discussions on the Social Partnership agreement known as the *Programme for Prosperity and Fairness*, concern was expressed that there were increasing numbers of individuals categorised as “self-employed” where the indicators may be that “employee” status would be more appropriate. Accordingly, in 2001, the Government established the Employment Status Group which was comprised of representatives from the relevant government Departments, the Revenue Commissioners and the Social Partners. The Group issued a *Code of Practice on determining employment status*, the express purpose of which was “to eliminate misconceptions and provide clarity”. It was specifically stated as not being intended to bring individuals who were “genuinely self-employed” into employment status.²⁹

The Code of Practice sets out a variety of criteria on whether an individual is an employee or is self-employed but emphasises the importance of looking at the job as a whole and the reality of the relationship. The overriding consideration “will always be whether the person performing the work does so as a person in business on their own account” and the fundamental question is whether that person is “a free agent with an economic independence of the person engaging the service?”

The Code of Practice indicates that an individual would normally be self-employed if he or she:

- owns his or her own business;
- is exposed to financial risk, by having to bear the cost of making good faulty or substandard work carried out under the contract;
- assumes responsibility for investment and management in the enterprise;
- has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks;
- has control over what is done, how it is done, when and where it is done and whether he or she does it personally;
- is free to have other people, on his or her terms, to do the work which has been agreed to be undertaken;
- can provide the same services to more than one person or business at the same time;
- provides the materials, equipment and/or machinery for the job, other than the small tools of the trade;
- provides his or her own insurance cover.

The Code of Practice also makes it clear that the fact that an individual has registered for revenue self-assessment or VAT does not automatically mean that he or she is self-employed.

It is accepted by the Minister for Employment Affairs and Social Protection that the Code of Practice needs further updating and, in August 2018, a Working Group was established to

²⁸ See also the High Court decision in *Minister for Agriculture and Food v. Barry* [2009] 1 I.R. 215.

²⁹ www.revenue.ie/en/self-assessment-and-self-employment/documents/code-of-practice-on-employment-or-self-employment-status-of-individuals. The Code was updated in 2007 by the Hidden Economy Monitoring Group established under the Social Partnership Agreement known as *Towards 2016*.

determine the necessary revisions.³⁰ The Minister has now confirmed that the Code is to be put on a statutory footing.³¹ All interviewees accepted that the changing nature of employment and the labour market show a move away from the binary concept that a worker, who is not unemployed, is either employed in a mutually dependent “contract of service” relationship with an employer or is a self-employed independent contractor competing for business on a “contract for services” basis, moving between clients as opportunities for work present themselves.

Practices such as outsourcing labour activity and contracting-in services and the emergence of new forms of service relationships in the so-called “gig economy” blur the line as to what constitutes contracts of service as opposed to contracts for services. Some workers, although nominally self-employed under a contract for services, are in fact wholly dependent on, and subject to the control of, and supervision by, a single employer in a manner which is tantamount to employment under a contract of service. The status of these economically dependent self-employed presents particular problems (on which see further below) and there is no consensus as to whether a third category, in between an employee and an independent contractor, should be created. As noted above, the Employment Equality Acts 1998-2015 apply not just to employees but also to persons who agree personally to execute any work or service for another person.

Further difficulties arise in the case of individuals who provide their services through a corporate structure. The emergence of “intermediary-type structures” as the basis for engaging workers has given rise to concerns that these structures are being exploited for the purpose of disguising an employment relationship as well as avoiding tax and social insurance payments

There are two main forms of intermediary structure which are found in Ireland – a Personal Service Company (PSC) and a Managed Service Company (MSC).

A PSC is a limited company that typically has a sole director (the worker/contractor) who owns most or all of the shares in the company. Under this arrangement, a contract for services is not agreed directly between the worker/contractor and the employer but is agreed between the employer and the PSC owned/directed by the worker/contractor. The employer pays the PSC for the services of the worker/contractor but does not deduct any tax or social insurance contributions. The company pays the worker/contractor who, as the owner/director of the company, is regarded as self-employed and can thus determine his or her own rate of pay and how much of the revenue will be consumed in remuneration and how much will be declared as profit after other expenses or returned as dividends. In this way the worker/contractor can optimise for their own benefit the amount of income tax, social insurance and corporation tax that is paid. They also have superior tax benefit options when it comes to funding a pension.

So, in *McCotter v Quinn Insurance Ltd*,³² the Employment Appeals Tribunal was hearing an unfair dismissal complaint brought by a Regional Claims Manager. The complainant worked under an agreement “for the provision of insurance investigation and settlement services”. He was the

³⁰ Joint Committee on Employment Affairs and Social Protection, 8 November 2018:

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_employment_affairs_and_social_protection/2018-11-08/4/

³¹ Seanad Éireann, 27 March 2019: <https://www.oireachtas.ie/en/debates/debate/seanad/2019-03-27/13/>, a confirmation reiterated in Daíl Éireann on 25 September 2019:

<https://www.oireachtas.ie/en/debates/debate/dail/2019-09-25/8/#s9>.

³² UD 242/2011; [2013] E.L.R. 45.

director and 100% shareholder of a limited company to which payments were made following the submission of invoices. He made his tax returns as a self-employed person but argued that the economic reality was that he was an employee as he had to carry out the work himself, was provided with the company's business cards and had a company email address. The Tribunal, however, concluded that he was not an employee and dismissed the complaint saying:

“Whether a worker is an employee or self-employed depends on a large number of factors. The Tribunal wishes to stress that the issue is not determined by adding up the number of factors pointing towards employment and comparing that result with the numbers pointing towards self-employment. It is the matter of the overall effect which is not necessarily the same as the sum total of all individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. When the detailed facts have been established the right approach is to stand back and look at the picture as a whole, to see if the overall effect is that of a person working in a self-employed capacity or a person working as an employee in somebody else's business. If the evidence is evenly balanced, the intention of the parties may then decide the issue. In summary there is no single test. Each case must be considered in the light of its own particular facts.”

It would appear that the professional services provided through PSCs include IT, accounting and engineering skills.

A MSC, however, is a company with a number of worker shareholders who may or may not be involved in delivering similar services to the same employer. An MSC is typically facilitated by a third-party agent who organises the legal and administrative affairs of the company. As with a PSC, the worker shareholders can optimise for their own benefit the amount of income tax, social insurance and corporation tax that is paid.

It would appear that the professional services provided through MSCs are principally found in the aviation sector and is a matter of particular concern to the Irish Air Line Pilots Association (on which see further below).

As noted in the University of Limerick report (*supra*), a particular issue arises in determining the employment status of those engaged under so-called “If and When” contracts. These differ from zero-hour contracts in that neither party are under any obligations – the employer is not obliged to offer work and the worker is not obliged to accept any such offer. Such contracts lack “mutuality of obligation” and consequently the courts have ruled that such contracts are not contracts of service. A discretion on the part of the worker to decline to work and discretion on the part of the employer not to provide work is inconsistent with the existence of a contract of service.

