Complaint Page 1 – Evidence Pages 2 – 119 – Exhibits Pages 120– 210

COMPLAINT TO SIPO

On the 1st of December 2022 Mr. John McKeon, the Secretary General of the Department of Social Protection, appeared before the Oireachtas Committee for Public Accounts.

During his evidence to the Committee, Secretary General McKeon stated:

> ***"We do not use test cases for the purpose of the wholesale classification of workers in a particular sector, namely, saying that all workers are one way because one worker is"***

This statement is false and misled the members of the Committee who are investigating issues relating to bogus self-employment. Mr. McKeon failed to maintain the highest standards of probity by engaging in dishonesty, by failing to be impartial, and by seeking to influence the committee with erroneous information.

Mr. McKeon's denial of 'Test Cases' to the Public Accounts Committee on 1st December 2022 was untrue and SIPO must hold him to account for this and ensure that the Committee Record is corrected to show that the Department of Social Protection does use 'Test Cases'.

EVIDENCE

On 22nd of September 2000, the Chairman of the Public Accounts Committee, Mr. Jim Mitchell wrote to the Secretary General of the Department of Social Welfare. Chairman Mitchell asked why couriers were all being classified by group and class as 'Self-Employed'.

On 2nd of October 2000, a reply (Exhibit 1) for PAC Chairman Mitchell was sent to the Secretary General of the Department by Assistant Principal Officer Mr. Vincent Long with an accompanying memo (Exhibit 2).

In this reply (Exhibit 1) signed by Secretary General Sullivan and sent to PAC Chairman Mitchell it states:

> ***"Some couriers consider that they are self-employed while other 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"***

This statement is perfectly true and is absolutely the norm. There are Journalists who fit the legal criteria to be self-employed and there are journalists who fit the legal criteria to regarded as employees. There are doctors, architects, accountants, salespersons, IT workers, agents for companies and many more occupations where workers fit the legal criteria to be self-employed and others fit the legal criteria to be employees. Insurability of Employment decisions (employee or self-employed) are based on established facts, not assumptions and as such there is no basis for categorizations purely by occupation. Each case is assessed on its own merits in accordance with the general precedents of Irish law. Operations which seem to be the same, may differ in the actual terms and conditions in any given case. This fact is currently available to view for oneself 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 precedent that each must be assessed on its own merits is confirmed in the Supreme Court case Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare as follows:

> ***"Employment relationship - supermarket demonstrator – Whether employed under a contract of employment 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"***

The next sentence in this reply (Exhibit 1) written AP Vincent Long, signed by Secretary General Eddie Sullivan and sent to PAC Chairman Jim Mitchell states:

> ***"In order to resolve the matter"***

That some couriers consider that they are self-employed while other regard themselves as employees and that this has implications for PRSI purposes and that there are different statutory provisions for employees and self-employed persons and that similar differences exist in relation to Employment Law and Health and Safety legislation, is not, nor was not something which needed to be 'resolved'. 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.

This reply (Exhibit 1) also states:

> ***"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"***

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 Exhibit 1. 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 25th March 2019:

> 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. It is also undeniable that the evidence contained in Exhibit 1 directly contradicts Secretary General McKeon's statement and proves beyond doubt that the Department of Social Protection and the Social

Welfare Appeals Office **do use** test cases for the purpose of the wholesale classification of workers in a particular sector, namely, saying that all workers are self-employed because one worker is.

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 on 2nd December 2021 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'.

Minister Humphreys does however admit there are 'group/class' decisions 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 previously 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 Social Welfare Appeals Office in 2016 where labourers and bricklayers, two completely different occupations, were told by the Appeals Officer that the Social Welfare Appeals Office wanted to use their 16 individual cases of both labourers and bricklayers as a 'Test Case'. That this approach was taken by the Social Welfare Appeals Office was admitted to by the Chief Appeals Officer in the Oireachtas SW Committee in December 2019.

That these 'Test Cases' were 'Representative' is also false. The reply (Exhibit 1) written by AP Vincent Long, signed by SecGen Eddie Sullivan and sent to PAC Chairman Jim Mitchell states that these cases were 'representative' but the Annual Report of the Social Welfare Appeals Office 1995, in which an anonymised version of the 12th June 1995 'Test Case' is contained, proves this statement to be false. The anonymised version (Exhibit 3) 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'***

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, Dept. 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 Decision has to be fixed in such a way that the Scope Section decision is overturned and the 'Status Quo' is maintained.

The issue of Test Cases is not complex. Exhibit 1 which was signed by Secretary General Sullivan and sent to Mr. Jim Mitchell Chairperson of the Public Accounts Committee, shows that couriers are being unlawfully classified as self-employed by group/class based on an unlawful test case in the Social Welfare Appeals Office on 12th of June 1995, and that this unlawful test case and the precedents set in and by it, are still being used by the Department of Social Protection, the WRC and the Revenue Commissioners to label employees as self-employed.

Revenue refers to this model of mislabelling employees as self-employed based on ownership of a vehicle alone, as an 'Owner/Driver' model in 'Taxation of Couriers' which is online on Reveue.ie. as follows:

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.

In February 2021, in direct response to questioning from the Public Accounts Committee, the Revenue Chairman wrote to the Public Accounts Committee and acknowledged that all couriers are still deemed to be self-employed by way of the precedent set by the Department of Social Welfare in 1995. This account is confirmed in the Public Accounts Committee Report of 2019 (Published in June 2021), 'Issue 4, Bogus Self-Employment in the Courier Industry' (Exhibit 27) as follows:

> *'Following the Committee's engagement with Revenue, it received correspondence regarding a voluntary PAYE system agreed by Revenue and courier firms in March 1997. The submissions included correspondence from Revenue which outlines the conditions of the voluntary PAYE system available to couriers, and asserts that couriers that fulfil a number of criteria should* ***"in the interests of uniformity" be treated "as self-employed for tax purposes". Correspondence from Revenue in February 2021 supports this view, stating "in the interest of uniformity Revenue decided, without prejudice, to treat those couriers as self-employed for tax***

purposes". Revenue confirmed this arose from a Social Welfare Appeals Officer's decision by which "couriers were regarded as self-employed for PRSI purposes". *Revenue also confirmed a voluntary PAYE system was operated for couriers that met a number of conditions on "self-employed courier income net of expenses (expenses agreed at 40% of income for motorcycle and 10% for cycle couriers)". However, the Committee is concerned that the decision to treat couriers as self-employed has resulted in a loss to the Exchequer in uncollected taxes and a loss to the workers affected by this agreement in benefits that self-employed individuals cannot claim.*

Recommendation 4: The Committee recommends that Revenue commission an independent investigation on the financial and sectoral implications of Revenue's agreement with the courier sector in 1997.

This investigation should include an examination into:

- *the magnitude of revenue lost to the State as a result of this practice,*
- *the number of workers impacted by the agreement in the sector, and*
- *the financial cost to those workers'*

Again, this irrefutable evidence, from the Revenue Commissioner's website confirmed by the Revenue Chairman himself in 2021 to the Public Accounts Committee, directly proves that Secretary General McKeon misled the Public Accounts Committee. All couriers are regarded as self-employed as a result of Social Welfare Appeals Officer's decision from 1995 to date. Legally the state cannot permit test cases as no legislation exists to allow test cases. The 'Test Case' was not, nor could not be representative of couriers who considered themselves to be employees and couriers who considered themselves self-employed.

That other group/class Test Cases exist is revealed from a Dail question to Education Minister from For Written Answer on 06/10/2022 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 deduct tax and PRSI at source from the Employer 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"

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 Social Welfare Appeals Office 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 Social Welfare Appeals Office 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 decisions 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 Social Welfare Appeals Office could label workers by group and class as self-employed. This is the overriding precedent which is unlawful.

On 1st February 2002, the Ombudsman released a report (Ombudsman's Ref: C22/01/1788) (Exhibit 4) where the use of the 1995 'Test Case' as a 'test case' was raised. In his report, the Ombudsman states:

> ***'The Department referred to 'test cases' from 1995*** (Exhibit 1) ***in determining your insurability. You assert that the test cases should have been presented to the Oireachtas within 6 months and this was not done'***

In his ruling on this point, the Ombudsman wrote:

> **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.

Points of Fact:

i. On this date, 1st February 2002, it was accepted and conceded by the Department of Social Welfare that the Department does use test cases.

ii. Every person who had denied the use of test cases from this date to present has misled the Oireachtas.

iii. It is an absolute fact, that in February 2002, in an official Report from the Ombudsman regarding a 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 Social Welfare Appeals Office, then Social Welfare Minister Dermot Ahern denied the complaint 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.

The Ombudsman is a standing member of SIPO. It is a fact, that in 2002, the Ombudsman accepted that an anonymised 'Case Study' contained in the Annual Report of the Social Welfare Appeals Office, which did not at all refer to it being a test case, satisfied the statutory obligation on the Social Welfare Appeals Office and the Department of Social Protection to inform the Oireachtas, within six months, that they had decided to act outside of the law and had created a **PRECEDENTIAL** group/class decision on the employment status of couriers.

On 12th February 2002, in reply to a complaint from Mr. Martin McMahon that employers in the Courier Industry were obtaining an illegal tax and PRSI exemption through the use of an unlawful test case, the Comptroller and Auditor General, Mr. John Purcell, wrote (Exhibit 7):

> ***'I wouldn't agree that contractors*** (employers) ***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 there is room for improvement'***

The Comptroller & Auditor General is a standing member of SIPO. It is undeniable that the Comptroller and Auditor General has known for 21 years that the Department of Social Protection, the Social Welfare Appeals Office and the Revenue Commissioners have been using an unlawful test case to mislabel employees as self-employed. It is undeniable that the Comptroller and Auditor General accepts that this unlawful 'system' is far from being ideal. It is undeniable that Courier Industry employers, who had refused to comply with their statutory obligations, were not pursued for their obligations and instead, employees were stripped of their employment rights to facilitate this practice. It is undeniable that employees are misclassified as self-employed by group and class in order to grant selected employers and sectors illegal state aid in the form of PRSI and Tax exemptions. According to Article 107 of Treaty on the Functioning of the European Union, an EU member state should not provide support by financial aid, lesser taxation rates or other ways to a party than does normal commercial business, in that if it distorts competition or the free market, it is classed by the European Union as being illegal state aid.

That the Department of Social Welfare uses test cases was also confirmed in 2016 by the then Social Welfare Minister and current Taoiseach Mr. Leo Varadkar on 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 Social Welfare Appeals Office uses test cases, and that the approach of test cases was taken during the tenure of the current Chief Appeals Officer, is also confirmed by the approach of using test cases employed by the Social Welfare Appeals Office in 2016 with 16 construction workers.

On 29 June 2017, Mr. Martin McMahon met with incoming Social Protection Minister Doherty and made a **Protected Disclosure** to the Minister about the unlawful use of test cases by the Department and the SWAO.

In July 2017, Mr. John McKeon was appointed as Secretary General. Mr. McKeon had been Assistant Secretary in charge of Pensions, PRSI & International Polices with the Department of Social Protection had been responsible for all matters relating to employment status from 2010 to 2017.

That the Social Welfare Appeals Office uses test cases was confirmed in writing by the Social Welfare Appeals Office on 9th of January 2019 (Exhibit 8) 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'***

It is undeniable that the evidence contained in Exhibit 8 directly contradicts Secretary General McKeon's statement and proves beyond doubt that the Department of Social Protection and the Social Welfare Appeals Office do use test cases for the purpose of the wholesale classification of workers in a particular sector, namely, saying that all workers are self-employed because one worker is.

How the Department of Social Protection, particularly the Chief Appeals Officer, the Secretary General and current Minister Heather Humphreys are untruthful about 'Test Cases', and are substituting the false term 'Sample Cases' instead, was exposed in the Oireachtas Social Welfare Committee on 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 made a determination was 'erroneous information' but because SIPO failed to follow their own procedures, the Committee Report Recommendation (Exhibit 9) has never been corrected to show that the Chief Appeals Officer gave 'erroneous information' to the Committee and that the Department and the SWAO do use test cases.

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 on 5th December 2019, was asked to explain how Test Cases became Sample cases -

> *"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"*

Points of fact

i. 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 (Exhibit 1) doesn't actually say 'Test Case' and wasn't actually a test case.

ii. Mr. Duggan would have the Committee believe that the Ombudsman's Report of February 2002 (Exhibit 4) doesn't actually say that the Department told the Ombudsman that the 1995 Social Welfare Appeals Office Report was proof of a 1995 test case (Exhibit 3) being presented to the Oireachtas.

iii. 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 (Exhibit 5), that Mr. Varadkar, the sitting Taoiseach of this Country, was lying, they were actually sample cases.

iv. 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 (Exhibit 26) –

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

This is a false statement. Minister Humphreys misled the Dail as have her senior officials, notably and particularly for the purposes of this complaint, the Secretary General Mr. John McKeon. 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 Social Welfare Appeals Office wrote and confirmed the use of test cases and the 5th of December 2019, when the Chief Appeals Officer denied the use of test cases, a decision was taken by the Department of Social Protection and the Social Welfare Appeals Office to deny the use of 'test case' an Oireachtas Committee and instead substitute the phrase 'sample case' in order to mislead the Oireachtas. The true factual position directly contradicts Secretary General McKeon's statement and proves beyond doubt that the Department of Social Protection and the Social Welfare Appeals Office do use test cases for the purpose of the wholesale classification of workers in a particular sector, namely, saying that all workers are self-employed because one worker is.

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 of test cases 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 and the Department of Social Welfare are simply making up their own rules to achieve a predetermined outcome and then lying about it to Committees, the Oireachtas, Workers and the Public. 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 and this is why Secretary General McKeon misled the Public Accounts Committee. The Department is liable for skipping of proper process & individual consideration via unlawful blanket decisions by the Social Welfare Appeals Office which must be set aside.

FURTHER EVIDENCE

(The Failure of SIPO)

During the course of 2018/2019, the Oireachtas Committee on Family Affairs and Social Protection undertook an investigation into 'Bogus Self-Employment'. On what was to be the final day of hearings, Thursday 24th Oct 2019, Mr. Martin McMahon appeared as a witness to the Committee. Mr. McMahon provided the Committee with Exhibit 1. Exhibit 8, and much more evidence not included in this complaint. Mr. McMahon also gave extensive detailed information to the Committee about the unlawful use of test cases and the consequences of using unlawful test cases.

Following Mr. McMahon's appearance as a witness to the Committee, the Committee decided to invite the Chief Appeals Officer to the Committee to directly answer to the evidence, both written and verbal, supplied to the Committee by Mr. McMahon.

On 5th of December 2019, the Chief Appeals Officer of the Social Welfare Appeals Office attended at the Committee hearing to directly answer to the evidence given by Mr. McMahon.

In the Committee, Ms. Gordon stated:

> ***"What I can say, however, is that our office does not use test cases. In the particular case referred to, I was not even aware that this case existed and had to go to find it. From the research I did for this meeting, it is my understanding that the precedential case referred to dates back to 1995 and an appeals officer's decision sometime in June of that year. We do not use this or any other case for decisions"***

On 18th of December 2019, Deputy Paul Murphy raised the issue of Ms. Gordon's denial of Test Cases to the Committee with the then Minister for Social Welfare Regina Doherty in a Dail Question (Exhibit 10). Deputy Murphy asked:

> ***'if the record will be corrected in relation to a statement by the Chief Appeals Officer of the Social Welfare Appeals Office to the Oireachtas Joint Committee on***

Employment Affairs and Social Protection that the Social Welfare Appeals Office does not use test cases in view of the fact this contradicts a letter of 9 January (Exhibit 8) ***which states*** '*An approach of having 'test cases' has been considered by the Social Welfare Appeals Office'*, ***and it contradicts a letter from former Secretary General Sullivan to the Chairperson of the Public Accounts Committee*** (Exhibit 1) ***which unequivocally states that 'test cases' are created by the SWAO and accepted by the DEASP?****'*

In her Dail Reply (Exhibit 11) to Deputy Murphy's Dail Question, Minister Doherty 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'***
>
> ***'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'***
>
> ***'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'***

Points of Fact:

i. Test cases were and are being used to determine a particular outcome on a 'group Basis' which are then applied to all cases from that sector.

ii. Mr. McMahon was not an 'Observer', he was the expert witness at the Oireachtas Committee and it was Mr. McMahon's documented evidence upon which the Chief Appeals Officer and the Minister were commenting.

iii. Sample case are test cases.

iv. The approach of test cases was taken during the tenure of the current Chief Appeals Officer in 2016 in the appeals of 16 Scope Section decisions that construction workers were employees by JJ Rhatigans.

v. The is clearly a contradiction between the fully documented evidence of test cases and the Chief Appeals Officer's verbal denial of test cases.

In January 2020 a General Election was called.

On 24th November 2020, Mr. McMahon Made an official complaint to SIPO:

> ***'The Social Welfare Appeals Office does use test cases, Ms. Gordon deliberately lied to a committee which was investigating bogus self-employment. Ms. Gordon failed to maintain the highest standards of probity by engaging in dishonesty, by failing to***

be impartial, by lack of integrity and by seeking to influence the committee with deliberately false information'

'On the 18th of December 2019, Deputy Paul Murphy raised the issue of Ms. Gordon's lie to the Committee with the then Minister for Social Welfare who committed to have Ms. Gordon explain why she lied to the Committee. No explanation has been forthcoming'

Mr. McMahon included exhibits 1, 8 & 10 as evidence.

On 22nd February 2021, SIPO replied to Mr. McMahon's complaint as follows (Exhibit 12):

'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'

Points of Fact:

i. SIPO made a 'Finding of Fact' that the Chief Appeals Officer provided, in SIPO's own words, 'Erroneous Information' to an Oireachtas Committee.

ii. SIPO's 'Finding of Fact' that the Chief Appeals Officer gave 'Erroneous Information' to the Committee proves undeniably SIPO's opinion that there is prima facie evidence to sustain the complaint.

iii. Upon making a 'Finding of Fact' that the Chief Appeals Officer gave 'Erroneous Information' to an Oireachtas Committee, it was then incumbent on SIPO, according to its own guidelines, to inform the Chief Appeals Officer that a complaint had been received against her and that the complaint had progressed to Stage 2 by virtue of SIPO's 'Finding of Fact' that there is prima facie evidence to sustain the complaint.

iv. SIPO referred to the Chief Appeals Officer as the 'Respondent'.

v. SIPO never asked the Chief Appeals Officer to respond to SIPO's 'Finding of Fact' that the Chief Appeals Officer provided 'Erroneous Information' to the Oireachtas Committee.

vi. SIPO failed to follow its own Guidelines.

vii. SIPO failed to maintain the highest standards of probity by failing to follow its own Guidelines.

viii. The Social Welfare Appeals Office functions independently of the Minister for Social Protection (exhibit 11).

ix. Nothing the Minister for Social Protection says has any relevance to the finding of fact that the INDEPENDENT Chief Appeals Officer gave erroneous information to an Oireachtas Committee.

x. In relying on statements from the Minister for Social Protection to 'Clarify' the erroneous information given by the 'Independent' Chief Appeals Officer, of the Independent Social Welfare Appeals Office, to an Oireachtas Committee, SIPO have acted completely outside of their remit and guidelines.

xi. The Minister for Social Protection has no role to play in explaining the erroneous information provided by the Chief Appeals Officer to the Oireachtas Committee.

xii. The Minister for Social protection did not, nor could not, clarify the erroneous information given to the Oireachtas Committee by the Chief Appeals Officer.

xiii. SIPO failed to follow any guidelines whatsoever in accepting the opinion of an unrelated third party as 'clarification'.

xiv. SIPO failed to maintain the highest standards of probity by engaging in dishonesty.

xv. SIPO failed to maintain the highest standards of probity by failing to be impartial.

xvi. Deputy Paul Murphy wrote to SIPO and stated that he does not accept that the Minister's reply to his PQ 'Clarified' the 'Erroneous Information' given by the Chief Appeals Officer to the Oireachtas Committee.

xvii. At all times, SIPO has been fully aware that SIPO failed to maintain the highest standards of probity by engaging in dishonesty, by failing to be impartial, and by allowing Committees to be influenced by information SIPO knows for a fact to be 'Erroneous'.

In June 2021, the 'Final Report of the Joint Committee on Employment Affairs and Social Protection Investigating Bogus Self-Employment' was published. Nowhere in the Final Report is the 'Finding of Fact' that the Chief Appeals Officer gave 'Erroneous Information' to the Committee in her denial of the existence of 'Test Cases'.

In July 2021, Mr. Martin McMahon wrote to the Joint Committee on Employment Affairs and Social Protection Investigating Bogus Self-Employment and requested to know if the Committee had received any 'Clarification' from SIPO, the Minister for Social Protection or the Chief Appeals Officer that the Chief Appeals Officer had given 'Erroneous Information' to the Committee in her denial of test cases.

