It is the legally accepted position of the courts that some workers in a sector will be legally regarded as employees and that others will fit the legal criteria to be self-employed. There is no legal basis to 'resolve' the employment status of a group of workers by occupation. To do so is to act outside of the law. I have an absolute right to have this data recorded alongside this data in my files.

- This document in my data also states:

> ***"A number of representative 'Test Cases' were selected in 1993/94 for detailed investigation and formal insurability decision under social welfare legislation"***

There is no legislation to allow the determination of the employment status of a group/class of workers, to do so is to act outside of the law. This fact is not contained in this data and should be. It would take a further 19 years for a Social Welfare Minister to admit that there is no legislation to allow the determination of the employment status of a group/class of workers which Minister Regina Doherty did, and which was published in the Irish Times on the 25th of March 2019 as follows -

The Minister is also looking at changing legislation to permit deciding officers to make determinations on the employment status of groups or classes of workers who are engaged and operate on identical terms and conditions. At present both employers and workers have to agree to such class decisions, and these can be subject to separate individual appeals.

It is an established fact that the process described in the letter created by Mr. Vincent Long, signed by Mr. Eddie Sullivan and sent to Mr. Jim Mitchell fails to inform the Chairperson of the Public Accounts Committee that the 'test case' process, defined and described in this letter, is emphatically not allowed by legislation, and is strictly precluded by the determinations and precedents handed down by the Higher Courts. Although Minister Doherty publicly admitted that there is, in fact, no legislation to allow employment determination by group or class, nowhere in my data is this fact recorded and it should be.

That the unlawful determinations of employment status by group/class is ongoing, was confirmed in a letter by current Minister Heather Humphreys to the Privileges Committee (which was included in the 2022 SAR reply) on the 2nd December 2001 where she states:

> ***"In rare and very limited circumstances, and only where agreed by the individual, some appeals involving a number of workers engaged by the same employers, may be determined by a sample of cases"***

Although clearly admitting to a practice which is outside of the law, Minister Humphreys refuses to acknowledge that 'Sample Cases' are 'Test Cases', a point which is clarified by other documents contained in the 2022 SAR reply.

Minister Humphreys does however admit there are 'sample cases' determined in respect of workers engaged by the same employer and not just workers who are engaged on identical terms and conditions as Minister Doherty had claimed. It is impossible to establish if workers are engaged on identical terms and conditions without first hearing from the individual worker and it is most certainly a stunning admission from the current Minister that insurability of employment decisions on workers working for an individual employer, who may not operate on identical terms and conditions, are made for employers. An example of just this kind of 'test case' scenario arose in the SWAO in 2016 where labourers and bricklayers, two completely different occupations, were told by the Appeals Officer that the SWAO wanted to use their 16 individual cases of both labourers and bricklayers as a 'Test Case'. That this approach was taken by the SWAO was admitted to by the Chief Appeals Officer in the Oireachtas SW Committee in December 2019 and can be confirmed by me as I represented these workers in the Social Welfare Appeals Officer and as I said earlier in this letter, data to do with this appeal should also be contained in my SAR replies.

That these 'Test Cases' were 'Representative' is also false and it must be recorded in my data that this data is false. The letter written by Vincent Long, signed by Eddie Sullivan and sent to Jim Mitchell states that these cases were 'representative' but the Annual Report of the SWAO 1995, in which an anonymised version of the 12th June 1995 'Test Case' is contained, proves this statement to be false. The anonymised version in the 1995 SWAO Report states:

> ***'Motor-cycle Business Couriers. A Deciding Officer gave a decision that a motor-cycle business courier was employed under a contract of service (as an employee) while engaged by a business courier firm. Both parties appealed the decision. The case was understood to be of wider significance to the trade. The Appeals Officer held an oral hearing. Both appellants were present and the Courier firm was legally represented. The Deciding Officer and Social Welfare Inspector were also present. Payment to the courier was ordinarily made by the firm on the basis of a basic engagement rate plus a mileage travel allowance. Individual jobs were allocated (generally by radio) by the employer on the basis of availability and the location of the courier. The firm supplied the radio and the carrier bag. The bag bore the firm's logo, which also appeared on the delivery dockets carried by the courier. The courier supplied the motorcycle and paid all related expenses such as tax, insurance and maintenance, as well as the outdoor clothing. In presenting her case, the Deciding Officer stated that application of standard tests for determining the nature of an employment engagement showed the existence of a contract of service (employee). She held that the firm possessed the right to direct, control and dismiss the courier (control test). The courier's job was so closely tied into the firm's activities that they could be regarded as inseparable (integration). The courier was not an independent business unit (entrepreneurial). Counsel for the firm submitted that the courier was fully free on how he did a job assigned, being at liberty as to the form of***

transport and route used. He was free to work for other employers. He did not have to provide personal service. He could refuse work. If he were off the road for any reason he would not be paid. On motor-cycle couriers being an integral part of the firm's operations, the fact that only about 50% of the business was related to motor-cycle couriers, the rest being done through the bus and rail networks (and so, it was submitted, the firm could carry out its integral courier activities without motor-cycle couriers as such).As to the free-standing nature of a courier's job, it was not unlike that of a taxi driver - the profit margin could be increased by greater activity. Counsel referred to case law to support these contentions.
The courier appellant's evidence did not conflict with the submission on behalf of the appellant firm. specifically, the courier confirmed the flexibility for jobs, the possibility of getting another courier to take his place and instanced occasions on which he had declined to accept jobs offered (fifteen refused in the previous week because they did no suit him for different reasons). The Appeals Officer allowed the appeal. In commenting on the case the Appeal's Officer acknowledged that there were features of the courier's engagement which were more consistent with a contract of service rather than a contract for services. However, in his view, the factors supportive of the existence of self employment outweighed such features. These critical factors included the want of control, acceptability of a substitute, freedom to refuse jobs and the flexibility in hours of availability. Consequently, the nature of contractual engagement was that of a self-employed person and not that of an employee'.

Both parties, the Courier Company and the Courier appealed the Scope Section decision that the Courier was an employee. A Courier who did not want to be regarded as an employee is not representative of some couriers who regard themselves as employees. Equally the reverse is true, a courier who regards him/herself as an employee is not representative of some couriers who consider that they are self-employed. For the Social Welfare Appeals Office to create this 'Test Case' and for Revenue, Department of Social Protection to use this test case, and for the WRC to use precedents set in test cases, is beyond farcical, the reality of such a system is that every time a person challenges their self-employment status to the Scope Section and succeeds, the entire collection and payment of PRSI and Taxes for every worker deemed to be self-employed in that sector (or by that employer) would have to change each time a decision is made which overturns a standing 'Test Case', or, the Appeal of the Scope Section has to be fixed in such a way that the Scope Section decision is overturned and the 'Status Quo' is maintained.

Further data contained in a letter from the Chairperson of the Revenue Commissioners to the Chairperson of the Public Accounts Committee in relation to this 'Test Case' is contained in a letter dated 9th August 2000. Attachments from this letter are contained in the 2022 SAR reply I received such as this –

Oifig an Árd-Chigire Cánach,
Urlár 1, Ionad Setanta,
S... Thobair Phádraig,
Baile Átha Cliath 2.

Office of the Chief Inspector of Taxes,
1st. Floor, Setanta Centre,
Nassau St.,
Dublin 2

Uimh. Thag. -
(Ref. No.) -

Tel. No. (01) 671 6777 Ext. 4356
Fax No. (01) 671 6668

To:
Name
Address

7 March 1997

Re: Couriers

I believe the letter from the Revenue Chairman to the Public Accounts Chairman should be included in my data contained in these files as it helps explain the attachments in their entirety. The letter from the Revenue Chairman to the PAC Chairman is as follows –

Office of the Revenue Commissioners
Dublin Castle
Dublin 2
Ireland

Oifig na gCoimisinéirí Ioncaim
Caisleán Bhaile Átha Cliath
Baile Átha Cliath 2
Éire

PS 3422/00

4 **August 2000**

Mr. Jerome Flanagan,
Office of the Chairman,
Committee of Public Accounts,
Leinster House,
Dublin 2.

Dear Mr. Flanagan,

I am directed by the Chairman to refer to your letter of 25 July 2000 concerning Mr. Martin McMahon, motor cycle courier, of , Ashbourne, Co Meath. Mr. McMahon's main concern seems to be health and safety in the courier business.

As regards taxation, the issue of couriers and particularly motorcycle couriers was the subject of protracted discussions between Revenue and representatives of the courier industry. I enclose copies of our letters of 7 March 1997 and 3 April 1997 to Messrs. K. Ryan & Co., which represented courier firms at the

was the subject of protracted discussions between Revenue and representatives of the courier industry. I enclose copies of our letters of 7 March 1997 and 3 April 1997 to Messrs. K. Ryan & Co., which represented courier firms at the discussions. The letters outline the agreement reached for tax purposes. The majority, if not all, of the courier firms identified following those discussions opted for the voluntary PAYE system of taxation for couriers engaged by them for the reasons outlined in the letters.

For the purpose of insurability under Social Welfare law a motorcycle courier was found to be self-employed by a Department of Social, Community & Family Affairs Appeals Tribunal some years ago. The decision was not challenged further through the High Court on a point of law and consequently would stand for social insurance purposes.

Motorcycle couriers are also regarded as self-employed in the UK. This has been reaffirmed today on the basis of a telephone contact with the UK office dealing with decisions relating to the status of taxpayers for tax and social security purposes.

Taxation of couriers is not currently an issue. The issues raised by Mr. McMahon relate to the question of insurability for social insurance purposes and presumably also to the employment and health and safety rights of couriers. These are matters for the Departments of Social, Community & Family Affairs and Enterprise, Trade & Employment respectively.

I understand that Mr. McMahon has formally taken up the question of his insurability status with the Department of Social, Community & Family Affairs.

The issue of couriers was also raised at a recent inaugural meeting of an 'employment status' group set up under the auspices of the Programme for Prosperity & Fairness. The group consists of representatives of ICTU, CWU, IBEC, Revenue and the Departments of Finance and Social, Community & Family Affairs. It is envisaged that representatives of the Department of Enterprise, Trade & Employment will be invited to the next meeting.

I trust this clarifies the position.

Yours sincerely,

The attachments to this letter, which are contained in the SAR reply to me of August 2022 also refer to the Social Welfare Appeals Office Test Case although Revenue do not directly call it a 'Test Case'. The relevant sections are –

2. *Couriers Status*

2.1 As you are aware, the Department of Social Welfare Appeals Office have decided that a motorcycle courier who provided his own equipment (e.g. motor cycle, special gear etc.) and was engaged under the standard courier contract was insurable as a self-employed contractor under the Social Welfare Acts.

While the decision is not binding on Revenue I propose, as previously stated, in the interest of uniformity and with a view to bringing the matter to a conclusion, to treat couriers as self-employed for tax purposes, whether deliveries are made by van, motorcycle or bicycle -

- where the vehicle is owned by the courier and
- all the outgoings in relation to the vehicle are paid by the courier and
- they are engaged under the standard contract and
- a basic wage is not paid in addition to a "mileage" rate.

This arrangement does not override the statutory rights of couriers, courier firms, Revenue or the Department of Social Welfare in this particular area for the future.

and

Finally, because of the special circumstances surrounding the Couriers' status for tax and social welfare purposes, the arrangements governing couriers should not be taken as a precedent for other cases you may have with the Revenue Commissioners.

In this letter from the Chairman of the Revenue Commissioners to the PAC Chairman, the Chairman of the Revenue Commissioners states about the 1995 Social Welfare Appeals Office 'Test Case' –

> ***"For the purposes of insurability under Social Welfare Law a motorcycle courier was found to be self-employed by a Department of Social Community and Family Affairs Tribunal some years ago. The decision was not challenged further through the High Court on a point of law and consequently would stand for social insurance purposes"***

The Chairman of the Revenue Commissioners at no time refers to the 1995 SWAO 'test case' as a test case. The Chairman of the Revenue Commissioners describes exactly, legally, what the SWAO 'Test Case' actually is. It is the overturning of a Scope Section determination that an individual courier was an employee and not self-employed, by the SWAO, which was not challenged to the High Court, and therefore stands as the final decision for that individual courier for social welfare purposes. It legally, cannot be a 'Test Case' and I have a right to have that data recorded alongside the false data contained in the letter written by Vincent Long, signed by Eddie Sullivan and sent to Jim Mitchell.

On the issue of the 'Test Case' standing by virtue of not being appealed to the High Court, the Courier who did not want to be regarded as an employee was not going

to appeal the SWAO decision, the Courier Company who appealed the Scope Section decision to the SWAO on behalf of the entire Courier Industry was not going to appeal the SWAO decision, that leaves the Department of Social Community and Family Affairs as the only other interested party who could appeal the SWAO decision and who was present in the SWAO in 1995. Only the Minister for Social Community and Family Affairs could appeal the SWAO decision on behalf of the Scope Section. However, decisions of the SWAO are taken as final under SW legislation and the SW Minister does not appeal SWAO decision unless new facts come to light. The true factual position is that the Department of Social Protection, in conjunction with the Revenue Commissioners and the Courier Industry chose a 'Test Case' which was never going to be appealed because it was neither a 'Test Case' nor 'Representative' of some couriers who legally fit the criteria for employees and others who legally fit the criteria for being self-employed.

From the Revenue Chairperson's letter, and the attachments about a 'Special Tax Agreement' between the Chief Inspector of Taxes and Courier Industry employer representatives dated 1997 and which is included in the August 2022 SAR replies but was not included in the 2019 SAR replies, it is clear that the Revenue Commissioners made a decision to treat all couriers as self-employed for PRSI purposes and yet to treat couriers as PAYE employees for Tax purposes based on a decision of an Appeals Officer in 1995 on a single courier who was deliberately selected because he was not nor could not be representative of all couriers and that the Revenue Commissioners were fully aware that it was not a test case. It is also the true factual position, and admitted to in writing in the Special Tax Agreement, that Revenue made the decision to label all couriers as self-employed for PRSI purposes yet treat them as employees under Revenue's PAYE system not because it was a lawful decision but because –

> ***"I propose, as previously stated, in the interest of uniformity and with a view to bringing the matter to a conclusion, to treat couriers as self-employed for tax purposes, whether deliveries are made by van, motorcycle or bicycle"***

That the Revenue Commissioners were fully aware that the decision they made to label couriers as self-employed for Revenue purposes yet treat couriers as employees using Revenue's PAYE system for employees is further evidenced in the statement in the Special Tax Agreement enclosures contained in my 2022 SAR replies which states –

> ***"Because of the special circumstances surrounding the couriers' status for tax and PRSI purposes, the arrangements governing couriers should not be taken as a precedent for other cases with the Revenue Commissioners"***

The true factual position which I have a right to have recorded in my data, is that the Revenue Commissioners acted outside of the law by knowingly labelling couriers as self-employed for tax purposes yet treat them as PAYE employees for Revenue tax purposes entirely based on a decision by a Social Welfare Appeals Officer to overturn a Scope Section decision that a courier was an employee and not self-employed and that it was neither a test case nor representative of the employment status of all couriers and that at all times the Revenue Commissioners and the SWAO and the Department of Social Protection were aware of these facts.

The Revenue Commissioners instruction that the special status of couriers could not be taken as a precedent in other areas proves that decisions taken by Revenue, the

SWAO and the Department of Social Welfare in the area of couriers is considered, unlawfully, by Revenue, the SWAO and the Department of Social Welfare to be 'Precedential' and I have a right to have this data recorded in my files.