This is seen clearly in the High Court decision in *McKayed v Forbidden City Ltd.*³³ The issue here was whether the claimant was an employee in the context of a complaint that he had been unfairly dismissed. He worked for the company as a translator/interpreter, including for persons being interviewed in police detention. The judge noted that there was no guarantee of work from the company, in circumstances where the company itself had no control over the amount of work that might come to it from An Garda Síochána, and that the claimant was free to refuse work from the company if he wished. Consequently, as the company was not under a contractual obligation to furnish the claimant with any, or any particular, volume of work, the requisite mutuality of

³³ [2016] IEHC 722; [2017] E.L.R. 57. See also *O'Sullivan v Liberty Insurance* UD 1573/2014 and *Karshan(Midlands) Ltd v Revenue Commissioners* [2019] IEHC 894.

obligation for a contract of service was absent and the complaint was dismissed as he was not an employee of the company.

Legislative Developments

The principal relevant legislative change, during the period under review, is that brought about by the Competition (Amendment) Act 2017.

The August 2004 decision of the Competition Authority (referred to above) had ramifications beyond voice-over actors. The National Union of Journalists could no longer agree rates with the Provincial Newspapers Association of Ireland for those of its members who were freelance journalists or photographers and the Musicians Union could no longer agree the going rate for session musicians. The government then agreed in the Social Partnership agreement known as *Towards 2016* to amend the 2002 Act to exempt such workers from its scope but the commitment was vetoed by the EU/IMF/ECB as not being consistent with the goals of the *Programme for Financial Support* accepted by the Government in November 2010.³⁴

Following the December 2014 decision of the Court of Justice in Case C-413/13, *FNV Kunsten Informatie en Media*.³⁵ the Irish Congress of Trade Unions asked the Competition and Consumer Protection Commission (which had replaced the Competition Authority) to revisit the 2004 decision but, in June 2016, the Commission determined that the analysis and conclusions of its predecessor remained valid. It acknowledged, however, that were the voice-over actors to be proved to be “false self-employed”, then a different conclusion would have emerged.

The Labour Party then introduced a Bill which was ultimately enacted in June 2017 as the Competition (Amendment) Act 2017. A “false self-employed worker” is defined therein as an individual who:

- (i) performs for a person under a contract the same activity or service as an employee of that other person;
- (ii) has a relationship of subordination in relation to that other person for the duration of the contractual relationship;
- (iii) is required to follow the instructions of that other person regarding the time, place and content of their work;
- (iv) does not share in the other person’s commercial risk;
- (v) has no independence as regards the determination of the time schedule, place and manner of performing the tasks assigned to him or her; and
- (vi) for the duration of the contractual relationship forms an integral part of that other person’s undertaking.

The 2017 Act then provides that section 4 of the 2002 Act will not apply to collective bargaining and collective agreements not just in respect of “false self-employed workers” but also in respect of relevant categories of “fully dependent self-employed workers”, which latter category is defined as consisting of individuals who perform services for another person and whose main income in respect of the performance of such services is derived from not more than two persons.

³⁴See paragraph 53 of the European Committee of Social Rights’ decision in *Irish Congress of Trade Unions v Ireland* (Complaint No.123/2016)

<https://hudoc.esc.coe.int/eng/#{%22ESCDcIdentifier%22:%22cc-123-2016-dmerits-en%22}> .

³⁵ECLI:EU:C:2014:2411.

Voice-over actors, freelance journalists and session musicians are automatically exempt from section 4 of the 2002 Act. A trade union, however, may make an application to the Minister for Business, Enterprise and Innovation for other categories to be exempt, which application will only be granted if the Minister is satisfied that the exemption will have no or minimal economic effect on the market in which those workers operate and will not lead to or result in significant costs to the state. No such applications have yet been made, a point noted by the European Committee of Social Rights in its 2016 decision.

The 2017 Act, however, operates solely within the “relatively narrow confines” of trade union membership and collective bargaining. On 13 February 2018, a Private Members Bill was introduced in the Seanad designed to apply the false self-employment test contained in the 2017 Act across the board for all employment rights legislation. The Protection of Employment (Measures to Counter False Self-Employment) Bill 2018 sought, *inter alia*, to provide protection for persons who are retained to carry out work and are incorrectly designated as self-employed. The use of PSCs was addressed in the Bill by providing that the fact that the agreement under which an individual works for a person is made between that person and a third party may be disregarded if the functions of the third person in relation to the arrangement are matters of form only and not of substance. Disputes as to whether an employment relationship exist were to be referred to the Workplace Relations Commission.

The Bill had its Second Reading on 28 February 2018 during which the Minister for Employment Affairs and Social Protection indicated that the Government would not be opposing the Bill at that point but that she would be tabling amendments when the Bill reached Committee Stage. Committee Stage was taken on 27 March 2019, where it was opposed by the Government on the basis that the Minister was bringing forward her own proposals on the issue and the Bill failed to proceed to Report Stage.³⁶

Two other Private Members Bills on this issue were introduced in the Dáil on 8 March 2018 and 27 March 2019. The Prohibition of Bogus Self-Employment Bill 2018 sought to disincentive employers from entering into bogus contracts for services. The Prohibition of Bogus Self-Employment Bill 2019 did likewise by providing criminal sanctions where an employer “incorrectly” designated an employee as self-employed. Neither Bill was given a Second Reading.

Answering questions in the Dáil on 4 April 2019, the Minister for Employment Affairs and Social Protection said that she was seeking a four-pronged approach to curtail bogus self-employment:

- Establish a dedicated team to deal with social insurance inspection work involved in large companies.
- Provide for Deciding Officers in her SCOPE section to make determinations on the employment status of groups or classes of workers without having to process complains individually.
- Put the Code of Practice for determining employment status on a statutory footing.
- Provide anti-victimisation measures for workers seeking a determination of their employment status.³⁷

³⁶<https://www.oireachtas.ie/en/debates/debate/seanad/2019-03-27/13/> .

³⁷<https://www.oireachtas.ie/en/debates/debate/dail/2019-04-04/10/?highlight%5B0%5D=employment&highlight%5B1%5D=affairs&highlight%5B2%5D=social&highlight%5B3%5D=protection#s12>. On 25 September 2019, the Minister told the Dáil that her Department was establishing a new unit of social welfare inspectors which would be focused solely on false self-employment: <https://www.oireachtas.ie/en/debates/debate/dail/2019-09-25/8/#s9>.

Another important legislative change is the Employment (Miscellaneous Provisions) Act 2018 which came into operation on 4 March 2019; the principal purposes of which are to ensure that employees are better informed about the nature of their employment arrangements within five days of commencing their employment; to prohibit zero-hour contracts in most circumstances; and to introduce a banded hours provision so that employees are entitled to be placed in a band of hours that better reflects the reality of the hours they work. It implements some of the University of Limerick's recommendations.

When introducing the legislation, the Minister for Employment Affairs and Social Protection said that the Bill, when enacted, would address the problems caused by the increased casualisation of work and would strengthen the regulation of precarious work. The key objective was to improve the security and predictability of working hours for employees on insecure contracts and those working variable hours.