The Committee replied (Exhibit 13) to Mr. McMahon as follows:

> ***'Your emails were considered by the Joint Committee at its meeting today, 14 July 2021'***
>
> ***'In relation to the specific questions raise in your email of 26 June and the claim made in your email of 26 June that "The Chief Appeals Officer deliberately misled the Oireachtas Committee", the Joint Committee has not received any***

correspondence from the Minister for from SIPO in relation to what SIPO referred to, in its email to you of 22 February, as "erroneous information"

Despite repeated written requests from Mr. McMahon, the Committee refused to amend the report to reflect that test cases do exist, refused to withdraw the report pending clarification on the use of test cases from the Minister, SIPO or the Chief Appeals Officer, and refused to seek clarification from SIPO, the Minister or the Chief Appeals Officer.

On 19th July 2021, Mr. McMahon wrote to SIPO (Exhibit 14), attached his correspondence with the Joint Committee on Employment Affairs and Social Protection and requested:

> ***'I now seek immediate clarification from SIPO on who informed SIPO that the Minister had 'clarified' the 'Erroneous Information' given to the Oireachtas Committee by the Chief Appeals Officer, also I seek immediate clarification from SIPO as to why a very clear denial from the Minister that 'Erroneous Information' was given to Oireachtas Committee by the Chief Appeals Officer was construed by SIPO to be, and I quote -***
>
> *"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"*
>
> ***The failure of SIPO to properly address my complaint calls into question the irrefutable evidence I gave to the Committee, besmirches my good name, and in my opinion, allows the SWAO and the Department to continue to defame me'***

On 21st July 2021, SIPO replied as follows (Exhibit 15):

From: SIPO Complaints Shared Mailbox <complaints@sipo.ie>
Date: 21 July 2021 at 16:34:30 GMT+1
To: Martin Mcmahon <martymannn@gmail.com>
Subject: RE: complaint

Dear Mr McMahon,

I refer to the above, and to your most recent correspondence in respect of same.

As previously stated, the Commission noted that information, which was provided by the Chief Social Appeals Officer, was subsequently clarified by the Minister in response to a PQ made by Deputy Murphy on 18 December 2019. In these circumstances, where the information was clarified, the Commission considers that there is no evidence of a breach of the Ethics Acts for the Commission to investigate. The Commission has considered the matter in full and is of the view that the complaint does not warrant further investigation.

The matter is accordingly closed.

Points of Fact:

i. SIPO made a 'Finding of Fact' that the Chief Appeals Officer provided, in SIPO's own words, 'Erroneous Information' to an Oireachtas Committee.

ii. SIPO's 'Finding of Fact' that the Chief Appeals Officer gave 'Erroneous Information' to the Committee proves undeniably SIPO's opinion that there is prima facie evidence to sustain the complaint.

iii. Upon making a 'Finding of Fact' that the Chief Appeals Officer gave 'Erroneous Information' to an Oireachtas Committee, it was then incumbent on SIPO, according to its own guidelines, to inform the Chief Appeals Officer that a complaint had been received against her and that the complaint had progressed to Stage 2 by virtue of SIPO's 'Finding of Fact' that there is prima facie evidence to sustain the complaint.

iv. SIPO referred to the Chief Appeals Officer as the 'Respondent'.

v. SIPO never asked the Chief Appeals Officer to respond to SIPO's 'Finding of Fact' that the Chief Appeals Officer provided 'Erroneous Information' to the Oireachtas Committee.

vi. SIPO failed to follow its own Guidelines.

vii. SIPO failed to maintain the highest standards of probity by failing to follow its own Guidelines.

viii. The Social Welfare Appeals Office functions independently of the Minister for Social Protection (exhibit 11).

ix. Nothing the Minister for Social Protection says has any relevance to the finding of fact that the INDEPENDENT Chief Appeals Officer gave erroneous information to an Oireachtas Committee.

x. In relying on statements from the Minister for Social Protection to 'Clarify' the erroneous information given by the 'Independent' Chief Appeals Officer, of the Independent Social Welfare Appeals Office, to an Oireachtas Committee, SIPO have acted completely outside of their remit and guidelines.

xi. The Minister for Social Protection has no role to play in explaining the erroneous information provided by the Chief Appeals Officer to the Oireachtas Committee.

xii. The Minister for Social protection did not, nor could not, clarify the erroneous information given to the Oireachtas Committee by the Chief Appeals Officer.

xiii. SIPO failed to follow any guidelines whatsoever in accepting the opinion of an unrelated third party as 'clarification'.

xiv. SIPO failed to maintain the highest standards of probity by engaging in dishonesty.

xv. SIPO failed to maintain the highest standards of probity by failing to be impartial.

xvi. Deputy Paul Murphy wrote to SIPO and stated that he does not accept that the Minister's reply to his PQ 'Clarified' the 'Erroneous Information' given by the Chief Appeals Officer to the Oireachtas Committee.

xvii. At all times, SIPO has been fully aware that SIPO failed to maintain the highest standards of probity by engaging in dishonesty, by failing to be impartial, and by allowing Committees to be influenced by information SIPO knows for a fact to be 'Erroneous'.

In November 2021, Mr. McMahon made an extensive complaint to the Clerk of the Dail (Exhibit 16) about the Minister's continued denial of Test Cases. In his complaint, Mr. McMahon referred to SIPO's 'Finding of Fact' that denial of test cases is 'Erroneous Information'.

On 3rd December 2021, Minister Heather Humphreys wrote to Committee on Parliamentary Privileges and Oversight (Exhibit 17) and stated:

> ***'Mr. McMahon has also advised the Committee on Parliamentary Privileges and Oversight that, following a complaint he made to the Standards in Public Office Commission (SIPO) that the Chief Appeals Officer had misled the Joint Committee in denying the use of test cases, the SIPO ruled that the CAO's denial of test cases was 'erroneous' but that I had clarified the erroneous statement. I am advised that neither the Chief Appeals Officer nor the Department have ever been contacted by SIPO in relation to the complaint and were not notified of any such ruling'***

On 17th August 2022, Mr. McMahon wrote to SIPO (Exhibit 18) as follows:

> ***'on the 22nd of February 2001 you wrote to me and stated:***
>
> > ***"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"***
>
> ***In December 2001, the Minister for Employment Affairs and Social Protection wrote to the Privileges Committee and completely denied that she had clarified the Chief Appeals Officer's denial of test cases to SIPO and states clearly that SIPO never bothered to contact the department or the SWAO at all.***
>
> ***Simple question, why did SIPO lie to me?'***

On 22nd August 2022, SIPO replied as follows (Exhibit 19):

> ***'I draw your attention to an email of 21st July 2021 which outlined the Commission's decision. It was noted that the response provided by the Minister to a Parliamentary Question posed by Deputy Paul Murphy on 18th December 2019 clarified the issue regarding the use of test cases. As previously stated, as the matter was already publicly clarified by the Minister, the Commission determined that there was no cause for further action in this regard. As advised, your complaint was fully considered and the matter is closed'***

On 22nd August 2022, Mr. McMahon wrote to SIPO and correctly pointed out that Minster denied in full giving any clarification to SIPO and that SIPO had not requested clarification from the Minister:

> ***'SIPO never asked the Minister to respond, the Minister did not proffer the reply to Deputy Murphy's PQ as a 'clarification' as both Deputy Murphy and I brought to SIPO's attention at the time. The Minister's reply to Deputy Murphy clearly states***

that the Chief Appeals Officer would be happy to explain her comments, but SIPO never asked, instead SIPO lied to me'

On 23rd August 2022, SIPO replied to Mr. McMahon as follows (Exhibit 20):

'As part of the initial assessment of the matter the Commission considered the statement issued by the Minister in response to the Parliamentary Question from Deputy Murphy. In her response the Minister stated that:

> *"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… The Chief Appeals Officer has advised me that the test cases were not used to determine a particular outcome on a 'group basis'… The Chief Appeals Officer has also advised me that she does not as a rule take group decisions based on test cases."*

Based on the response from the Minister, the Commission were satisfied that the issue had been clarified and did not consider it necessary to contact the Minister or the Chief Appeals Officer seeking further clarification on the matter.

Points of Fact:

i. Test cases were and are being used to determine a particular outcome on a 'group Basis' which are then applied to all cases from that sector.

ii. Sample case are test cases.

iii. The approach of test cases was taken during the tenure of the current Chief Appeals Officer in 2016 in the appeals of 16 Scope Section decisions that construction workers were employees by JJ Rhatigans.

iv. The is clearly a contradiction between the fully documented evidence of test cases and the Chief Appeals Officer's verbal denial of test cases.

v. SIPO made a 'Finding of Fact' that the Chief Appeals Officer provided, in SIPO's own words, 'Erroneous Information' to an Oireachtas Committee.

vi. SIPO's 'Finding of Fact' that the Chief Appeals Officer gave 'Erroneous Information' to the Committee proves undeniably SIPO's opinion that there is prima facie evidence to sustain the complaint.

vii. Upon making a 'Finding of Fact' that the Chief Appeals Officer gave 'Erroneous Information' to an Oireachtas Committee, it was then incumbent on SIPO, according to its own guidelines, to inform the Chief Appeals Officer that a complaint had been received against her and that the complaint had progressed to Stage 2 by virtue of SIPO's 'Finding of Fact' that there is prima facie evidence to sustain the complaint.

viii. SIPO referred to the Chief Appeals Officer as the 'Respondent'.

ix. SIPO never asked the Chief Appeals Officer to respond to SIPO's 'Finding of Fact' that the Chief Appeals Officer provided 'Erroneous Information' to the Oireachtas Committee.

x. SIPO failed to follow its own Guidelines.

xi. SIPO failed to maintain the highest standards of probity by failing to follow its own Guidelines.

xii. The Social Welfare Appeals Office functions independently of the Minister for Social Protection (exhibit 11).

xiii. Nothing the Minister for Social Protection says has any relevance to the finding of fact that the INDEPENDENT Chief Appeals Officer gave erroneous information to an Oireachtas Committee.

xiv. In relying on statements from the Minister for Social Protection to 'Clarify' the erroneous information given by the 'Independent' Chief Appeals Officer, of the Independent Social Welfare Appeals Office, to an Oireachtas Committee, SIPO have acted completely outside of their remit and guidelines.

xv. The Minister for Social Protection has no role to play in explaining the erroneous information provided by the Chief Appeals Officer to the Oireachtas Committee.

xvi. The Minister for Social protection did not, nor could not, clarify the erroneous information given to the Oireachtas Committee by the Chief Appeals Officer.

xvii. SIPO failed to follow any guidelines whatsoever in accepting the opinion of an unrelated third party as 'clarification'.

xviii. SIPO failed to maintain the highest standards of probity by engaging in dishonesty.

xix. SIPO failed to maintain the highest standards of probity by failing to be impartial.

xx. Deputy Paul Murphy wrote to SIPO and stated that he does not accept that the Minister's reply to his PQ 'Clarified' the 'Erroneous Information' given by the Chief Appeals Officer to the Oireachtas Committee.

xxi. At all times, SIPO has been fully aware that SIPO failed to maintain the highest standards of probity by engaging in dishonesty, by failing to be impartial, and by allowing Committees to be influenced by information SIPO knows for a fact to be 'Erroneous'.

SIPO refused to communicate any further with Mr. McMahon.

On 14th September 2022, Deputy Claire Kerrane TD, put a Parliamentary Question to Minister Heather Humphreys (Exhibit 21):

For Written Answer on : 14/09/2022
Question Number(s): 362 Question Reference(s): 44368/22
Department: Social Protection
Asked by: Claire Kerrane T.D.

QUESTION

To ask the Minister for Social Protection if her attention has been drawn to a specific issue with regard to the social welfare appeals office (details supplied); and if she will make a statement on the matter. (Details Supplied) On the 22nd February 2001, the Standards in Public Office Commission advised that the Chief Appeals Officer of the Social Welfare Appeals Office gave 'Erroneous Information' to the Oireachtas Social Welfare Committee investigating Bogus Self Employment. The 'Erroneous Information' was the denial of the use of 'Test Cases' by the Social Welfare Appeals Office. Confirmation is being sought if the Chief Appeals Officer's denial of test case to the Oireachtas Social Welfare Committee is 'Erroneous Information', and if the Minister will confirm her written statement to the Privileges Committee that the Standards in Public Office Commission did not sought 'clarification' from the Minister in regard to the Chief Appeals Officer's 'Erroneous Information'.

In reply to Deputy Kerrane's PQ, Minister Humphreys stated (Exhibit 22):

> ***'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.***
>
> ***In the details supplied with this question the Deputy states that the Standards in Public Office Commission (SIPO) advised that the Chief Appeals Officer of the Social Welfare Appeals Office gave 'erroneous information' to the Oireachtas Committee investigating "bogus self- employment". This 'erroneous information' is said to be the denial of the use of "test cases" by the Social Welfare Appeals Office.***
>
> ***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'***

On 27th September 2022, Deputies Paul Murphy and Claire Kerrane requested replies in PQs (Exhibit 23) from Minister Humphreys in regard to the fact that no clarification had been sought by SIPO from the Minister in regard to 'Erroneous Information' given to the Oireachtas Committee and what action the Minster proposed to take to rectify the situation.

In her reply (Exhibit 24), Minister Humphreys states:

> ***'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'

On 5th October 2022, Deputy Claire Kerrane T.D. again wrote to the Minister and requested (Exhibit 25):

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'.

In her reply to Deputy Kerrane's PQ, Minister Humphreys stated (Exhibit 26):

'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'

Point of Fact 1:

1) **On four separate occasions**, the Minister for Social Protection has stated that the Social Welfare Appeals Office **functions independently** of the Minister for Social Protection and of the Department.

   1. 27th September 2022 (Exhibit 24), Minister Humphreys states:

      'The Social Welfare Appeals Office functions independently of the Minister for Social Protection and of the Department'

   2. On 14th September 2022 (Exhibit 21), Minister Humphreys states:

      'The Social Welfare Appeals Office functions independently of the Minister for Social Protection and of the Department'

   3. On 6th July 2021 (Exhibit 29), Minister Humphreys states:

      'The Social Welfare Appeals Office functions independently of the Minister for Social Protection and of the Department'

   4. On 18th December 2019 (Exhibit 11), Minister Doherty states:

      'The Social Welfare Appeals Office functions independently of the Minister for Employment Affairs and Social Protection and of the Department'

   Indisputable Facts:

   i. The Social Welfare Appeals Office does function independently of the Minister for Employment Affairs and of the Department.

   ii. Upon making a 'Finding of Fact' that the Chief Appeals Officer gave 'Erroneous Information' to an Oireachtas Committee, it was then incumbent on SIPO, according to its own guidelines, to inform the Chief Appeals Officer that a complaint had been received against her and that the complaint had progressed to Stage 2 by virtue of SIPO's 'Finding of Fact' that there is prima facie evidence to sustain the complaint. That SIPO failed to follow its own guidelines by not informing the Chief Appeals Officer as the 'Respondent' that there was prima facia evidence to sustain the complaint is confirmed by Minister Heather Humphreys on 27th September 2022 in (Exhibit 24):

      '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'

iii. The Minister vehemently denies that the Minister gave any clarification to SIPO of the 'erroneous information' given by the Chief Appeals Officer. In her letter to the Oireachtas Committee on Parliamentary Privileges and Oversight (Exhibit 17) in December 2021, the Minister states:

Mr McMahon has also advised the Committee on Parliamentary Privileges and Oversight that, following a complaint he made to the Standards in Public Office Commission (SIPO) that the Chief Appeals Officer had misled the Joint Committee in denying the use of test cases, the SIPO ruled that the CAO's denial of test cases was 'erroneous' but that I had clarified the erroneous statement. I am advised that neither the Chief Appeals Officer nor the Department have ever been contacted by SIPO in relation to the complaint and were not notified of any such ruling.

I trust this clarifies the position.

Yours sincerely,

Heather Humphreys, T.D.,
Minister for Social protection

The Minister is a Designated Public Official under the Regulation of Lobbying Act, 2015

It is bizarre in the extreme that SIPO are relying on a reply to a Parliamentary Question from the Social Protection Minister which does not nor cannot clarify the 'erroneous information' given by the INDEPENDENT Chief Appeals Officer, a reply which was given eleven months BEFORE the complaint was made to SIPO, a reply which the Minister for Social Protection vehemently denies was either asked for or given in 'clarification' of SIPO's finding of fact that the Chief Appeals Officer gave 'Erroneous Information' to an Oireachtas Committee.

iv. It is further truly bizarre, that the legal independence of Social Welfare Appeals Office was already ruled upon and sustained by the Ombudsman in 2002 and, despite the Ombudsman being a sitting member of SIPO, SIPO steadfastly refuses to recognise the independence of the Chief Appeals Officer or the Social Welfare Appeals Office. In his Decision (Exhibit 4) the Ombudsman states:

'6 The independence of the Appeals Office.

The Appeals Office is an administrative tribunal and the courts have ruled that the essential role of Appeals Officers in the exercise of their statutory functions 'is laid upon him by the Oireachtas and he is required to perform it as between the parties that appear before him freely and fairly as becomes anyone who is called upon to decide matters of right or obligation' and 'appeals officers … are, and are required to be, free and unrestricted in discharging their functions under the Act'

v. SIPO referred to the Chief Appeals Officer as the 'Respondent' (Exhibit 12).

vi. SIPO never asked the Chief Appeals Officer to respond to SIPO's 'Finding of Fact' that the Chief Appeals Officer provided 'Erroneous Information' to the Oireachtas Committee.

vii. SIPO failed to follow its own Guidelines.

viii. SIPO failed to maintain the highest standards of probity by failing to follow its own Guidelines.

ix. Nothing the Minister for Social Protection says has any relevance to the finding of fact that the INDEPENDENT Chief Appeals Officer gave erroneous information to an Oireachtas Committee.

x. In relying on statements from the Minister for Social Protection to 'Clarify' the erroneous information given by the 'Independent' Chief Appeals Officer, of the Independent Social Welfare Appeals Office, to an Oireachtas Committee, SIPO have acted completely outside of their remit and guidelines.

xi. The Minister for Social Protection has no role to play in explaining the erroneous information provided by the Chief Appeals Officer to the Oireachtas Committee.

xii. The Minister for Social protection did not, nor could not, clarify the erroneous information given to the Oireachtas Committee by the Chief Appeals Officer.

xiii. SIPO failed to follow any guidelines whatsoever in accepting the opinion of an unrelated third party as 'clarification'.

xiv. SIPO failed to maintain the highest standards of probity by engaging in dishonesty.

xv. At all times, SIPO has been fully aware that SIPO failed to maintain the highest standards of probity by engaging in dishonesty, by failing to be impartial, and by allowing Committees to be influenced by information SIPO knows for a fact to be 'Erroneous'.

Point of Fact 2:

2) **On five separate occasions**, Social Protection Ministers and Senior Officials have referred to the involvement of Social Partners under the Programme for Prosperity and Fairness in the creation, development, and/or existence of 'Test Cases', in particular, this 'Erroneous Information' is contained in Minister Doherty's PQ reply of 18th December 2019 (Exhibit 11) upon which SIPO are relying as 'Clarification' of the Independent Chief Appeals Officer's 'Erroneous Information'.