Securicor representing the entire courier industry and the Appeals Officer in my case and the Appeals Officer in Richard McArdle's case have all stated that they accept that the 'Special Tax Agreement' reached between Revenue and Courier Industry employers in the Burlington Hotel, is determining evidence that all couriers are self-employed. They are all wrong and I have a right to have that recorded in my data.

On the 2nd December 2021, the Chairman of the Revenue Commissioners told the Public Accounts Committee –

> ***"Revenue is of the view that, in general, van owner driver couriers are engaged under a contract for service"***

In the Special Tax Agreement which is contained in the August 2022 SAR the Chief Inspector of Taxes, Mr. Bob Dowdall, who was also the Revenue representative at the Employment Status Group, claimed that the Special Tax Agreement did not override the statutory rights of couriers, however, the Special Tax Agreement is now accepted by the SWAO as a factor in the employment status of couriers, and Revenue have admitted to the Public Accounts Committee that Revenue hold a view, unlawful as it is, that all couriers are self-employed and that it is an ideological view, not a legal one, is outside of the law. I have a right to have this recorded alongside the Special Tax Agreement in my data. In the Public Accounts Committee in December 2021 and in subsequent written replies to the PAC in 2022, the Revenue Chairman vehemently denies that the operation of the Revenue's PAYE system on couriers for tax purpose is evidence that Revenue have been, legally, treating couriers as employees and at the same time labelling them as self-employed based on a SWAO's decision in 1995. However, in a reply from Finance Minister Pascal Donohoe to Deputy Paul Murphy's PQ on the 27/9/2022 completely contradicts the Revenue Chairperson's denial to the PAC that the operation of Revenue's PAYE system is indicative of employee status –

> ***Question Number(s): 130 Question Reference(s): 47056/22, Department: Finance, Asked by: Paul Murphy T.D – 'One example where the approach between DSP and Revenue is different involves home tutors. The Department of Education has an administrative agreement with Revenue that while home tutors are subject to class S PRSI (self-employed for DSP purposes), income tax and PRSI are deducted under the PAYE system (the Revenue treatment for employees) and the tutor must file an income return only if they are in receipt of other income'***

A further Dail question to Education Minister from For Written Answer on 6th October 2022 from Donnchadh Ó Laoghaire T.D. (Question Number(s): 249 Question Reference(s): 49267/22) reveals that Home Tutors are also all classified as self-employed by the Department of Social Welfare based on a single decision on a single home tutor which is being used to unlawfully classify all home tutors as self-employed yet treat them all as employees under Revenue's PAYE system -

> ***"The Department of Social Protection has determined that Home Tutors are engaged under a contract for service and are therefore self-employed and subject to PRSI Class S"***

Again, the practice of labelling all workers with the same job description as 'Self-employed' based on a single 'test case' is unlawful. Each case must be taken on its own merits which was confirmed by Keane J in the Supreme Court case Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare -

> ***"In deciding whether a person was employed under a contract of service or a contract for services, each case must be considered in light of its particular facts and of the general principles which the courts have developed"***

This unassailable legal precedent that each case must be take on its own merits is also on the GOV.ie website under 'Operational Guidelines – Scope Section' which states:

> ***"Each Scope case is assessed on its own merits and a separate decision is made in relation to each individual case. Employment relationships which may, on the face of it, seem to be the same can differ in the actual terms and conditions that pertain. Scope Section considers all the available evidence, including the report of the Social Welfare Inspector where applicable, and establishes the facts of each case"***

The use of 'Test Cases' or 'Sample Cases' as Minister Humphreys now insists on calling 'Test Cases' is unlawful.

It is the practice of using test cases by the SWAO which, not only differs from the Operation Guidelines from the Scope Section, but it is also entirely unlawful which all arms of the State are fully aware of. It also proves that the SWAO is using its own unlawful precedents to label workers as self-employed while at the same time claiming that it uses the exact same guidelines as the Scope Section. This is vitally important.

Workers are being 'forced' under threat of fine, to attend at SWAO appeals of their Scope Section determinations where they are led to believe that the same precedents and guidelines apply but they do not.

As in the case of couriers, the decision that they will be found by the Appeals Office to be self-employed was made in 1995 and even though the Scope Section has determined numerous times that couriers are employees, those Scope Section decision are always overturned based on unlawful precedents set in an unlawful test case. In using a 'test case' to decide the employment status of all couriers, the Social Welfare Appeals Office set a precedent that the SWAO could label workers by group and class as self-employed. This is the overriding precedent which is unlawful.

On the 2nd December 2021, Minister Heather Humphreys wrote to the Privileges Committee (this letter is included in the 2022 SAR reply) and stated:

> ***"The use of test cases in the 1990s were not used to determine the employment status of all workers in a particular sector"***

This statement from Minister Humphreys is false and the Minister knows it to be false.

All couriers and all home tutors are labelled as self-employed determined by the use of test cases. That a single Appeal's Office decision has been used to determine the employment status of all couriers since 1995 is clearly stated on Revenue.ie website –

Appendix 1

Position up to 31 December 2018

Question

How are couriers treated for tax purposes?

Answer

Couriers are regarded as self-employed for PRSI purposes as a result of a Social Welfare Appeals Officer's decision. In the interest of uniformity Revenue decided, without prejudice, to treat them as self-employed for tax purposes.

Comparing the treatment of Home Tutors to the treatment of Couriers under the PAYE system exposes that the Revenue Commissioners pick and choose, outside of the law, whether they treat unlawful SWAO 'Test Cases' as employees or self-employed on an ad-hoc basis in the PAYE system and there is no continuity to their decisions. They simply make it up as they go along. Therefore, the treatment of Couriers by Revenue, under the PAYE system is not indicative of self-employed status and I have a right to have this recorded in my data.

The SWAO Appeals Officer's decisions in my case and in Richard McArdle's case that the taxation at source of couriers by the Revenue Commissioners is a factor to be considered in appeals of Scope Section decisions is incorrect. The treatment of couriers as PAYE workers, with tax and PRSI deducted at source, most certainly does not indicate self-employment status, if anything, it indicates employment status.

I have a right to have it recorded in my data alongside the letter written by Mr. V Long, signed by Mr. E Sullivan and sent to Mr. J Mitchell which states –

> ***"A number of representative 'Test Cases' were selected in 1993/94 for detailed investigation and formal insurability decision under social welfare legislation"***

is entirely false.

Legally, the State cannot permit test cases as no legislation exists to allow test cases. The case (not cases, a single case) was not, nor could not be representative of couriers who considered themselves to be employees and couriers who considered themselves self-employed. It was not representative because the courier chosen as a test case did not want to be considered as an employee and appealed the Scope Section decision. The treatment of all couriers as self-employed based on a single unlawful test case in the SWAO cannot decide the employment status of all couriers past present and future.

- In the letter written by Mr. Vincent Long, signed by Mr. Eddie Sullivan and sent to Mr. Jim Mitchell it states:

> ***"The general issue of the employment status of couriers is currently being re-examined and meetings with various interest groups will take place shortly"***

This letter was written on the 2nd October 2000. Securicor had appealed the Scope Section decision in my case on the 22nd September 2000. That 'various interest groups' were due to, or had had, discussions on the employment status of couriers, and that my individual case was discussed at these meetings by parties representing those who would be hearing the appeal, was a) unlawful and b) prejudicial in terms of discussing matters that were sub judice in my case.

Although there is a claim that 'various interest groups' would meet, which is confirmed in this letter from Ms. Patricia O'Donovan, Deputy General Secretary of ICTU -

12th December 2000

Mr. Chris Hudson,
Organising Officer,
Communications Workers Union,
575 North Circular Road,
Dublin 1.

Dear Chris,

Further to our meeting on Thursday, 7th December, I undertook to follow up on a number of issues.

Further to our meeting on Thursday, 7th December, I undertook to follow up on a number of issues.

Please find attached a copy of letter to the secretary of the 'Hidden Economy Group' under the PPF formally requesting them to look into the operation of the courier sector, particularly in the Dublin area. As Fergus Whelan is the Congress representative on this Group, you should liaise directly with him on follow-up to this.

I contacted the Scope Section of the Department concerning the right of access of a claimant to the documents from the original case. They confirmed with me that the claimant has exactly the same right as the employer to get all the relevant documents associated with the case. According to them, in relation to this particular case, they did not receive any request for the documents and that if such a request had been received, all the appropriate documents would have been made available. There was therefore no need to submit a request under the Freedom of Information Act. Once such a request was made, then all the procedures under that Act had to be followed. I understand that this process has now been completed and all the relevant documents will be made available to the claimant.

I contacted the Social Welfare Appeals Office about the delay in scheduling the appeal. I was informed that the employer firm had submitted the notice of appeal within the 21 day period and that a

I contacted the Social Welfare Appeals Office about the delay in scheduling the appeal. I was informed that the employer firm had submitted the notice of appeal within the 21 day period and that a

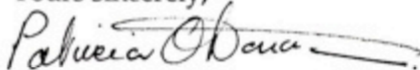
submission from them (giving the grounds for appeal) is awaited. I was also informed that there is a 6 month backlog in having cases heard. Following some discussion about the urgency of this particular case, it was agreed that every effort would be made to schedule it before the end of January, 2001. The union/claimant will get approximately 10 days notice of the hearing which will be an oral hearing. I spoke with John O'Donnell, Deputy Chief Appeals Officer about this matter. I told him that you were representing the claimant and that you would call him early in January to get confirmation of the hearing date from him (tel: 6732800).

I also got clarification of the position in the event of the employer dropping the appeal. In that event, an inspector from the Department of

dropping the appeal. In that event, an inspector from the Department of Social, Community and Family Affairs will issue a 'demand notice' to the employer to collect the arrears of PRSI contributions (both employer and employee contributions) due. If the employer fails to pay up, then they will be pursued in the normal way by the Department. The Department will credit the contributions to the employee and therefore entitlements to benefits will be secured. In this particular case, this would mean restoration of contributions to the initial date of employment and immediate entitlement to the relevant benefits in accordance with the normal conditions.

Finally, I think that it would be useful if you write formally to John O'Donnell, Deputy Chief Appeals Officer advising him that the CWU represents the claimant in this particular case and requesting that all relevant communications be copied to you for information.

Yours sincerely,



Patricia O'Donovan
Deputy General Secretary

The absence of any records, data, reports etc. from the Hidden Economy Group would indicate that no further meetings took place. That no further meetings took place would also seem to be confirmed in this letter from John Purcell, Comptroller and Auditor General dated 13th February 2002 –

Ard-Reachtaire Cuntas agus Ciste
Comptroller and Auditor General

Dublin Castle,
Dublin 2.

Telephone: (01) 603 1000
Fax: (01) 603 1010

13 February 2002

Mr Martin McMahon

Ashbourne
Co. Meath

Dear Mr McMahon,

I refer to your letter dated 9 February regarding employment status in the courier industry.

The issue of what constitutes 'a contract of service' as distinct from 'a contract for service' is an interpretational minefield. The recent report of the Employment Status Group serves to confirm the difficulties in this area as evidenced by their decision to shy away from the legislative

interpretational minefield. The recent report of the Employment Status Group serves to confirm the difficulties in this area as evidenced by their decision to shy away from the legislative approach to defining what an employee is. From my own experience of this area, I think they were wise to confine themselves to setting down criteria and factors which would help define employment status in cases which are not black and white.

My Office has been concerned about this issue and, partly as a result of that concern, the Revenue Commissioners in 1998 undertook a special programme of 6,200 visits to principal contractors in the construction industry. During the visits the status of 63,000 sub-contract situations was examined and 12,000 were reclassified as employees. Because concern was expressed at the Committee of Public Accounts last year that misclassification could still be rife, a similar campaign was commenced in the second half of the year as you have noted in your letter.

I wouldn't agree that contractors in the courier industry are exempt from taxation laws. What can be said is that the arrangement employed is administratively efficient in collecting tax from a sector which traditionally has been recalcitrant when it comes to paying tax. All concerned recognise that it is far from being an ideal system and that there is room for improvement. I will bear the points you make in mind for future audits in this area.

As to your treatment at the Social Welfare appeal hearing, it seems to me, on the basis of your account of events, that you may have grounds for a complaint to the Ombudsman. I want to assure you that, in suggesting this course of action, I am not merely fobbing you off to yet another organ of the State. It is the Ombudsman's role to investigate complaints about administrative actions, delays or inactions adversely affecting citizens in their dealings with Government Departments and Offices. You might have some joy in going down that route.

Thank you for taking the trouble to write to me. It helped to shed light on how the "system" operates in practice.

Thank you for taking the trouble to write to me. It helped to shed light on how the "system" operates in practice.

Yours sincerely

John Purcell
Comptroller and Auditor General

The issue of a 'Test Case' would not be raised again until I raised it in the Oireachtas Social Welfare Committee in 2019. Following my appearance at the Oireachtas Social Welfare Committee, the Chief Appeals Officer was requested to attend at the Committee to directly answer to evidence submitted by me of the unlawful use of test cases. The Chief Appeals Officer denied the use of test cases.

When the report from the Oireachtas Social Welfare Committee it stated –

Recommendation:

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

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

On foot of this Report I made a complaint to the Standards In Public Office Commission that the Chief Appeals Officer had deliberately misled the Oireachtas Social Welfare Committee. SIPO replied to me agreeing that the Chief Appeals Officer had given 'Erroneous Information' to the Oireachtas SW Committee and also stated that the Minister had 'clarified' the 'Erroneous Information' -

Complaint to the Standards Commission

SIPO Complaints Shared Mailbox <complaints@sipo.ie> Mon, Feb 22, 2021 at 4:10 PM
To: "martymannn@gmail.com" <martymannn@gmail.com>

Dear Mr McMahon,

I refer to previous correspondence in respect of the above.

At their meeting on 22 January 2021, the Commission considered your complaint and noted that the erroneous information provided by the respondent to the Committee was subsequently clarified by the Minister for Employment Affairs and Social Protection.

Having considered your complaint, the Commission is of the view that it does not merit further investigation.

Yours sincerely,

However, Minister Humphreys has vehemently denied in recent Dail replies that SIPO ever contacted the Department or the Chief Appeals Officer. The Minister accuses SIPO of failing to follow its own procedures. Minister Humphreys continues to deny the use of Test Cases and steadfastly stands behind the denial of Test Cases by the Chief Appeals Officer in 2019 and again by the current Secretary General in 2021 in the Public Accounts Committee –

Written answers (Question to Social)

Minister for Social Protection (Deputy Heather Humphreys)

I propose to take Questions Nos. 303 and 325 together.

The Social Welfare Appeals Office functions independently of the Minister for Social Protection and of the Department and is responsible for determining appeals against decisions in relation to social welfare entitlements.

I understand that under the procedures adopted by the Standards in Public Office Commission (SIPO) in relation to a complaint, the respondent is notified of the fact that a complaint about them has been received by the Commission.

As stated in my reply to Parliamentary Question No. 262 of 14 September 2022, I am advised by my officials that neither the Chief Appeals Officer nor the Department have ever been contacted by SIPO in relation to any such complaint and nor have they been advised of any such ruling.

I am further advised that the information provided by the Secretary General at the Public Accounts Committee in relation to classification of employment for PRSI purposes was, and remains, correct.