The Joint Committee on Employment Affairs and Social Protection held a number of hearings on the issue of bogus self-employment. The first took place on 8 November 2018, when the Committee heard from the relevant departmental officials.³⁸ Its second hearing took place on 31 January 2019, when the Committee heard from trade union representatives.³⁶ The General Secretary of the Irish Congress of Trade Unions (Congress) pointed out that the practice of misclassifying workers as self-employed had very negative consequences for the workers concerned, caused a significant financial loss to the State and conferred significant benefits on the person who in normal circumstances would be the employer.

She called for various control measures to minimise risk and to detect the fraudulent classification of workers as self-employed:

1. Workers should only be permitted to register as self-employed if they satisfy criteria laid down in an agreed Code of Practice.
2. Principal contractors should be made liable for employer PRSI for all subcontractors.
3. The Workplace Relations Commission/Labour Court should replace the Department's SCOPE section in reviewing reported misclassification.
4. The Revenue Commissioners' capacity of PRSI/PAYE non-compliance intervention should be strengthened
5. Legislation should be enacted to clearly define the terms "worker" and "employee".

A hearing took place with employer representatives on 28 March 2019.³⁹ They stated that they were "manifestly opposed" to the practice of bogus self-employment because of the competitive advantage it gave non-compliant employers but were concerned as to the risk of creating a framework which removed, for all practical purposes, genuine self-employment. They also maintained that the practice of bogus self-employment was not as widespread a problem as suggested by the trade unions and point out that, where it does arise, there is an existing legal framework to address it. The appropriate response to the issue "has to be stronger enforcement of existing laws and remedies".

The final hearing took place on 20 June 2019 where the committee heard from *inter alia* the Irish Airline Pilots Association whose representative outlined the structure of many pilots'

³⁸https://www.oireachtas.ie/en/debates/debate/joint_committee_on_employment_affairs_and_social_protection/2018-11-08/4/.

³⁹https://www.oireachtas.ie/en/debates/debate/joint_committee_on_employment_affairs_and_social_protection/2019-03-28/3/.

employment.⁴⁰ He focussed on the use by certain airline companies of MSCs through which to engage pilots and the consequent loss of revenue to the State, as well as the avoidance of obligations as regards paid annual and other forms of leave.

In May 2018, the Department of Employment Affairs and Social Protection launched a one-month radio and on-line awareness campaign around false self-employment with instructions on how to pursue a claim through the Department's SCOPE section. The campaign aimed to inform workers on what constitutes genuine self-employment and how it is distinguished from bogus or false self-employment.⁴¹ The Department have revealed that the webpage had 10,500 visits but that the level of direct contact was low. It received 50 telephone calls and 30 emails from individuals who had become aware of the SCOPE section's services as a result of the campaign. Only 15 formal applications, however, were submitted which included couriers, van drivers, home tutors, IT and media, and construction.

It is worth noting that an employer who knowingly and incorrectly classifies a worker as self-employed in order to evade or reduce liability to pay social insurance contributions is guilty of a criminal offence under section 252 of the Social Welfare (Consolidation) Act 2005.

Attitude of Social Partners

The employers' organisation, Ibec, sees the proposed legislation on bogus self-employment and the recently enacted Employment (Miscellaneous Provisions) Act 2018 as a threat to flexibility in the labour market and part of a general narrative which is hostile to self-employment or independent contractor arrangements. Ibec does not see atypical work arrangements as being suspect in themselves and responded with alarm to the amendments made to the legislation as it progressed through the Oireachtas. In its view, the Act developed "into a lightning rod for many who are fundamentally opposed to flexible work and with limited understanding of how most of those arrangements operate in practice". By allowing the Act to encroach into new areas of employment regulation without due regard to both parties was irresponsible, "would significantly damage the Irish business model and would erode our competitiveness".

The trade unions, however, support a harder line being taken on false self-employment and the MANDATE trade union in particular has welcomed the banded-hours and zero-hour contracts provisions in the Act for its members in the retail trade.

The Irish Air Line Pilots Association has also sought that steps be taken to ensure that Ryanair's contractor pilots enjoy the same rights and entitlements as those employed directly by the company.

Of particular concern to the trade unions are the construction and electrical contracting sectors. The workforce here is mobile, and the sectors are complex due to the number of different contractors involved in construction and electrical projects.⁴² The unions, particularly those

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https://www.oireachtas.ie/en/debates/debate/joint_committee_on_employment_affairs_and_social_protection/2019-06-20/3/

⁴¹ The Department's false self-employment information page can be accessed at:

<http://www.welfare.ie/en/Pages/EmploymentStatus.aspx>.

⁴² On employment in these two sectors, see Report of Independent Review of Employment Regulation Orders and Registered Employment Agreement Wage Settling Mechanisms:

representing plasterers and brick/block layers, contend that the practice of employers incorrectly treating workers as self-employed contractors is widespread in the construction sector.

2,126 construction sites were visited by Revenue or Social Welfare Inspectors in 2016 and 11,699 interviews took place which resulted in 848 individuals registering as PAYE employees and the reclassification of 345 sub-contractors as employees. The trade unions' response to these figures was that many subcontractors are reluctant to report instances of "forced self-employment" for concern for losing their work and that in some cases payment of a gross sum without PAYE and PRSI deductions is regarded as a benefit of the arrangement.

Case Study: State Broadcaster (Radio Telefis Eireann) and self-employed freelancers

Following complaints by trade unions that some individuals were hired by the State Broadcaster (Radio Telefis Eireann) as self-employed freelancers rather than PAYE workers employed under contracts of service, the company engaged a Consultant to carry out an independent review of persons hired on contracts for services. The number in question were 472 of which 391 were deemed "sole traders" and 81 were PSCs.

The Review analysed the contractual arrangements from an employment law perspective with reference to the Code of Practice and the relevant case law. The Review concluded that of the 443 contractors examined:

- 106 were assessed as having attributes akin to employment and required individual review with regard to their employment;
- 51 were assessed as having attributes akin to both employment and self-employment and required review; and
- 276 were assessed as persons who would not normally be considered as employees and required no further review.

In December 2019, it was reported that 81 of those originally described as having attributes akin to employment have received "proper" contracts of employment. A small number remain to be accommodated, with the remainder either having left or not seeking such a contract.

Position and role of the social partners on new forms of employment

This section provides an overview of the main findings of the primary research.

Law and social security

The central issue that determines an individual's capacity to access protection under current legislation is the definition of the relationship between the person providing labour and an employer. While the majority of the interviewees agreed on the central role of this, the impact of this relationship was viewed very differently by the different organisations. For those in a position where their employment status is recognised the employment legislation is relatively robust. Such workers have a floor of rights.

Employers/ employer bodies

Some employer bodies felt that the recession had a significant impact on the nature of employment in general and the specifically employee/employer relationship. The concept of 'security' changed. They felt that after the recession there was no secure employment; that the once prominent employee – employer cradle to grave contract was over. Those who were highly skilled were better in this scenario and could move into a position of becoming contractor charging significant daily rates for their services. This is exemplified by those working in the IT sector and other areas, such as GDPR as a service, where jobs are always going to be part-time/once off roles.