1. On 27th September 2022 (Exhibit 24), Minister Humphreys states:

   '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'***

2. On 3rd December 2021, Minister Humphreys wrote to the Committee on Parliamentary Privileges and Oversight (Exhibit 17) and stated:

   '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-Employed Status of individuals agreed with trade unions and employers'

3. On 6th July 2021, in reply to a PQ, Minister Humphreys states (Exhibit 29):

   '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'***

4. On 18th December 2019, in reply to a PQ, the PQ SIPO are relying upon as 'Clarification' of the Independent Chief Appeals Officer's 'Erroneous Information', Minister Doherty stated (Exhibit 11):

   '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'***

5. On 5th December 2019, at the Oireachtas Committee on Family Affairs and Social Protection, the Independent Chief Appeals Officer was the first to raise the issue of the involvement of Social Partners under the Programme for Prosperity and Fairness in the creation, development, and/or existence of 'Test Cases'. The Chief Appeals Officer stated:

> ***'From the research I did for this meeting, it is my understanding that the precedential case referred to dates back to 1995 and an appeals officer's decision sometime in June of that year. We do not use this or any other case for decisions'***
>
> ***'I was going to comment on that. I did not have this particular letter but I made it my business to find it. It is the case that the then Secretary General of the Department, in correspondence with the then Chairman of the Committee of Public Accounts, in October 2000 referred to a number of representative test cases which were selected in 1993 and 1994 for investigation and formal decision. I assume that was a decision by deciding officers and one or two made their way to the appeals process. That process resulted in a decision by an appeals officer in June 1995. The latter decided, I presume among other things, that a worker in a particular sector was self-employed if he or she provided his or her own vehicle and equipment, was responsible for expenses, including taxes, insurance and maintenance, while payment was made on the basis of rate per job. The Secretary General at the time also outlined that the appeals officer's decision to establish the criteria was generally accepted to be the employment status of workers in that sector.*** *However, the Secretary General also referred to subsequent discussions with trade union representatives on the insurability of workers in that sector in the context of the Programme for Prosperity and Fairness. It is my understanding that the outcome of these discussions was the establishment of the employment status group which developed the code of practice for determining employment and self-employment which was drawn up in 2001*'
>
> *'That code was prepared, on a tripartite basis, by the group set up under the Programme for Prosperity and Fairness in response to concerns that some individuals were categorised as self-employed when the indicators were that employee status might be more appropriate.* ***The objective of the code was to eliminate misconceptions and provide clarity. The code postdated the 1995 decision. Our decisions in the appeals office on the insurability of workers are made by reference to the code and the abundance of legal principles emerging from the case law of the courts. They are not made with reference to that test case or any other test case. Obviously, we strive to be consistent. However, consistency is achieved in this area by reference to using the code and principles emerging from the court. What I have set out is my***

understanding. I cannot obviously speak for the Department. We do not use the secret precedential cases or this specific 1995 decision'

'On test cases and what changed, I wish to be clear that I will speak on my understanding. I cannot speak for the Department. I have only gleaned these documents in the past two or three weeks*. I do not know what happened in 1993 and 1994 on the test cases. It may have been done in consultation with trade union representatives but I cannot be certain about that as I was not there then'*

'From the letter that the Secretary General wrote to the Committee on Public Accounts*, it seems that the outcome of the later discussions some time between 1995 and 2000 was the establishment of the employment status group under the Programme for Prosperity and Fairness, PPF, and that the product of that was the code****. It reflects the three very small factors that were highlighted. If one reads the code it has more factors and indicators. These would feature in the code in some way or another. I am open to correction, but from what I can see,* *the change was the establishment of the group in 2001, which itself drew up the code on a tripartite basis. It was originally drawn up in 2001 under PPF. I cannot be any clearer than that as I do not know'.*

I have put this note together for myself on the 1993-1994 cases, but some of this is within the Department's domain, so I do not really know. Reading the chronology of events, there was clearly a decision or an agreement made that a number of cases in a particular sector would be determined based on sample or test cases. At least one if not more made their way to the appeals system*. Subsequently, the employment status group was set up under the programme for prosperity and fairness where the development of the code probably overtook or superseded anything that had happened before that'*

6. On 5th December 2019, at the Oireachtas Committee on Family Affairs and Social Protection, Senator Alice-Mary Higgins corrected the Chief Appeals Officer and confirmed from Exhibits 30, 31 & 32 that there was no involvement of Social Partners under the Programme for Prosperity and Fairness in the creation, development, and/or existence of 'Test Cases'. Senator Higgins stated:

'I want to correct Ms Gordon's suggestion that it was perhaps the unions who pushed for those test cases at the time. We can definitely clarify. It was part of the 2000 correspondence to the Committee of Public Accounts (Exhibits 30, 31 & 32) ***at that time where representatives of the couriers industry - not of one company but the industry - were in correspondence and engagement with Revenue, which has confirmed that. It would certainly seem that this was an industry-led push for categorisation because they were engaged in the same process with Revenue'***

7. On 30th March 2021, Mr. Martin McMahon appeared as a witness to the Public Accounts Committee which was investigating bogus self-employment. Mr. McMahon raised the comments from Minister Doherty in her PQ reply (Exhibit 11) and the Chief Appeals Officer in her evidence to the Oireachtas Committee on Family Affairs and Social Protection in regard to the references made to the involvement of Social Partners under the Programme for Prosperity and Fairness in the creation, development, and/or existence of 'Test Cases'. On foot of Mr. McMahon's evidence, the Public Accounts Committee wrote to the Irish Congress of Trade Unions to seek clarification.

   ICTU replied to the Public Accounts Committee (Exhibit 28). In a scathing attack on the statements given by Minister Doherty and the Chief Appeals Officer, ICTU vehemently denied any involvement or knowledge whatsoever in the creation, development, and/or existence of test cases. ICTU wrote:

   'Bogus Self Employment

   I refer to your recent correspondence regarding the above and would advise as follows:

   In the first instance it is important that I confirm you, that while ICTU participates in hearings of The Social Welfare Tribunals the body which hears appeals in relation to unsuccessful claims of Job Seekers Benefit, ICTU has no other involvement in the Social Welfare Appeals system.

   For many years ICTU has sought to highlight the severe negative impact of Bogus Self Employment on State revenue, workers employment rights, their income and security of employment tenure.

   To date, the State has chosen to deal with this matter through a variety of means none of which to date, have in our view been satisfactory. It appears also that there a varying arrangements by the Revenue Commissioners, agreed with employers alone, operated within economic sectors.

   In the construction, forestry and meat sectors, for instance, the Revenue Commissioners introduced a system of withholding tax know as RCT (Relevant Claims Tax). This scheme operates three tax rates, 0%, 20% and 35%. It permits the main contractor to classify workers. ICTU has consistently argued that this system is fundamentally flawed and unfair resulting in very negative consequences as referred above, and no employment status choices offered to the prospective employee. The Revenue Commissioners have always taken the view that their system is fair and misclassifications are captured through their inspection process. We fundamentally disagree with this proposition and have sought and advocated legislative intervention, but so far this has not transpired. Losses of PRSI to the State, albeit collected by Revenue, are within the remit of the Department of Social Protection whose 'Scope' section oversees relevant inspections.

While this Department has declared its intention to increase the number of inspectors to their target number of 12 and offered some cursory amendment to the Code of Practice, no effective legislative measures to resolve the matter have been implemented. The basis of their ineffective response is probably best explained in this Department's submission to the Oireachtas Committee, December 2019 which opines that the magnitude of the problem is overstated.

It is worth noting that in a recent answer to a Parliamentary Question to the Minister for Finance he estimated that in the years 2016, 2017 and 2018, €54m, €60.2m and €50.6m had been lost in PRSI foregone. €164.8m in total.

For the record, ICTU has had no direct involvement with the case relating to the employees of Courier companies'

Indisputable Facts:

i. There was no involvement of Social Partners under the Programme for Prosperity and Fairness in the creation, development, and/or existence of 'Test Cases'.

ii. The use test cases for the purpose of the wholesale classification of workers in a particular sector, namely, saying that all workers are self-employed because one worker is, was an industry-led push for categorisation because they were engaged in the same process with Revenue (Exhibits 30,31 & 32). At no time were Unions or Workers involved in the process to label workers all as self-employed by group and or class.

iii. Even after Senator Higgins clarification on 5th of December 2019, and ICTU's letter of 30th March 2021 denying any involvement of Social Partners under the Programme for Prosperity and Fairness in the creation, development, and/or existence of 'Test Cases', Minister Heather Humphreys went on to repeat the false allegations in reply to a PQ on 6th July 2021 (Exhibit 29), on 3rd December 2021 (Exhibit 17) to the Privileges Committee and most recently on 27th September 2022 (Exhibit 24) in reply to another PQ.

iv. In 2016, the loss to the State through PRSI evasion was estimated by the Finance Minister to be €54m. In 2016, Minister Varadkar, as Minister for Social Welfare, launched his 'Welfare Cheats Cheat Us All' campaign. A 'Fact Check' on the amount lost through claimant fraud by TheJournal.ie concluded that €51.9 million had been lost to the state through claimant fraud. It is a fact that Employer PRSI evasion was a greater loss to the state than Claimant Fraud and that Minister Varadkar's 'Welfare Cheats Cheat Us All' campaign very specifically didn't include Employer welfare cheats. Following the attempt by the SWAO to treat 16 construction workers as one 'Test Case' in 2016, on 27th September 2016 Deputy Mick Barry tabled a PQ on behalf of the construction workers requesting that the Scope Section be legally

represented in the SWAO appeal hearings of their cases. Minister Varadkar replied:

> *While it is not the practice of Scope section to be represented by legal counsel at Appeal hearings, legal advice is available to Scope section decision makers from the Department's own legal advisory service. Other parties to the appeal may engage legal counsel at their own expense. I hope this clarifies the matter for the Deputy'*

The Scope Section had been legally represented at previous Appeal hearings. It was the practice to have Scope legally represented in high profile cases which the case of 16 construction workers as a single test case was.

Just over 2 months later on 7th December 2016 in a Parliamentary Reply to Deputy Eugene Murphy (Question 134) Minister Varadkar confirmed the use of test cases:

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

Point of Fact 3:

3) **On five separate occasions,** Social Protection Ministers and Senior Officials have claimed that the Code of Practice ended the use of the 1995 test. At all times, all those making this claim have been fully aware that it is a false statement, in particular, this 'Erroneous Information' is contained in Minister Doherty's PQ reply of 18th December 2019 (Exhibit 11) upon which SIPO are relying as 'Clarification' of the Independent Chief Appeals Officer's 'Erroneous Information'.

1. On 5th of December 2019, at the Oireachtas Committee on Family Affairs and Social Protection, the Chief Appeals Officer Stated:

> ***'Reading the chronology of events, there was clearly a decision or an agreement made that a number of cases in a particular sector would be determined based on sample or test cases. At least one if not more made their way to the appeals system. Subsequently, the employment status group was set up under the programme for prosperity and fairness where the development of the code probably overtook or superseded anything that had happened before that'***.

2. On 18th December 2019, in reply to a PQ, the PQ SIPO are relying upon as 'Clarification' of the Independent Chief Appeals Officer's 'Erroneous Information', Minister Doherty stated (Exhibit 11):

> ***'This approach was a precursor to the subsequent development on a tripartite basis of the Code of Practice'***

3. On 6th July 2021, Minister Humphreys (Exhibit 29):

> '***This approach was a precursor to the subsequent development on a tripartite basis of the Code of Practice'***

4. On 3rd December 2021, Minister Humphreys wrote to the Committee on Parliamentary Privileges and Oversight (Exhibit 17) and stated:

> ***'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-Employed Status of individuals agreed with trade unions and employers'***

5. On 27th September 2022 (Exhibit 24), Minister Humphreys states:

> ***'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'***

Indisputable Facts:

i. On 12h June 1995, the Social Welfare Appeals Office created a 'Test Case' for the purpose of the wholesale classification of workers in the courier sector, namely, saying that all workers are self-employed because one worker is. That this was a 'Precedential' test case was confirmed by the Chief Appeals Officer on 5th of December 2019, at the Oireachtas Committee on Family Affairs and Social Protection as follows:

> ***'From the research I did for this meeting, it is my understanding that the precedential case referred to dates back to 1995 and an appeals officer's decision sometime in June of that year.***

ii. On 3rd March 1997, an accountancy firm representing all **employers** in the courier industry, senior management from Securicor and the Chief Inspector of Taxes met in the Burlington Hotel.

iii. On 7th March 1997, the Chief Inspector of Taxes Mr. Dowdall, wrote to Messrs Kieran Ryan and Co. an accountancy firm which represented all **employers** at the discussions in the Burlington Hotel. This fact is confirmed in a letter from the Chairman of the Revenue Commissioners to the Chairperson of the Public Accounts Committee on 9th August 2000 (Exhibit 30):

> ***'As regards taxation, the issue of couriers and particularly motorcycle couriers was the subject of protracted discussions between 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 purposes of insurability under Social Welfare law a motorcycle courier was found to be self-employed by a Department of Social Community & Family Affairs Tribunal some years ago. The decision was not challenged further through the High Court on a point of was and consequently would stand for social insurance purposes'

iv. Chief Inspector of Taxes Dowdall and Chairman of the Revenue Commissioners accepted* the 1995 Social Welfare Appeals Office decision as a **precedential** 'test case' and stated that Revenue would act in 'uniform' with the Dept SWs decision to label all couriers as self-employed (Exhibit 32):

'2 Courier 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 motorcycle, 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 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 milage rate'***

v. This acceptance of the Social Welfare Appeals Office 'Test Case' by the Revenue Commissioners formed the basis for a 'Special Tax Agreement' (Exhibit 32) between the Revenue Commissioners and employers across the entire sector, to label couriers as self-employed by group and class entirely based on the 1995 'Test Case'.

vi. That this 'Special Tax Agreement' was unique and unavailable to other employers without the consent of the Revenue Commissioners was confirmed on 3rd April 1997 in a letter from Chief Inspector of Taxes to Messrs K, Ryan Co. (Exhibit 31):

'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'

vii. This 'Special Tax Agreement' (Exhibit 32) treated couriers as employees through the PAYE system, with tax and employee PRSI deducted at source from their employers. Couriers received standard tax rate allowances, P60s, weekly payslips etc. Additional 'Flat Rate Expenses' were given to couriers under Revenue's 'Flat-rate expense allowances' scheme which is only available to employees through their employers and is not available to the self-employed. All of the standard tax allowances and the operation of Revenue's 'Flat-rate expense allowances' exclusively for employees through their employers are confirmed, in writing, in the 'Special Tax Agreement':

'3.1 Motorcycle Couriers

Motorcycle courier' expense allowance figure, to exclude wear and tear on the motorcycle, is agreed at 40% of a couriers' gross earnings.

Wear and tear element on the motorcycle will be regarded as addition to the 40% expenses. To avoid couriers, courier firms and Revenue having to compute wear and tear on an ongoing basis, particularly each time a motorcycle is changed, I agree to allow 5% of the couriers' gross earning as an additional expense to cover wear and tear on the motorcycle. This will give a total expense allowance of 45% of gross earnings for motorcycle couriers.

3.2 Cycle Couriers

While cycle couriers would obviously not have a similar level of expenditure to that of Motorcycle couriers, I propose to agree a composite flat-rate expenses figure of 20% to cover wear and tear, replacement of the bicycle and spare part and the purchase, replacement, cleaning of specialist gear etc.

3.2 Van Owner/Driver Couriers

Because of the limited number and particular circumstances of owner van driver couriers there is no point in agreeing a flat-rate expense for this category. They may claim expenses incurred 'wholly and exclusively' for the purpose of the trade in the normal way'

'For a single courier the temporary concessional allowance is the personal allowance 2,900 + 800 PAYE allowance = 3,700 x 1/52 = £72

For a married courier the temporary allowance is personal allowance 5,800 + PAYE allowance 800 = £127.

The concessional temporary tax free-allowance or the subsequent official tax free-allowance may be used against the couriers' earnings after allowing for the expenses as outlined above in paragraph 3'

'The main advantages would be that

- ***even though operation through the PAYE system would be voluntary, the PAYE allowance of £800 will be given to couriers.***
- ***Approval can be given to courier firms to operate PAYE and PRSI class S on the earnings of motorcycle or cycle couriers reduced by 45% or 20% expenses as appropriate.***
- ***Income Tax and PRSI is collected in a structured fashion.***

viii. This 'Special Tax Agreement', based on the four criteria listed by Revenue,

- ***Where the vehicle is owned by the courier and***
- ***All 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 milage rate'***

is officially known as the 'Owner/Driver' model of 'insurability of employment'.

ix. Couriers were, for all intents and purposes, treated as employees under the PAYE system by the Revenue Commissioners. The only difference being a technical reclassification of Class S employee status on the couriers' payslip thus enabling courier company employers, who are clearly identified as employers on courier's payslips, evade paying employers PRSI.

x. The Revenue Commissioners stated that the 'Special Tax Agreement' was to last for 5 years (Exhibit 32):

'I agree the following standard expenses regime for the coming 5 years 1997/98 – 2001/2002 inclusive'

xi. This 'Special Tax Agreement' (Exhibit 32) operated from 6th April 1997 until 31st December 2018, a period of 22 years, 8 months, and 25 days.

xii. The cessation of the 'Special Tax Agreement' for courier employers was posted on Revenue.ie website in 2018 as an 'addendum' to the announcement by Finance Minister Paschal Donohoe, in 2018, that he was making changes to the 'Tax Treatment of Employment Expenses including Flat Rate Expenses'.

xiii. According to the 'Addendum' attached to the Finance Minister's announcement couriers were still classified as self-employed under the 'owner driver model' and would be required to make returns by self-assessment from 1st January 2019.

xiv. It is inconceivable, that on 18th December 2019 in reply to a PQ, (Exhibit 11), when Minister Doherty stated:

> ***'This approach was a precursor to the subsequent development on a tripartite basis of the Code of Practice'***

that Minister Doherty, the Minister who oversaw a major structural change to the collection of PRSI across an entire sector, from a 22 year 'Special Tax Agreement' based on a Social Welfare Appeals Office 'Test Case' to a self-assessment basis, that the Minister did not know this statement was untrue. Neither the 'Test Case' nor the 'Special Tax Agreement' created from it, were 'Precursors' to the Code of Practice.

xv. It is inconceivable that on 1st of December 2022, when Mr. John McKeon, the Secretary General of the Department of Social Protection, former Assistant Secretary in charge of Pensions, PRSI & International Polices with the Department of Social Protection since October 2010, stated:

> ***"We do not use test cases for the purpose of the wholesale classification of workers in a particular sector, namely, saying that all workers are one way because one worker is"***

that he, who oversaw a major structural change to the collection of PRSI across an entire sector, from a 22 year 'Special Tax Agreement' based on a Social Welfare Appeals Office 'Test Case' to a self-assessment basis, did not know his statement was untrue.

xvi. Employers were allowed by the Revenue Commissioners, the Social Welfare Appeals Office and the Department of Social Welfare, to place the burden of vehicle ownership on employees who were clearly not in business on their own account, in order to misclassify employees as self-employed.

xvii. A Special Tax Arrangement, with a selected group of employers, to label all their employees as self-employed by group or class, particularly based on their job description alone, and which cannot be used as a precedent in any other area with the Revenue Commissioners, amounts to illegal state aid to employers.

xviii. According to Article 107 of Treaty on the Functioning of the European Union, an EU member state should not provide support by financial aid, lesser taxation rates or other ways to a party that does normal commercial business, in that if it distorts competition or the free market, it is classed by the European Union as being illegal state aid. A Special Tax Arrangement, with a selected group of employers, to label all their employees as self-employed by group or class, particularly based on their job description alone, and which cannot be used as a precedent in any other area with the Revenue Commissioners, amounts to illegal state aid to selected employers.

xix. In 2003 An Post reduced staff numbers by 114 by introducing an owner/driver model in a bid to make its business model more competitive. It is a fact, that people lost jobs because of a distortion of competition created by the Social Welfare Appeals Office

'Test Case' and the use of that 'Test Case' to create an Owner/Driver Model of self-employment.

Point of Fact 4

4) **On five separate occasions,** Social Protection Ministers and Senior Officials have claimed that the 'Criteria' contained in the Social Welfare Appeals Office 'Test Case' are 'Reflected' in, or 'Formed the basis for' the Code of Practice. At all times, all those making this claim have been fully aware that it is a false statement, in particular, this 'Erroneous Information' is contained in Minister Doherty's PQ reply of 18th December 2019 (Exhibit 11) upon which SIPO are relying as 'Clarification' of the Independent Chief Appeals Officer's 'Erroneous Information'.

1. On 5th of December 2019, at the Oireachtas Committee on Family Affairs and Social Protection, the Chief Appeals Officer Stated:

> ***'From the letter that the Secretary General wrote to the Committee on Public Accounts, it seems that the outcome of the later discussions some time between 1995 and 2000 was the establishment of the employment status group under the Programme for Prosperity and Fairness, PPF, and that the product of that was the code. It reflects the three very small factors that were highlighted'***

2. On 18th December 2019, in reply to a PQ, the PQ SIPO are relying upon as 'Clarification' of the Independent Chief Appeals Officer's 'Erroneous Information', Minister Doherty stated (Exhibit 11):

> ***'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'***

3. On 6th July 2021, Minister Humphreys (Exhibit 29):

> ***'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'***

4. On 3th December 2021, Minister Humphreys wrote to the Committee on Parliamentary Privileges and Oversight (Exhibit 17) and stated:

'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-Employed Status of individuals agreed with trade unions and employers'

5. On 27th September 2022 (Exhibit 24), Minister Humphreys states:

'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'

Indisputable Facts

i. 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

ii. 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 that ownership of a vehicle was not an indicator of self-employment as per the Denny case. 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 is employed under a contract of service. 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"***

In the original 'Code of Practice', no reference is made to the ownership of a vehicle, the cost of running and insuring that vehicle, nor to specialist equipment (helmet) required to drive such vehicles.

In the updated 2021 'Code of Practice', it states:

> ***'It is possible that the provision of tools or equipment will not have a significant bearing on reaching a conclusion about which employment status is appropriate, having regard to all the circumstances of a particular case'***

In the Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare Supreme Court judgment (01 January 1998), the ownership of a vehicle was rejected as a determinative factor in employment status.

FACT: **Ownership of a vehicle, paying vehicle insurance, road tax and maintenance is universal to all vehicle owners. It is not and never was a 'criterion' which indicates self-employment status. The 'criteria' referred to by the Ministers and Senior Officials 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.**

iii. On the criteria, **'Payment was made on the basis of rate per job plus mileage allowance'**:

In the original 'Code of Practice', the only reference to payments states:

> ***'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'***

In the updated 2021 'Code of Practice',

> ***'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 hours of work or remuneration of an employee may be uncertain'***

In the Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare Supreme Court judgment (01 January 1998), payment in an atypical fashion was rejected as a determinative factor in employment status.