I trust this clarifies the matter for the Deputy.

I have recently written to SIPO on several occasions but in their most recent communication to me, SIPO have informed me that they will not communicate any further with me and will not take any action whatsoever about a) the erroneous denials of test cases and b) SIPOs failure to adhere to its own guidelines.

I would appreciate the Data Protection Commissioner's advice on this matter. The failure of SIPO to act on its own decision has resulted in a report from the Oireachtas Social Welfare Committee which contains erroneous information, a report from the Public Accounts Committee which contains erroneous information and a decision from the Oireachtas Privileges Committee which is entirely based on Minister Heather Humphreys erroneous denial of the use of test cases.

As was suggested in Comptroller and Auditor General Purcell letter, I did go to the Ombudsman to complain about the use of test cases by the SWAO, before I wrote to the C&AG.

In the Ombudsman's Report of 1st February 2002 in regard to my complaint that 'Test Cases' must be presented to the Oireachtas within 6 months, the Ombudsman's decision, based on the explanation supplied by the Dept., stated –

4: Test cases should have been presented to the Oireachtas within 6 months and that this was not done,

You referred to the test cases in 1995 regarding insurability and considered that these should have been presented to the Oireachtas within 6 months. Section 254 of the Social Welfare (Consolidation) Act, 1993 provides that '*As soon as may be after the end of each year, but not later than 6 months thereafter, the Chief Appeals Officer shall make a report to the Minister of his activities and the activities of the appeals officers under this Part during that year and the Minister shall cause copies of the report to be laid before each House of the Oireachtas.*' The insurability cases were included in the Social Welfare Appeals Office Annual Report 1995 on pages 19, 24 and 25 refer. I have enclosed a photocopy of these pages for your information.

For convenience, I attach the relevant section from the 1995 SWAO report here (it is also contained in evidence above) –

‘Motor-cycle Business Couriers. A Deciding Officer gave a decision that a motor-cycle business courier was employed under a contract of service (as an employee) while engaged by a business courier firm. Both parties appealed the decision. The case was understood to be of wider significance to the trade. The Appeals Officer held an oral hearing. Both appellants were present and the Courier firm was legally represented. The

Deciding Officer and Social Welfare Inspector were also present. Payment to the courier was ordinarily made by the firm on the basis of a basic engagement rate plus a mileage travel allowance. Individual jobs were allocated (generally by radio) by the employer on the basis of availability and the location of the courier. The firm supplied the radio and the carrier bag. The bag bore the firm's logo, which also appeared on the delivery dockets carried by the courier. The courier supplied the motorcycle and paid all related expenses such as tax, insurance and maintenance, as well as the outdoor clothing.

In presenting her case, the Deciding Officer stated that application of standard tests for determining the nature of an employment engagement showed the existence of a contract of service (employee). She held that the firm possessed the right to direct, control and dismiss the courier (control test). The courier's job was so closely tied into the firm's activities that they could be regarded as inseparable (integration). The courier was not an independent business unit (entrepreneurial).Counsel for the firm submitted that the courier was fully free on how he did a job assigned, being at liberty as to the form of transport and route used. He was free to work for other employers. He did not have to provide personal service. He could refuse work. If he were off the road for any reason he would not be paid. On motor-cycle couriers being an integral part of the firm's operations, the fact that only about 50% of the business was related to motor-cycle couriers, the rest being done through the bus and rail networks (and so, it was submitted, the firm

could carry out its integral courier activities without motor-cycle couriers as such).As to the free-standing nature of a courier's job, it was not unlike that of a taxi driver - the profit margin could be increased by greater activity. Counsel referred to case law to support these contentions.

The courier appellant's evidence did not conflict with the submission on behalf of the appellant firm. specifically the courier confirmed the flexibility for jobs, the possibility of getting another courier to take his place and instanced occasions on which he had declined to accept jobs offered (fifteen refused in the previous week because they did no suit him for different reasons). The Appeals Officer allowed the appeal. In commenting on the case the Appeal's Officer acknowledged that there were features of the courier's engagement which were more consistent with a contract of service rather than a contract for services. However, in his view, the factors supportive of the existence of self-employment outweighed such features. These critical factors included the want of control, acceptability of a substitute, freedom to refuse jobs and the flexibility in hours of availability. Consequently, the nature of contractual engagement was that of a self-employed person and not that of an employee’.

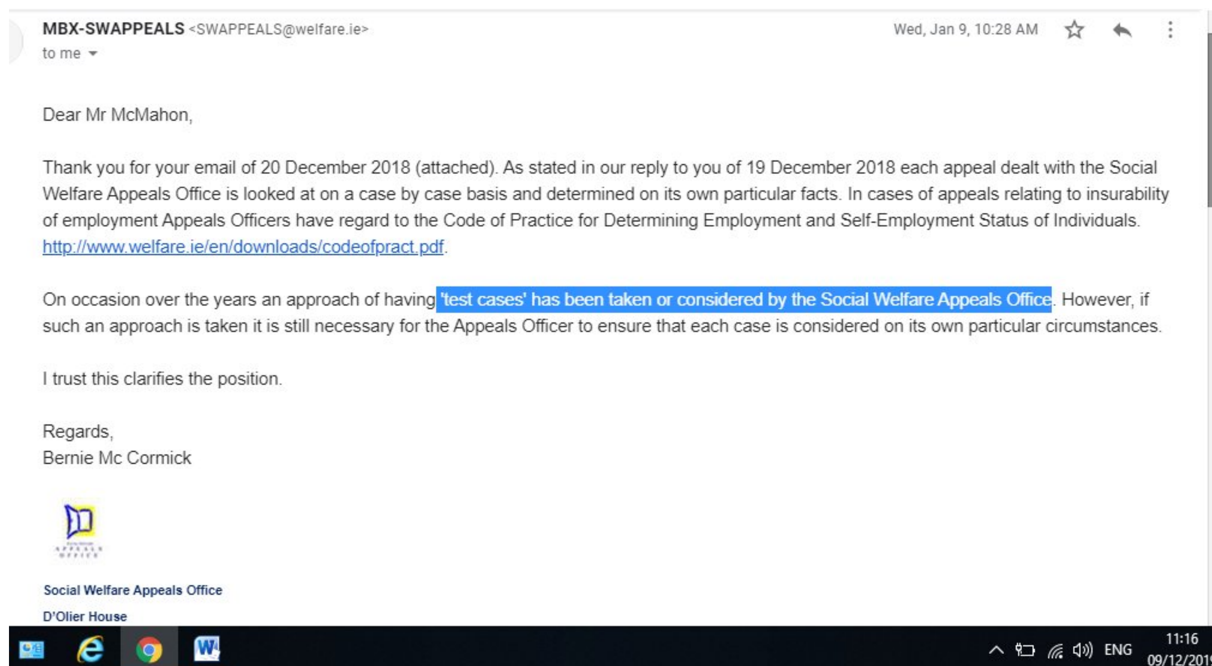
It is an absolute fact, that in February 2002, in an official Report from the Ombudsman on my complaint that the Minister for Social Welfare had failed to put before the Oireachtas the creation and use of test cases by the Department of Social Welfare and the SWAO, then Social Welfare Minister Dermot Ahern denied my claim to the Ombudsman and stated that the Dept and the SWAO do use test cases and that the obligation to inform the Oireachtas about the creation of a test case was satisfied by the 1995 Social Welfare Appeals Office Annual Report. Former SW Minister Ahern is not the only Minister to categorically confirm the use of test cases.

That the Department of Social Welfare uses test cases was also confirmed in 2016 by the then Social Welfare Minister Mr. Leo Varadkar on the 7th December 2016 in a Parliamentary Reply to Deputy Eugene Murphy (Question 134) in which Minister Varadkar states:

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

That the SWAO uses test cases is also confirmed by the approach of using test cases employed by the SWAO in 2016 with 16 construction workers

That the SWAO uses test cases was confirmed in writing to me by the SWAO on the 9th of January 2019, in which the SWAO states:



MBX-SWAPPEALS <SWAPPEALS@welfare.ie> Wed, Jan 9, 10:28 AM

to me

Dear Mr McMahon,

Thank you for your email of 20 December 2018 (attached). As stated in our reply to you of 19 December 2018 each appeal dealt with the Social Welfare Appeals Office is looked at on a case by case basis and determined on its own particular facts. In cases of appeals relating to insurability of employment Appeals Officers have regard to the Code of Practice for Determining Employment and Self-Employment Status of Individuals. http://www.welfare.ie/en/downloads/codeofpract.pdf.

On occasion over the years an approach of having 'test cases' has been taken or considered by the Social Welfare Appeals Office. However, if such an approach is taken it is still necessary for the Appeals Officer to ensure that each case is considered on its own particular circumstances.

I trust this clarifies the position.

Regards,
Bernie Mc Cormick

Social Welfare Appeals Office
D'Olier House

The issue of Test Cases is an extremely important one. There is no legislative provision which allows the use of test cases. This is confirmed by former Minister Doherty in the Irish Times and also by the Secretary General of the SW Department to the Public Accounts Committee in 2019.

Despite admitting to using test cases on multiple occasions, in writing, the Minister is now attempting to deny that test cases were actually test cases. It is worth noting that workers in the courier industry have been classified as self-employed en masse since the 1995 test case and this particular precedent set in an unlawful test case is

still used today by the Department and the Revenue Commissioners to classify all couriers as self-employed.

All current denials of the use of test cases by Minister Humphreys and her officials are deliberately 'Erroneous Information' and this deliberately erroneous information has been spread much further than merely my Social Welfare data.

I have been given permission by Mr. Matthew McGranaghan to use his data in relation to ongoing denials to the use of test cases by the SWAO. Matt received a decision from the Scope Section that he was an employee and not self-employed as his employer had claimed. Matt works in an industry where a lot of workers, if not all workers, are labelled as self-employed. The Scope Section decision was appealed to the Social Welfare Appeals Office by Matt's employer.

On the 25th April 2022, Matt emailed the SWAO and requested copies of test/sample cases used by the SWAO in determining employment status.

On the 16th May 2022 the SWAO wrote to Matthew McGranaghan in response to his 25 April 2022 request. This correspondence states-

An Oifig Achomhairc Leasa Shóisialaigh
Social Welfare Appeals Office

Mr. Matt McGranaghan

16 May 2022

By email to mattmcgranaghan@gmail.com

Re: Insurability of Employment Appeal (Appellant: [redacted]

Dear Mr. McGranaghan,

I refer to your email of 25 April 2022 (attached) regarding the above.

Your email refers to a letter of 2 December 2021 from the Minister for Social Protection to the Clerk to the Dáil Committee on Parliamentary Privileges and Oversight and, in respect of some appeals, quotes that they *"...may be determined based on a sample of cases."*.

The full text of the relevant paragraph in that correspondence is as follows:

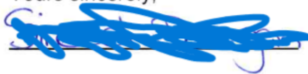
"The answer to the Parliamentary Question is a response to a question concerning the number of individual cases heard by the social welfare appeals office relating to the insurability class of persons. It details the number of cases determined each year from 2012

"The answer to the Parliamentary Question is a response to a question concerning the number of individual cases heard by the social welfare appeals office relating to the insurability class of persons. It details the number of cases determined each year from 2012 to 2020 and to June 2021 and sets out how the use of so-called 'test cases' in the 1990s were not used to determine the employment status of all workers in a particular sector but to identify criteria for use when assessing each case on an individual basis and how these criteria then formed the basis for the Code of Practice for the Determination of the Employment or Self-employment Status of individuals agreed with trade unions and employers. It also sets out how every individual making an appeal is afforded the opportunity to have their own individual case determined but that, in rare cases and very limited circumstances, and only where agreed by the individual, some appeals involving a number of workers engaged by the same employers, may be determined based on a sample of cases. The answer does not name or refer to Mr McMahon."

A sample case approach has not been taken by the Social Welfare Appeals Office during the tenure of the current Chief Appeals Officer which commenced in 2015 in any case of an appeal where the classification of a worker as an employee or self-employed is the issue under appeal. All such appeals are determined on a case by case basis and on the particular facts of each appeal.

I trust that clarifies the position. In line with your request in your email of 25 April 2022 and the procedures of this Office your correspondence and this reply is being shared with the appellant, MEPC Music Ltd.

Yours sincerely,



Sinead Donegan
Social Welfare Appeals Office

Mr. McGranaghan's exact wording for his request for copies of test/sample cases was as follows –

> ***"I have been made aware of test/ sample cases used by the Social Welfare Appeals Office in determining insurability of employment. In a letter from the Minister for Social Protection dated 2nd December 2021, to the clerk of the Dáil Committee on Parliamentary Privileges and Oversight, it is stated that some appeals 'may be determined based on a sample of cases'.***
>
> ***I would like to request a copy of these test cases please.***
>
> ***I also ask that this request is shared with the appellant"***

The letter Mr. McGranaghan was referring to was a letter to me from the Privileges Committee in response to a detailed complaint that I had made that Minister Heather Humphreys was defaming me in repeated denials of test cases. I had not made the full text of that letter available, and Mr. McGranaghan did not know me personally. I had posted online that the Minister was stating that some appeals ***'may be determined based on a sample of cases'***

In this reply, the SWAO again repeats Minister Humphreys admission to the use of what she is now calling 'Sample Cases'. These are 'Test Cases'. Test cases are unlawful. Former Minister Dermot Ahern confirmed in 2002 that the SWAO does use test cases and that the Annual Report of the SWAO contains records of 'Test Cases'. That is all the SWAO had to send to Matt, an anonymised account of each and every test case. The SWAO again refused to admit to the use of test cases. The data sent to Mr. McGranaghan is erroneous. Why the Department think it appropriate to include my name, other than to discredit me, in a reply to a third party engaged in a SWAO appeal, I do not know.

The 'Test Case' approach had been used during the tenure of the current Chief Appeals Officer in the cases of 16 Construction Workers which had been established under question by Senator Alice Mary Higgins in the Oireachtas SW Committee in

December 2019 and had been admitted to by the Chief Appeals Officer. This is from the Committee transcript for 5th December 2019 –

> of workers. I note that she mentioned that during her time as chief appeals officer in 2015, the classification of a worker as an employee or self-employed has not been the approach adopted. However, as I know and as Ms Gordon mentioned, an appeals officer proposed this approach.
>
> Ms Gordon is referring to the 2016 case where a group case was proposed by an appeals officer. It has quite recently been the practice. I understand that in that case the employees objected.

I represented these workers and as a result: I know this to be true.

On 24th May 2022, the SWAO proceeded with the oral hearing at which Mr. Matthew McGranaghan was not present due to his stated concerns over test cases. Despite these concerns, the oral hearing opened and SWAO was prepared to proceed.

When concerns were raised by representatives of the employer the hearing was then adjourned and just this week the SWAO has written to Mr. McGranaghan in an attempt to reconvene the Appeal hearing without acknowledging the unlawful use of test cases and without providing Mr. McGranaghan with details of test cases as he has repeatedly requested.