Government Department

A central issue for interviewees from government departments was how self-employment is defined and the capacity to differentiate between the legitimate and the bogus self-employed; the legitimate do not have mutuality of obligation. Some central issues include contract of service/contract for services, which are particularly problematic in the platform and gig economies – “we need to ask what the nature of is a 'true-employee' or is someone in a position of being false self-employed”.

Some protections do exist, and the State does provide protection and tries to establish status. It is the role of the Department of Employment Affairs and Social Protection to define the different types of the self-employed. Useful figures would include the number of workers in each category of self-employed. The data from the ESRI report suggests that the numbers in each category of employment is not large and hence they do not represent a large feature of the labour market.

These figures do matter, and even purely from an economic perspective, determining employee status is critical for tax and social security. What is important, is to be able to differentiate between the quantification of the issue and the requirement for legislation to protect those vulnerable to exploitation.

NGO

The representative from the NGO sector felt that the issue was heavily influenced by the type of employment and type of labour. Therefore, while the majority of employment is permanent (part-time or full-time) and is protected by the legislation, those who are in precarious forms of employment (although the minority) have relatively few protections. Examples of vulnerable persons include those working in catering (mainly cafés and restaurants), domestic work, and migrant workers. In this regard it was noted that the majority of Deliveroo riders in Dublin are Brazilian. Overall, a lack of knowledge and experience puts people at risk of accessing social protection.

Another major issue is that people taking jobs that cannot support them financially means that they are also further supported either by the State, by family, or by family and friends; this constitutes an informal social welfare system.

State Agency

A respondent from a state agency takes this a little further. The interviewee argued that inexperienced workers receive less pay, contribute less to the social insurance fund, and hence have less access to social welfare and the extensive range of benefits. This is particularly problematic for the bogus self-employed who find themselves in the situation of being under poor legislative guidelines of self-employment, and also vulnerable to the changeable economic needs of an employer. Further, there is an added risk in the differential between what is paid in; “contribution by employer and employee is 14%; if self-employed is 4%”. If you have the status of a ‘non-worker’, you do not have an equal footing and you are open to exploitation. For example, certain industries are more prominent in the gig economy; in services etc.

At present the Employment (Miscellaneous Provisions) Act 2018 deals with If and When contracts; in Ireland, Ibec⁴³ and Congress⁴⁴ are on either side of the debate as to what the legislation should have had in it; they are driven by quantitative argument in the case of the former, and the provision of legislation to protect the vulnerable minority in the latter. There is a concern that the legislation will be prescriptive.

From a union perspective, it raises significant issues as if workers do not have rights and they have taken cases and have determined that they have rights. In European legislation the term used is “worker”, in much Irish case law the definition used is an employee- which is a narrower concept.

Therefore, and by the very nature of being ‘bogus self-employed’, it is difficult to determine the exact number of people employed in these areas at any one time; somewhat diminishing the power of the quantitative argument.

In other types of employment (e.g. the gig economy) individual workers are not thought of as employees and hence fall outside all legislation. This arises in most cases, as each assignment the individual workers take on is regarded as separate contract. Arguably while they are working, they may be under a contract of service, but there is no continuity.

Trade Union

From the trade union perspective, the main issues the legislation needs to address are that those who pay are those who benefit; working hours have to be proportionate to what you earn. There has to be a “threshold of decency [which is a] minimum of what someone is expected to exist on” . This becomes complicated when discussing part time or on-call, or if and when work. There is a complex balance in trying to implement and legislate for what people earn and what they are entitled to in terms of welfare support. This includes areas of eligibility criteria, as almost every system is built on the full-time worker.

Academic

Social partnership worked well in late 1990’s. In 2010 there was a breakdown of social partnership in any form; for which (an academic interviewee felt) the unions were to blame. It ended up with unions saying one thing and Ibec saying another and no one really telling the truth.

Overall, the opinion seemed to be that the trade union movement is declining, but as fast as in other places. The main issue is really the status of the employee- they must be classified as an employee as the system is built around supporting employees; e.g. job seekers allowance,

⁴³ Ireland's largest lobby group representing Irish business both domestically and internationally.

⁴⁴ Congress is the largest civil society organisation on the island of Ireland, representing and campaigning on behalf of some 800,000 working people.

healthcare. In some cases, workers think they are covered but they are not, and only realise it when the move to access their rights. Further, which the number of new companies increasing- this does not necessarily make for a success. Statistics are, again, do not tell the story - it is in the reality of the lived experience of a number of people that we can identify the issues. They may not represent a large percentage of the population. Yet, it can be argued that legislation should be in place to ensure that no one is open to exploitation.

Flexibilisation of the work environment

Employer organisation

One representative from an employer organisation suggested that there had been a growth in business in the contract work area. This includes a lot of work with women returning to the workforce (after having children), and many who are not looking for full time employment. She did, however, represent people who have significant experience and expertise, and those in “high powered careers who had previously had corporate [background] and now wanted to work three days a week with less onerous responsibility, and bring their skills and experience to bear [on their career]”. In this particular line of work, there has been a growth in employment in this area and it is viewed as beneficial to all parties. These benefits include the freedom of choice, higher daily rates for the contractor, and the luxury of not having to hire permanent or part time staff for the employer. Contractors can also move between companies and different projects without it being seen as a negative factor on their CV.

Government Department

A government interviewee suggested that, from their perspective, this is a relatively new area and they felt that neither the trade unions, employee organisations, nor the government understood this yet. The central issues are the vulnerability of the individual worker from a societal point of view and cover the lacuna in our legislation: protection must be extended to all employees. Further, they did not think that there was an appetite for social partnership or to return to the ‘old way of doing business’ but a huge support to bring back / support social dialogue and involve Ministers, senior officials in a new productive form of dialogue.

NGO

The NGO representative had another perspective;

“Originally flexibility was offered as a benefit to employees.... but I am sceptical about the impact of flexibility, as it depends on the individual... but the risk of the entrepreneur has now been placed on the individual and [moved] from the business. Unions need to make themselves relevant again to young people; to the 20 to 25-year olds.”

This can be achieved by articulating what the union can support them with not only in terms of job security and representation but what it can provide to them that is relevant to their lifestyles and their needs:

“What we can do is look at the current conditions: what are young people earning, what does it buy, what does it provide for in terms of security... e.g. pensions; looking at Gen X- we are not a certain we want to support them in their old age?”

Trade Union

One union representative suggested that they were, in fact, growing as an organisation. This may be viewed as in response to proactive development of service offerings and remaining as advocates supporting changed in legislation. They did, however, recognise that they were slow to change and needed to evolve if they were to keep pace with the changes in employment.

Academic

Therefore, concludes an academic interviewee, while the issue of vulnerability for any adult is significant; “the notion that there has been a rapid rise in new forms of employment is simply not true; temporary employment as a proportion of all employees was 10% in late 90’s”. It is the nature of these types of work that has changed. Therefore, while issues like the gig economy are very small aspects of the Irish economy they get a lot of attention in the media.