FACT: **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 Ministers and Senior Officials 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.

iv. None of the 3 'Criteria' identified by the Secretary General in 2000 are 'Reflected' in, or 'Formed the basis for' the Code of Practice. The Code of Practice does not reflect the three precedential 'criteria' which have been used to mislabel couriers as self-employed for 30 years.

v. The true factual position is that the three precedential 'criteria' identified in the 1995 test case, are specifically prohibited by the Code of Practice and have been rejected by the Higher Courts as 'Indicators of Self-Employment'. At all times, all those making this claim have been fully aware that it is a false statement**.**

vi. On the FOURTH 'Criterion', **"they are engaged under the standard contract":**

This 'Criterion' **was NOT** one of the precedential criteria created in the Social Welfare Appeals Office 1995 'Test Case' (Exhibit 1). However, this 'Criterion' is included in Revenue's 'Special Tax Agreement' (Exhibit 32).

Nowhere in Exhibit 1, nor in Exhibit 3, is the issue of a 'Standard Contract' referred to.

The FOURTH 'Criterion', "they are engaged under the standard contract" is not actually a criterion. It is a 'Precedent', added by the Revenue Commissioners alone, without the benefit of any kind of quasi-judicial or judicial process.

This shows that the Revenue Commissioners didn't just accept* the Social Welfare Appeals Office 1995 'Test Case', the Revenue Commissioners actively participated in creating the precedents for the 'Owner/Driver Model' of self-employment created by the 1995 'Test Case'.

Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare Supreme Court judgment (01 January 1998) confirms that there is no formulation of words in a 'Contract' which can guarantee that a worker is self-employed and that it is the 'Reality of the Situation', not the existence of a contract, which must be relied upon. This is now, and was in 2001, reflected in the Voluntary Code of Practice as follows:

> ***"While statements in written contracts to the effect that an individual is not an employee may express the opinion or preference of the contracting parties, the courts have found that they are of minimal value in coming to a conclusion as to the actual employment status of the person concerned and may be overruled"***

FACT The 'Criterion' **'they are engaged under the standard contract'** is a 'criterion' created by Revenue without the benefit of a judicial or quasi-judicial process. This criterion is, and always has been, rejected by the higher courts and the Code of Practice. This 'Criterion' is not

'Reflected' in the Code of Practice nor has it ***'Formed the basis for'*** the Code of Practice.

FACT The true factual position is that the FOUR precedential 'criteria', 3 identified in the 1995 test case and 1 in the 1997 'Special Tax Agreement', are specifically prohibited by the Code of Practice and have been rejected by the Higher Courts as 'Indicators of Self-Employment'. At all times, all those making this claim have been fully aware that it is a false statement. It is significant however, that both the Chief Appeals Officer and the Chairperson of the Revenue Commissioners 'believe' these 4 precedential 'Criteria' are '*reflected in*' the Code of Practice to this day.

FACT 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, and many other workers in other sectors, for many decades, the right to have their individual cases determined according to case law and Oireachtas legislation.

FACT In a letter to the Public Accounts Committee in 2000 (Exhibit 30), the Revenue Chairman states:

> ***"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 and tax and social security purposes"***

On the Gov.UK site, under 'Employment Status' and 'Self-Employed and Contractor, it clearly states:

> *"Self-employed workers are not paid through PAYE"*

In the most up-to-date version of the 'Code of Practice' (2021) it states:

> *3. Typical characteristics of an employee*
>
> • *Has their tax deducted from their wages through the PAYE system.*

The use of the PAYE system, is an indicator of 'Employee' status. It was an indicator of employee status in 1997 and remains an indicator of employee status today. The use of the PAYE system CANNOT be an indicator of self-employment.

In a letter to the Chairperson of the Public Accounts Committee dated 24th March 2021, the Chairperson of the Revenue Commissioners stated:

'***PAYE is a withholding mechanism***

It is not true to say that "this agreement treated couriers as employees". It was necessary for the courier to be self-employed for the voluntary system to apply'

The Chairperson is incorrect in fact and in law. PAYE is a withholding mechanism for employees not for the self-employed. This was confirmed by Finance Minister Paschal Donohoe in reply to a PQ of 27th September 2022 in which he states:

> ***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.***

It **IS TRUE** to say that *"this agreement treated couriers as employees"*. The 'Special Tax Agreement' obliged the employer to deduct tax and employee PRSI at source. The employee did not operate through the self-assessment system, was not registered for VAT, worked exclusively for one employer, was not in business of his/her own account, and had to be an employee to avail of Revenue's 'Flat-rate expense allowances' scheme which is only available to employees through their employers and is not available to the self-employed.

The Revenue Commissioners are signatories to the 'Code of Practice' and CANNOT be unaware that in the most up-to-date version of the 'Code of Practice' (2021) it states:

> ***3. Typical characteristics of an employee***
>
> ***• Has their tax deducted from their wages through the PAYE system.***

The Revenue Commissioners cannot credibly claim on 24th March 2021 that:

> ***'It was necessary for the courier to be self-employed for the voluntary (PAYE) system to apply'***

and then in July 2021, as signatories to the 'Code of Practice', accept that:

> '***3. Typical characteristics of an employee***

• Has their tax deducted from their wages through the PAYE system'

Couriers were, unquestionably, treated as employees through Revenue's PAYE system for employees, yet were labelled by group and class as 'Self-Employed' by Revenue.

Point of Fact 5

5) On three separate occasions, Social Protection Ministers and Senior Officials have claimed that the 1995 'test case' was used ***to improve the quality and consistency of decision making***. At all times, all those making this claim have been fully aware that it is a false statement, in particular, this 'Erroneous Information' is contained in Minister Doherty's PQ reply of 18th December 2019 (Exhibit 11) upon which SIPO are relying as 'Clarification' of the Independent Chief Appeals Officer's 'Erroneous Information'.

1. On 5th December 2019, at the Oireachtas Committee on Family Affairs and Social Protection, Mr. Tim Duggan, Assistant Secretary in charge of Pensions, PRSI & International Polices with the Department of Social Protection, 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"

2. On 18th December 2019, in reply to a PQ, the PQ SIPO are relying upon as 'Clarification' of the Independent Chief Appeals Officer's 'Erroneous Information', Minister Doherty stated (Exhibit 11) that test cases:

   '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'

3. On 6th July 2021, Minister Humphreys (Exhibit 29) Minister Humphreys stated that test cases were used:

   'to improve the quality and consistency of decision making in relation to the determination of whether an individual was employed or self-employed'

Indisputable Facts:

i. Prior to 1997, Courier Company employers were operating almost entirely in the 'Black Economy'. Couriers were paid 'Cash in Hand', no tax or PRSI, employers or employees PRSI, was being paid.

ii. At some stage in the early 1990s, Courier Company Employers came to the attention of the Revenue Commissioners for failure to comply with their statutory obligations. The failure to comply with their statutory obligations is an offense under the Social Welfare Consolidation Act:

> ***"An employer who knowingly and incorrectly classifies a worker as self-employed, rather than employed, in order to evade or reduce the employer's liability to pay social insurance contributions may be guilty of an offence under section 252 of the Social Welfare Consolidation Act 2005. An employer who aids, abets, counsels or procures an employee to misrepresent his or her employment status is also guilty of an offence under section 251 of the Act. Any employer who fails to pay employment contributions and/or makes false or misleading statements may also be guilty of an offence under the Act, section 254 of which requires employers to keep records of employees and people engaged under a contract for services. A person guilty of an offence is liable on summary conviction to a fine not exceeding €2,500 or imprisonment for a term not exceeding six months or both, or on conviction on indictment to a fine not exceeding €13,000 or the amount that is equivalent to twice the amount unpaid or deducted, whichever is the greater, or to imprisonment for a term not exceeding three years or both"***

iii. That Courier Company Employers were failing to comply with their statutory obligations is documented in the 'Special Tax Agreement' (Exhibit 32) as follows:

> ***'1.3 It would appear that there is a generally held perception that certain return compliance and tax/PRSI obligations of courier firms and courier were 'put on hold' until the status of courier for tax and PRSI purposes was concluded. Because the PAYE system for tax and PRSI purposes was not generally applied by courier firms on courier earnings***
>
> - ***There was always an obligation on courier firms to make a return of all couriers who were paid in excess of £3,000 (gross)'***
>
> ***'5.2 As previously stated, return compliance and tax/PRSI obligation were never 'put on hold'***
>
> ***'4. PAYE***
>
> ***4.1 Because I propose to treat couriers as self-employed for tax purposes, firms would not be obliged to deduct tax and*** (Employers) ***PRSI through the PAYE system.***

However, as discussed, to avoid couriers having to comply with self-assessment procedures and courier firms having to comply with annual return filing for self-employed persons to whom they make payments of over £3,000 etc., I would suggest that the option of operating PAYE and PRSI class S through the PAYE system'

'3. Again, in the interest of uniformity, simplification reducing the compliance burden on courier companies and couriers, I agree the following standard expenses regime for the coming 5 years 1997/98 – 2001/2002 inclusive to allow for a reasonable period of stability for all concerned'

iv. In October 2000 (Exhibit 1), the Secretary General said 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 delivery. That is clearly not individual decision-making; it is literally saying:

"We use test cases for the purpose of the wholesale classification of workers in a particular sector, namely, saying that all workers are self-employed because one worker is"

What a 'Test Case' is and how a 'Test Case' was used to label all couriers as self-employed by group and class because one worker was found to be self-employed, and why a precedential 'Test Case' is used, was clearly and unequivocally defined by Secretary General Sullivan in 2000. Secretary General McKeon's denial of test cases failed to maintain the highest standards of probity.

v. On 13th February 2002, in reply to an allegation that Courier Company employers were being allowed to 'EVADE' their statutory obligations through the use of the Social Welfare Appeals Office 'Test Case' (Exhibit 1) and the 'Special Tax Agreement' (Exhibit 32), the Comptroller & Auditor General wrote:

''I wouldn't agree that contractors (employers) ***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 there is room for improvement"***

The C&AG is incorrect. A 'Special Tax Agreement', which is only available to selected employers in selected sectors, based on an unlawful precedential test case, containing precedents which are not contained in the Code of Practice and which have

been roundly rejected by the Higher Courts, and which the Minister has admitted are group/class decisions for which there is no legislation, is not 'Avoidance' of 'Obligations', it is not allowed in law, therefore it is 'Evasion' of 'Obligations'. Despite the Minister for Social Protection's claims that this 'Evasion' is done with the 'Consent' of employers and employees, the Minister CANNOT inveigle others to act outside of the law to 'Evade' employer's PRSI. In the 21 years since the C&AG wrote this letter, no improvement was forthcoming. Couriers are still classified as self-employed under the 'Owner/Driver' model and Courier Company Employers have never complied with their obligations.

FACT **Courier Employers, who had failed to meet their statutory obligations, lobbied for, and received, a 'Special Tax Agreement' from the Revenue Commissioners and the Department of Social Welfare, which allowed them to misclassify their employee couriers as self-employed. This was initially a temporary arrangement to bring employers who were 'recalcitrant' in meeting their statutory obligations, into the tax net. This temporary arrangement lasted for 22 years and created an un-legislated for self-employment status of 'Owner/Driver' which is widely used across many sectors by the Revenue Commissioners and the Department of Social Protection.**

Point of Fact 6

6) On 15 separate occasions, since 5th April 2019, Social Protection Ministers and Senior Officials have denied the use of the 1995 'Test Case' and/or have misled the Oireachtas by claiming 'Test Cases' were and are 'Sample Cases'. At all times, all those making this claim have been fully aware that it is a false statement, in particular, this 'Erroneous Information' is contained in Minister Doherty's PQ reply of 18th December 2019 (Exhibit 11) upon which SIPO are relying as 'Clarification' of the Independent Chief Appeals Officer's 'Erroneous Information'.

Timeline of 'Acceptances' and 'Denials' of 'Test Cases'

ACCEPTANCES OF TEST CASES

1. In 93/94 an approach of 'Test Cases' was taken to 'Resolve' that some couriers considered themselves to be employees and others considered that they were self-employed. That this approach was taken by the Department of Social Welfare is confirmed in Exhibits 1, 2, 3, 4, 5, 7, & 8. Two former Social Welfare Ministers have directly admitted to the use of 'Test Cases', Ministers Ahern and Varadkar in 2002 and 2016 respectively. The Ombudsman confirmed the use of test cases in 2002. In 2002 the C&AG confirmed the use of the 'Special Tax Agreement' which confirms the use of a precedential 'Test Case'. Former Minister Doherty confirmed in 2019 the use of group/class decisions by the Department, is/was outside of the

law. This was also confirmed as a practice of the Social Welfare Appeals Office, to label workers by group/class outside of the law, in the Oireachtas SW Committee in December 2019 by the Chief Appeals Officer both during her tenure and before it.

2. On 12th June 1995, a 'Test Case' took place in the Social Welfare Appeals Office. This is confirmed in Exhibits 1, 2, 3, 4, 5, 7, & 8. Two former Social Welfare Ministers have directly admitted to the use of 'Test Cases', Ministers Ahern and Varadkar in 2002 and 2016 respectively. The Ombudsman confirmed the use of test cases in 2002. In 2002 the C&AG confirmed the use of the 'Special Tax Agreement' which confirms the use of a precedential 'Test Case'. Former Minister Doherty confirmed in 2019 the use of group/class decisions by the Department, is/was outside of the law. This was also confirmed as a practice of the Social Welfare Appeals Office, to label workers by group/class outside of the law, in the Oireachtas SW Committee in December 2019 by the Chief Appeals Officer both during her tenure and before it. That other 'Test Cases' exist is confirmed by Minister Varadkar in 2016, by Minister Foley in 2022 and by Minister Donohoe in 2022.

3. In 1995 an anonymised version of the 12th June 1995 'Test Case' (Exhibit 3) was presented to the Oireachtas in the Annual Report of the Social Welfare Appeals Office. That it was a 'Test Case' and that it was presented to the Oireachtas as a 'Test Case' is confirmed by former Minister Ahern and the Ombudsman in Exhibit 4.

4. On 7th March 1997, a meeting took place between the Revenue Commissioners and representatives of all Courier Employers in the Burlington Hotel. At this meeting, a 'Special Tax Agreement' (Exhibit 32), which treated all couriers as employees through the PAYE system yet deducted PRSI at S Class, was agreed. That this meeting took place is confirmed by Exhibit 31 signed by the Chief Inspector of Taxes. This 'Special Tax Agreement' is confirmed in the agreement, to be based on 12th June 1995 Social Welfare Appeals Office group/class decision (Exhibits 1, 2, 3, 4, 7 & 8) which is clearly a 'Test Case', to label all couriers as self-employed.

5. On 3rd April 1997, the Chief Inspector of Taxes wrote to the Courier Employer's Representative in the Burlington Hotel (Exhibit 31) and threatened that employers who didn't sign up to a 'Special Tax Agreement' to label couriers as self-employed by group and class yet treat them as employees under the PAYE system, would be audited for failure to comply with their statutory obligations.

6. On 9th August 2000, the Chairperson of the Revenue Commissioners wrote to the Chairperson of the Public Accounts Committee (Exhibit 30). The Chairperson of Revenue confirmed to the Chairperson of the Public Accounts Committee that:

> ***'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 7 March 1997*** (Exhibit 32) ***and 3 April***

1997 (Exhibit 31) ***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 purposes of insurability under Social Welfare law a motorcycle courier was found to be self-employed (Exhibits 1, 2, 3, 4, 7 & 8) ***by a Department Social, Community and Family Affairs 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'***

7. On 2nd October 2000 Mr. Vincent Long Assistant Principal Officer sent a memo (Exhibit 2) containing a draft letter (Exhibit 1) for signing by the General Secretary Mr. Sullivan, to be sent to the Public Accounts Committee Chairperson. This draft letter was sent to Ms. V Scanlon Private Secretary, Ms. B Lacey Assistant Secretary, Ms. E Coleman Principal Officer.

8. On 2nd October 2000, the letter (Exhibit 1) drafted by Mr. V Long, was signed by Secretary General Sullivan and sent to the PAC Chairman. This letter confirms unequivocally the use of 'Test Cases'.

9. On 1st March 2001, at an Appeal against the Decision of a Deciding Officer of the Scope Section that a courier was an employee and not self-employed, the Appellant Company, Securicor, who had played a lead role in the 'Negotiations' with Revenue, and which was the Courier Company Appellant in the 1995 'Test Case', stated in their legal submission:

'In or about the year 1997 the Revenue Commissioners entered into an agreement with the courier industry to treat couriers as not being employees and agreed a special regime for the deduction of income tax and PRSI. By letter dated 7th March 1997 (Exhibit 32) ***from Mr. Dowdall of the Office of the Chief Inspector of Taxes, Kieran Ryan & Co is attached. In essence it was agreed at that time, and the system continues to date, that whilst couriers would be treated as self-employed in ease of them and in ease of the courier companies, tax would be paid on a quasi PAYE basis'***

10. On 28th May 2001, Mr. McMahon wrote to the Ombudsman and queried that the 12th June 1995 'Test Case' had not been declared to the Oireachtas and therefore could not be a 'Test Case'.

11. On 5th June 2001, an Appeals Officer issued his decision in the successful Appeal by Securicor. In his 'Conclusions', the Appeals Officer states:

'The Company also referred to the special tax arrangement for couriers which had been agreed between the Courier Industry and the Revenue Commissioners in 1997 to treat couriers as not being employees. Special arrangements have been agreed for the deduction of Income Tax and PRSI and in their view this was indicative of self-employed status'

'I have also noted that in a previous appeal case (12th June 1995 'Test Case, Exhibit 1) ***an Appeals Officer decided that a courier was a self employed person and that there are special arrangements in place*** (Special Tax Agreement Exhibit 32) ***between the Revenue Commissioners and courier industry for the payment of tax and PRSI for couriers'***

12. On 7th November 2001, a Scope Section decision issued on the employment status of a Securicor bicycle courier. In this Scope Section (Exhibit 34) decision to label the bicycle courier as 'Self-Employed', it cites the 1st March 2001 Securicor Appeal as a precedent:

'Conclusion

'The employment status and PRSI position of couriers has been examined in great detail at an oral hearing recently. This hearing was attended by three legal teams who addressed all the points for and against a contract of/for service. After some deliberation the Appeals Officer found the courier to be self-employed. This case is similar in many respects to those previously examined in that the courier supplies his own transport and is responsible for maintenance of same. He is paid per delivery and if he does not attend then he receives no renumeration. This would appear to be a contract for the transport of goods and not a contract of service. Based on the information on file the most important points are in favour of a contract for service rather than of service. Therefore I am satisfied that MrMcArdle was engaged under a contract for service and insurable at PRSI class S'

The legal authority cited for this decision is 'High Court case McAuliffe v Minister for Social Welfare' (1994)**.

13. During hearings of a successful Unfair Dismissal Case in the Employment Appeals Tribunal on dates 23rd October 2001, 6th December 2001 and 25th January 2002, the General Manager of Securicor was asked about the 1995 'Test Case'. The General Manager had been present in the 1995 'Test Case' and at the Appeal in March 2001. In his evidence, which is contained in CASE NO. UD524/2001

PT44/2001 MN1401/2001 WT164/2001, the position of the General Manager of Securicor is recorded as:

> ***'the respondent company had in fact put forward one of its own drivers as a test case. While a deciding officer with Social Welfare had decided that this driver was an "employee" there had been no definitive outcome to this test case as the driver in question had emigrated in the meantime. However, a second test case using a driver from another courier company had settled the matter. In that case an Appeals Officer had found the person in question to be self-employed. Following this decision an arrangement had been entered into between the courier companies and the Revenue Commissioners in 1997 whereby courier companies like the respondent would operate a voluntary PAYE arrangement for couriers. This was done in cooperation with couriers and their representatives at the time. The General Manager told the Tribunal that generally couriers with the respondent company were given the choice of being self-assessed or of participating in the voluntary PAYE arrangement operated by the respondent with the consent of the Revenue Commissioners. The Tribunal was told that while payslips were issued to couriers this was done clearly as an administrative facility. The respondent had been asked to operate secretary paperwork in relation to the voluntary tax arrangement but this should not be seen as conferring employee status on couriers. While the witness agreed that the claimant's payslips contained the word employee P60's issued by the respondent to couriers including the claimant were always stamped "contractor, not employee"***

14. On 9th of February 2001, Mr. Mc Mahon wrote to the Comptroller & Auditor General and complained that Courier Industry employers were exempt from tax and PRSI through the use of the 'Special Tax Agreement' (Exhibit 32).

15. On 11th February 2002, the Ombudsman sent his report (Exhibit 4) on Mr. McMahon's complaint of 28th May 2001. In his report, the Ombudsman accepts the Department of Social Welfare's position, that the presentation of an anonymised version (Exhibit 3) of the 1995 'Test Case' in the Annual Report of the Social Welfare Appeals Office, satisfied the obligation on the Department to declare the use of 'Test Cases' to the Oireachtas. From this date, it is accepted and conceded by the Ombudsman, Former Social Welfare Minister Ahern and the Department of Social Welfare that 'Test Cases' do exist, and that 'Test Cases' are used.