This email is dated 19th October 2022 and states:

> *"To Mr Matt McGranaghan,*
>
> *I am writing to you in relation to your correspondence attached16th October to this office. This is email is cc'd Brenda Moran Scope Section Depart of Social Protection and Ms Bernie Greally MEPC Music Ltd for their attention. The correspondence was sent to the Appeals Officer who has responded as follows:*
>
> > *"This office had engaged with the appellants, MEPC, in relation to the proposed date of the reconvened hearing and the change of venue as I had another hearing at that location"*
>
> *As far back as 19 September, we had proposed week commencing 10 October for the hearing but that was not suitable for MEPC. On 28 September, MEPC suggested a date between1-4 November with 1st being provisionally confirmed on 3 October. The formal notifications however only issued on 14 October.*
>
> *I have been unaware of any WRC proceeding until this time.*
>
> ***I acknowledge Mr McGranaghan's stated reasons for withdrawing from the appeals process but I am still urging him to participate. In the 1995 Social Welfare Appeals Office's annual report, which is referenced in his correspondence to the Committee on Public Accounts, there is a synopsis of a motor-cycle couriers case at pages 24&25. That case was decided on the facts of that case after an oral hearing where the appeals officer found the following critical features of self-employment: the absence of control; substitution; freedom to refuse a job; flexibility of the hours of availability. While these are still relevant considerations, a previous appeals officer's***

decision is not binding or precedent setting and has no relevance to this appeal relating to Mr McGranaghan's employment status.

Since 1995, there have been several leading cases on employment status. I have outlined these cases in previous correspondence with the most recent being the findings of the Court of Appeal in the case of Karshan (Midlands Limited) Trading as Domino's Pizza and The Revenue Commissioners [2022] IECA 124.

As has been already stated, this appeal will be decided on the facts of the case, case law and the guidance provided in The Code of Practice for Determining Employment Status and not on the basis of an historic appeals officer's decision." ENDS"

Mr. McGranaghan rightly will not go into an appeals process without first knowing the rules of that process and having sight of all the Test Cases unlawfully created by the SWAO.

Previous decisions of the SWAO may be ones, which if applied to a worker's case would benefit the worker but if he has no access he has no knowledge of the previous decisions made by different Appeals Officers. It does not require an elaborate view of the relevant case law and fair procedures to come to the conclusion that such a secret system is manifestly unfair. The unfairness is compounded if as in Mr. McGranaghan's case the Appeals Officer as advocates against the worker (they clearly are with the use of unlawful test cases) have access to previous decisions. This results in a grave concern in relation to equality of arms as Mr McGranaghan would be at an obvious disadvantage without the relevant information.

Another worker, who works with a major media company, is in exactly the same situation and has received exactly the same replies from the SWAO. I would ask that the Data Protection Commissioner treat these cases with the utmost urgency and both Mr as Mr McGranaghan and the other worker will be writing to the DPC on foot of this reply.

From all of these communications, I have a right to have it recorded in my data that the statement in the letter written by Mr. Vincent Long, signed by Mr. Eddie Sullivan and sent to Mr. Jim Mitchell claiming that:

I. There would be meetings in the future, is false. And that
II. Any and all denial of the use of test cases by Minister Humphreys are deliberately erroneous.
III. That the Ombudsman's report of February 2002, some of which is contained in the 2022 SAR reply, did not satisfy the legislative obligation to inform the Oireachtas of test cases.
IV. That the Ombudsman's report of February 2002 failed to inform me that although the Minister was accepting the 1995 Social Welfare Appeals Office Appeal as a 'Test Case', was outside of the law.
V. That the denial of test cases to third parties involved in Appeals Hearings, invoking my name and both a Ministerial acceptance of sample cases yet a denial of test cases, is false data.
VI. I also have a right to have the true factual position recorded in my data as follows:

On the 17th of July 2000 I wrote to the Scope Section and requested an insurability of employment determination on my employment status. By the 9th of August 2000, just 23 days later, Securicor had been refused an 'Off The Record' meeting with the Scope Section which Securicor requested, and Representatives from ICTU, CWU, IBEC, Revenue and the Departments of Finance and Social Community and Family Affairs had met and specifically discussed the case I was making to the Scope Section This meeting was set up because of the case I was making and the Programme for Prosperity and Fairness was used as a cover for something which was unlawful, and unfair. A decision was taken at this meeting that no matter what evidence the Scope Section or I put forward, that agents of the state acting for the state would take any actions necessary to overturn the Scope Decision and to maintain the status quo of unlawful test cases.

The Participants to and the timeline of this meeting are confirmed in the letter from the Revenue Chairman to Jim Mitchell, Chairman of the Public Accounts Committee on the 9th of August 2000 (below), 2 months before Mr. Vincent Long and Mr. Eddie Sullivan wrote to Mr. Jim Mitchell and they knew, at the time of writing to Mr. Mitchell that Mr Vincent Long had represented the Department.

The issue of couriers was also raised at a recent inaugural meeting of an 'employment status' group set up under the auspices of the Programme for Prosperity & Fairness. The group consists of representatives of ICTU, CWU, IBEC, Revenue and the Departments of Finance and Social, Community & Family Affairs. It is envisaged that representatives of the Department of Enterprise, Trade & Employment will be invited to the next meeting.

I trust this clarifies the position.

- Finally, on this data contained in the August 2022 SAR reply but not contained in the 2019 SAR reply, written by Vincent Long, signed by General Secretary of the Department of Social Welfare Eddie Sullivan, and sent to Public Accounts Chairperson Jim Mitchell, I would like to address this false data contained in the letter –

"The employment status of couriers has been under review for some time. Some couriers consider themselves self-employed while others regard themselves as employees. This has implications for PRSI purposes as there are different statutory provisions for employees and self-employed persons. Similar differences exist in relation to employment law and Health and Safety legislation. In order to resolve the matter, a number of representative 'Test Cases' were selected in 1993/94 for detailed investigation and formal insurability decision under Social Welfare Legislation. This process resulted in a decision by an Appeals Officer of the Social Welfare Appeals Office on the 12 th of June 1995 who decided that a courier was self-employed if he

A) Provided his own vehicle and equipment
B) Was responsible for all expenses including tax, maintenance, insurance etc and
C) Payment was made on the basis of rate per job plus mileage allowance

The Appeals Officer's decision established the criteria in relation to the employment status of couriers that has, since then, been generally accepted throughout the industry and also by the Office of The Revenue Commissioners for income tax purposes"

As both former Social Welfare Minister Regina Doherty, and current Social Welfare Minister Heather Humphreys have given largely identical Dail replies about the use of test cases which they deny, to Deputy Paul Murphy on the 18th December 2019 (Question no. 449 Ref. 53652/19) and on 6th July 2001 (PQ ref. no. 36092/21) respectively, I will explain the falseness of the above data with reference to replies to Parliamentary Question on 6th July 2001 (PQ ref. no. 36092/21) by Minister Heather Humphreys. The full PQ reply is here –

Written answers (Question to Social)

Minister for Social Protection

The Social Welfare Appeals Office functions independently of the Minister for Social Protection and of the Department and is responsible for determining appeals against decisions in relation to social welfare entitlements and insurability of employment.

The information required by the Deputy in relation to insurability appeal cases decided by Appeals Officers over the past ten years is set out in the table below. The category of insurability includes cases where Scope Section has made decisions on the appropriate class of PRSI, as well as other matters determined by Deciding Officers, including voluntary contributions and the correct contribution records of individuals.

In relation to the Deputy's reference to appeals being heard "with a number of cases attached to each one" the Chief Appeals Officer has advised me that the discussion in relation to the use of 'test cases' before the Joint Committee on Employment Affairs and Social Protection on 5th December 2019 specifically related to a number of cases considered in the 1990s. These cases, involving workers in a particular sector, were selected as so called 'test cases' not to determine the employment status of all workers in that sector but rather to identify criteria that could be used by Deciding Officers and Appeals Officers for the purpose of assessing each case on an individual basis and to improve the quality and consistency of decision making in relation to the determination of whether an individual was employed or self-employed. The Chief Appeals Officer has advised me that the test cases were not used to determine a particular outcome on a 'group basis' that would be applied to all cases from

making in relation to the determination of whether an individual was employed or self-employed. The Chief Appeals Officer has advised me that the test cases were not used to determine a particular outcome on a 'group basis' that would be applied to all cases from that employment sector, as seems to have been inferred by some observers, but instead that the cases informed the identification of criteria that could be applied to each individual case in that sector. Decision makers (both Deciding Officers and Appeals Officers) would then apply these criteria to all cases that came before them and depending on the circumstances of each case, as assessed by reference to these criteria, an individual decision would be made in each case. This approach was a precursor to the subsequent development on a tripartite basis of the Code of Practice for Determining Employment or Self-Employment Status of Individuals under the Programme for Prosperity and Fairness, a code which was subsequently updated in 2007 under the Towards 2016 Social Partnership Agreement.

The Chief Appeals Officer has also advised me that every individual making an appeal to her office always has the opportunity of having any evidence in their own case presented to and considered by an Appeals Officer. On rare occasions, usually where a number of workers engaged by the same employer are concerned, she may be asked either by the workers or the employer to make decisions on a 'sample' number of cases. The Chief Appeals Officer has agreed to this approach in very limited circumstances and only with the agreement of both the employer and the workers concerned. This approach has not been adopted during the period of her tenure in any case of an appeal where the classification of a worker as an employee or self-employed is the issue under appeal.

This approach can be an efficient way of dealing with issues that are common in appeal cases and where there are a number of workers attached to an appeal. However, the approach cannot compromise the integrity of the appeal process or deny any individual interested party due process. Each individual always has the opportunity of having any evidence in their own case presented to and considered by an Appeals Officer. Importantly, an individual decision issues in each case, and can be individually submitted for review to the Chief Appeals Officer or indeed, appealed to the Courts.

I trust this clarifies the position for the Deputy.

Written answers (Question to Employment)

Minister for Employment Affairs and Social Protection

The Chief Appeals Officer has advised me that the discussion in relation to the use of 'test cases' before the Joint Committee on Employment Affairs and Social Protection on 5th December 2019 related to a particular set of circumstances dating back to the early 1990s where a number of cases involving a number of employers in a particular sector were selected as so called 'test cases' to identify criteria that could be used to improve the quality and consistency of decision making in relation to a particular type of employment. The Chief Appeals Officer has advised me that the test cases were not used to determine a particular outcome on a 'group basis' that would be applied to all cases from that employment sector, as seems to have been inferred by some observers, but instead, it is her understanding, that the cases informed the identification of criteria that could be applied to each individual case in that sector. Decision makers (both Deciding Officer and Appeals Officers) would then apply these criteria to all cases that came before them and depending on the circumstances of each case, as assessed by reference to these criteria, an individual decision would be made in each case. This approach was a precursor to the subsequent development on a tripartite basis of the Code of Practice for Determining Employment or Self-Employment of Individuals Status under the Programme for Prosperity and Fairness, a code which was subsequently updated in 2007 under the Towards 2016 Social Partnership Agreement.

The Chief Appeals Officer has also advised me that she does not as a rule take group decisions based on test cases. However, she has advised that occasionally, and usually where a number

The Chief Appeals Officer has also advised me that she does not as a rule take group decisions based on test cases. However, she has advised that occasionally, and usually where a number of workers engaged by the same employer are concerned and have individually submitted an appeal, she is asked to make decisions on a 'sample' number of cases. The Chief Appeals Officer has agreed to this approach in very limited circumstances and only with the agreement of both the employer and the workers concerned. This approach has not been adopted during the period of her tenure in any case of an appeal where the classification of a worker as an employee or self-employed is the issue under appeal.

This approach can be an efficient way of dealing with issues that are common in appeal cases and where there are a number of workers attached to an appeal. However, the approach cannot compromise the integrity of the appeal process or deny any individual interested party due process. Each individual always has the opportunity of having any evidence in their own case presented to and considered by an Appeals Officer. An individual decision issues in each case, and can be individually submitted for review to the Chief Appeals Officer or indeed, appealed to the Courts.

I am advised that in the circumstances the Chief Appeals Officer does not consider that a contradiction has occurred but she is happy to clarify the position as outlined.

The Social Welfare Appeals Office functions independently of the Minister for Employment Affairs and Social Protection and of the Department and is responsible for determining appeals against decisions in relation to social welfare entitlements.

The Chief Appeals Officer has also advised me that she does not as a rule take group decisions based on test cases. However, she has advised that occasionally, and usually where a number of workers engaged by the same employer are concerned and have individually submitted an appeal, she is asked to make decisions on a 'sample' number of cases. The Chief Appeals Officer has agreed to this approach in very limited circumstances and only with the agreement of both the employer and the workers concerned. This approach has not been adopted during the period of her tenure in any case of an appeal where the classification of a worker as an employee or self-employed is the issue under appeal.

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I am advised that in the circumstances the Chief Appeals Officer does not consider that a contradiction has occurred but she is happy to clarify the position as outlined.

The Social Welfare Appeals Office functions independently of the Minister for Employment Affairs and Social Protection and of the Department and is responsible for determining appeals against decisions in relation to social welfare entitlements.

1. In her Dáil reply, Minister Humphreys states:

> ***"The Chief Appeals Officer has advised me that the discussion in relation to the use of 'test cases' before the Joint Committee on Employment Affairs***

and Social Protection on 5th December 2019 specifically related to a number of test cases considered in the 1990s"

The true factual position is that the discussion in relation to the use of test cases before the Joint Committee on Employment Affairs and Social Protection on the 5th December 2019 did not only relate to a number of test cases from the 1990s. The discussion also related to the approach of using test cases by the SWAO in 2016. It was accepted and conceded by the Chief Appeals Officer in the Committee on the 5th of December that the approach of using test cases was used specifically in relation to 16 construction workers in 2016. This is further confirmed in a number of communications between the construction workers and the SWAO from the 2016 cases, where the construction workers wrote to vehemently oppose the approach of test cases being used by the SWAO. Extract from those communications –

> ***"Test Cases***
>
> ***Further to the issue of individual cases, the Appeals Officer voiced an intent to use these cases as 'Test Cases'. I do not wish to be considered as a 'test case'. Although it is correct to recognise that my case has wide ranging implications for the building trade, it is incorrect for the Social Welfare Appeals Office to use it as a test case. Considering that each case must be assessed on its own merit, it is highly questionable that the SWAO has the authority to adjudicate on the employment status of persons who have not been assessed on their own merit by SCOPE or the SWAO. In essence, to use these cases as 'test cases' would be to pass judgement on workers who have not been afforded an opportunity to represent themselves or to have representations made on their behalf. The only matter before the SWAO is an appeal of the specific SCOPE decision that I was found to be an employee of JJ Rhatigan, it is impossible to see how considerations other than this very specific case fall within the legal powers of the Social Welfare Appeals Office"***

2. In her Dáil reply, Minister Humphreys states:

> ***"These cases involving workers in a particular sector"***

The true factual position is that these cases involved employers, not workers in a particular sector. That these cases involved employers and not workers, is confirmed in a Parliamentary Reply from former Social Welfare Minister Doherty to Deputy Paul Murphy on the 18th of December 2019 (Question no. 449 Ref. 53652/19) in which she states:

> ***"A number of cases involving a number of employers in a particular sector"***

Minister Humphrey's Parliamentary Reply contains an almost verbatim copy of the reply given by Minister Doherty in 2019 yet this point, that it was employers involved and not workers, has been altered in Minister Humphrey's reply. It was employers in the courier industry who sought to have all those working as couriers labelled as self-employed. Workers were not represented nor involved in the lobbying and subsequent decisions which determined that they were all classified as self-employed.