This highlights the central issues in this research: policy, strategy and legislation need to be considered on the basis that a balanced approach is taken to legislating to support the most vulnerable, and also policy and strategy developed proportionate to the scale of the problem.

Social Partners

The definition of an individual’s legal status is fundamental to how social partners can engage with a worker. Most law is based on the concept of ‘employee’ rather than ‘worker’. If an individual worker is not an employee (i.e. is not paying PRSI and they are not in an employment contract relationship), they do not have access to the protection of employee status, maternity leave and a range of social supports. Therefore, only ‘employees’ can access the machinery of the WRC and Labour Court . Further, they are not contributing to the State through taxation of their income.

Trade Union

A union representative suggested that the main issue for employees was idea of certainty. Precarious forms of employment that do not state hours of work each week, what days those will span, and over what days of the week they are being asked to work do not allow people to plan their lives. The representative disputed the argument that these forms of employment suit people remaining adamant that “earning and certainty of earnings allow people to plan their lives”.

Further, while it was conceded that there was an overall decline in trade union membership, it was felt that the decline had plateaued:

“Trade Unions are, by their nature, are conservative, rigid, and slow to change; that’s the nature of the beast. If you are stuck in a way that is to deal with the traditional servicing model, and we [as a country and labour] are faced with a challenge to organise. The union movement needs to recognise that they need to organise in ways that [new forms of work] ask of us... What you do with that space is very important. You start building that now and direct it towards a more organising and activating trade union.”

Further, it was the opinion of this representative that employers have taken on a different attitude to employee/industrial relations. Some large organisations have hired outside consultants to provide them with advice and strategies for employee engagement and no longer have to consider trade unions as a fundamental part of this process. Through these mechanisms, employers are establishing forms of direct internal engagement/workers councils, informed by consultants; either to employers or employee organisations: “Independent consultants have sprung up all over”.

Therefore, trade unions are challenged to make themselves relevant to workers in these new forms of employment. Trade unions have not, to date, been successful at addressing this. It can be argued that the social movement and political systems have not reacted quickly enough either.

Employer organisation

In terms of the role of social partners in this form of employment, many felt that the trade unions have not kept pace with changes in the nature of work and cannot effectively support workers in new forms of employment; “they have not stepped up to the mark”. There is a perception that their model is only fit for purpose to support people who have been in their roles for 30 years or so and work in full time, pensionable employment. Challenges lie in engaging with and supporting

those in new forms of employment, addressing who is to be represented and how. Further, the collective is no longer important in the context of employment: “it weakens everyone” (NGO).

For unions in the present day, collective bargaining issues are problematic as these unions do not have a presence in these areas of new forms of employment, they “move too slowly”, and as institutions they are “stuck in their ways” (ibid). It was suggested that they need to modernise and use technology better to engage people in social dialogue / collective bargaining (e.g. mobile/computer apps, online forums etc.)

NGO

According to one NGO interviewee, many individuals are ignorant about what trade union they can join, and this is particularly an issue in the case of millennials. This situation is not helped by the view among the younger generation of employees that trade union leaders were directly involved in increasing student fees in 2012. Efforts to engage younger workers in joining the trade union movement are further challenged by offerings of large technology companies which provide incentives to stay, alternatives to pay, and options to engage directly with the company through professional mediators. “Now technically at near full employment... there is huge turnover as a result of choice ... so companies try to encourage people to stay via the culture; the place of health care, pensions etc are taken with a ping-pong table”.

It was further suggested that a means of addressing the rapid changes in the employment market monitoring should include:

- 1) directly through changes in business practices as “employers have a duty to provide for their employees”;
- 2) the realisation by workers that businesses are in the business to make profit: that is that “someone is using labour to make a profit implies that where they can businesses will exploit their workers and hence workers need to recognise they have direct power”;
- 3) increased consumer awareness of the processes and employment practices that go into the products and services they purchase: “consumers have a significant responsibility to engage in ethical consumption and recognise that cheap products are on the back of someone being exploited- they have to ask themselves are they OK with that on a moral basis they have to act: ‘consumers are the most important player in the economy’?”

Government Department

The government’s approach to this issue of the dissolution of social partnership and the lack of coherent dialogue, has been to set up subgroups to deal with specific issues.

State Agency

From the perspective of one state agency, employers who are dealing in new forms of employment tend to be new companies / actors working in areas, such as online service provision, that did not exist before and are a result of advances in technology; for example- Uber in the UK. They are ‘disruptors’. The regulatory environment that surrounds these new forms of employment is based on assumptions that no longer apply. Legislation is only now beginning to catch up with this challenge.

In the case of professional and technological companies, generally they have a well-educated workforce. The areas of real concern are those who are not as educated and who do not have access to the same options. They end up working in low paid jobs and are open to exploitation; and (at the moment) there are few social actors who are in a position to support them. Nor has there been a legal basis for it.

In employee relations, Ireland has seen a significant growth in private agencies / consultancies who have emerged in recent years who provide a service to employers and advice on all sorts of employment relations matter. Individuals, in many cases, advise employers to avoid application of employment law by engaging in these forms of arrangements- these cases have come before the WRC.

Academic

There are divergent views among social partners on state statutes, and the extent of the new forms of employment. An academic interviewee suggested that there has been a rise in temporary employment agencies. While they have always existed as part of the employment sector, their business models appear to have changed in that now they play an increasingly significant role in these forms of employment.⁴⁵ Other new players in the labour market are 'platforms'.

An exacerbating factor, according to the interviewee, is that new business models are exciting, and governments are eager to announce a new technological initiative and hence these can influence policy decision. As we have seen, the ESRI report suggested that new forms of employment are not an issue as the numbers involved represent only a small fraction of employees. However, it comes down to a choice of whether we measure the number of individuals who may be open to exploitation or whether we adopt the approach that legislation should protect everyone from possible exploitation: "When we are talking about legislation, we are talking about legislating for the floor".

In recent years, possibly in response to improvements in legislation, cases in the WRC, or simple increased awareness, Ireland has seen a movement away from zero hours contracts. It is imperative that this movement continues to develop new forms of actions rather than actors and towards a multiplicity of actors engaging in new ways of supporting collective discourse and bargaining. For example, social media and the internet have enabled individuals and groups of actors to articulate their interests/pressures in a way they have not before. This is a new means of lobbying, public pressure, and putting activism in the public space. If we view direct action as an outcome of dialogue, and a means of creating purposive dialogue, these new mediums can act as potential mediums for highlighting these issues among those involved as well as situating this dialogue into the public sphere. This also has the potential for further enforcing certain standards and behaviours in the public sphere; possibly even setting norms and expectations.

So, while trade unions are concerned about it, and express their concern, and employers believe that flexibilisation is important and necessary, most respondents agree that there are limitations to the unregulated flexibilisation of workplace conditions.

