# Addressing Bogus Self-Employment: A Blueprint for Decent Work

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

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

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

*"The progression of platform work can be linked to the development of self-employment and non-standard employment relationships. A European initiative should therefore focus on the protection of all non-standard workers and workers in platform companies (including the self-employed), because a musician, a delivery man, a journalist or a cleaner are in the same situation. They are similar vis-à-vis: their "order giver"; the absence of or incomplete social protection; the difficulties to organise themselves and bargain collectively; and the inability to enforce their right to a decent income. Whether one is an employee, an autonomous or a (bogus) self-employed worker, one does not set the rules of the game, neither with a traditional employer nor with the market. They are workers who have no real possibility of claiming their rights, otherwise they will not be called back the next day"*[1].

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

Unite argues that the following measures could form part of a blueprint for decent work:

## 1. Presumption of employment

Unite argues that an employment relationship should be presumed to exist unless it can be proven otherwise: hence, the burden of proof in the event of a disputed relationship must be on the employer, rather than on the worker.

2. **Updating the Code of Practice for Determining Self-Employment Status and placing it on a statutory footing**

The process of putting the non-statutory 'Code of Practice' on a statutory footing must of necessity encompass the important legal principles set out in court judgments, many of which seem to be being ignored in individual Appeals Panel decisions. Unite further argues that we be given an opportunity to input into the new Statutory Code of Practice. At present, the Code currently does not take account of new forms of bogus self-employment such as platform work. This needs to be addressed in the formulation of the Statutory Code of Practice which must be regularly reviewed and updated.

3. **Establishment of a new 'Decent Work' unit within the Workplace Relations Commission.**

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

In 2015, the National Employment Rights Authority was merged into the Workplace Relations Commission established to streamline Ireland's industrial relations system. When the WRC was established, the then Employment Minister Richard Bruton said it would replace a system which he correctly described as *"characterised by forum-shopping, overlapping claims, delays, and a high degree of formality that often worked against early and easy resolution of claims"*[2].

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

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

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

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

In addition to these efficiency savings, a well-resourced unit would be in a position to recoup significant monies. In his report[3] published in September 2018, the Comptroller and Auditor General noted that, in 2017, the Joint Investigation Unit (for which staff are drawn from the Department of Social Protection's Special Investigation Unit, Revenue's own Joint Investigations Unit, and the Workplace Relations Commission) initiated a campaign specifically focused on the construction sector, resulting in €60.2 million being recovered by the Revenue Commissioners and nearly 500 subcontractors reclassified as employees.

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

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

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

4. **Development of a standard definition of the terms 'employee' and 'worker', to be applied to all pieces of employment legislation.**

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

In this regard, the ETUC has noted that *"The presumption of an employment relationship is closely linked to the definition of worker, which is essential for the application of national labour legislation and for the national social partners to conclude collective agreements on employment and working conditions, while taking into account the general principles of the union legislation and case law established by the Court of Justice of the European Union. Based on this assumption a reversal of burden of proof is needed. Criteria should be based on ECJ decisions, or the California test or ILO conventions"*[4].

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5. **Introducing Anti-Blacklisting legislation**

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

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

6. ***Time limitation periods for filing statutory employment claims to be extended***

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

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

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

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

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

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

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