16. On 13th February 2002, the Comptroller replied (Exhibit 7) to Mr. McMahon's complaint:

> ***'I wouldn't agree that contractors*** (employers) ***in the courier industry are exempt from taxation laws. What can be said is that the arrangement employed*** (Exhibit 32) ***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 there is room for improvement'***

17. In 2016 the 'Approach' of 'Test Cases' was taken by the Social Welfare Appeals Office during the tenure of the current Chief Appeals Officer. This was confirmed by her, and is on record, during her appearance at the Oireachtas Committee on December 5th 2019.

18. On 27th September 2016, Deputy Mick Barry tabled a PQ on behalf of the construction workers requesting that the Scope Section be legally represented in the SWAO appeal hearings of their cases. Minister Varadkar replied:

> ***'While it is not the practice of Scope section to be represented by legal counsel at Appeal hearings, legal advice is available to Scope section decision makers from the Department's own legal advisory service. Other parties to the appeal may engage legal counsel at their own expense. I hope this clarifies the matter for the Deputy'***

19. On 7th December 2016 in a Parliamentary Reply to Deputy Eugene Murphy (Question 134) (Exhibit 5) Minister Varadkar confirmed the use of test cases:

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

20. On 29th June 2017, Mr. Mc Mahon made a Protected Disclosure to Minster Regina Doherty in the Pillo Hotel in Ashbourne, County Meath. Mr. McMahon explained to the Minister how the Social Welfare Appeals Office was acting outside of the law to label groups and classes of workers as self-employed. Mr. McMahon specifically spoke about Couriers and Construction Workers and provided significant detail about 'Test Cases' and the State's legal representative Mr. Connaughton, who had represented the Department in the Social Welfare Appeals Office.

21. On 29th June, after the meeting, Minister Doherty sent a Direct Message to Mr. McMahon thanking him for entrusting the Minister with the issue.

22. On 8th November the Joint Committee on Social Protection, Community and Rural Development and the Islands announced that it was going to investigate Bogus Self-Employment.

23. In November 2018 Finance Minister Paschal Donohoe announces the end of flat-rate expenses schemes for employees. The cessation of the 'Special Tax Agreement' (Exhibit 32) is attached as an addendum to the announcement of

changes to the flat-tax schemes for employees through their employers on the Revenue Commissioners' website.

24. On 17th of December 2018, Mr. McMahon wrote to the Social Welfare Appeals Office and requested access to any and all precedential decisions of the Social Welfare Appeals Office. Mr. McMahon cited Opesyitan & ors. -v- Refugee Tribunal & ors. (2006) as precedent for accessing the precedential cases regarding insurability of employment. Mr. McMahon was assisting another worker in a Social Welfare Appeals Office appeal.

25. 31st December 2018, as per the addendum to the ending of the flat-rate expenses scheme, the 'Special Tax Agreement' (Exhibit 32) with courier employers ceases to operate. Couriers are still classified as self-employed by group & class as per the addendum under the Owner/Driver model.

26. On 9th January 2019, the Social Welfare Appeals Office admitted to the use of 'Test Cases' (Exhibit 8):

> ***'On occasion over the years an approach of having 'Test Cases' has been taken or considered by the Social Welfare Appeals Office'***

27. On 9th January 2019, Mr. McMahon wrote back to the Social Welfare Appeals Office and again requested sight of all test cases.

28. On 10th January 2019, during an interview on Drivetime RTE, Minister Regina Doherty was questioned about the Department's failure to pursue employers who evade employers' PRSI by mislabelling employees as self-employed. Minister Doherty replied that she doesn't want to make employers the 'Bad Guy':

> Boucher-Hayes***: "No you are giving them a free pass because the Deputy Secretary General of the department admitted that there had only been one prosecution, in spite of the fact that this is a criminal law, under the statute books but your policy is: not to enforce it."***
>
> Minister Doherty: ***"if you just let me finish for one second…I'm also going to take away the attractiveness of employers using people as contract staff at some point, with legislation, in the next 12 months. So if I can tackle this in a number of ways, ultimately, what I want is: I don't want to penalise anybody. I don't want to make employers the bad guy…'***

29. On 24th of January 2019, at the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach debate, Deputy Paul Murphy questioned the Chairperson of the Revenue Commissioners about courier 'Test Cases':

> Deputy Murphy ***"Where does the idea of treating them all as self-employed in the interests of uniformity come from? How can it be justified? I understand that there is no such thing as test cases in the***

sense that every case has to be examined individually because the circumstances are individual"

Revenue Chairperson ***"Ultimately, the Department of Employment Affairs and Social Protection is the lead in regard to the setting of employment status. Social Welfare Officers determine the status. We try, as much as possible, to have a shared common view between ourselves and the Department of Employment Affairs and Social Protection"***

30. On 25th March 2019, an interview with Minister Regina Doherty is published in the Irish Times. In this interview, Minister Doherty accepts that the Department is acting outside of the law to label groups and classes of workers as self-employed. Minister Doherty does not call these group and class decisions 'Test Cases'. In case law, a test case is a legal action whose purpose is to set a precedent. A group/class decision is a precedential case.

31. On 26th of March 2019, at an Appeal hearing in the Social Welfare Appeals Office, the Appeals Officer stated:

'The Deputy Chief Appeals Officer, Mr. Duff, told me that they are awaiting legal advice in relation to your contention that the Supreme Court Ruling in the refugee case applies to this office and as soon as they get back the legal advice on that they'll be replying to you'

Mr. McMahon advised the worker to leave the appeal in the absence of 'Test Cases' which the worker did.

32. On 5th of April 2019, the Social Welfare Appeals Office wrote to Mr. McMahon (Exhibit 33) and stated:

"On a very few occasions over the years the approach of having sample cases has been taken by the Appeals Office

It is noted that in your correspondence of January 2019 you referenced the decision of the Supreme Court in O and Other v Refugee Appeals Tribunal (2006). However, that case is readily distinguishable from the situation pertaining to the Social Welfare Appeals Office. Firstly, the case at issue relates to the political state of certain countries and therefore consistence of decisions is required to ensure there is no different assessment of countries where there is no evidence of change. The decision making carried out by the Social Welfare Appeals Office centres on whether a particular person meets the requirements set out in statute and is far removed from such decision making which was at issue in O and Others.

For your information, there is no database of Appeals Officers decisions which is available to the public or the Department of Employment Affairs and Social Protection, therefore there is no inequality of arms issue.

This reply from the Social Welfare Appeals Office which admits to group and class decisions but denies they are 'Test Cases' is the first substitution of the phrase 'Sample Cases' instead of 'Test Cases'.

33. On 9th May 2019, Secretary General McKeon replied to queries from the Public Accounts Committee about the use of 'Test Cases'. In his response (Exhibit 35) to the PAC, Secretary General McKeon 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. It is also the case that the legislation does not preclude such an approach.

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 also advised me that 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. She is therefore not aware of any precedential test cases.

34. On 13th June 2019, the Public Accounts Committee wrote to Mr. McMahon to inform him that his complaint to the committee about 'Test Cases' was a 'Legal Matter that he should take it up legally and the Committee would take no further action:

'The next item, No. 2204C, dated 3 June 2019, is from an individual responding to correspondence from the committee regarding the Social Welfare Appeals Office and the use of precedent test cases. The individual believes that legislation is being breached. Basically, there is legislation on the operation of the various schemes operated by the Department of Employment Affairs and Social Protection and by the appeals office. Not everything is covered in the legislation. Obviously, they have their own procedures to deal with similar-type cases. The correspondent wants to know if there is any legislative provision for this and he is saying it is illegal that they have procedures in place that are secret and that are not covered in legislation. If somebody thinks it is illegal, he or she can take it up

legally but it is not a matter for the Committee of Public Accounts. We will note the item. Is that agreed? Agreed'

35. On 4th July 2019, the Public Accounts Committee made a decision to write to Mr. McMahon to tell him that the State Organisations had dealt with the information he had provided and therefore no further action would be taken by the Committee:

> ***'No. 2260C, dated 18 June, is further correspondence from an individual about the Social Welfare Appeals Office. We considered correspondence from this individual at our meeting on 13 June 2019. The matters raised appeared to involve a breach of legislation and it was agreed to advise the individual that the matters raised were not within the remit of the committee, but were a policy or legislation issue. In this item, the correspondent states that he intends to make a further submission to the committee. We have previously written to both the Department of Employment Affairs and Social Protection and the Revenue Commissioners on matters raised by the correspondent regarding bogus self-employment. We sent responses to the correspondent, which were received, in June 2018. The Department advised in 2018 that it had published a review of trends in, and issues arising from, the use of intermediary structures and self-employment arrangements, together with the Department of Finance and the Revenue Commissioners. The report considered the available data on employment trends, including data used in the correspondent's submission, and concluded that there was little, if any, evidence that there has been an increase in the level of what is termed "disguised or false self-employment". The report made a number of recommendations. One recommendation was to increase public awareness of the services provided by the Department of Employment Affairs and Social Protection's scope section, and a public awareness campaign about false self-employment was launched in May of last year. I propose we inform the correspondent that our consideration of the matter is closed, in light of the fact that various State organisations have dealt with the information. Is that agreed?***
>
> ***Agreed'***

36. On 24th Oct 2019, Mr. Martin McMahon appeared as a witness to the Joint Oireachtas Committee on Family Affairs and Social Protection. Mr. McMahon provided the Committee with Exhibit 1 & Exhibit 8. Mr. McMahon also gave extensive detailed information to the Committee about the unlawful use of test cases and the consequences of using unlawful test cases.

37. On 5th of December 2019, the Chief Appeals Officer appeared at the Joint Oireachtas Committee on Family Affairs and Social Protection. The Chief Appeals Officer was called in by the Committee to answer to the evidence of 'Test Cases'

given by Mr. McMahon on 24th of October 2019. During the course of her evidence, the Chief Appeals Officer stated:

> ***'No legislative provision 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. However, it is also the case that the legislation does not preclude such an approach.***
>
> ***I have occasionally, and usually where a number of workers engaged by the same employer are concerned and have individually submitted an appeal, been asked to make decisions on a sample number of cases. I have agreed to this approach in limited circumstances and only with the agreement of both the employer and the workers concerned.***
>
> ***The 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.***
>
> ***I can also advise that this approach has not been adopted during my time as chief appeals officer since 2015, in the case of an appeal where the classification of a worker as an employee or a self-employed person is the issue under appeal. However, I am aware that an appeals officer proposed this approach in a case where a number of workers engaged by a specific employer was concerned.***
>
> ***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.***
>
> ***What I can say, however, is that our office does not use test cases. In the particular case referred to, I was not even aware that this case existed and had to go to find it. From the research I did for this meeting, it is my understanding that the precedential case referred to dates back to 1995 and an appeals officer's decision sometime in June of that year. We do not use this or any other case for decisions.***
>
> ***It is the case that the then Secretary General of the Department, in correspondence with the then Chairman of the Committee of Public Accounts, in October 2000 referred to a number of representative test cases which were selected in 1993 and 1994 for investigation and formal decision.***
>
> ***We do not use the secret precedential cases or this specific 1995 decision.***

On test cases and what changed, I wish to be clear that I will speak on my understanding. I cannot speak for the Department. I have only gleaned these documents in the past two or three weeks. I do not know what happened in 1993 and 1994 on the test cases.
I cannot be any clearer than that as I do not know.

On groups, there is no specific provision in the legislation that says one cannot. I would not propose it but I was asked, not in the area of contract law or contract for services, where there were some 40 workers involved. It was the exact same issue. The only issue that was to be determined on appeal was the same in all cases. The approach was that is would be something of a waste of time to hear all 40 when it related to that issue.

The case that the Senator referred to was a 2016 case involving 16 workers. When it is the exact same appeal contention across 20 or 30 people, it can be an efficient way of dealing with the issue.

Reading the chronology of events, there was clearly a decision or an agreement made that a number of cases in a particular sector would be determined based on sample or test cases. At least one if not more made their way to the appeals system'

38. On 5th of December 2019, Mr. Tim Duggan, Assistant Secretary in charge of Pensions, PRSI & International Polices with the Department of Social Protection appeared with the Chief Appeals Officer at the Joint Oireachtas Committee on Family Affairs and Social Protection. In reply to questions about 'Test Cases', Mr. 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"

39. On 5th of December 2019. at the Joint Oireachtas Committee on Family Affairs and Social Protection Senator Alice-Mary Higgins told the Chief Appeals Officer:

'Ms Gordon mentioned that there is no legislation that says that one cannot, but there is a legal decision that says one cannot. Ms Gordon has told us that the decisions are being made based on the principles and the legal decisions that are coming down through the courts. Does this point to the appropriate place for decisions on appeals being the courts if the appeals office is not aware of cases in the 1990s and is not aware of key legal decisions such as the Denny** decision, which effects it?'

** As per the Scope Section decision on Mr. Richard McArdle (Exhibit 34) neither the Social Welfare Appeals Office nor the Scope Section (Scope since Mr. McArdle's decision) consider that the Supreme Court case Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare applies to couriers or Owner/Drivers. High Court case McAuliffe v Minister for Social Welfare' (1994) is the legal authority cited for Owner/Drivers. The Department and the Social Welfare Appeals Office have always been aware that this legal position is untenable, and that is why they now deny 'Test Cases'.

40. On 18th December 2019, a PQ from Deputy Murphy was put to Minister Doherty:

> ***'if the record will be corrected regarding the statement by the chief appeals officer of the social welfare appeals office to the Oireachtas Joint Committee on Employment Affairs and Social Protection that the social welfare appeals office does not use test cases in view of the fact this contradicts a letter of 9 January 2019*** (Exhibit 8)***'***

41. On 18th December 2019, in reply to Deputy Murphy's PQ, Minister Doherty stated (Exhibit 11):

> ***'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.***
>
> ***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.***
>
> ***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.***
>
> ***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.***

42. On 18th December 2019, (Question 456) Deputy Paul Murphy asked the Minister for Employment Affairs and Social Protection Regina Doherty, if the social welfare appeals office does not have legislative powers, cannot set precedent and is not free to act outside of legislation and precedents set by court.

43. On 18th December 2019, Minister Regina Doherty replied to Question 456:

> '***The Chief Appeals Officer has advised me that the decisions of Appeals Officers do not create precedents*** ***but the Office strives to achieve consistency in its decision making such that cases based on the same or similar factual circumstances have the same outcome***
>
> ***The Chief Appeals Officer has also advised me that while the Office is not a Court it must observe the principles of natural justice and fair procedures'***

44. On 14th October 2020, the Public Accounts Committee again discussed correspondence from Mr. McMahon. A decision was taken that it was not a 'Policy Matter' not a 'Legal Matter' but was, in fact, in the Public Interest:

> ***'I have flagged No. R0149 for further consideration. This is a later dated 8 October on the issue of bogus self-employment. The previous committee considered correspondence regarding the matter raised and decided not to take the matter further in light of the fact that various State organisations have already dealt with it. The correspondent was advised of these outcomes. We agreed last week that we would include the issue of bogus self-employment on our work programme as part of our engagement with the Revenue Commissioners and the Department of Employment Affairs and Social Protection. We advised the correspondent accordingly. We have set out this course of action, but I do not think we should rule out inviting the correspondent to appear before the committee to deal with that issue again. Is that agreed? Agreed. The witness has previously been before the Committee of Public Accounts and seems to have imparted a lot of information regarding alleged bogus self-employment. It might be worthwhile for the committee to have the opportunity to hear what he has to say. It is a very serious matter and involves the possibility of hundreds of millions of euros of uncollected revenue'***

45. On 24th November 2020, Mr. McMahon Made an official complaint to SIPO:

> ***'The Social Welfare Appeals Office does use test cases, Ms. Gordon deliberately lied to a committee which was investigating bogus self-employment. Ms. Gordon failed to maintain the highest standards of probity by engaging in dishonesty, by failing to be impartial, by lack of integrity and by seeking to influence the committee with deliberately false information'***
>
> ***On the 18th of December 2019, Deputy Paul Murphy raised the issue of Ms. Gordon's falsehood to the Committee with the then Minister***

for Social Welfare who committed to have Ms. Gordon explain why she lied to the Committee. No explanation has been forthcoming'

Mr. McMahon included exhibits 1, 8 & 10 as evidence.

46. On 4th December 2020, the Revenue Commissioners removed all references to the 'Special Tax Agreement' (Exhibit 32) from their website along with all references to the 'Flat Rate Allowances' scheme for employers through their employers and the addendum regarding courier employment status which was attached to it.

47. On 22nd of February 2021, SIPO replied to Mr. McMahon's complaint. SIPO wrote:

"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"

48. In February 2021, in direct response to questioning from the Public Accounts Committee, the Revenue Chairman wrote to the Public Accounts Committee and acknowledged that all couriers are still deemed to be self-employed by way of the precedent set by the Department of Social Welfare in 1995. This account is confirmed in the Public Accounts Committee Report of 2019 (Published in June 2021), 'Issue 4, Bogus Self-Employment in the Courier Industry' (Exhibit 27) as follows:

'Following the Committee's engagement with Revenue, it received correspondence regarding a voluntary PAYE system agreed by Revenue and courier firms in March 1997. The submissions included correspondence from Revenue which outlines the conditions of the voluntary PAYE system available to couriers and asserts that couriers that fulfil a number of criteria should "in the interests of uniformity" be treated "as self-employed for tax purposes". Correspondence from Revenue in February 2021 supports this view, stating "in the interest of uniformity Revenue decided, without prejudice, to treat those couriers as self-employed for tax purposes". Revenue confirmed this arose from a Social Welfare Appeals Officer's decision by which "couriers were regarded as self-employed for PRSI purposes"

49. On 24th March 2021, the Revenue Commissioners replied to further queries from the PAC. Revenue had nothing new to add in this reply other than:

'Revenue historically held the view that, in general, motorcycle and bicycle couriers were engaged under a contract for service i.e. they are self-employed individuals'

50. On 30th March 2021, Mr. McMahon appeared as a witness at the Public Accounts Committee which was investigating bogus self-employment. Mr. McMahon gave over 300 Exhibits in a book of evidence proving the use of 'Test Cases'.

51. On 6th July 2021 (Exhibit 29), in reply to a PQ, Minister Humphreys stated:

> ***'These cases, involving workers in a particular sector, were selected as so called 'test cases***
>
> ***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.***
>
> ***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.***
>
> ***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.***

52. On 3rd December 2021, Minister Heather Humphreys replied to the Oireachtas Committee (Exhibit 17) in regard to a complaint made by Mr. McMahon about the Minister's continued denial of 'Test Cases'. In her reply, Minister Humphreys states:

> ***'The matters which are the subject of the perceived inconsistencies relate to the issue of the insurability status of workers as being either employed or self-employed. These are matters of public importance, interest and significant public concern within the meaning of Paragraphs 7 and 8 of Standing order 71A as is evident from the fact that they have been the suject of debate on a number of occasions in public fora, including Oireachtas Committees'***
>
> ***'The answer to the PQ (Exhibit 29) 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 case in the 1990s were not used to determining the employment of all workers in particular sector'***

'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 on a sample of cases'

53. On 9th December 2021, Secretary General McKeon appeared before the Public Accounts Committee where he was asked about test cases. Secretary General McKeon stated:

'To be clear, we do not classify a sector as one thing or another'

'There was no courier deal'

'there was no classification of one sector or entire groups of workers as being one thing or another'

'First, we have to define a test case, so let me do that, if I may. A suggestion has been made the Department took a test case with regard to a particular sector and, on the basis of that test case, then determined that everybody in a sector fell within a particular category. As I said, we did not do that. What the Department did - this is going back to the 1990s, long before my time - was to have a look at a number of cases to try to determine what criteria could be used, applying the common law handed down by the courts, to classify somebody as employed or self-employed'

'On rare occasions, particularly in the appeals space, if all the employees and an employer agree to have a group of workers who are in a similar position with the same employer, evaluated based on taking a sample, that may happen, but it is very rare'

'No, I cannot but that has not happened with the courier sector. That is wrong. It has not happened with the courier sector'

'It is nonsense to suggest everybody who works in the courier industry is classified as self-employed. It is just nonsense'

'I do not think it is the case that everybody in the sector is determined the same way. I know people say that but I have yet to see evidence that that is the case'

'I am sorry, but there was no courier deal. I am not aware of the correspondence to which Deputy Munster referred from 1995'

'the decision in the Department of Social Protection established the criteria by which cases would be judged. It did not establish that everybody in the sector would fall into those categories'

'We do not and have not determined that all employees of a particular sector are one status or another'

'I am not aware of any deal** that people are talking about. If somebody could show me the deal, I would be interested to see it. I am not aware of any deal. People use the language of a deal. I do not know whether they think we are trying to do something to help courier companies at the expense of courier staff. **That is simply not the case'

'I am not aware of any deal. I am assured there was no deal. Even the quote the Chairman gave from the Revenue Commissioners, and I cannot speak for the Revenue Commissioners, referred to one case of one individual'

54. On 27th September 2022, In reply to a PQ, Minister Humphreys states (Exhibit 24):

'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'

55. On 5th October 2022, in reply to a PQ (Exhibit 26) Minister Heather Humphreys stated:

'The reference to so-called 'test cases' and 'sample case's relate to two discrete (Distinct) ***issues***

In the 1990s, a number of so-called 'test case' relating to the insurability status of a person was examined by the Department for the purpose of establishing a set of criteria to guide Deciding Officer 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 for the approach subsequently agreed with the Social Partners under the PPF and set out in the Code of Practice for Determination of the Employment or self-employed status of individuals. The Criteria are applied by the Department when assessing questions related to insurability of a worker being either as employee or self employed.