Social Dialogue / Collective Bargaining

Academic

At the moment, the Joint Labour Committees are not functioning. The reforms introduced by the Industrial Relations (Amendment) Acts in 2012 and 2015 have had little or no effect and sectoral employment orders have limited scope. One recent progressive development is the inclusion of the term worker, rather than employee, as this is broader referring to any person who provides services under a contract, not necessarily a contract of employment. Further, it is in line with UK and EU legislation.

⁴⁵ A full list of such agencies is available at:

https://www.workplacerelations.ie/en/publications_forms/current_employment_agency_list.pdf.

According to media reports (Irish Times, 16 April 2019), the "flexible talent" division of recruitment firm CPL had a headcount of 12,296 workers in 2018.

Employer organisation

It is the view of one employer organisation that we must return to some form of collective bargaining or that there is a need to put in place proactive measures through collaboration and dialogue. That this will allow all parties to benefit from the engagement.

Government Department

A government interviewee suggested that the dissolution of social dialogue and partnership during the recession has led, at the enterprise level, to each sector (employer and employee organisations) “minding its own back patch”. Certain employment areas have retained strength and work on a sectoral level; e.g. construction / mechanical. While we have seen the emergence of the aforementioned coming together of new parties, the role of the union is still central. This is because it is possible to have sectoral representatives as alternative to Trade Union Sectoral Orders being made. If this approach could be applied to all in the sector that could be effective (e.g. childcare).

Further, they felt that the role of the WRC is critical as it provides a more integrated services which increases a focus on employee relations among employers.

State Agency

One state agency felt that they did not think that there was any social dialogue in place: “there are informal relationships/discussion between the Congress of trade unions and Ibec on some matters but no common approach”.

These employers who are dealing in new forms of employment tend to be new actors in areas that did not exist before; e.g. Uber. Already a provision to provide service in a disruptive way. Some of these companies working in the gig economy have opened the possibility of collective agreements with the workers in their fields; e.g. services sectors. Therefore, according to a state agency, they were disruptors and now they are maturing through competition “they are going to find it difficult to recruit if they are not offering terms of employment that are going to get companies. For example, attracting interns is a big area in a post JobsBridge environment”.

Legislation catching up is a challenge; it is “touching on some of these issues, but yet no formal structure exists- it is tinkering around the edges”.

“Initiatives happening in Europe- the real hope is that the European Commission will press through on commitment to harmonise the application of social policy law and employment law throughout the EU. Current positions identified by the unions, social policy directives are supposed to be applicable to present a level playing field. ... up to states to apply this. The Commission has identified problems.” (ibid)

NGO

From the perspective of the NGO group; the question of what is fair pay is important. For example, the living wage as a concept and the fact that this is higher than the minimum wage- “it is perfectly legal to pay someone below what is enough to access a basic standard of living; this comes back to fact that the state is sponsored by the family”. This, from their point of view, is founded on fair working conditions and working hours; the gig economy puts us at risk of moving into a realm where work and life are blended: “passion and enthusiasm [for work] are the basis of exploitation- work should be there to facilitate life not the other way around.” This gives rise to a dissolving sense of work as a vocation.

Trade Union

From the perspective of a union interviewee, there is nothing inherently new in Industrial Relations. There are some new actors, such as Uber, Deliveroo etc. working across online

platforms, but this is based on the based on traditional self-employment such as the taxi service etc. The difference is that large stateless companies are basing their company models on using this form of self-employment to establish precarious forms of employment. What seems to be relatively new are the consultants selling their form of employment relationships.

One of the key issues in the fragmentation of a workforce is the loss of the power of the strike: “this is the ultimate power that workers have”. It was the opinion of another union representative that the longer workers are removed from this as an option they will forget about it, and this hugely benefits the employers: “would it not be better if we were to sit down and negotiate and use the machine of the State to support collective bargaining.” This is, however, not happening in many areas.

Another union interviewee, however, suggested that a move to legislate for precarious work through similar methods used when engaging the organised workforce is not an answer: “it is hard to organise workers in types of precarious employment. If we go back in time, the labourers on the docks were the same. Eventually a battle between the dockers and employers emerged which started the button system; this was done by collective bargaining not by law”.

The trade unions are, in the context of recent legislative changes, moving towards a more powerful framework for collective bargaining.

State

The Irish Congress of Trade Unions and the Irish government engaged little in social dialogue in public sector pay agreement during the recession. Pay agreements have been bounded. The public service agreement will be unwound, and it is not clear as to what will follow that. What are emerging more frequently are the rise in bilateral negotiations. Trade unions point to the problems of those in precarious employment, yet employers say there is no real problem.

Future initiatives: legislation, initiatives

Academic

There is little doubt, among all our interviewees, that this is a complex issue. Indeed, it is true that some people choose to go into temporary employment. One argument is that there is a trade-off between the freedom of working outside the restrictions of permanent full-time employment and the security and rights offered within such working conditions. Further, it is suggested by one interviewee that many people involved in temporary work contracts consciously balance this out through placing a low value on security and pay and a higher value on freedom of working conditions or that they have taken a job because they want to gain worked experience and that they view these contracts as a means to an end. There is some evidence to support this but an admission by one interviewee that there is a need to be built up representative statistics “in a sensible way”. Further, this interviewee suggests that overregulation means employers may not offer these contracts at all, and that we need to “move away from unions saying these types of contacts are bad and employers saying these are good- “the truth is somewhere in the middle”. What is needed is a progressive form of social partnership supported by an evidence base.

Government Department

One government interview stated that, from a legislative point of view, the key issues going forward are advocacy, awareness and better capacity to reach the population of all employees and employers. It is critical to create citizen employment law structures and that these are accompanied by a willingness to act a local level: “disputes settled locally- get a better outcome”.

Further, trade unions need to work towards different roles and need to evolve and be 'a bit more mature' about their identity. There is also an onus on employers to provide appropriate terms of employment.

State Agency

When asked what the biggest challenges in the future are; a state agency interviewee argued that we need to build supports for new forms of employment around future benefits in social welfare. In particular, if we are not funding social welfare we will have a huge challenge for pensions. In this instance, the government will have to provide for expectations for current gig economy workers and they retire, and no state supports – then it becomes a major challenge: “this is where legislation needs to be going”.

Another state agency interviewee was of the opinion that the decline in the role of trade unions represent a significant issue as, at least under the current system, workers outside a union setting cannot easily engage in collective bargaining. This is further exacerbated by the fact that collective bargaining is declining in general.

It was suggested that “we hold on to common law definition of employee [and away from the ‘master and servant’ type of working relationship fast disappearing. It was argued that this represents operating concepts and definitions that do not represent the modern workforce. The notion of employee that works for certain time, fixed wage, duty to prove and do work is fine in respect to most people, but there is a large body of people that that does not apply to. In fact, it is “relatively easy to design a job that that does not apply to”. These individuals are then outside the scope of employment regulatory framework.

“What is needed to recognise what is happening in the economy- abandoning the old common law notion of master and servant and adopt a definition of employee/worker as a person who works for another in return for a wage and should be regarded as part of the workforce and covered by all the regulation intended to protect people in the workforce.”