That workers were not at all involved in the process of test cases, is confirmed in a reply from the Chairperson of the Revenue Commissioners to a query from the

Chairperson of the Public Accounts Committee as to why all couriers were labelled as self-employed. This letter is dated the 9th of August 2000 and it states:

> ***"As regard taxation, the issue of couriers and particularly motorcycle couriers was the subject of protracted discussions between Revenue and representatives of the courier industry. I enclose copies of our letters of 7 March 1997 and 3 April 1997 to Messrs. K Ryan & Co; Company which represented courier firms at the discussions. The letters outline the agreement reached for tax purposes. The majority, if not all, of the courier firms identified following these discussions opted for the voluntary PAYE system of taxation for couriers engaged by them for the reasons outlined in the letters. For the purposes of insurability under Social Welfare law, a motorcycle courier was found to be self-employed by a Department of Social, Community and Family Affairs Appeals Tribunal some years ago. This decision was not challenged further through the High Court on a point of law and consequently would stand for social insurance purposes"***

That workers were not at all involved in the process to label them all as self-employed by group/class is further confirmed in a letter dated 1999 from Mr. Chris Hudson, Organising Officer with the Communications Workers Union to a Mr. Hughes who wrote to Mr. Hudson on behalf of the Minister for Labour, Trade and Consumer Affairs, Mr. Tom Kitt. The CWU represented approximately 10% of couriers working in Dublin at that time. In his letter, Mr. Hudson stated:

> ***"Dear Mr. Hughes,***
>
> ***Please could you convey to the Minister for Labour, Trade and Consumer Affairs, Mr. Tom Kitt, my disappointment that he cannot meet my request for a meeting to discuss the issue of motorbike couriers. I am well aware of the Organisation of Working Time Act 1997 and also the definition of employees. What I had hoped to inform the Minister of was that many people, in particular Motorbike Couriers, are against their will being classified as self- employed. However, in many cases they are paid what can only be described as a weekly wage. Whilst Revenue and Social Welfare have for the reasons of tax purposes and social welfare payment classified Motorbike Couriers as self-employed, they do not see this as prejudicing any future determination on the nature of employment of couriers***"

3. In her Dáil reply, Minister Humphreys States:

> ***"were selected as so-called 'test cases'"***

The true factual position is that these cases are not 'so-called' test cases. They are undeniably test cases. What the Minister is doing in this reply directly contradicts the evidence I gave to committees. There is no question but that the Social Welfare Appeals Office and the Department of Social Welfare use test cases, there is nothing 'so-called' about them. That they are test cases was first confirmed in 2000 by the Secretary General of the Department of Social Welfare to the Public Accounts Committee Chairperson where he wrote –

> ***"The employment status of couriers has been under review for some time. Some couriers consider themselves self-employed while others regard themselves as employees. This has implications for PRSI purposes as there are different statutory provisions for employees and self-employed***

persons. Similar differences exist in relation to employment law and Health and Safety legislation. In order to resolve the matter, a number of representative 'Test Cases' were selected in 1993/94 for detailed investigation and formal insurability decision under Social Welfare Legislation. This process resulted in a decision by an Appeals Officer of the Social Welfare Appeals Office on the 12th of June 1995 who decided that a courier was self-employed if he

A) Provided his own vehicle and equipment

B) Was responsible for all expenses including tax, maintenance, insurance etc and

C) Payment was made on the basis of rate per job plus mileage allowance

The Appeals Officer's decision established the criteria in relation to the employment status of couriers that has, since then, been generally accepted throughout the industry and also by the Office of The Revenue Commissioners for income tax purposes" (2nd October 2000)

That the Social Welfare Appeals Office uses test cases is also confirmed by the approach of using test cases employed by the Social Welfare Appeals Office in 2016 with 16 construction workers.

That the Department of Social Welfare uses test cases was also confirmed in 2016 by the then Social Welfare Minister Leo Varadkar on the 7th of December 2016 in a Parliamentary Reply to Deputy Eugene Murphy (Question 134) in which Minister Varadkar states:

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

That the Social Welfare Appeals Office uses test cases was confirmed in writing to me by the Social Welfare Appeals Office on the 9th January 2019 in which the SWAO states:

"On occasion over the years an approach of having 'test cases' has been taken or considered by the Social Welfare Appeals Office"

That the Department of Social Welfare and the SWAO uses test cases to make insurability of employment decisions outside of existing legislation on groups and classes of workers (test cases) was confirmed by former Minister Doherty in an Irish Times article on the 25th May 2019 in which it states:

"The Minister is also looking at changing legislation to permit deciding officers to make determinations on the employment status of groups or classes of workers who are engaged and operate on identical terms and conditions. At present both employers and workers have to agree to such class decisions"

The issue of Test Cases is an extremely important one. There is no legislative provision which allows the use of test cases. This is confirmed by former Minister Doherty in the Irish Times and also by the Secretary General of the SW Department to the Public Accounts Committee in 2019.

Despite admitting to using test cases on multiple occasions, in writing, the Minister is now attempting to deny that test cases were actually test cases.

On 13 October 2022, Minister Humphreys replied to a Parliamentary Question from Deputy Claire Kerrane. Deputy Kerrane asks Minister Humphreys to confirm that 'so called' test cases were in fact 'Test Cases' and that Previous Ministers and Senior Management had referred to test cases as test cases right up until January 2019 when a decision was made by the Department and the Social Welfare Appeals Office to rename 'Test Cases' as 'Sample Cases' and to apply the term 'Sample Case' retrospectively to what were, if fact, 'Test Cases' until the Department decision to discontinue the use of the term 'Test Cases'.

In other words, did the Minister deliberately change the term 'Test Case' to 'Sample Case' in order to deny the unlawful use of test cases by the Department and the SWAO.

QUESTION

To ask the Minister for Social Protection if she will advise on a matter (details supplied); and if she will make a statement on the matter. (Details Supplied) In December 2021 the Minister wrote to the Committee on Parliamentary Privileges and Oversight and made reference to 'So-called Test Cases'. Can the Minister confirm if the 'So-Called' test cases referred to were called 'Test Cases' by senior Social Welfare Management and previous Ministers up until January 2019 when a decision was made by her Department and the Social Welfare Appeals Officer to rename 'Test Cases' as 'Sample Cases' and to apply the term 'Sample Case' retrospectively to what were in fact 'Test Cases' until the Department decision to discontinue the use of the term 'Test Cases'.

The very reason I made a SAR in 2019 was to see if I could find out if discussions were taking place where my data was included and where decisions were being made by the Department and the SWAO to conceal that they are using unlawful test cases.

On the 9th January 2019, in reply to a query, I received an email from the SWAO confirming that the SWAO was using test cases and the approach of test cases. It had taken a very long time, years, to get the SWAO to admit that they were using test cases. There are many emails between me and the SWAO with me trying to get them to admit that they were using test cases as the Ombudsman had been told by the Department and the SWAO in 2002 –

Office of the Ombudsman
Oifig an Ombudsman

18 Lower Leeson Street
Dublin 2.

Tel: (01) 678 5222
Fax: (01) 661 0570
email: ombudsman@ombudsman.irlgov.ie

18 Sráid Líosain Íochtarach,
Baile Átha Cliath 2.

Our Reference : C22/01/1788
1| February, 2002

Mr Martin McMahon

Ashbourne
Co. Meath

Dear Mr McMahon

I refer to your letter of 28 May 2001, and subsequent correspondence with this Office, about your insurability under the Social Welfare Acts as decided by the Department of Social, Community & Family Affairs.

In the course of these contacts you raised a number of issues which I will outline below for ease of reference:

4: Test cases should have been presented to the Oireachtas within 6 months and that this was not done,

You referred to the test cases in 1995 regarding insurability and considered that these should have been presented to the Oireachtas within 6 months. Section 254 of the Social Welfare (Consolidation) Act, 1993 provides that '***As soon as may be after the end of each year, but not later than 6 months thereafter, the Chief Appeals Officer shall make a report to the Minister of his activities and the activities of the appeals officers under this Part during that year and the Minister shall cause copies of the report to be laid before each House of the Oireachtas.***' The insurability cases were included in the Social Welfare Appeals Office Annual Report 1995 on pages 19, 24 and 25 refer. I have enclosed a photocopy of these pages for your information.

I had known this for a very long time that the SWAO and the Department were using test cases. I also knew that legally, there is no legislation to allow the use of test cases and that in using test cases, the SWAO and the Department were acting outside of the law. I was working with MEP Luke Ming Flanagan at the time to have this matter raised at EU level, namely, that the Irish State was granting illegal state aid to selected industries and employers in the form of a PRSI exemption and labour costs reduction through the deliberate use of bogus self-employment.

MEP Flanagan was attempting to bring the issue before the European Commissioner for Competition, Margrethe Vestager, as anti-competitive. I was particularly focusing on the Construction Sector at that time because it had more Europe wide implications on competitivity than couriers for example.

MEP Flanagan did arrange to make a submission which he did, but the outcome was that we needed to exhaust all avenues within the Irish Courts before we could proceed to the EU with these matters.

That would mean being forced into the court system to prove what the Irish state was up to. I was also representing a worker in the SWAO whose employer was appealing the worker's Scope Section decision. I had made the following request to the SWAO on the 17th December 2018 on behalf of the worker –

> ***"Dear SWAO, I request access to any and all precedential decisions of the SWAO regarding insurability of employment. I cite Opesyitan & ors -v- Refugee Appeals Tribunal & ors [2006] IESC 53 (26 July 2006) as precedent for accessing this information.***
>
> ***Kind regards Martin McMahon"***

It was a huge achievement, that after many years, I had finally succeeded in compelling the SWAO to admit to the use of test cases in writing. Now, the SWAO, had to give me details of the test cases.

On the 5th April 2019, a Ms Grace O'Reilly of the Social Welfare Appeals Office emailed me and stated –

> ***"ON A VERY FEW OCCASIONS OVER THE YEARS THE APPROACH OF HAVING SAMPLE CASES HAS BEEN TAKEN BY THE APPEALS OFFICE"***

From that point on, I knew the 'fix' was in. I knew that the Department was going to revert to denying test cases, which is exactly what happened. They would not give me the test cases and, as a result, I advised the worker to walk out of the Social Welfare Appeals Office, which she did, and she won her appeal in doing so. (The SWAO does not want any of this to end up in court)

I was hoping to shake loose some information about it with my SAR request in 2019. Because the Department deliberately withheld data from me in the 2019 SAR reply, I didn't get the opportunity.

However, how 'Test Cases' became 'Sample Cases' was eventually exposed in the Oireachtas Social Welfare Committee on the 5th December 2019 due to excellent questioning by Senator Alice Mary Higgins. This is the Committee hearing where the Chief Appeals Officer denied the use of test cases, which SIPO determined was 'erroneous information' but because SIPO failed to follow their own procedures, the Committee Report has never been corrected to show that the Chief Appeals Officer gave 'erroneous information' to the Committee.

Mr. Tim Duggan, Assistant Secretary in charge of Pensions, PRSI & International Polices with the Department of Social Protection, who appeared in the Oireachtas Social Welfare Committee with the Chief Appeals Officer was asked to explain how Test Cases became Sample cases -

Mr. Tim Duggan: The following might help to clarify matters. There is something of a misunderstanding of test cases. We do not use that phrase any more. Essentially these were sample cases at the time when a particular sector was being looked at and efforts were made to try to streamline the process to get greater administrative efficiency in the making of decisions for people. That does not change any of the things that we said about principles. All decisions are individual. Anybody at any time can seek a review or an appeal of such a decision, and can use the various mechanisms that the chief appeals officer has set out for that appeal, namely, sections 317 and 318. They can subsequently move on to the courts, if they so wish. There is no precedential value at all to the sample cases that were examined in the 1990s, in the sense that anyone look for their case to be dealt with individually. What happened in 2001 was not a change of policy, because the policy was exactly what I have just said, all along. What happened from 2001 on was that a greater rigour was put into how people would know about these things. The working group's negotiations resulted ultimately in the first version of the code of practice, which subsequently was revised following further consideration in 2007 and is now being further revised, as we speak, because of developments in the case law since 2007.

Senator Alice-Mary Higgins: I am sorry but that does contradict the statement. Mr. Duggan has been consistent with the narrative previously but that is inconsistent. The Secretary General said in October 2000 that some couriers consider that they are self-employed while others regard themselves as employees. In order to resolve the matter, a number of representative test cases were selected in 1993 and 1994 for detailed investigation and a formal insurability decision under social welfare legislation. The process resulted in the decision that a courier was self-employed if he provided his own vehicle and equipment, was responsible for all expenses, including tax and insurance, and payment was made based on a rate per hour. That is clearly not individual decision-making; it is literally saying there are different kinds of cases and different opinions. We want to resolve the fact of there being different opinions and different individual
opinions. We want to resolve the fact of there being different opinions and different individual
cases and here is how we have decided to resolve it through these test cases. It is great to move on but let us not retrospectively recreate the process.

Mr. Tim Duggan: That is not inconsistent with what I said at all.

Senator Alice-Mary Higgins: It clearly is.

Mr. Tim Duggan: These were sample cases that were taken to deal with a specific issue at that specific time. They do not have precedential value for any other cases, even cases in the same set of circumstances. For instance, if a courier were to approach the scope section tomorrow morning to seek a determination of their employment status, it would be considered *de novo*, from the very beginning, to use the chief appeals officer's term. The particular circumstances of that person's working environment would be the consideration in conjunction with the guidance and the case law that has emerged.

Senator Alice-Mary Higgins: That is true now, but I am talking about the period between-----

Mr. Tim Duggan: It was true then as well.

Chairman: Senator Higgins has made that point.

Senator Alice-Mary Higgins: I know, but I am not satisfied with the answer.

Chairman: Senator Higgins might not be satisfied with the answer but she got the answer. She does not have to be happy with it.

Senator Alice-Mary Higgins: I have clearly described the test cases.

Just to put this in context, I had appeared as a witness, to give evidence, to the Oireachtas Social Welfare Committee on the 24th of October 2019. I was to be the last in a long line of witnesses who had appeared over the course of 2019. Indeed, everybody who had been represented at the Employment Status Group inaugural meeting back in 2000 had already been before the Committee before I appeared.

Not one of them, not the unions, not IBEC, not ICTU, not Revenue and most particularly not the Department of Social Protection, mentioned that the SWAO creates unlawful test cases, that Social Protection senior management instruct Revenue to collect PRSI on the Department's behalf on the basis of unlawful test cases, and depending on what humour Revenue is in, Revenue will use Revenue's treatment for employees, the PAYE system, and maybe call you an employee for Revenue purposes or maybe call you self-employed.

That I raised the issue of test cases in the Oireachtas SW Committee is an important matter. The Committee knew that test cases are unlawful and went against everything they had been told by all previous witnesses. In fact, it was such an important matter, that the Committee decided that the Chief Appeals Officer should be asked into the Committee to answer to the statements I had made and crucially to the written evidence I had presented. When the Chief Appeals Officer appeared in the Committee, the weight of evidence that the Department and the SWAO were using test cases was overwhelming and the consequences were enormous.

In the Oireachtas Social Welfare Committee, on the 5th December 2019, Mr. Tim Duggan stated –

> ***"The following might help to clarify matters. There is something of a misunderstanding of test cases. We do not use that phrase anymore. Essentially these were sample cases at the time when a particular sector was being looked at and efforts were made to try to streamline the process to get greater administrative efficiency in the making of decisions for people"***

Point of fact – Mr. Duggan would have the Committee believe that the very letter written by Mr. Vincent Long, signed by Mr. Eddie Sullivan and sent to the PAC Chairman didn't actually say 'Test Case' and wasn't actually a test case. Mr Duggan would have the Committee believe that the Ombudsman's Report of February 2002 doesn't actually say that the Department told the Ombudsman that the 1995 Social Welfare Appeals Office Report, containing an anonymised account of what the then Minister was claiming was proof of a test case, was not actually a test case.