Separately, the Department is open to taking a 'sample case' approach to determinations of insurance classifications using the Criteria set out in the Code, in cases involving multiple workers performing the same work for a single employer'

56. On 1st of December 2022, Mr. John McKeon, the Secretary General of the Department of Social Protection, appeared before the Oireachtas Committee for Public Accounts. During his evidence to the Committee, Secretary General McKeon stated:

"We do not use test cases for the purpose of the wholesale classification of workers in a particular sector, namely, saying that all workers are one way because one worker is"

57. On 18th January 2023, in reply to a PQ from Deputy Claire Kerrane, Minister Heather Humphreys stated (Exhibit 42):

'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'

Point of fact 7

7) SIPO cannot objectively rely on Exhibit 11 as 'Clarification' of the 'Erroneous Information' given by the Independent Chief Appeals Officer on 5th December 2019 in the Joint Oireachtas Committee on Family Affairs and Social Protection in her denial of 'Test Cases'.

Indisputable Facts

i. The Social Welfare Appeals Office and the Chief Appeals Officer function INDPENDENTLY of the Department of Social Protection. The Minister for Social Protection CANNOT be the 'Respondent' to 'Erroneous Information' given by the Chief Appeals Officer to the Joint Oireachtas Committee on Family Affairs and Social Protection.

ii. The Minister for Social Protection vehemently denies that Exhibit 11 was either asked for or given in 'clarification' of SIPO's finding of fact that the Chief Appeals Officer gave 'Erroneous Information' to an Oireachtas Committee.

iii. It is bizarre in the extreme that SIPO are relying on a reply to a Parliamentary Question from the Social Protection Minister which cannot clarify the 'erroneous information' given by the INDEPENDENT Chief Appeals Officer, a reply which was given eleven months BEFORE the complaint was made to SIPO.

iv. The Chief Appeals Officer is the 'Respondent' as was clearly identified by SIPO in their decision of 9th January 2019.

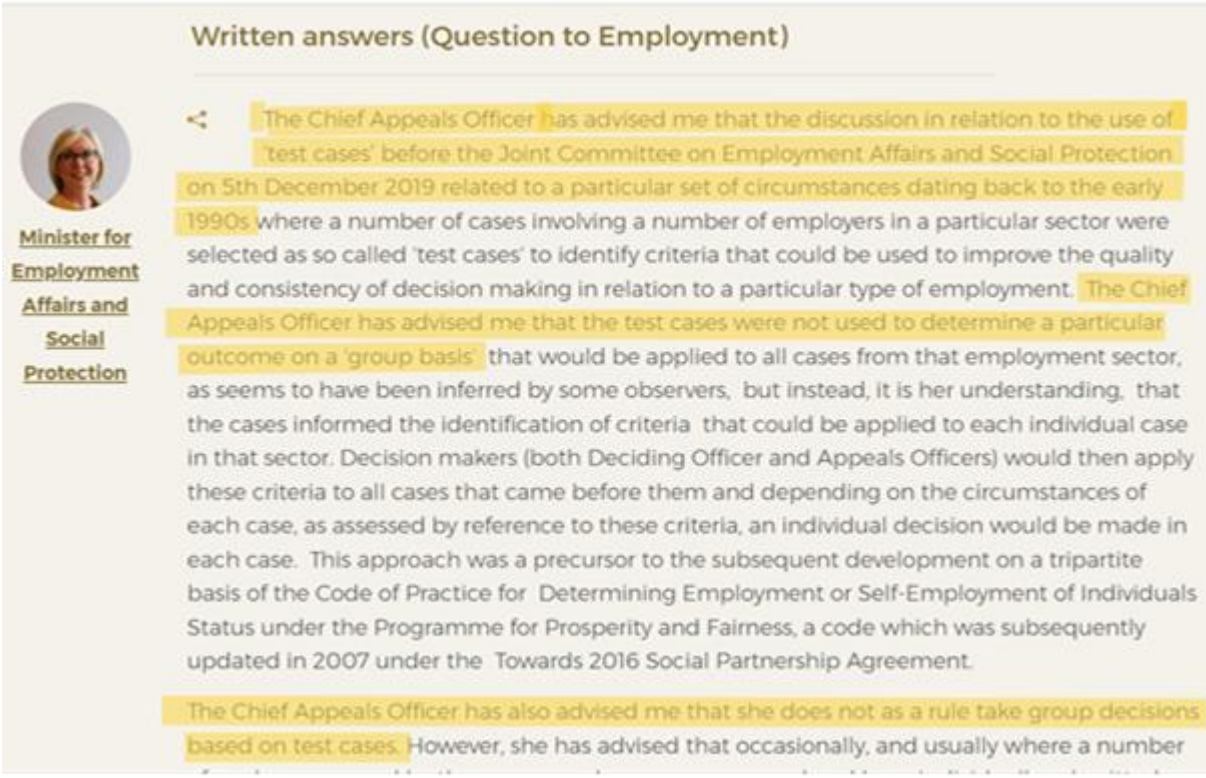
v. The Minister for Social Protection has directly accused SIPO of failing to follow its own guidelines in not seeking a clarification from the Chief Appeals Officer.

vi. The exact wording from Exhibit 11 SIPO have relied upon as 'Clarification' of the Chief Appeals Officer's 'Erroneous Denial' of 'Test Cases' is:

"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…

The Chief Appeals Officer has advised me that the test cases were not used to determine a particular outcome on a 'group basis'…

The Chief Appeals Officer has also advised me that she does not as a rule take group decisions based on test cases."



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

At no time does Minister Doherty state that this is her own 'Clarification' as Minister. Minister Doherty is merely repeating the position of the Chief Appeals Officer. It is a fact that these words are not a 'Clarification'.

On the first partial sentence relied upon by SIPO as 'Clarification' of the Chief Appeals Officer's 'Erroneous Information' in her denial of test cases:

"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…"

FACT ***"The Chief Appeals Officer has advised me"*** **is not a 'Clarification'** from the Minister. SIPO cannot objectively claim that it is.

FACT ***"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…"*** **is factually incorrect**. As evidence has shown, the discussion in relation to the use of test cases before the Joint Committee on Employment Affairs and Social Protection on 5th December 2019 did not only relate to a particular set of circumstances dating back to the early 1990s. The discussion also related to the ongoing use of the 1995 'Test Case' and the use of the approach of test cases in 2016 during the tenure of the current Chief Appeals Officer. SIPO cannot objectively claim that this statement from Minister Doherty is a 'Clarification' of the Chief Appeals Officer's 'Erroneous Information'.

On the second partial sentence relied upon by SIPO as 'Clarification' of the Chief Appeals Officer's 'Erroneous Information' in her denial of test cases:

> ***'The Chief Appeals Officer has advised me that the test cases were not used to determine a particular outcome on a 'group basis'…'***

FACT ***"The Chief Appeals Officer has advised me"*** **is not a 'Clarification'** from the Minister. SIPO cannot objectively claim that it is.

FACT **'*that the test cases were not used to determine a particular outcome on a 'group basis'…'* is factually incorrect. Exhibits 1, 2, 3, 4, 7 & 8, 30, 31 & 32** define and confirm the use of a 1995 'Test Case'. That it is a test case is confirmed by Ombudsman in 2002, by the Department in 2002, by the Minister in 2002 and by the Revenue Commissioners in 2021. Minister Varadkar confirmed the ongoing use of test cases in 2016 and Minister Doherty admitted to the use of group and class decisions in 2019, Minister Foley admitted to a group/class Decision in 2022 on Home Tutors. Even Minister Humphreys has said she is happy to take 'Sample Cases', which are 'Test Cases', because, as Minister Doherty confirmed to the Irish Times, they are group and class determinations on the employment status of workers for which there is no legislation and is strictly precluded by the Higher Courts.

On the final sentence relied upon by SIPO as 'Clarification' of the Chief Appeals Officer's 'Erroneous Information' in her denial of test cases:

> ***'The Chief Appeals Officer has also advised me that she does not as a rule take group decisions based on test cases'***

FACT ***"The Chief Appeals Officer has advised me"* is not a 'Clarification' *from the Minister. SIPO cannot objectively claim that it is.***

FACT ***'that she does not as a rule take group decisions based on test cases'* is factually incorrect.** That the Social Welfare Appeals Office 'takes' group decisions is confirmed in Exhibits 1, 2, 3, 4, 7 & 8, 30, 31 & 32. That the 1995 'Test Case' is a test case is confirmed by Ombudsman in 2002, by the Department in 2002, by the Minister in 2002 and by the Revenue Commissioners in 2021. Minister Varadkar confirmed the ongoing use of test cases in 2016 and Minister Doherty admitted to the use of group and class decisions in 2019, Minister Foley admitted to a group/class Decision in 2022 on Home Tutors. Even Minister Humphreys has said she is happy to take 'Sample Cases', which are 'Test Cases', because, as Minister Doherty confirmed to the Irish Times, they are group and class determinations on the employment status of workers for which there is no legislation and is strictly precluded by the Higher Courts. That the 'Approach' of 'Test Cases' was taken during the tenure of the current Chief Appeals Officer was confirmed by the current Chief Appeal Officer in the Oireachtas Committee on 5th December 2019.

FACT SIPO cannot objectively rely on statements contained in Exhibit 11. SIPO 'Cherrypicked' partial sentences and yet ignored that the Chief Appeals Officer admits to group/class decisions and the final 'Conclusion' of Minister Doherty's PQ which states:

> **'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'**

SIPO cannot credibly maintain that SIPO's 'Finding of Fact' that the Chief Appeals Officer gave 'Erroneous Information' in her denial of test cases, is 'Clarified' by Minister Doherty stating that the Chief Appeals Officer does not believe a contradiction has occurred.

FURTHER EVIDENCE

(The RTE worker)

An RTE worker, one of many workers in RTE who are labelled as self-employed by RTE, the Revenue Commissioners and the Department of Social Protection, wrote to the Social Welfare Appeals Office. Many RTE workers have either had their self-employed status overturned by a non-legal process known as the 'Eversheds Scope', or through the legal process of the Scope Section of the Department of Social Protection. Some of these workers have been reclassified as employees backdated up to 30 years. The RTE worker in question had been reclassified by the Scope Section as an employee backdated several years. It is undeniable that the RTE worker had a material interest in the area of bogus self-employment having been bogusly self-employed for several years. RTE appealed the Scope Section decision that the RTE worker was an employee to the Social Welfare Appeals Office.

In April 2022 the RTE worker wrote to the Social Welfare Appeals Office and requested:

> *"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* (Exhibit 17)*, 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"*

Up to a quarter of RTE's workforce (600) are under review (Many with decisions) for being mislabelled as self-employed for considerable numbers of years. That alone is prima facia evidence of systematic employer PRSI evasion and at the very least, failure or malpractice on the part of the Revenue Commissioners and most particularly, failure or malpractice on the part of the Minister for Social Protection on whom failure or malpractice in the area of PRSI classifications entirely lies. The question of the use of test cases and/or precedents set in test cases has serious implications in the area of liability should RTE workers seek redress for their losses due to being bogus self-employed.

In May 2022, the Social Welfare Appeals Office replied to the RTE worker. In this letter (Exhibit 36) it states:

> '***Query in relation to "test/sample cases"***
>
> ***Your email refers to a letter of 2 December 2021 from the Minister for Social Protection to the Clerk to the Dail 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 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 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 on the particular facts of each appeal.

I trust that clarifies the position in line with your request in your email of 2 May 2022 and the procedures of this Office your correspondence and this reply is being shared with the appellant, RTE, via its representatives Arthur Cox, Solicitors'

FACTS

i. The statement:

'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'

is a false statement. A 'Test Case' was created on 12th June 1995, by the Social Welfare Appeals Office, for the express purpose of making all couriers 'Not Employees'. This 'Test Case' was used to create a 'Special Tax Agreement' with courier employers to allow them to evade their statutory obligations. This 'Special Tax Agreement' operated from 6th April 1997 until 31st December 2018 and couriers are still classified as self-employed by group/class based on the 'Owner/Driver' model of self-employment which was created, without a legislative basis, by the Revenue Commissioner and the Department of Social Welfare by using an unlawful Social Welfare Appeals Office 'Test Case'. Evidence of further test cases has been confirmed by Taoiseach Leo Varadkar, former Finance Minister Donohoe and Education Minister Foley. It was confirmed by the Ombudsman in 2002 that the Department of Social Welfare used a 'test case', created by the Social Welfare Appeals Office, and by the C&AG in 2002 that a 'Special Tax Agreement' was in use for the entire sector of courier employers.. This 1995 'Test Case' is not a 'So-Called' test case. It is undeniably a test case.

ii. The statement:

> *'but to identify criteria for use when assessing each case on an individual basis'*

is a false statement. The 'Criteria' referred to are 'Ownership & maintenance of a personal vehicle', 'Being paid in an A-typical way', & the 'Existence of a Contract'. None of these 'Criteria' are contained in the Code of Practice, but are specifically precluded by the Code of Practice, and have been repeatedly rejected as 'Indicators of Self-Employment' by the Higher Courts. These 'Criteria' are not used to assess each case on an individual basis. These 'Criteria' are used to label a group/class of employees as self-employed. Once a worker 'Fits' these unlawful criteria, they are excluded from having all other lawful precedents on 'Contract of Service' applied to the reality of their employment. The continued use of these unlawful 'criteria' deliberately excludes groups/classes of workers from having their cases heard on an individual basis according to the legal precedents and rulings hand down from the courts. These 'Criteria' are not legal 'Criteria', they are unlawful 'Criteria' created by civil servants with no constitutional authority to create precedential 'Criteria'. Only the Oireachtas has the power to make law (criteria). The only function of the Social Welfare Appeals Office and the Department of Social Protection is to apply the legal precedents handed down by the courts, the SWAO has no authority to 'create' criteria.

iii. The statement:

> *'these criteria then formed the basis for the Code of Practice' for the Determination of Employment or Self-Employment Status of individuals agreed with trade unions and employers'*

is a false statement. These 'Criteria' which are not 'Reflected in the Voluntary Code of Practice and have been roundly rejected by the Higher Courts as indicators of Self-Employment, did not form the basis for the Code of Practice. The Irish Congress of Trade Unions has vehemently denied any involvement whatsoever in the classifications of couriers as self-employed.

That the Trade Union movement had no involvement with the 1995 test case and the 1997 Special Tax Agreement is confirmed in a letter (Exhibit 37) dated **November 1999** from Mr. Chris Hudson Organising Officer, Communication Workers Union to the Private Secretary of the Minister for Labour, Trade and Consumer Affairs Mr. Tom Kitt TD. In this letter to Minister Kitt, Mr. Hudson states:

> ***'Dear Mr Hughes,***
>
> ***Please could you convey to the Minister for Labour, Trade and Consumer Affairs, Mr. Tom Kitt T.D., 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'

'Again, I would appreciate if you would reiterate my disappointment to the Minister as the intention of the meeting was to inform him of the concerns of Motorbike Couriers and to seek an explanation of the present situation as it is'

Important Fact — As is evidenced in Mr. Hudson's letter to Minister Kitt in 1999, the Department of Social Protection classified couriers as 'Not Employee' PAYE Class S PRSI classification was to prevent couriers qualifying for Social Welfare 'Payment'. It is also a fact that as bogus self-employed employees, unemployed couriers were not counted on the unemployment register.

iv. The Statement:

'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'

is a false statement.

a. 'based on a sample of cases'. The true factual position is that between 1993 and 9th January 2019, what are now referred to by the Minister as 'Sample Cases' were in fact and in evidence 'Test Cases'. Between January 2019 and April 2019, a decision was taken by the Department of Social Protection and the Social Welfare Appeals Office to discontinue the use of the term 'Test Case' and to substitute the term 'Sample Case'. They also decided to apply the term 'Sample Case' retrospectively to cases which were and are, 'Test Cases'. Minister Regina Doherty described the process formerly known as 'Test Cases', currently claimed to be 'Sample Cases', to the Irish Times on 25th March 2019:

'The Minister is also looking at legislation to permit deciding officers to make determinations on the employment status of groups or classes of workers who are engaged or 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'

Regardless of whether the Minister calls these precedential cases 'Sample' or 'Test' cases the true factual position is that these are ***'class decisions'*** ***'on the employment status of groups or classes of workers'***. It is also the true factual position that no legislation exists to allow 'class decisions' that ***'class decisions'*** are not *'reflected'* in the 'Code of Practice', that ***'Class Decisions'*** ***'to make determinations on the employment status of groups or classes of workers'*** 'can be subject to separate individual appeals' but because of the unique criteria created for these ***'Class Decisions'***, every separate individual appeal is doomed to failure once the unique criteria are applied. As no legislation exists to allow '***group or class decisions'***, no legislation exists to allow appeals of the ***'class decisions'*** on the ***'determinations on the employment status of groups or classes of workers'***

FACT **The Social Welfare Appeals Office creates 'Test Cases' involving groups and classes of workers engaged by the same employers, one employer or across an entire sector, determined based on 'Test Cases' which are applied to all workers in the Group or Class working for a group of employers an individual employer or by entire Sector. The Department accepts and encourages these 'Test Cases' and the Revenue Commissioners agree Special Tax Agreements based on these 'Test Cases'. And all of this is not just outside of the law, class actions are strictly precluded in the Higher Courts and the precedents handed down from the Higher Courts in the area of Employment Status.**

v. **'and only where agreed by the individual'. The true factual position is that one** 'Individual', even several 'individuals' cannot agree to act outside of the law to label all workers present and future, as self-employed based on that one individual's individual circumstances. It is also the true factual position that neither the Department nor the Social Welfare Appeals Office can inveigle another person to act outside of the law. To do so is an offence under Social Welfare law. It is also the true factual position that the 1995 'Test Case' and subsequent 'Special Tax Agreement' for courier employers, had no input whatsoever from couriers. Couriers were given 2 choices, they could be 'Not Employees' under the PAYE system or 'Not Employees' under self-assessment. That workers do not 'Appeal' the unlawful 'Group/Class' decisions, which they have no idea exist, is taken by successive Ministers of Social Protection to imply 'Consent' on the part of workers. 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 and this is why Secretary General McKeon misled the Public Accounts Committee. The Department is liable for skipping of proper process & individual consideration via unlawful blanket decisions by the Social Welfare Appeals Office which must be set aside.

vi. The Statement:

> ***'****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****'***

is a false statement. The true factual position is that the RTE worker asked specifically for the sample/test cases referred to by Minister Humphreys in her letter to the Dail Committee on Parliamentary Privileges and Oversight which states:

> *'some appeals involving a number of workers engaged by the same employers, may be determined based on a sample of cases'*

The RTE worker did not ask if there had been sample/test cases during the tenure of the Current Chief Appeals Officer nor does the reply that there has been no approach of sample/test cases during the tenure of the current Chief Appeals Officer address that Minister Humphreys told the Dail Committee on Parliamentary Privileges and Oversight that there are Precedential 'Sample' cases containing unique criteria which may impact on the RTE worker. It is also a fact that because the RTE worker has been reclassified pre-dating the tenure of the current Chief Appeals Officer that precedential sample/test cases from before 2015 are relevant to the RTE worker.

It is also a fact that a **TEST CASE** approach **has been** taken by the Social Welfare Appeals Office during the tenure of the current Chief Appeals Officer. In 2016, an Appeals Officer stated that he was going to use 16 individual cases of bricklayers and labourers, which were under appeal by JJ Rhatigan, as ONE 'Test Case'. The workers were not asked if they agreed to be a 'Test Case', they were told they were going to be. On seeking expert advice, several of the construction workers wrote to the Social Welfare Appeals Office at the time and strongly protested against the decision of the Appeals Officer to use the 16 individual appeals of their Scope Section decisions, that they were employees, as ONE 'Test Case'. A section of the construction workers' letters state:

> *'Individual Cases*
>
> *There appears to be an attempt on the part of the Social Welfare Appeals Office to deal with all 14 decisions and appeals as one case with all to be heard and decided upon in one hearing. I strongly protest this approach, decisions are based on established facts, not assumptions and as such there is no basis for categorisations purely by occupation. Each case must be assessed on its own merits in accordance with the general precedents of Irish law. Operations which seem to be the same may differ in the actual terms and conditions in any given case.*
>
> *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 wideranging 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.