In the Employment Equality Act 1998, a worker is defined broadly as anyone who provides work for money. The Industrial Relations Acts 1946 to 2015 use the term worker, which includes a person who has entered into or works under “a contract to personally execute any work or labour”. The root cause of problem and solution seems to be straightforward: working relations have evolved and the law has not.

The biggest issues centre on the standard contractual arrangement with the worker or type of worker- terms that are encompassed in that; from a regulatory point of view this is critical. In the consultation on European Directive, the EC Directive transfers to predictable working conditions the defining a notion of worker for defining worker status in shorter causal relationship. Trade off of expansion in public sector was the elimination of the use of new forms of employment – if the economic boom had continued in Ireland it might be more evident but pay cuts and increase working hours made more of security and were traded for flexibility and cooperation with reform.

Trade Union

One union interviewee believed that the system itself would inevitably produce these types of employment; “in a capitalist system, the desire to work comes first; you will take what you can get and try to get more afterwards.”

The issue is that regulation based on individual rights will make a difference, but it only scratches the surface. The real difference can be made in ensuring that those in positions of precarious employment have the legal right to be in a union and the capacity to engage in collective bargaining. This requires a change of mind set by trade unions.

Every sector is vulnerable to new types of employment- the market determines this treatment. The difference between a freelancer and someone working in a precarious situation must be clearly identifiable. Precarious work is when the employer chooses that you will be on an 'If and When' and in a precarious position: "every profession is vulnerable to this; if you don't control that every sector is vulnerable."

A union interviewee suggested that it is important for the role of the union to be able to argue for sectoral orders. They suggest that legislation is now catching up with employment types, and while recent "legislative amendments are not perfect, they represent progress [and] it puts in [place] an extra layer of statutory protection for workers who may be vulnerable to exploitation".

This interviewee also argued that most of the legislation in Ireland originated from Europe rights-based legislation and that the WRC have taken up a critical role in providing clarity for workers about their rights and a medium of resolution. Yet some problems remain: lack of knowledge of rights and fear of repercussions for those working in positions where they are either being exploited or are open to exploitation:

"The real problem is ignorance of your entitlements. It is the role of the Trade Union to reach out to workers using whatever technological advances to ensure that they are aware of their rights, the state agencies are making them aware of the rights, and then [the union can say] if you are fearful, we can take up those rights on your behalf."

"[The real] problem [is] of fear ... someone knows their rights when knocking on the boss's door and the repercussions of doing that".

"[Therefore], we seek to improve on the statutory floor [established by the new legislation]." (Union interviewee 2)

This interviewee viewed their next big campaign as fundamentally about the right to collectively bargain in this new working environment. They suggested that the Australian model is a good one to review.

Academic

An academic interviewee felt that while the current legislation was a step in the right direction, "we need to legislate for the floor".

This interviewee also stated that collective protection via sectoral standards is also of critical importance for new forms of employment: "having a right and being able to access it are very different things". Further, the key challenge is in quantifying this. However, platform work by its very nature captures all information about the worker: this, if accessed and used effectively, is a good opportunity to get more and more reliable data. Unions and groups using technology to organize better – e.g. Deliveroo insist that drivers meet at a time and place with unintended consequences that unofficial collective bargaining emerged and so could 'pop-up' unions. This could be an excellent government initiative. Many people in the gig economy, however, work in isolation.

Can technology be harnessed by trade unions and employees to improve their situation as it is by employers? The more difficult issue to argue is non-geographically based / national projects which present a transnational challenge. The challenge is to differentiate between quantification of an issue in terms of numbers and legislating for basic human rights to establish a floor of protection. This should be done in a way that supports new business models, and also ensures the collection of appropriate taxes – which are a potential huge loss of revenue for the country.

NGO

An NGO interviewee's opinion can be summarised in one quote:

"Increasing appetite for the extreme politics- facing Trump and Brexit that played off the fears of the disenfranchised white working class in 2016 who presented solutions to their problems. This might inspire new actors in industrial relations."

Employer/Employer Organisation

Finally, the issue of gender was also raised as an important matter for future consideration. An interviewee from an employer/employer organisation suggested that the gender pay legislation in the UK represents an important example for Ireland.

For example, they suggest that in the current economic upswing recruiters are under pressure to fill roles, and they do not have the luxury of ensuring that gender balances are met if they are not pushed to do so:

"We are sending our daughters into a workplace designed by our fathers; so, to me the traditional forms of work are patriarchal. New forms of employment are throwing that open. I am happy to play a part in that because if your value is to tie someone to being in a physical location Monday to Friday 9 to 5, then you are cutting out a huge amount of the population. You are not taking into account."

To meet these needs of the modern family where two parents are working, flexibility is critical. In addition, the price of petrol, accommodation in Dublin and other costs are significant. Therefore, offering the opportunity to work remotely or work flexible hours is essential to address the requirements of the modern worker, and in particular addressing inequality in gender employment.

Another means of supporting workers' rights is through the better use of communications; in particular social media. This is something most of the interviewees seem to agree upon.

The example of a clothes shop in Malahide, Dublin was cited. Here the owner was defrauding their customers by selling replica/cheaper versions of designer clothes at very high prices. Further, their employees were also being asked to lie about this to customers and being treated very poorly. This prompted some of them to post some of this information on social media which led to an investigation and legal repercussions for the owner and redress for the employees.

Overall, it was felt, that working practice need to change to reflect contemporary society and be 'blown open' to meet the needs of a globalised, modern, 24 hour working world we now inhabit.

"We need to redefine the economic unit."

"Your career is not a ladder it is a jungle gym."

Examples of the benefits outside gender, include supports for 'education for life' reflecting rapid changes in careers, the inclusion of reduction in strains on the transport system and the challenges of transport for the modern worker, which, in turn, will have significant repercussions for the housing, energy etc.

Labour market effects of the reforms: Ireland, new forms of employment: quantifying or qualifying

The Department of Finance summarises the main issues with uncertainty around self-employment as follows:

- There is a risk of losses of tax and PRSI.
- That intermediary/self-employment arrangements do allow employers to avoid social insurance payments.
- That there is an increased vulnerability of workers and the impact of disguised self-employment on workers' rights and earnings.
- They suggest a number of approaches to addressing this:
reducing the differential in social insurance rates between employees/workers and self-employed;and
need for clear public information to ensure that workers and employers are aware of the mechanisms available where there is a dispute as to employment status

To summarise, the main findings of the previous three sections, the central challenge is that there is no set of data about these new forms of employment that can claim representativeness. Therefore, there is no research, data nor public engagement that can comprehensively determine the prominence of the state of new forms of employment, nor the conditions under which most people within these forms of employment work in Ireland.

It is, however, estimated that somewhere between 8 and 10.5 per cent of employees are in some form of new employment. Further, it is clear that while this does not represent a large section of the work force, it is certainly not insignificant. From a legal, policy and strategy point of view, it is imperative that the government of Ireland legislate to protect the rights of all workers in Ireland. This is critical to ensure that employee rights are upheld, and vital funds are not diverted from the exchequer.