Mr. Duggan would have the Committee believe that when Social Welfare Minister Leo Varadkar replied to a PQ that the Department was engaging in test cases, that Minister Varadkar was lying, they were actually sample cases. Mr. Duggan wanted the Committee to believe a lot of fantastical things, but the one thing Mr. Duggan categorically did not say, was that 'Test Cases' and 'Sample Cases' are two distinct things. He said they are the same thing just that the Department and the SWAO don't use the phrase 'Test Case' anymore and they instead use the term 'sample case' and they are applying the term 'Sample Case' retrospectively to cases which were, in fact and undoubtedly, test cases.

Mr. Duggan did not say test cases and sample cases were two different kinds of cases. He most definitely wanted the Committee to believe that they were the same thing, just misnamed. Critically, that is not what Minister Heather Humphreys told Deputy Claire Kerrane in her very recent Dail reply dated 5th October 2022 –

REPLY

The references to so-called 'test cases' and 'sample cases' relate to two discrete issues.

In the interest of clarity, the position is as follows.

In the 1990s, a number of so-called 'test cases' relating to the insurability status of a person were examined by the Department for the purpose of establishing a set of criteria to guide Deciding Officers on the assessment of whether a worker should be classified as a Class S (self-employed) contributor or as an employee contributor. The criteria identified from the examination of these cases formed the basis of the approach subsequently agreed with the Social Partners under the Programme for Prosperity and Fairness and set out in the Code of Practice for the Determination of the Employment or Self-employment Status of Individuals. The criteria are applied by the Department when assessing questions related to insurability of a worker as being either an employee or self-employed.

Separately, the Department is open to taking a 'sample cases' approach to determination of insurance classification, using the criteria set out in the Code, in cases involving multiple workers performing the same work for a single employer. In indicating its openness to this approach, the Department has always stressed that it would only do so by agreement with all of the parties concerned, that each worker will always be given the option of having their case determined on an individual basis and will always have the option of appealing any decision on an individual basis.

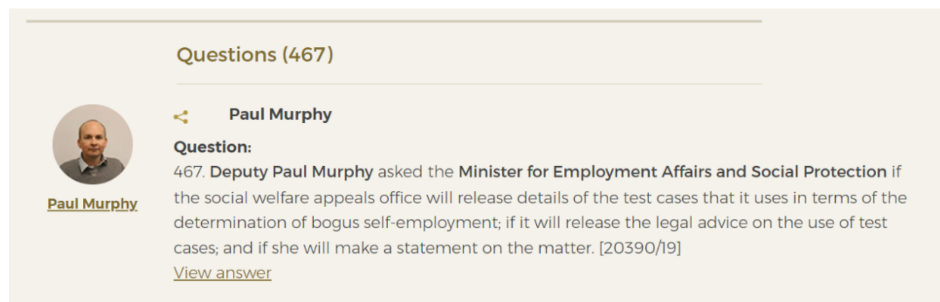
I trust that this clarifies the matter for the Deputy.

I have a right to have it recorded in my data that Minister Humphreys' statement –

> ***"The references to so-called 'test cases' and 'sample cases' relates to two discrete*** (Distinct) ***issues"***

is a false statement.

The true factual position is that 'so called test cases' are test cases. The true factual position is that 'sample cases' are test cases. The true factual position is that sample cases and test cases do not relate to two distinct (discrete) issues. The true factual position is that between the 9th January 2019 when the SWAO emailed me and confirmed the use of test cases, not case singular, cases, and the approach of the use of test cases, and the 14th May 2019, a decision was taken by the Department of Social Protection and the SWAO to deliberately deny the use of 'test case' and instead substitute the phrase 'sample case' instead in order to deliberately mislead. A reply to a direct question about the use of test cases from Deputy Paul Murphy by then Minister Regina Doherty confirms this timeline -


Questions (467)

Paul Murphy

Paul Murphy

Question:

467. **Deputy Paul Murphy** asked the **Minister for Employment Affairs and Social Protection** if the social welfare appeals office will release details of the test cases that it uses in terms of the determination of bogus self-employment; if it will release the legal advice on the use of test cases; and if she will make a statement on the matter. [20390/19]

View answer

Written answers (Question to Employment)

Minister for Employment Affairs and Social Protection

The Social Welfare Appeals Office functions independently of the Minister for Employment Affairs and Social Protection and of the Department and is responsible for determining appeals against decisions in relation to social welfare entitlements and insurability of employment.

The Chief Appeals Officer has advised me that occasionally, and usually where a number of workers engaged by the same employer are concerned and have individually submitted an appeal, she is asked to make decisions on a 'sample' number of cases. The Chief Appeals Officer has agreed to this approach in very limited circumstances and only with the agreement of both the employer and the workers concerned. However, it should be noted that each worker is entitled to an individual decision on their appeal and the approach cannot compromise the integrity of the appeal process or deny an interested party the opportunity of having any evidence particular to their appeal being considered by an Appeals Officer.

The Chief Appeals Officer has also advised that all appeals are determined on a case by case basis and on the particular facts of each appeal. While appeal decisions do not themselves create precedents, the Office endeavours to be consistent in its decision making and strives to ensure that the same conclusion is reached in cases that are based on the same or similar factual circumstances. In the case of appeals on the insurability of employment consistency is achieved by applying the precedents emerging from the case-law of the Courts and which

ensure that the same conclusion is reached in cases that are based on the same or similar factual circumstances. In the case of appeals on the insurability of employment consistency is achieved by applying the precedents emerging from the case-law of the Courts and which
are reflected in the Code of Practice for Determining Employment and Self-Employment Status of Individuals

The Chief Appeals Officer is required to make an annual report to the Minister on the activities of the Social Welfare Appeals Office in the previous year. Chapter 4 of the report for 2015 provides information on how the Office considers and determines insurability of employment appeals, including the case law context.
https://www.socialwelfareappeals.ie/uploads/annrep15.pdf

As legal advice provided to the Social Welfare Appeals Office is confidential and privileged it is not proposed to release any legal advice received in relation to this matter.

4. In her Dáil reply, Minister Humphreys States:

> ***"These cases, involving workers in a particular sector, were selected as so-called 'Test Cases' not to determine the employment status of all workers in that sector"***

The true factual position is that these cases, involving employers in a particular sector, were selected as test cases explicitly to determine the employment status of all workers in that sector. This undeniable fact was confirmed in writing by the Secretary General of the Department of Social Welfare to the Chairperson of the Public Accounts Committee in 2000 where he stated –

> ***"The employment status of couriers has been under review for some time. Some couriers consider themselves self-employed while others regard themselves as employees. This has implications for PRSI purposes as there are different statutory provisions for employees and self-employed persons. Similar differences exist in relation to employment law and Health and Safety legislation. In order to resolve the matter, a number of representative 'Test Cases' were selected in 1993/94 for detailed investigation and formal insurability decision under Social Welfare Legislation"***

The true factual position as outlined to the Public Accounts Committee by the Secretary General could not be clearer, not only was one test case in 1995 used to determine the employment status of all workers in the courier industry by the

Department of Social Welfare and the SWAO, workers are still determined by the Department and the SWAO to be self-employed based on this single test case 26 years later. This, despite numerous higher Court rulings and precedents, clearly indicating that group/class determinations are unlawful.

More recently, in the Public Accounts Committee, the Revenue Commissioners confirmed in writing that all those working as couriers are classified as self-employed since 1995. This blanket classification of workers as self-employed, thousands of workers over 26 years, none of whom have ever been informed that they are determined as self-employed by Revenue, based on a single SWAO test case in 1995, is now subject to a demand from the PAC for a fully independent investigation.

5. In her Dáil reply, Minister Humphreys States:

> ***"These cases, involving workers in a particular sector, were selected as so-called 'Test Cases' not to determine the employment status of all workers in that sector but rather to identify criteria that could be used by Deciding Officers and Appeals Officers for the purpose of assessing each case on an individual basis and to improve the quality and consistency of decision making in relation to the determination of whether an individual was employed or self-employed"***

The true factual position is that what the Minister describes as 'Criteria' are, in fact, 'Precedents'.

These precedents, which are unknown in legislation and have not been handed down by the Higher Courts, were not used for the purpose of assessing each case on an individual basis, they were and are, in fact, used to establish the employment status of all couriers ad infinitum thus disposing of the necessity to have each case assessed on an individual basis. There is no legal basis for categorizations purely by occupation.

These 'criteria', which were created by the SWAO over 26 years ago are not, nor have they ever been used by Deciding Officers. This was confirmed in an email dated the 11th of April 2019 from the Scope Section of the Department of Social Welfare to a worker I was representing in an appeal. In this email, the Scope Section Deciding Officer states:

> ***"Please note, I am not aware of any secret test case nor are any of my colleagues in the Scope Section. This was news to me when Martin explained to me your position at the Appeals Office the morning of your hearing"***

That Deciding Officers of the Scope Section were never informed of the 'Criteria' described by the Minister was also confirmed to me verbally in 2000 by Deciding Officer Fintan Farrelly who explained to me that legislation and case law explicitly states that each case must be assessed on its own merits and that the use of test cases by the SWAO is de facto unlawful and that the Scope Section cannot use 'Test Cases' of any kind.

This glaringly untrue utterance from the Minister in her Dáil reply illustrates perfectly how the Scope Section is acting in accordance with legislation and case law and yet Scope Section decisions are overturned by the SWAO using their own precedents, created outside of the law, which are unknown to the Scope Section

and workers seeking insurability of employment determinations who likewise have never been informed that they are already classified as self-employed by the SWAO using test cases without any individual assessment of their case. The importance for the worker here is that if the SWAO upholds the Scope decision, it is the state which must defend it in the higher courts if the employer challenges it but if the SWAO overturns the Scope Section decision, it is the worker who must pay to challenge it further.

This particular fact, that the SWAO uses unlawful, precedent setting test cases, to overturn valid Scope Section decisions thus placing the burden of defending the Scope Section decision in the Higher Courts on the individual worker, was originally put forward and accepted by the Employment Status Group in 2000. A report on that group, from the Communications Workers Union, in 2000, confirms in writing, the State's position of deliberately forcing individual workers to the High Court to have their employment status correctly determined regardless of the evidence the worker presents to the Scope Section or the SWAO. It states:

> ***"The View of IBEC, Finance & Revenue was that the 'Status Quo'*** (The use of unlawful test cases to make group and class decisions) ***should remain. The Status Quo is where a worker has a disagreement over his/her employment status they can take a case to the High Court'***

This statement made at the ESG, confirms that the SWAO exists only to protect unlawful test cases and that no worker will ever have their case heard on its own merits if it challenges an already existing 'test case'. In fact, the SWAO will always, and has always, overturned any Scope Section decision which challenges the status quo of unlawful test cases. The entire purpose of test cases is deny workers the right to have their case heard on its own merits.

Having the SWAO use 'criteria' unknown to the Scope Section does not improve the quality and consistency of decision making in relation to the determination of whether an individual is employed or self-employed, it achieves exactly the opposite. It creates glaring inconsistency in quality and consistency of decision making particularly between Deciding Officers of the Scope Section and Appeals Officers of the SWAO.

6. In her Dáil reply, Minister Humphreys States:

> ***"The Chief Appeals Officer has advised me that the test cases were not used to determine a particular outcome on a 'group Basis' that would be applied to all cases from that employment sector, as seems to have been inferred by some observers"***

I am the person Minister Humphreys refers to as an 'Observer'. I am the only person who appeared at an Oireachtas Committee who gave evidence about the use of test cases. I am not an 'Observer'. I am a whistleblower.

I am an employee of a courier company who was fired for seeking a Scope Section determination on my employment status. I did not 'infer' that test cases were used to determine a particular outcome on a group basis that was applied to all cases in the courier sector. What I had done, was supply irrefutable evidence to two Oireachtas Committees in the form of the letter from the Secretary General from 2000 clearing stating that a single test case in 1995 was, and is, used to determine self-employed employment status for all couriers, past, present and future on a

group basis, and also the email to me from the SWAO in January 2019, confirming the use of and the approach of using test cases.

The Revenue Commissioners did not reveal to the Oireachtas SW Committee that they have been classifying all couriers as self-employed for three decades, but the Revenue Commissioners did reveal this fact to the Public Accounts Committee which resulted in a call from the PAC for a fully independent inquiry into The Revenue Commissioners labelling of all couriers as self-employed. Neither did the Department of Social Welfare, nor did the Scope Section, nor did the SWAO, all of whom also appeared before the Oireachtas SW Committee. In fact, the Chief Appeals Officer vehemently denied the use of test cases, a denial which was later ruled 'erroneous' by SIPO.

This statement by the Minister is a direct attack on me, a direct undermining of the fully documented, irrefutable evidence I presented to two Oireachtas Committees and incontrovertible evidence of the Minister's lack of credibility and therefore raises the question around fitness to hold public office. I cannot express strongly enough the extent of the injury to my reputation emanating from this blatant dishonesty from the Minister.

I am a private citizen, who has, at great emotional, physical and financial cost, earned the trust of politicians, journalists and the general public on the issue of Bogus Self Employment. I have appeared at the sittings of both Oireachtas Committees and told the truth, the whole truth, and nothing but the truth. For the Minister to so casually call into question the veracity of my statements and to damage my reputation by means of her Dáil reply, with information that she and many of the civil servants to whom she reports absolutely knows to be erroneous, is deeply hurtful and has caused me great anguish. There must be accountability.

7. In her Dáil reply, Minister Humphreys States:

> ***"the cases informed identification of criteria that could be applied to each individual case in that sector"***

The true factual position is that what the Minister describes as 'Criteria' are, in fact, 'Precedents' which is confirmed in writing by the Revenue Commissioners. These precedents, which are unknown in legislation and have not been handed down by the Higher Courts, were not used for the purpose of assessing each case on an individual basis, they were and are, in fact, used to establish the employment status of all couriers ad infinitum thus disposing of the necessity to have each case assessed on an individual basis.

There is no legal basis for categorizations purely by occupation. There is no legal basis for criteria which are sector specific as the Minister has stated these criteria are. Every worker has the right to have their case assessed on its own merits using the exact same Oireachtas Legislation and Case Law. These unique, uniquely unlawful criteria, are, as the Minister admits, used only for couriers and are an unlawful extra obstacle which couriers must overcome to in order for their employment status to be determined. No other worker should be subjected to unlawful 'criteria' before the Dept. SW and the SWAO consent to apply the actual case law and legislation to their employment situation.

The 3 'Criteria' identified by the Secretary General in 2000 are -

A) Provided his own vehicle and equipment

B) Was responsible for all expenses including tax, maintenance, insurance etc and

C) Payment was made on the basis of rate per job plus mileage allowance

The only 'conditions' which should apply to insurability of employment (employed or self-employed) decisions and appeals of those decisions, are those legislated for in the Oireachtas and on the legal principles handed down from the Courts. Neither the SWAO nor the Department of Social Welfare have the authority to create unique criteria for one set of employers. The creation of these criteria goes far beyond the legal powers of the SWAO and the Department of Social Welfare. None of the 'Criteria' above have been legislated for nor are they legal principles handed down from the courts.