That an Appeals Officer took the approach of 'Test Cases' (Not 'Sample Case') during the tenure of the current Chief Appeals Officer was confirmed by the current Chief Appeals Officer herself in the Oireachtas SW Committee on 5th December 2019 under questioning by Senators Alice Mary Higgins & Gerard Nash:

'Of the figures I just provided, one appeal had four people attached and another had three. I am aware of a case prior to 2018 to which 16 workers in a specific category were attached'

'I am only aware of one case where there were 16 workers with the same issue and they were unhappy'

'The case that the Senator referred to was a 2016 case involving 16 workers. When it is the exact same appeal contention across 20 or 30 people, it can be an efficient way of dealing with the issue'

FACT

As was confirmed by Ministers Doherty & Humphreys, insurability of employment 'class' decisions on group and class of workers, are being created by the Social Welfare Appeals Office and are being used by the Department of Social Protection. That this malpractice has been ongoing for 30 years has a material affect on all workers, particularly on those whose Scope Section Decisions have been appealed to the Social Welfare Appeals Office. The RTE worker was denied access to these precedential class decisions. That this 'Erroneous Information' was also sent to RTE and to Arthur Cox Sols. is a matter of great concern.

Following this denial of sample/test cases by the Social Welfare Appeals Office, the RTE worker requested that any appeal of her Scope Section decision be referred to the Circuit Court under Section 306 of the Social Welfare Consolidation Act. The Social Welfare Appeals Office refused to refer the appeal to the Circuit Court. Following the refusal of the

Social Welfare Appeals Office to refer the appeal to the Circuit Court, the RTE worker wrote to SIPO.

In October 2022, the RTE worker wrote to SIPO:

Complaint re: Social Welfare Appeals office and the Department of Social Protection.

To Whom it may concern, 18/10/2022

On the 27 September 2022 the Minister for the Department of Social protection replied to questions from Paul Murphy TD and Claire Kerrane TD Questions 303 & 325 respectively.

The minister stated " 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....".

The Minister has refuted the Standards in Public Office Commission finding that the denial of the use of 'testcases' by top civil servants to a committee is "erroneous information". Ms Joan Gordon denied the use of test cases on the 5th December 2019 to the Social Welfare Oireachtas committee. This is of major consequence for people like me. People who have had their Scope Decisions appealed by their employers to the Social Welfare Appeals Office. Whether test cases are used will affect how my appeal is considered and this lack of clarity is creating a major concern for my case and undue stress and tension in my life.

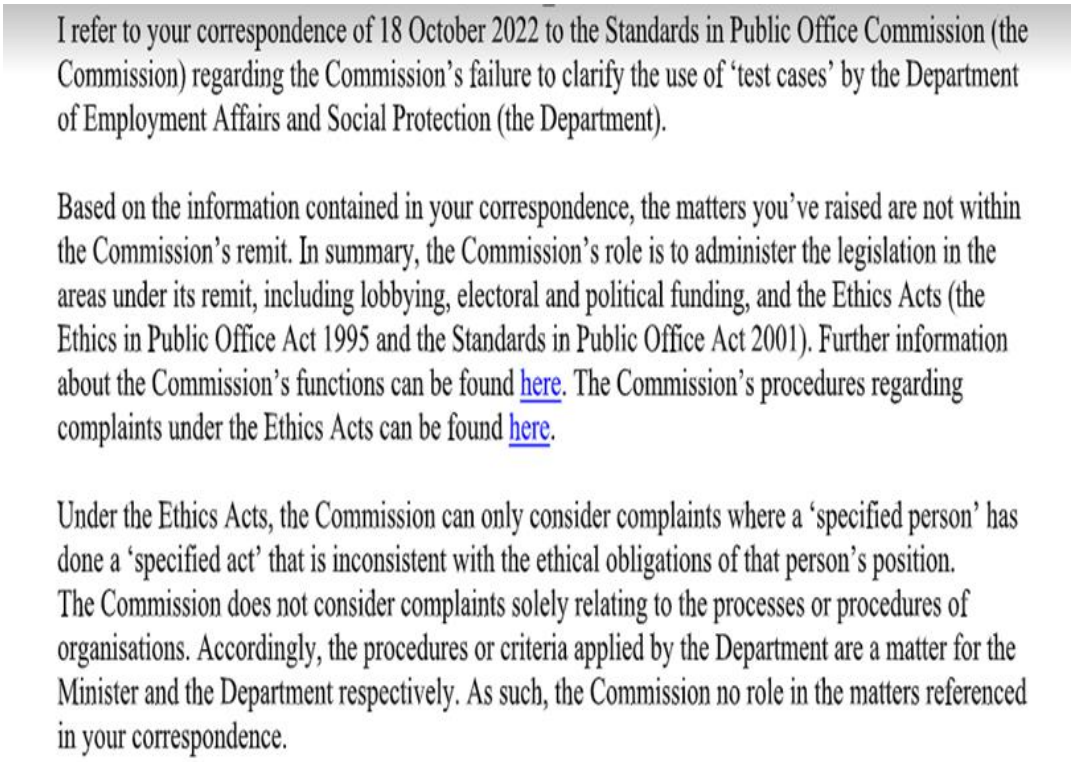
The Revenue.ie website has published that motorcycle couriers were labelled as self-employed based on a SWAO decision. The Secretary General of the Department of Social Welfare, confirmed in writing to the Public Accounts Committee chair that this SWAO decision is a 'test case'. The Secretary General clearly defines what a test case is and that the department used test cases to make group / class decisions on workers to label them as self-employed. Minister Humphries has denied three times that couriers were classified as self-employed in the past, when it is clear as the light of day that the Revenue collects PRSI on behalf of the Department of Social protection from couriers. This group / class who have been determined to be self-employed by a social welfare appeals office 'test case' in 1995.

Procedures have not been followed by SIPO as they have not clarified this issue and have allowed it to fester and cause great stress and frustration for those workers who have to deal with the issue of employment status. I wish to complain about the lack of follow up and want the record to be set.

Sincerely

(RTE WORKER WHO HAS BEEN FOUND TO BE AN EMPLOYEE)

In December 2022, SIPO replied to the RTE worker:



I refer to your correspondence of 18 October 2022 to the Standards in Public Office Commission (the Commission) regarding the Commission's failure to clarify the use of 'test cases' by the Department of Employment Affairs and Social Protection (the Department).

Based on the information contained in your correspondence, the matters you've raised are not within the Commission's remit. In summary, the Commission's role is to administer the legislation in the areas under its remit, including lobbying, electoral and political funding, and the Ethics Acts (the Ethics in Public Office Act 1995 and the Standards in Public Office Act 2001). Further information about the Commission's functions can be found here. The Commission's procedures regarding complaints under the Ethics Acts can be found here.

Under the Ethics Acts, the Commission can only consider complaints where a 'specified person' has done a 'specified act' that is inconsistent with the ethical obligations of that person's position. The Commission does not consider complaints solely relating to the processes or procedures of organisations. Accordingly, the procedures or criteria applied by the Department are a matter for the Minister and the Department respectively. As such, the Commission no role in the matters referenced in your correspondence.

On 9th of December 2022, the RTE worker wrote again to SIPO. The RTE worker thought that SIPO did not understand the complaint:

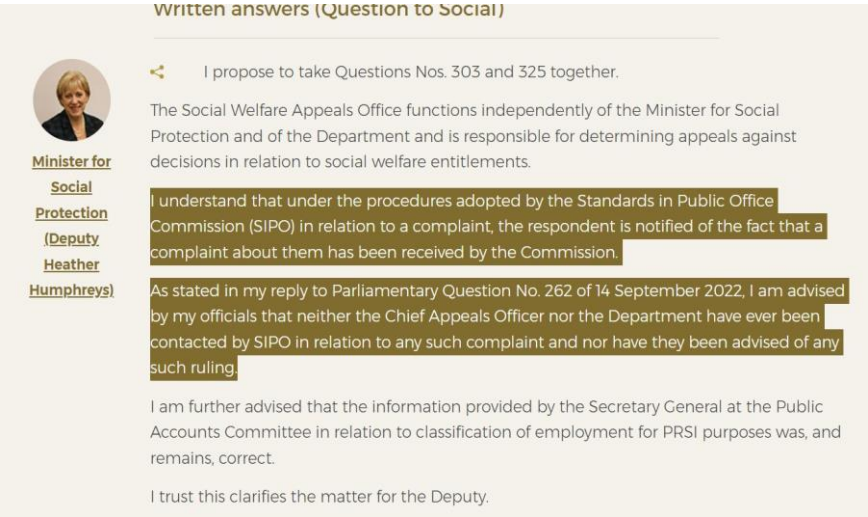
> *"You have misinterpreted my complaint. My complaint is not about the department. My complaint is that, according to Minister Heather Humphreys, SIPO failed to follow its own guidelines in not informing the Chief Appeals Officer that SIPO had decided that Chief Appeals Officer had given 'Erroneous Information' to the Oireachtas Social Welfare Committee.*
>
> *The failure of SIPO to follow its own guidelines means that many hundreds of workers in RTE, including myself, are receiving a barrage of denials about the use of Test Cases from the Social Welfare Appeals Office, when SIPO, having reviewed the document evidence, knows for a fact, and has put in writing, that the Chief Appeals Officer gave erroneous information to the Oireachtas Social Welfare Committee. Please address the complaint I have made. SIPO failed to follow its own guidelines in not informing the Chief Appeals Officer, why, and what are SIPO going to do to rectify SIPOs failure to follow its own guidelines?*
>
> *This is a matter of urgency, please have the respect to deal with this issue swiftly and to address the actual complaint I have made.*
>
> *Yours sincerely, RTE Worker"*

On 13th December a reply issued from SIPO to the RTE worker which stated:

> ***'Dear .....***
>
> ***I wish to acknowledge receipt of your correspondence of 09 December 2022 to the Standards in Public Office Commission (the Commission). As previously advised, under the Standards in Public Office Act 2001 (the 2001 Act), the Commission can only consider complaints against individuals where they have done an act or omission that is inconsistent with the proper performance of that person's position. The Commission does not consider complaints in any other format. All complaints within remit are considered in accordance with the legislative provisions of the 2001 Act and the Ethics in Public Office Act 1995, and in line with the policies and procedures in place at the time.***
>
> ***In your correspondence of 09 December, you wrote the following:***
>
> > ***"SIPO failed to follow its own guidelines in not informing the Chief Appeals Officer that SIPO had decided that Chief Appeals Officer had given 'Erroneous Information' to the Oireachtas Social Welfare Committee."***
>
> ***The Commission has no such role in the manner referred to here. Accordingly, this matter is not within the Commission's remit and no action will be taken in this regard'***

On 13th December 2022, the RTE worker wrote again to SIPO. The RTE Worker was dismayed that SIPO could not see that the issue was of grave importance to misclassified workers in RTE:

> *"The Minster for Social Protection, currently acting Justice Minister Heather Humphreys, has directly stated in a Dail reply that SIPO failed to follow its own guidelines –*



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.

Your reply to my letter does not explain why SIPO failed to follow its own guidelines nor does it outline how SIPO proposes to rectify its own failings in this matter.

Please answer my questions as follows –

iv. Does SIPO accept Minister Humphreys statements that SIPO a) failed to follow its own guidelines & b) failed to notify the respondent (Chief Appeals Officer)?
Who can rectify SIPOs failure to adhere to its own guidelines?

Yours Sincerely, RTE worker"

On 14th of December 2022, a reply issued from SIPO to the RTE Worker:

'As previously advised, any complaints which the Commission receives are assessed in accordance with the Ethics Acts (collectively the Standards in Public Office Act 2001 and the Ethics in Public Office Act 1995) and the procedures and policies in place at the time.

In summary, the Commission's complaints process has three stages:

- ***Stage 1 – The Secretariat conducts an initial assessment to determine if a complaint is within remit. The Commission are provided a briefing note of all complaints within remit and they will decide whether or not to further investigate the complaint.***

- ***Stage 2 – Preliminary Inquiry. An Inquiry Officer will draft a report and provide an opinion as to whether or not there is prima facie evidence to sustain the complaint. The Commission will decide whether or not to progress to a hearing.***

- ***Stage 3 – Investigation hearing, following which the Commission publishes a report.***

You can view the Commission's Ethics Complaints Procedure on the Commission's website here. As noted on the bottom of page 1, these procedures were revised and updated in August 2022.

Prior to July 2022, the Commission's procedure was only to inform the subject of a complaint that a complaint had been received against them when a complaint had progressed to Stage 2. From July 2022 the practice was to inform the subjects of a complaint during Stage 1, once a complaint had deemed to be within remit. This practice was formally adopted by the Commission in its revised and updated Ethics Complaints Procedure of August 2022. The complaint regarding the Social Welfare Appeals Officer was assessed by the Commission in January 2021 – prior to the adoption of this new procedure and, accordingly, the subject was not notified during Stage 1. Therefore, this complaint was appropriately dealt with based on the procedures in place at the time.

As such, as stated previously, the Commission has no role in the manner referred to in your correspondence. The Commission has exercised its statutory functions

under the Ethics Acts in relation to the complaint involving the Social Welfare Appeals Officer. The legislation does not allow for an appeals mechanism or for the Commission to revisit its decision. Accordingly, this matter is closed and no further action will be taken by the Commission'

On 14th December 2022, the RTE Worker wrote to SIPO, told SIPO that SIPO's reply was deliberately misleading, that SIPO had made a finding of fact that the Chief Appeals Officer had given 'Erroneous Information' to the Oireachtas Committee, that SIPO had clearly identified the Chief Appeals Officer as the 'Respondent' and that SIPO had demonstrably proceeded to Stage 2 by seeking 'Clarification' of the Chief Appeals Officer's 'Erroneous Information'. The RTE worker correctly pointed out that it was at this exact point that SIPO failed to follow its own Guidelines by seeking 'clarification' from the Minister for Social Protection but not from the Independent Chief Appeals Officer as the 'Respondent'.

'In correspondence from SIPO to a Mr. McMahon dated 22nd February, which is freely available online, SIPO states:

> ***"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"***

You are demonstrably factually incorrect in your assertion that this complaint did not pass stage 1.

1. *The Commission clearly refers to the 'RESPONDENT', i.e. the Chief Appeals Officer. Yet you are claiming that the Chief Appeals Officer was never asked to respond, why therefore is the Chief Appeals Officer referred to as the Respondent?*
2. *The Commission clearly made an emphatic decision that the Chief Appeals Officer had given 'Erroneous Information' to the Oireachtas Social Welfare Committee. This is undeniably a DECISION Mr. O'Shea, a decision SIPO failed to communicate to the Chief Appeals Officer, why?*
3. *The Minister for Social Protection has vehemently denied, in Dail Replies, that the Minister at all 'Clarified' the Chief Appeals Officer's 'Erroneous Information' and indeed has insisted many times, including to the Oireachtas Ethics Committee that 'Test Cases' are NOT used by the Social Welfare Appeals Office, why are you Mr. O'Shea, and the Commission, contradicting the Minister?*

In conclusion, SIPO did make a decision that the Chief Appeals Officer gave 'Erroneous Information' to an Oireachtas Committee and that for reasons as yet unexplained by the Commission, this decision was not communicated to the RESPONDENT as the Chief Appeals Officer is clear labelled by the Commission. One cannot be a 'Respondent' if one is never asked to respond. In all honesty, this situation reeks of wrongdoing by SIPO and the Chief Appeals Officer. Thus far your

responses have been deliberately misleading, have deliberately misinterpreted my questions and are far below what the public should be entitled to expect from SIPO. Please deal with the issues I have raised. Sincerely RTE Worker.

On 20th December 2022, SIPO replied to the RTE worker:

'Dear....

The matters referred to in your correspondence were properly considered by the Commission in accordance with the procedures in place at the time. The Commission closed the complaint and communicated its decision to the complainant. As previously advised, the Commission has made its decision on this matter and no further correspondence will issue to you in this regard'

FURTHER EVIDENCE

(The Music Industry worker)

A Music Industry worker, one of many workers in the Music Industry who are labelled as self-employed by Music Industry Employers, the Revenue Commissioners and the Department of Social Protection, wrote to the Scope Section and asked for a decision on his Insurability of Employment (Employed or Self-Employed).

On 18th November 2020, following an intensive investigation by the Department of Social Protection, the Scope Section decision determined that Music Industry worker had been working under a contract of service (**Employee**) for (Employer) from 1 January 2014 and was therefore insurably employed at the PRSI Class A rate where earnings exceeded €38 per week. The decision was made in accordance with Section 300 (2) of the Social Welfare Consolidation Act 2005.

The decision of the Scope Section Deciding Officer was that the Music Industry worker was an employee (Exhibit 38):

> *'The Employment of* (Music Industry worker) *by* (Music Industry employer*) from 1st January 2014 to date is insurable under Social Welfare Acts at PRSI Class A* (Employee)'

The Music Industry worker had been bogus self-employed for almost 7 years.

The Deciding Officer was particularly strong and long in his reasons for determining that the Music Industry worker was, and should always have been, an employee:

> *'According to the information in the Investigator's report,* (The Music Industry Worker) *works as a fiddle player with the* (Employer's) *band.* (employer) *is the lead singer and musical director of the band. He is also the company secretary and majority shareholder in* (Employers Company) *ltd. The* (Music Industry worker) *contacted the* (Employer) *in 2013 to let him know of his interest in becoming part of the* (Employers) *new band. After a meeting between them, the (Music Industry Worker) was offered the job. His rate of pay was €250 per gig, increasing to €280 from April*

2019. Payment for the first couple of years was made by cheque and was then made by EFT. He is paid to be a fiddle player with the band (he also play acoustic guitar in songs of a genre where a fiddle would not be used such as rock 'n roll).

The band delivers a lot of its work in the Country and Irish scene, mainly playing at dances throughout Ireland, as well as in the UK, Spain and Portugal. The band also does theatre concerts, church concerts and festivals in Ireland and the UK. Most of the work (The Music Industry worker) *does with the band is at dances. The duration of these dances is two hours. Doors to the venues normally open two hours before the band starts playing. This means that the band have to be there before the doors open to set up and do sound checks.*

The only equipment that (The Music Industry Worker) *carries to gigs is his fiddle. The rest of his equipment and all other band equipment is carried in the band's truck and set up by a crew. (*(The Music Industry worker) *supplies his own instruments and equipment to do the job: a fiddle, an acoustic guitar, 2 turning pedals, I octave pedal, a wireless in-ear monitor system and various leads to the value of €1,200 - €1,500).*

The start and finish times of the dances can vary but they are usually between 10.30pm and 12.30am or 11pm and 1am. (The Music Industry worker) *has to drive himself to wherever the gig is taking place (he enquired about fuel costs/trave expenses being reimbursed but received no reply). For theatres and concerts the show usually begins at 8pm, or 7.30pm in the UK. He would have to be at the venue and ready to do a sound check at 5pm. This would generally take 10 minutes but may take an hour if the band was instructed to rehearse something. In respect of performances in Ireland* (The Music Industry worker) *supplies his own car and covers his own costs in driving to all the gigs (fuel, insurance, tax, tolls, AA Rescue and maintenance). When the band tours in the UK usually for 20 nights a year, Transport is supplied in the UK. Transport is also supplied to get to the UK by ferry or plane. Air travel is also supplied for other trips outside of Ireland. Accommodation is provided on all travel outside of Ireland. In Ireland, accommodation is supplied* by (Employer's Company) *Ltd when necessary, for example, for consecutive gigs in same part of country.*

(The Music Industry worker*) said that as a fiddle player with 30 years' experience he doesn't always require direction from someone else. The skill set in the band's genre requires musicians to be able to improvise and play from memory, as distinct from an orchestra, where sheet music is available, and the performer must play what is in front of them. He stated he would also be given recordings of songs and would have to learn them and be able to reproduce the part of the tune played by the fiddle from what he had heard. He said he would have certain freedom to play what was suitable. If it wasn't suitable, the musical director* (Employer) *would instruct him what to play. Ultimately, the decision lay with the musical director.* (The Employer) *would supply him with cord charts/sheet music or recordings of songs that he would have to learn material from. At rehearsals* (The Music Industry worker) *would be instructed what and where to play in a particular song. Sometimes he would be told which verse to*

come in on the fiddle and it would be left to him to play what was appropriate for the style of song.