Other significant issues are that the trade unions are wholly unprepared for these forms of employment, which poses a significant risk to new forms of collective bargaining. Therefore, it is even more important that the rights of the worker are supported by legislation, and that all workers are aware of their rights and the mechanisms by which they can exercise them. This includes their employer, the WRC, and access to effective union support. Further additions to this support system are organic networks that employ some of the same communications technologies supporting peer-to-peer engagement that the gig economies use to employ the workers in the first instance.

Conclusions and recommendations

Types of employment

The central issue that determines one's access to protection under current employment legislation is the definition of relationship between the person providing labour and an employer. A prevailing opinion among the interviewees who took part in this study was that there had been a perceived growth in contract work in recent years. Further, the type and quality employment vary hugely across the employment spectrum and is largely dependent on experience, education and expertise. While self-employed high-end contract workers (e.g. IT) are highly educated, highly skilled and have chosen to take up this line of work, many unskilled workers engage in these forms of employment because they cannot access better conditions.

The various types of new forms of work and non-standard employment relationships in Ireland are shaped by a variety of factors, including technological developments and demographic change, but particularly due to

(i) the difference in social insurance contribution rates between, and the tax treatment of, the employed and the self-employed; and

(ii) the extensive suite of employment rights granted to the employed and the regulatory and record keeping obligations of the employer.

There has been significant media and public debate about the gig economy, but no firm data exists as to the extent of this employment, nor are there any court cases pending where the employment status of a gig economy worker is in issue. UBER, for example does not offer its "ride sharing" service in Ireland but in the food delivery service both Deliveroo and UBER Eats are prominent.

Among respondents in this qualitative study there were obvious difference of opinion between: a) those who accept that, although the data is, in itself, not representative, it is nevertheless reliable and; b) those who believe that this is not a matter of quantifying the prevalence of these new forms of employment in the Irish labour force but a matter for legislation as these forms of new employment open employees, or workers, up to possible exploitation.

While the majority of the interviewees agreed that there is a critical need for defining the relationship between the person providing labour and an employer, the impact of this relationship was viewed very differently by the various organisations. Essentially, it can be summarised as follows: for those in recognised employment status the employment legislation is relatively robust and such workers have a floor of rights, yet for those in non-standard forms of employment, a lack of a clear definition of their role can have a wide range of implications including access to rights and social welfare.

Social Partners

Most law is based on employees rather than workers. If not paying PRSI as not in employment contract relationship so not have access to protection of employee status, maternity leave and a range of social supports. Therefore, all 'employees' can access machinery of WRC and Labour Court and access to legal supports. Many in new forms of employment are, however, defined as self-employed (bogus or not).

Employers who are dealing in new forms of employment tend to be new companies / actors working in areas, such as online service provision, that did not exist before and are a result of advances in technology; for example- Uber in the UK.

New actors in the area are contract negotiators (many with previous union experience) who work directly for large companies.

One immediate consequence is a decrease in collective bargaining coverage. Trade unions are reluctant to engage in collective bargaining on behalf of "dependent self-employed" workers, such as air line pilots, for fear of being fined for breaching section 4 of the Competition Act 2002.

The key issue is that of misclassification and the challenge of classifying workers who fall between the traditional definition of "employee" and self-employed. Ensuring the correct classification is key to ensuring access to employment and social welfare legislation as well as collective bargaining.

Social dialogue

One state agency felt that they did not think that there was any social dialogue in place. The dissolution of social dialogue and partnership during the recession has led, at the enterprise level, to each sector (employer and employee organisations) retracting into protectionist mode. Further, one of the key issues in the fragmentation of a workforce is the loss of the power of the strike: "this is the ultimate power that workers have" (Union interviewee). Therefore, social dialogue currently has no role and the collective bargaining system in Ireland cannot adapt to developments in this area because of fears caused by the Competition Act 2002.

Legislative amendments

The Competition (Amendment) Act 2017 has addressed, to a limited extent, the collective bargaining entitlements of three small groups of dependent self-employed workers.

The Employment (Miscellaneous Provisions) Act 2018 has addressed the issue of variable hours contracts (including zero hours contracts).

Measures have been announced to tackle the problem of bogus self-employment, including targeting inspection efforts in particular sectors or geographical areas known to have a greater prevalence of such employment such as construction, cleaning, food processing and facility services.

Recommendations have also been made to reduce the differential in social insurance contribution rates between the employed and the self-employed. This is not just to reduce Exchequer revenue losses but also to reduce distortive effects in the labour market and the incentive to construct disguised employment relationships that may undermine employment rights.

Future initiatives

There remain significant deficits in individual's knowledge of their entitlements. Further "having a right and being able to access it are very different things" (Academic interviewee). Therefore legislation "for the floor" was considered critical, but not the solution.

We need to move towards some form of dialogue on these issues. This may include moving away from "unions saying these types of contracts are bad and employers saying these are great- the truth is somewhere in the middle" (Academic interviewee). A key challenge is the reliability of the data and the different types of approaches being taken. The first is the quantification of the issue in terms of percentages of those employed in new forms of employment, as per the ESRI report. And the rights-based approach which argues that we should legislate for the floor. Regardless of which approach one takes, we suggest that further research and building up reliable representative data on this issue is critical.

An employer organisation suggested that “platform work by its very nature captures all information about the worker. This data, if accessed and used effectively, is a good opportunity to get more and more reliable data. Unions and groups need to use technology to organize better.” We suggest that new forms of communication technology could open up means and way of engagement and the potential for collective discourse. Further, Trade unions need to work towards different roles and need to evolve and be a bit more mature about their identity.

Further, we need to build supports for new forms of employment around future benefits in social welfare- or we may face a serious pension crisis in 20 to 30 years.

Although some workers may be misclassified, others will be genuinely difficult to classify because of ambiguity in their employment status. Some employment rights are already given to such workers; the challenge is to decide whether other employment rights should be extended to them, as was done with temporary agency workers whose employment status was also ambiguous.

Suggestions for ways that we may address these issues include redefining ‘work’ as a person who works for another in return for a wage, opening up flexibility in forms of employment in this context to address the perpetuation of patriarchy inherent in the current system of work, and the better use of technology to encourage collective dialogue and possibly a new form of collective bargaining.

Summary

In summary, no set of data that can claim representativeness about new forms of new employment. From a legal, policy and strategy point of view, it is imperative that the government of Ireland legislate for all workers in Ireland. This is critical to ensure that employee rights are upheld, and vital funds are not diverted from the exchequer. Trade unions are wholly unprepared for these forms of employment, which poses a significant risk to new forms of collective bargaining. Therefore, it is even more important that the rights of the worker are supported by legislation, and that all workers are aware of their rights and the mechanisms by which they can exercise them. This includes their employer, the WRC, access to effective union support. Finally, additions to this support are organic networks employing some of the same technologies (e.g. online communications platforms) the gig economies use to employ the workers.