Insurability of Employment legislation and case law specifically precludes the Department of Social Welfare and the SWAO from creating unique 'Criteria' which can only be applied to one group of workers and not all workers. In essence, the use of specific, unique criteria for employers in the Courier industry, bestows an unfair advantage on Courier industry employers which cannot be used by other employers in other industries who must abide exclusively by the legislation created in the Oireachtas and the case law handed down by the courts.

That these 'criteria' are unique to the courier industry is confirmed by the Revenue Commissioners who wrote to Courier employers in 1997 and stated:

> ***'The arrangements governing couriers should not be taken as a precedent for other cases you may have with the Revenue Commissioners'***

In her Dáil reply, the Minister is declaring that decades of legislation and scores of court rulings on employment status have been distilled down to 3 simple tick box criteria which are applied only to couriers. This is not just ignoring the authority of the Oireachtas and the authority of the Judiciary in this matter, the acceptance of the use of these 3 'criteria' by the Minister to label a group/class of worker as self-employed, exposes that the Minister is acting IN DEFIANCE of the Higher Courts and the Oireachtas.

In 2000, the Social Welfare Minister sought legal advice on the 'criteria' –

'Provided his own vehicle and equipment'

And

'Was responsible for all expenses including tax, maintenance, insurance etc'

The Minister was told, in no uncertain terms, that ownership of a vehicle was not an indicator of self-employment as per the Denny case. The Minister chose and still chooses to ignore the Denny case and legal advice from the Chief State Solicitors Office delivered in writing by Mark Connaughton SC to the SWAO as follows –

> ***"Applying the law to the facts of the instant case, it is contended that the Appeals Officer is bound to hold that the claimant (A Motorbike Courier) is employed under a contract of service (employee). Insofar as there are any distinguishing facts, they appear only to apply to the provision of a motorcycle by the claimant and it is respectfully suggested that this cannot of itself justify a conclusion that the claimant is in business on his own***

account within the meaning of the authorities cited (The Denny Case). In the present case, the claimant is required to perform the work personally and does not as a matter of practice work for anyone else"

On the criteria:

'Payment was made on the basis of rate per job plus mileage allowance'

This 'criteria' was ruled upon by a 3 person tribunal in the Employment Appeals Tribunal Chaired by Ms. M Faherty SC as follows -

"While the case is being made that the claimant (courier/delivery worker) could earn as much or as little as he liked, the reality of the case was that the claimant worked a full day almost every day at a rate set by the respondent company. In this the claimant was no different to a piece work employee'

Being paid by the piece i.e., by delivery, by brick laid, by potato picked, is not and never was a 'criterion' which indicates self-employment status.

The 'criteria' referred to by the Minister are not indicators of 'self-employment'. To subject workers in the courier industry to these 'criteria' and not the case law handed down by the courts and the legislation created by the Oireachtas has denied all couriers, for many decades, the right to have their individual cases determined according to case law and Oireachtas legislation.

8. In her Dáil reply, Minister Humphreys States:

"Decision makers (Both Deciding Officers and Appeals Officers) could then apply these criteria to all cases that come before them"

The true factual position is that Deciding Officers are completely unaware of these unique 'Criteria' and do not apply these 'criteria' to cases that come before them. That Deciding Officers are completely unaware of these 'criteria' originating from the 1995 test case was confirmed in writing by a Deciding Officer of the Scope Section in an email dated the 11th of April 2019, which states:

"Please note, I am not aware of any secret test case nor are any of my colleagues in the Scope Section. This was news to me when Martin explained to me your position at the Appeals Office the morning of your hearing"

If Deciding Officers in the Scope Section of the Department of Social Welfare did actually know about and apply the uniquely unlawful criteria arising from the 1995 test case, then there would be uniformity of bad decision making coming from both the Scope Section and the SWAO. However, Deciding Officers do not apply these criteria which means that valid, legitimate Scope Section determinations, made in accordance with Case Law and Oireachtas legislation, are then overturned by the SWAO using these unlawful and legally unsustainable 'criteria'. This has happened on numerous occasions which the Minister is fully and undeniably aware of.

It is particularly worth noting, that it was only after this written communication from a Scope Section Deciding Officer, that the Department of Social Welfare and the Social Welfare Appeals Office decided not to use the term 'test cases' anymore. From at least 1993 until April 2019, the Department, the SWAO and Social Welfare Ministers were quite happy to use the term 'test case'. It was only when the

prospect of having to explain the unlawful use of test cases at an Oireachtas Committee arose, that the Dept, the SWAO and the Minister issued an edict that the term ‘test cases’ was to be substituted with the term ‘sample cases’. This particular piece of what can only be described as ‘corruption’, then allowed the CAO of the SWAO appear before an Oireachtas Committee and vehemently deny the use of test cases knowing full well that the Dept. and the SWAO have used test cases and the approach of test cases for 3 decades. This was confirmed in the Oireachtas SW Committee by Assistant Secretary, Mr. Tim Duggan.

9. In her Dáil reply, Minister Humphreys states:

> ***“as assessed by reference to these criteria, an individual decision would be made in each case”***

The true factual position is, that by referencing these ‘criteria’ BEFORE applying legislation and case law handed down by the courts, the SWAO is excluding couriers from having an individual decision made in accordance with the circumstances of their own individual case. Not only does it deny couriers the same rights as all other workers to have their cases heard on its own individual circumstances, couriers are not even informed by either the Scope Section or the SWAO that a previous ‘Test Case’ has already determined them to be self-employed.

The Minister is stretching credulity in her Dáil reply in maintaining that the SWAO will make a determination on an individual courier which then exposes that the SWAO and the Dept. have been acting unlawfully for 3 decades to label all couriers as self-employed. Not only does the individual courier not get a fair hearing on their own individual circumstances, the decision that they will be found to be self-employed by the SWAO and will be forced to the high court to overturn the group/class decision which determined them to be self-employed in the first place, was made decades before the worker appears in the SWAO. The decision that an individual courier will be found to be self-employed is made long before the courier seeks an insurability of employment decision.

Over the past 26 years, many thousands of couriers have been labelled as self-employed by the Dept and the SWAO. None of them have been informed that they are self-employed based on unique ‘criteria’ created exclusively by and for the SWAO in a 1995 test case. None of the thousands of couriers have ever received an individual decision in accordance with their own particular circumstances. The decision by the Dept and the SWAO to label all couriers as self-employed is a ‘blanket’ decision based on just one case in 1995. Individual decisions are not made in each case, that is simply untrue and is demonstrably untrue.

10. In her Dáil reply, Minister Humphreys States:

> **“This approach was a precursor to the subsequent development on a tripartite basis of the Code of Practice for determining employment or self-employment status of individuals under the Programme for Prosperity and Fairness”**

Following the disclosure of this particular statement at the Public Accounts Committee by me in 2021, the Irish Congress of Trade Unions released a statement categorically denying any involvement on the use of or the approach of the use of test cases. ICTU denied in full, that it had any knowledge that the ‘Code of Practice’, cited by the Minister, replaced the use of test cases.

ICTU can, of course, deny as much as they wish. ICTU may not have made the decision but they provided the table, discussed a sub judice case and have most certainly been tripartite in the cover up.

The use of test cases did not stop with the advent of the Code of Practice. In the Oireachtas SW Committee the Chief Appeals Officer, despite initially denying the use of test cases, then admitted that the approach of using test cases was used during her tenure in 2016 and that she was fully aware that the approach of using test cases was used during her tenure in 2016. That the Minister is repeating this falsehood in a Dáil reply as fact, even after it was admitted by the Chief Appeals Officer that it is not fact, severely undermines the evidence I gave to Oireachtas Committees and irrevocably injures my reputation.

The voluntary Code of Practice is a product of the ESG, the details of which are contained in 'Tax Briefing, Issue 43, April 2001". The ESG was established and had its first meeting between the dates of 17th July 2000 and 9th August 2000.

On the 25th of July 2000 the PAC Chairman wrote to the Revenue Chairman asking why all couriers were labelled as self-employed. On the 9th of August 2000 a reply from the Chairman of the Revenue Commissioners to the Chairman of the Public Accounts Committee states -

> ***"The issue of couriers was also raised at a recent inaugural meeting of an 'employment status' group set up under the auspices of the Programme for Prosperity & Fairness" & "I understand Mr. McMahon has formally taken up the question of his insurability status with the Dept. of Social, Community and Family Affairs"***

And I had. I was a motorcycle courier working solely for Securicor. I knew nothing about the special tax agreement nor why my employer, Revenue and Department of Social Welfare were labelling me as self-employed. On the 17th July 2000, I wrote to the Scope Section of the Department of Social Welfare and requested a formal insurability of employment decision. I gave detailed reasons why I believed I was an employee and not self-employed.

But it was this letter from the Secretary to the Chairperson of the Public Accounts Committee which was sent to me in April 2001 which finally shows exactly what the Employment Status Group and the Code of Practice were and why the ESG was established -

> ***"I believe your case was one which gave rise to this group's formation and I know it was certainly discussed at some of the Group's meetings!"***

To this day, I have grave concerns about the fact that a group of civil servants, trade union representatives and business lobbyists met to discuss my employment status after I had requested a formal insurability of employment decision and long before the decision issued.

The true factual position in relation to the Code of Practice is that it was created by a group which was specifically set up to discuss my individual insurability of employment case and that the decision of that group was that the status quo of unlawful test cases should remain regardless of the evidence I presented in my case. That the Dept. SW representative on the ESG deliberately interfered with evidence in my case, terminally prejudiced any chance that I would get a fair hearing in the SWAO, decided on my own individual employment circumstances.

The true factual position in regard to the Code of Practice is that is a meaningless document which can be interpreted to mean anything the Department of Social Welfare, Revenue and the SWAO want it to mean and that it was, in fact, a cover-up for meeting between vested interests to discuss my individual case while it was sub judice and to decide that I was not to get a fair hearing on my own individual employment circumstances in the SWAO.

The continuing use of the voluntary Code of Practice 22 years later and the Minister's false statements in regard to the Code of Practice, not only denied me the right to have my case heard on its own merits, it is a massive and unresolved perversion of all workers' rights.

11. In her Dáil reply, Minister Humphreys states:

> **"The Chief Appeals Officer has also advised me that every individual making an appeal to her Office always has the opportunity of having any evidence in their own case presented to and considered by an Appeals Officer"**

This is an entirely false statement. In 2019, I requested details of all and every 'test case' created by the SWAO in order to fully represent a worker who had been determined by the Scope Section to be an employee and not self-employed. In order to properly represent the worker, whose Scope Section decision was appealed by the employer to the SWAO, I needed sight of the test cases in order to present the evidence that the SWAO was using different, unlawful criteria, to overturn Scope Section decisions. The SWAO refused and still refuses to release the details of test cases even though the Secretary General did release information to the PAC in regard to the Courier Test Case which proves that there is a database of test cases which the SWAO has access to.

Previous test cases of the SWAO may be ones, which if applied to the worker's case would benefit the worker but if there is no access to them, the worker has no knowledge of them, and the worker has no guarantee that the Appeals Officer will make a determination based on case law and not on spurious unlawful 'criteria' made by different colleagues in test cases.

It does not require an elaborate review of the relevant case law and fair procedures to come to the conclusion that such a secret system is manifestly unfair. The unfairness is compounded when Appeals Officers and Employers have full access to previous test cases. This raises immediately an 'equality of arms' issue.

The SWAO cannot have test cases and at the same time claim to determine each case on a case by case basis on its own particular facts.

That this is an entirely false statement is further evidenced by the decision of an Appeals Officer in 2000 to adjourn an appeal from pushbike courier Mr. Richard McArdle and to refuse to hear the appeal unless and until I ceased to represent him. Mr. McArdle was insistent on having me as his representative and the Appeal was never reconvened.

What this statement from the Minister fails to reveal is that even if a worker has the opportunity to present evidence in their own case, the existence of a pre-existing test case and the decision from the Employment Status Group that the worker must be forced to the High Court to challenge a pre-existing test case, means that the evidence presented by the worker WILL NOT be considered by an Appeals Officer.

In fact, regardless of what evidence a worker presents, the decision has already been made, long before the worker presents evidence to an Appeals Officer, that the SWAO will rule in favour of the employer and the worker must appeal to the High Court to have their evidence considered.

12. In her Dáil reply, Minister Humphreys states:

> **"On rare occasions, usually where a number of workers are engaged by the same employer are concerned, she may be asked either by the workers or the employer, to make decisions on a 'sample' number of cases"**

This statement from the Minister is not only false, it exposes that the Minister (and the CAO) are actively usurping the authority of the Higher Courts and the Oireacthas to create their own group and class decisions in defiance of ALL existing legislation. The Minister has admitted earlier in her Dáil reply that a single test case can be used across an entire sector with multiple employers as happened in the Courier Industry.

There are serious constitutional issues with making a decision affecting a group of people without proper procedures and safeguards. There MUST be specific legislation to permit Appeals Officers to make determinations on the employment status of groups or classes of workers, which there is not.

Only the Oireachtas can create legislation and only the Courts can hand down precedent. It is not within the powers of the SWAO to create its own precedents with test cases. That Group and Class decisions are ultra vires is further confirmed in a letter dated 9th May 2019 from the Secretary General of the Department of Employment Affairs and Social Protection to the Public Accounts Committee which states:

> ***'There is no legislative provision which provides for Appeals Officers to make decisions on the employment status of groups or classes of workers who are engaged or operate on the same terms and conditions'***

That these decisions are not 'sample' cases but are in fact, 'test cases' was confirmed in the Oireachtas SW Committee Mr. Tim Duggan Assistant Secretary, to the Chairperson of the PAC by the Secretary General of the Department of Social Welfare, to me in writing by the SWAO, and also by the Chief Appeals Officer in the Oireachtas SW Committee despite her initial denial of the use of test cases.

That the Minster is claiming that the only commonality in this group/class determination is that the workers are engaged by the same employer is false.

As in the courier test case decision, many thousands of workers who work for hundreds of different employers were and are all determined to be self-employed by the SWAO and the department based on one test case.

Of further concern is that the Minister's statement directly conflicts with the above statement by the Secretary General in regard to workers operating on the same terms and conditions, and also directly conflicts with a statement given to the Irish Times by former Minister Doherty published on 25th March, 2019, which states:

> ***"The Minister is also looking at changing legislation to permit deciding officers to make determinations on the employment status of groups or classes of workers who are engaged and operate on identical terms and conditions"***

Having the same employer is not the same as operating on identical terms and conditions.

There is no basis for group and class decisions based solely on having the same employer. In 2016, sixteen construction workers, some were bricklayers, some were labourers and two others who had been compelled by their employer to set up a company to funnel their wages through, were told by and Appeals Officer that their cases would all be used as ONE test case.

The only commonality for these workers is that their employer settled an outstanding wages bill for all sixteen in the Labour Court. This approach of using test cases to decide the employment status of workers in several differing occupations entirely based on the fact that they had one employer exposes the deep lack of understanding of what insurability of employment determinations should be by both the Minister and the CAO.

The SWAO and the Department of Social Welfare are simply making up their own rules to achieve a predetermined outcome.

That these 'sample' cases are, in fact, group/class test cases was also confirmed by the Minister in the same Irish Times piece where she states:

> ***"At present both employers and workers have to agree to such class decisions, and these can be subject to separate individual appeals"***

There is no legislation to allow the use of group and class decisions, therefore, there is no legal recourse for couriers, as a group/class, to have the unlawful group/class decision made by the SWAO and the Department, overturned. This is an extremely important point which shows that Couriers cannot legally undo the unlawful decision to label them all as self-employed, no pathway exists in law.

13. In her Dáil reply, Minister Humphreys states:

> **"This approach has not been adopted by during the period of her (The Chief Appeals Officer) tenure in any case where the classification of a worker as an employee or self-employed is the issue under appeal"**

Once again, I find myself completely disrespected and much maligned by this blatantly false statement in the Minister's Dáil reply. This approach HAS been adopted during the tenure of the Chief Appeals Officer specifically where the classification of 16 construction workers as employees by the Scope Section was under appeal to the SWAO in 2016. Although the Chief Appeals Officer initially denied the use of the approach of having test cases during her tenure, under questioning from Senator Alice-Mary Higgins, the Chief Appeals Officer admitted that the approach of using test cases was taken during the period of her tenure with these 16 appeals and that the Chief Appeals Officer was fully aware of this at the time she denied it.

I subsequently made a complaint to SIPO that the Chief Appeals Officer had deliberately misled the Oireachtas Committee in denying the use of the approach of test cases during the period of her tenure. SIPO ruled that the denial of the use of the approach of test cases during her tenure was 'Erroneous Information' given by the Chief Appeals Officer to the Oireachtas Committee but that the Minister had 'clarified' the erroneous statement. Yet, here it is again, a completely false,

erroneous and deliberately misleading statement presented as fact in the Minster's Dáil reply almost 3 years after the Minister supposedly 'clarified' the erroneous statement.

14. In her Dáil reply, Minister Humphreys states:

> ***"This approach can be an efficient way of dealing with issues that are common in appeals cases and where there are a number of workers attached to the Appeal"***

The approach of using test cases in group/class decisions may be 'efficient' for the SWAO and the Minister, but it is entirely unlawful, denies workers the right to an individual hearing and is contrary to natural justice.

There can be no such thing as 'a number of workers attached to the Appeal'. The Scope Section makes an individual insurability of employment determination on a worker, not on a group of workers.

Each appeal of a Scope Section Appeal is meant to be an individual Appeal where the circumstances of that worker and only that worker can be heard in the SWAO. That the SWAO is grouping cases together and calling that one 'Appeal' is outrageously ultra vires.

It also raises serious question about the statistics provided by the SWAO in its annual report which is relied upon by the Oireachtas as an accurate account of the number of Scope Section decisions which are overturned in the SWAO. One Scope Section decision on one worker should equal one Appeal, however, the situation as described by the Minister indicates that one appeal can refer to several Scope Section decisions being overturned and the Oireachtas then being informed by the SWAO that this is one appeal of a Scope Section decision.

This begs the question, exactly how many Scope Section decisions are overturned by the SWAO because it is far in excess of the number of Appeals given by the SWAO in its annual report?

In the case of Couriers, as is already proven, one Scope Section decision overturned in the SWAO has many thousands of workers attached over 26 years, none of whom have any idea why they are labelled as self-employed, who were not parties to the SWAO test case and did not receive individual appeal decisions. Not a single statistic in regard to insurability of employment Appeals coming from the SWAO can be relied upon as accurate.

15. In her Dáil reply, Minister Humphreys states:

> ***"However, the approach cannot compromise the integrity or the Appeal process or deny the individual interested party due process"***

The approach of unlawful group and class decisions by the SWAO has undoubtedly, and deliberately, compromised the integrity of the Appeal process and denies many thousands of workers due process. This is simply an undeniable fact and the Minister is entirely factually incorrect in this statement.

16. In her Dáil reply, Minister Humphreys states:

"Importantly, an individual decision issues in each case and can be individually submitted to the Chief Appeals Officer or indeed, appealed to the courts"

Thousands upon thousands of workers in the Courier Industry have been determined by the SWAO to be self-employed based on one Appeal hearing in the SWAO. None, not even one, of those workers has received an individual decision which can be appealed to the courts.

This has led to the ridiculous situation where the Appeals Office made a determination that all couriers are self-employed, but because all couriers have not received an individual decision, and the Scope Section is entirely unaware of the 1995 test case and the precedents it set, the worker is then forced to go through a very long and arduous process which has already pre-determined that the worker will be determined by the SWAO to be self-employed.

The SWAO gets two bites at the same cherry, once in the absence of the worker and again as theatre where the courier will automatically be determined to be self-employed.

This charade, where no matter what evidence the courier presents to the Scope Section or the SWAO, will always result in a decision of self-employment, can only and fairly be described as a 'Kangaroo Court'.

In regard to Minister Humphreys' reply to Deputy Kerrane's parliamentary question, the Department was most certainly 'not open' to me being a 'test case' to overturn the deliberate misclassification of couriers as self-employed.

I have a right to have it recorded in my data that this data -

"The employment status of couriers has been under review for some time. Some couriers consider themselves self-employed while others regard themselves as employees. This has implications for PRSI purposes as there are different statutory provisions for employees and self-employed persons. Similar differences exist in relation to employment law and Health and Safety legislation. In order to resolve the matter, a number of representative 'Test Cases' were selected in 1993/94 for detailed investigation and formal insurability decision under Social Welfare Legislation. This process resulted in a decision by an Appeals Officer of the Social Welfare Appeals Office on the 12th of June 1995 who decided that a courier was self-employed if he

A) Provided his own vehicle and equipment

B) Was responsible for all expenses including tax, maintenance, insurance etc and

C) Payment was made on the basis of rate per job plus mileage allowance"

contained in the August 2022 SAR reply but not contained in the 2019 SAR reply, written by Vincent Long, signed by General Secretary of the Department of Social Welfare Mr. Eddie Sullivan Sullivan, and sent to Public Accounts Chairperson Jim Mitchell is false data.

The true factual position is that 'running costs', 'maintenance' and 'repairs' and 'provided his own vehicle' are all the same thing. They are not 'equipment'. They are

the requirements for every vehicle owner, and as bicycles are included in the test case, they are requirements for every vehicle owner including bicycle owners, e-scooter owners, roller skate and skateboard owners etc. These universally accepted requirements for all vehicle owners are not, nor cannot be indicators of employment status.

The true factual position is that vehicle ownership is not an indicator of employment status which is longstanding legal precedent which was confirmed in the Supreme Court Denny case, is repeated in the Voluntary Code of Practice and has been overruled by the SWAO using powers it does not have, implemented by the Department of Social Protection using powers it does not have and is accepted unlawfully by Revenue using powers it does not have, and the Department of Social Welfare has, at all times, been aware of this since 1995 and the Minister's own legal advice in 2001 confirms that Minister was always fully aware of this unlawful position.

The statement that ***'Payment was made on the basis of rate per job plus mileage allowance'*** is a factor to be considered as indicative of self-employment status is also false. The true factual position as determined by Ms. M. Faherty S.C. in the Employment Appeals Tribunal, confirmed in the Denny Supreme Court case and repeated in the Voluntary Code of Practice is that –

> ***"An individual who is paid by commission, by share, or by piecework or in some other atypical fashion, may still be regarded as an employee'***

The true factual position is that this longstanding legal tenet and has been overruled by the SWAO using powers it does not have, implemented by the Department of Social Protection using powers it does not have and is accepted unlawfully by Revenue using powers it does not have, and the Department of Social Welfare has, at all times, been aware of this since 1995 and the Minister's own legal advice in 2001 confirms that Minister was always fully aware of this unlawful position.

I have a right to have it recorded in my data that the data contained in the August 2022 SAR reply but not contained in the 2019 SAR reply, written by Mr Vincent Long, signed by General Secretary of the Department of Social Welfare Eddie Sullivan, and sent to Public Accounts Chairperson Jim Mitchell as follows is false data -

> ***"The Appeals Officer's decision established the criteria in relation to the employment status of couriers that has, since then, been generally accepted throughout the industry and also by the Office of The Revenue Commissioners for income tax purposes***"

Another example of incomplete and false data is this section of the 'Special Tax Agreement'. That this document and attachments is incomplete in my files is unacceptable. This document contains information which was vital to my case and was known about by all parties, except me and the Scope Section Deciding Officer, when I applied for a Scope Section determination on my employment status. This document with covering letters from the Chief Inspector of Taxes and the Chairman of the Revenue Commissioners should be in my files in their entirety. The Department should not be allowed to 'cherry pick' only what

they want from it.

2. *Couriers Status*

2.1 As you are aware, the Department of Social Welfare Appeals Office have decided that a motorcycle courier who provided his own equipment (e.g. motor cycle, special gear etc.) and was engaged under the standard courier contract was insurable as a self-employed contractor under the Social Welfare Acts.

While the decision is not binding on Revenue I propose, as previously stated, in the interest of uniformity and with a view to bringing the matter to a conclusion, to treat couriers as self-employed for tax purposes, whether deliveries are made by van, motorcycle or bicycle -

- where the vehicle is owned by the courier and
- all the outgoings in relation to the vehicle are paid by the courier and
- they are engaged under the standard contract and
- a basic wage is not paid in addition to a "mileage" rate.

This arrangement does not override the statutory rights of couriers, courier firms, Revenue or the Department of Social Welfare in this particular area for the future.

This data contained in this document lists the precedents used by the Department to label all couriers as self-employed but there is one vital difference. Revenue's version of the precedents listed by Mr. Long in his letter signed by Secretary General Sullivan differ on this point –

"they are engaged under the standard contract"

In the original 'Notification of Appeal' sent by Securicor's representative Kieran Ryan & Co. to the Chief Appeals Officer on the 22nd of September 2000, the notification of appeal states:

"The contract between Mr. McMahon and the Company together with the method of implementation of this contract is such that Mr. McMahon is a supplier of services under contract for service"

That's an astounding statement. I am both 'Contract of' and 'Contract for' services under terms of a contract and the method of implementation of this contract.

In their notification of appeal, Securicor's representatives also say:

"The grounds for appeal are that Mr. McMahon was engaged under a contract for service rather than of service"

Although no detailed reasons for appeal were given, no point of fact or law which would allow an appeal. Sometime after the appeal I did get to see Securicor's legal submission which states:

'the treatment of couriers by Revenue was indicative of self-employed status'.

Because all parties were acting on this data before either I or the Scope Section Deciding Officer knew about it, because Securicor say it is the reason I was self-employed and because it is data vital to my case which should have been in my 2019

SAR but was not, which should have been in my 2022 SAR but was not and because it is only a partial copy of data which should be in my files when all of it should be in my data, I attach the complete 'Special Tax Agreement' between Revenue, the Department of Social Protection (it's their test case being accepted) and Courier Industry employers. This information was sent to the Public Account's Chairperson, Mr. Jim Mitchell one day before I met with SWI O'Connor and 2 months before the letter written by Mr. Long, signed by Secretary General Sullivan and sent to Jim Mitchell. Chairperson Mitchell forwarded the documents onto me sometime after that –

Office of the Revenue Commissioners
Dublin Castle
Dublin 2
Ireland

Oifig na gCoimisinéirí Ioncaim
Caisleán Bhaile Átha Cliath
Baile Átha Cliath 2
Éire

PS 3422/00

9 August 2000

Mr. Jerome Flanagan,
Office of the Chairman,
Committee of Public Accounts,
Leinster House,
Dublin 2.

Dear Mr. Flanagan,

I am directed by the Chairman to refer to your letter of 25 July 2000 concerning Mr. Martin McMahon, motor cycle courier, of , Ashbourne, Co Meath. Mr. McMahon's main concern seems to be health and safety in the courier business.

As regards taxation, the issue of couriers and particularly motorcycle couriers was the subject of protracted discussions between Revenue and representatives of the courier industry. I enclose copies of our letters of 7 March 1997 and 3 April 1997 to Messrs. K. Ryan & Co., which represented courier firms at the discussions. The letters outline the agreement reached for tax purposes. The

of the courier industry. I enclose copies of our letters of 7 March 1997 and 3 April 1997 to Messrs. K. Ryan & Co., which represented courier firms at the discussions. The letters outline the agreement reached for tax purposes. The
majority, if not all, of the courier firms identified following those discussions opted for the voluntary PAYE system of taxation for couriers engaged by them for the reasons outlined in the letters.

For the purpose of insurability under Social Welfare law a motorcycle courier was found to be self-employed by a Department of Social, Community & Family Affairs Appeals Tribunal some years ago. The decision was not challenged further through the High Court on a point of law and consequently would stand for social insurance purposes.

Motorcycle couriers are also regarded as self-employed in the UK. This has been reaffirmed today on the basis of a telephone contact with the UK office dealing with decisions relating to the status of taxpayers for tax and social security purposes.

Taxation of couriers is not currently an issue. The issues raised by Mr. McMahon relate to the question of insurability for social insurance purposes and presumably also to the employment and health and safety rights of couriers. These are matters for the Departments of Social, Community & Family Affairs and Enterprise, Trade & Employment respectively.

I understand that Mr. McMahon has formally taken up the question of his insurability status with the Department of Social, Community & Family Affairs.

The issue of couriers was also raised at a recent inaugural meeting of an 'employment status' group set up under the auspices of the Programme for Prosperity & Fairness. The group consists of representatives of ICTU, CWU, IBEC, Revenue and the Departments of Finance and Social, Community & Family Affairs. It is envisaged that representatives of the Department of Enterprise, Trade & Employment will be invited to the next meeting.

I trust this clarifies the position.

Yours sincerely,

Letter attached from Mr. Bob Dowdall, Chief Inspector of Taxes and Revenue representative at the Employment Status Group –

Oifig an Árd-Chigire Cánach,
Úrlár 1, Ionad Setanta,
Sráid Thobair Phádraig,
Baile Átha Cliath 2.

Office of the Chief Inspector of Taxes,
1st. Floor, Setanta Centre,
Nassau St.,
Dublin 2

Uimh. Thag. -
(Ref. No.) -

Tel. No. (01) 671 6777 Ext. 4356
Fax No. (01) 671 6668

To:
Name
Address

3rd April 1997

Re: Couriers

Dear

I refer to your letter of 26 March 1997 in which you indicdted that the list of courier firms which attended the recent meeting in the Burlington Hotel are prepared to operate the voluntary PAYE system.

Until they receive a tax free allowance certificate for each courier, the should operate PAYE on the basis of the temporary allowances set out in my letter of 7 March 1997 with effect from 6 April 1997.

PAYE on the basis of the temporary allowances set out in my letter of 7 March 1997 with effect from 6 April 1997.

In the meantime, Courier firms should send immediately, preferably by fax to aviod delay, to Des Murray, PAYE 4, Division 96, Unit 967, 14/15 Upper O'Connell St., Dublin 1 a list of all couriers currently engaged by them, setting out the following particulars;

- Courier firm's name and address and employer registered number.
- The full name and address of each courier.
- The Revenue and Social Insurance (RSI) number for each courier (each courier will have an RSI number already allocated by the Department of Social Welfare - the RSI number is a person's life-long personal identifier for all tax and social welafre purposes.
- Courier's date of birth and mother's birth name.
- Indicate whether a courier is single or married, if known, for tax free allowance allocation purposes.
- If married, the spouse's full name, address and RSI number should also be given - otherwise a single personal allowance and PAYE allowance only will be granted.