The (Employer Company) *Ltd would take all the bookings for all the performances and the schedule of performance dates would then be communicated to the musicians in the band.* (The Employer) *decided what gigs to take, when to take them, and when the band holidays would be. Generally, the musicians were allocated 8-10 days in January and the same in September each year.* (The Music Industry worker) *is not required to provide public liability insurance. He cannot gain or lose financially from the performance of the work. He states that between 1/1/14 and 15/3/20 he only ever took 2 nights off from playing in the band for personal reasons, one with 48 hours' notice and one with several months' notice. It was not his responsibility to find a replacement. It would be up to the band to find a replacement if he were unable to perform. He stated that asking for too many nights off could lead to him being seen as unreliable or him being replaced. From the information supplied to the Inspector, it appears that* (the Music Industry worker) *has been the band's resident fiddle player since 2014.*

(The Music Industry worker) *said on nights off playing with the band he sometimes stood in with another band when they needed a fiddle player, or on his days off he sometimes does some recording work in a studio. However, due to the workload with his* (Employer's) *band, which is approximately 220 gigs/days per year, he only did a limited amount of extra work for others and he also turned down work in order to have some free personal time. He stated that he wouldn't be able to perform as a musician for another band at the same time he was working for the* (Employer's) *band.*

The work is carried out all over Ireland/Northern Ireland at dances held in hotels, large lounges and marquees. In the summer months the band would perform mostly at festivals throughout the country, on a gig-rig mobile festival stage or in marquees. They also do concerts in theatres, hotel function rooms and churches. In the UK, the band performs mainly in theatres. When they perform in the UK, flights to the UK, travel and accommodation is arranged by (the Employer). *When the band performs in Spain and Portugal, they do so as part of* (Director) *Tours holidays. Flights and accommodation are arranged by* (Director*) Tours.* (Director) *is a director of* (Employer's Company) *Ltd. The band plays 6 gigs in a 7 day period or 9 in a 10 day period. The gigs vary between 45 minutes and 2 hours including one outdoor poolside gig. The band also plays on a cruise ship each year on a week long cruise for a US promotions company. During his free time on the cruise he was able to perform with bands if they requested a fiddle player. This was usually done to pass the time and the other bands would pay $50 - $100 off his on-board bill on the ship. He was able to perform with other bands/artists on the cruise ship, provided it wasn't at the same time as shows for* (The Employer). *Due to the amount of time he works for (The Employer), throughout the year,* (The Music Industry worker*) didn't have much time to work with other bands, but did so occasionally, as mentioned earlier. Any earnings from such freelance work is included in his own self-assessment tax returns.*

According to the INS1 form completed by (The Music Industry worker) *he got the job by approaching* (The Employer) *the lead singer. He worked variable hours, he is subject to direction, control and dismissal. He is not free to take up similar work the same time with another business or company. He supplies labour only. He supplies his own instruments, leads and pedals. The P.A. and lighting are supplied by the company. The work is carried out at various locations in Ireland, the UK, Europe and North America. This is decided by the company. He had a say in negotiation his rate of pay. The company supplies transport.* (The Music Industry Worker) *is not required to provide public liability insurance. He could not gain or lose from the performance of the business. He has to render personal service and cannot hire an assistant. He can send a substitute. The company would pay the substitute.*

The INS1 form completed by (The Employer) ***agrees with the information*** *in* (The Music Industry worker's) ***INS1 except for saying that*** (The Music Industry worker) ***did not have to render personal service and that he would pay any substitute.***

(The Music Industry worker) *provided further information stating that in February 2019 he raised the possibility of being an employee of the band. He was told that* (Employer's Company) *Ltd had no obligation to offer him employment, He was advised by (Director), a director of* (Employer's Company) *Ltd, that he would be better off to create a limited company and use it as a vehicle to invoice* (Employer's Company)*, rather than continue as an independent contractor.* (Director of Employer's company) *stated that such an agreement could be used as a mechanism to legitimately maximize payments from* (Employers Company), *tax free.* (Director) *also suggested that* (Employer's Company*) might be able to make an additional payment towards annual accountancy fees incurred by* (The Music Industry worker) *through this arrangement*. (The Music Industry worker) *did not form a limited company.*

I asked (The Music Industry worker) *to clarify the travel arrangements for when the band travelled abroad. He said for UK tours, the truck and some of the crew would travel on their own generally the day beforehand. I asked if the band always travelled together and if each member made their own arrangements. He said the band would travel sometimes from different airports (depends which airport was closest etc.) or all together if a ferry was used.* (The Employer's Company) *organised the times and costs of any flights/ferry travel. Sometimes, the entire band and crew would all fly together depending on the gig and whether the truck had to travel and be used.*

(The Employer) *provided further information stating that he has worked at various shows/venues since 2104 where he did not require the services of* (The Music Industry worker) *in his band. He said the* (Music Industry worker) *is free to decide if a particular show or fee doesn't suit him. The* (Employer) *gives an example of the* (Music Industry worker) *declining to perform on an episode of The Late Late Show as he though the fee offered was not sufficient. However, he did perform with the band later that night at a gig in Mullingar.* (The Music Industry worker) *is free to perform shows with other bands/entertainers whilst also working with* (The Employer's) *band.*

I have considered the conditions of employment and I am more persuaded by the information supplied by (The Music Industry worker)*. I find he satisfies the control test as he was under the instruction of the musical director and he had no say in determining the job specifications, he performed as part of a band of musicians, performing a set list of tunes. He had some discretion as to how he played, but if it was not deemed suitable, the musical director would instruct him what to play. The musical director had the final say. The* (Music Industry worker) *could be told which verse of a song to play in and was routinely given recordings of songs to learn so he could play them at gigs. He supplied labour and his own instruments. He has no say in determining his own hours of work. He has no say in sourcing the employment.* (The Employer/The Employer's Company) *would take all the bookings for all the performances and the musicians in the band would be told of the schedule of performance dates. He satisfies the exclusivity test as although he occasionally played with other bands in his time off, because of his commitments to* (Employer's) *band, he did not have the time to work elsewhere. I am satisfied that working with (the Employer) was his main employment, given the amount of work he did with him, and that he would give priority to the work with him.*

Considering factors such as mutuality of obligation and integration, he was offered almost continual work from the company for 6 years. I am aware of one example where he declined an offer of work from them because he was not satisfied with the fee offered but the same example says he worked with the band at a second gig that same night. He was reluctant to ask for too much time off as he thought this would mean he would be seen as unreliable and possibly be replaced. His holidays were decided by the company. The band members were allocated 8-10 days in January and the same in September. When the band performed outside Ireland, travel (by air/sea) and accommodation was arranged and paid for by the company in the UK and by (Company Director) *Tours when they toured mainland Europe. (The Music Industry worker) could not take holidays at his own discretion and did not have to pay for his own air/sea travel or accommodation with regard to performances with the band.*

(The Music Industry worker) *worked hours determined by the times of the gigs. His work was directed by* (Employer's Company) *as regard content. He is directed by* (Employer's Company) *as to what work is done, how the work is done (his skill and experience not withstanding), and when the work is done. The work is carried out on premises booked by* (Employer's Company)*. In effect* (Employer's Company) *decided where the work was done. Travel expenses and accommodation for overseas engagements are covered by* (Employer's Company)*.*

I am satisfied that, on the balance of information, he is employed under a contract of service. PRSI class A applies to the employment.

An **'Inventory of Evidence'** (Exhibit 40) of all the evidence relied upon by the Deciding Officer in making his determination is attached to the decision.

In essence, the decision of the Scope Section Deciding Officer brought the Music Industry worker's insurability of employment in line with band members of the RTE Orchestra who are all 'Contract of Service' employees. Similar cases throughout Europe and beyond have all ruled that band members in such circumstances are employees.

The employer was given 21 days to appeal the Scope Section Deciding Officer's decision:

> ***'If you are not satisfied with this decision you may appeal in writing to the Chief Appeals Officer, D'Olier House, D'Olier Street, Dublin 2, telephone 1890 747434. You must lodge your appeal within 21 days of the date of this letter, clearly stating the grounds of your appeal'***

On 9th December 2020, the employer appealed the Scope Section decision to the Chief Appeals Officer. 17 'Grounds for Appeal' (Exhibit 39) are listed as follows:

1. ***The Deciding Officer did not have regard for the reality of the situation regarding the music industry as it is in Ireland. This situation has become more precarious with the current health restrictions.***
2. ***The applicant made his application to SCOPE in the knowledge that he had approached me seeking work on the basis that he would invoice me for the nights that we worked. I also state that the applicant has had the opportunity and has availed of the opportunity to perform with other musicians and bands. The fact that he chose to perform his services primarily with me is not sufficient to establish that he is an employee.***
3. ***The applicant could, and did chose not to perform on occasion.***
4. ***There is no evidence that*** (Employers Company) ***Ltd did or would have found the applicant unreliable or would have replaced him if he requested too many nights off. It was his choice.***
5. ***The control test referred to does not make allowance for the fact that all musicians playing together must take instruction from a band leader or play the music at the required tempo or rhythm.***
6. ***It is long established custom and practice that musicians working with bands travel with the band and do not have to supply their own transport to distant gigs.***
7. ***The applicant did by his own information provide services to different people and bands.***
8. ***There is no evidence that the applicant had to turn down any work from other people requiring his services.***
9. ***It is also long established custom and practice that musicians have their accommodation covered by the band, in this case*** (Employer's Company) ***Ltd. This practice is not indicative of a master and servant situation.***

10. ***There is no indication of whether the applicant did make the relevant returns to Revenue as a self-employed person.***

11. ***It is denied that*** (Employer's Company) ***Ltd was ever in a position to dismiss the applicant as the applicant was always in control of what work he provided and when he provided it.***

12. ***The applicant could send a substitute and*** (Employer's Company) ***would pay that substitute. It was often the case that*** (Employer's Company) ***Ltd would look for a replacement for musicians at short notice due to many different reasons outside the control of*** (Employer's Company) ***Ltd.***

13. ***It is submitted that the decision is erroneous and is a mistake in law and on that facts did not take account of those facts and additional that were referred to in the information supplied by*** (Employer's Company) ***Ltd.***

14. ***The exclusivity test cannot be satisfied if the appellant supplies services to other bands. This is a mistaken belief.***

15. ***There was no obligation on*** (Employer's Company) ***Ltd to provide services to the applicant and similarly there was no obligation on the applicant to provide services on*** (Employer's Company) ***Ltd behalf. There is no mutuality of obligation and integration.***

16. ***Holidays are a matter for*** (Employer's Company) ***Ltd and its staff and did not and do not apply to the applicant as he was free to decline the offer to provide services. The lack of bookings for a period is not defined as holidays and*** (Employer's Company) ***Ltd. would continued in business despite not having bookings.***

17. ***The applicant could take his holidays anytime and has not demonstrated any examples of when he was unable to take his holidays. In any event that is a matter for the applicant and*** (Employer's Company) ***Ltd denies that it was responsible for the applicant's alleged forbearance of his holidays.***

Upon receipt of the employer's 'Grounds for Appeal', the Chief Appeals Officer, under Article 10 if the Social Welfare (Appeals) Regulations 1988, wrote to the Scope Section, forwarded the 'Grounds for Appeal', and requested a statement from the Deciding Officer to show to what extent the facts and contentions advanced by the Appellant are accepted or rejected.

Also in his letter to the Scope Section, the Chief Appeals Officer, under Section 248 (1) of the Social Welfare Consolidation Act, 1993, asks the Deciding Officer if he wishes to revise his Decision in light of new facts or evidence. The Deciding Officer in the Scope Section DID NOT revise his decision in light of the 'Grounds for Appeal'.

On 2nd December 2001, Minister Heather Humphreys wrote to the Oireachtas Procedures Committee (Exhibit 17) and stated that some Appeals in the Social Welfare Appeals Office:

'May be determined based on a sample of cases'

On 25th April 2022, the Music Industry worker wrote to the Social Welfare Appeals Office and requested:

> *"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 (Exhibit 17), 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"*

On 28th April 2022, notification of an 'Oral Hearing' on 24th May 2002 issued by letter from the Social Welfare Appeals Office.. In the letter, the Music Industry worker is "requested to attend" by the Appeals Officer.

On 5th May 2022, the Music Industry Worker emailed the SWAO to say that he was still seeking details of sample cases and he noted that he was now 'requested' to attend the hearing.

On 16th May 2022, the Social Welfare Appeals Office replied to the Music Industry worker. In this reply (Exhibit 41) it states:

> ***'Query in relation to "test/sample cases***
>
> ***Your email refers to a letter of 2 December 2021 from the Minister for Social Protection to the Clerk to the Dail 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 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 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 on the particular facts of each appeal.

FACTS

i. The statement:

'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'

is a false statement. A 'Test Case' was created on 12th June 1995, by the Social Welfare Appeals Office, for the express purpose of making all couriers 'Not Employees'. This 'Test Case' was used to create a 'Special Tax Agreement' with courier employers to allow them to evade their statutory obligations. This 'Special Tax Agreement' operated from 6th April 1997 until 31st December 2018 and couriers are still classified as self-employed by group/class based on the 'Owner/Driver' model of self-employment, which was created, without a legislative basis, by the Revenue Commissioner and the Department of Social Welfare by using an unlawful Social Welfare Appeals Office 'Test Case'. Evidence of further test cases has been confirmed by Taoiseach Leo Varadkar, former Finance Minister Donohoe and Education Minister Foley. It was confirmed by the Ombudsman in 2002 that the Department of Social Welfare used a 'test case', created by the Social Welfare Appeals Office, and by the C&AG in 2002 that a 'Special Tax Agreement' was in use for the entire sector of courier employers. This 1995 'Test Case' is not a 'So-Called' test case. It is undeniably a test case.

ii. The statement:

'but to identify criteria for use when assessing each case on an individual basis'

is a false statement. The 'Criteria' referred to are 'Ownership & maintenance of a personal vehicle', 'Being paid in an A-typical way', & the 'Existence of a Contract'. None of these 'Criteria' are contained in the Code of Practice, but are specifically precluded by the Code of Practice, and have been repeatedly rejected as 'Indicators of Self-Employment' by the Higher Courts. These 'Criteria' are not used to assess each case on an individual basis. These 'Criteria' are used to label a group/class of employees as self-employed. Once a worker 'Fits' these unlawful criteria, they are excluded from having all other lawful precedents on 'Contract of Service' applied to the reality of their employment. The continued use of these unlawful 'criteria' deliberately excludes groups/classes of workers from having their cases heard on an individual basis according to the legal precedents and rulings hand down from the courts. These 'Criteria' are not legal 'Criteria', they are unlawful 'Criteria' created by civil servants

with no constitutional authority to create precedential 'Criteria'. Only the Oireachtas has the power to make law (criteria). The only function of the Social Welfare Appeals Office and the Department of Social Protection is to apply the legal precedents handed down by the courts, the SWAO has no authority to 'create' criteria.

iii. The statement:

> ***'these criteria then formed the basis for the Code of Practice' for the Determination of Employment or Self-Employment Status of individuals agreed with trade unions and employers'***

is a false statement. These 'Criteria' which are not 'Reflected in the Voluntary Code of Practice and have been roundly rejected by the Higher Courts as indicators of Self-Employment, did not form the basis for the Code of Practice. The Irish Congress of Trade Unions has vehemently denied any involvement whatsoever in the classifications of couriers as self-employed.

That the Trade Union movement had no involvement with the 1995 test case and the 1997 Special Tax Agreement is confirmed in a letter (Exhibit 37) dated November 1999 from Mr. Chris Hudson Organising Officer, Communication Workers Union to the Private Secretary of the Minister for Labour, Trade and Consumer Affairs Mr. Tom Kitt TD. In this letter to Minister Kitt, Mr. Hudson states:

> *'Dear Mr Hughes,*
>
> *Please could you convey to the Minister for Labour, Trade and Consumer Affairs, Mr. Tom Kitt T.D., 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'*
>
> *'Again, I would appreciate if you would reiterate my disappointment to the Minister as the intention of the meeting was to inform him of the concerns of Motorbike Couriers and to seek an explanation of the present situation as it is'*

Important Fact As is evidenced in Mr. Hudson's letter to Minister Kitt in 1999, the Department of Social Protection classified couriers as 'Not Employee' PAYE Class S PRSI classification was to prevent couriers qualifying for Social Welfare

'Payment'. It is also a fact that as bogus self-employed employees, unemployed couriers were not counted on the unemployment register.

iv. The Statement:

'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'

is a false statement.

a) ***'based on a sample of cases'***. The true factual position is that between 1993 and 9th January 2019, what are now referred to by the Minister as 'Sample Cases' were in fact and in evidence 'Test Cases'. Between January 2019 and April 2019, a decision was taken by the Department of Social Protection and the Social Welfare Appeals Office to discontinue the use of the term 'Test Case' and to substitute the term 'Sample Case'. They also decided to apply the term 'Sample Case' retrospectively to cases which were and are, 'Test Cases'. Minister Regina Doherty described the process formerly known as 'Test Cases', currently claimed to be 'Sample Cases', to the Irish Times on 25th March 2019:

'The Minister is also looking at legislation to permit deciding officers to make determinations on the employment status of groups or classes of workers who are engaged or 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'

Regardless of whether the Minister calls these precedential cases 'Sample' or 'Test' cases the true factual position is that these are 'class decisions' 'on the employment status of groups or classes of workers'. It is also the true factual position that no legislation exists to allow 'class decisions' that 'class decisions' are not 'reflected' in the 'Code of Practice', that 'Class Decisions' 'to make determinations on the employment status of groups or classes of workers' 'can be subject to separate individual appeals' but because of the unique criteria created for these 'Class Decisions', every separate individual appeal is doomed to failure once the unique criteria are applied. As no legislation exists to allow 'group or class decisions', no legislation exists to allow appeals of the 'class decisions' on the 'determinations on the employment status of groups or classes of workers'

FACT The Social Welfare Appeals Office creates 'Test Cases' involving groups and classes of workers engaged by the same employers, one employer or across an entire sector, determined based on 'Test Cases' which are applied to all workers in the Group or Class working for a group of employers an individual employer or by entire Sector. The Department accepts and encourages these 'Test Cases' and the Revenue Commissioners agree Special

Tax Agreements based on these 'Test Cases'. And all of this is not just outside of the law, class actions are strictly precluded in the Higher Courts and the precedents handed down from the Higher Courts in the area of Employment Status.

b) ***'and only where agreed by the individual'***. The true factual position is that one 'Individual', even several 'individuals' cannot agree to act outside of the law to label all workers present and future, as self-employed based on that one individual's individual circumstances. It is also the true factual position that neither the Department nor the Social Welfare Appeals Office can inveigle another person to act outside of the law. To do so is an offence under Social Welfare law. It is also the true factual position that the 1995 'Test Case' and subsequent 'Special Tax Agreement' for courier employers, had no input whatsoever from couriers. Couriers were given 2 choices, they could be 'Not Employees' under the PAYE system or 'Not Employees' under self-assessment. That workers do not 'Appeal' the unlawful 'Group/Class' decisions, which they have no idea exist, is taken by successive Ministers of Social Protection to imply 'Consent' on the part of workers. 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 and this is why Secretary General McKeon misled the Public Accounts Committee. The Department is liable for skipping of proper process & individual consideration via unlawful blanket decisions by the Social Welfare Appeals Office which must be set aside.

vi. The Statement:

'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'

is a false statement. The true factual position is that the MUSIC INDUSTRY worker asked specifically for the sample/test cases referred to by Minister Humphreys in her letter to the Dail Committee on Parliamentary Privileges and Oversight which states*:*

'some appeals involving a number of workers engaged by the same employers, may be determined based on a sample of cases'

The Music Industry worker did not ask if there had been sample/test cases during the tenure of the Current Chief Appeals Officer nor does the reply that there has been no approach of sample/test cases during the tenure of the current Chief Appeals Officer address that Minister Humphreys told the Dail Committee on Parliamentary Privileges and Oversight that there are Precedential 'Sample' cases containing unique criteria

which may impact on the MUSIC INDUSTRY worker. It is also a fact that because the MUSIC INDUSTRY worker has been reclassified pre-dating the tenure of the current Chief Appeals Officer that precedential sample/test cases from before 2015 are relevant to the MUSIC INDUSTRY worker.

It is also a fact that a TEST CASE approach has been taken by the Social Welfare Appeals Office during the tenure of the current Chief Appeals Officer. In 2016, an Appeals Officer stated that he was going to use 16 individual cases of bricklayers and labourers, which were under appeal by JJ Rhatigan, as ONE 'Test Case'. The workers were not asked if they agreed to be a 'Test Case', they were told they were going to be. On seeking expert advice, several of the construction workers wrote to the Social Welfare Appeals Office at the time and strongly protested against the decision of the Appeals Officer to use the 16 individual appeals of their Scope Section decisions, that they were employees, as ONE 'Test Case'. A section of the construction workers' letters state:

> *'Individual Cases*
>
> *There appears to be an attempt on the part of the Social Welfare Appeals Office to deal with all 14 decisions and appeals as one case with all to be heard and decided upon in one hearing. I strongly protest this approach, decisions are based on established facts, not assumptions and as such there is no basis for categorisations purely by occupation. Each case must be assessed on its own merits in accordance with the general precedents of Irish law. Operations which seem to be the same may differ in the actual terms and conditions in any given case.*
>
> *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 wideranging 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.*

That an Appeals Officer took the approach of 'Test Cases' (Not 'Sample Case') during the tenure of the current Chief Appeals Officer was confirmed by the current

Chief Appeals Officer herself in the Oireachtas SW Committee on 5th December 2019 under questioning by Senators Alice Mary Higgins & Gerard Nash:

> ***'Of the figures I just provided, one appeal had four people attached and another had three. I am aware of a case prior to 2018 to which 16 workers in a specific category were attached'***
>
> ***'I am only aware of one case where there were 16 workers with the same issue and they were unhappy'***
>
> ***'The case that the Senator referred to was a 2016 case involving 16 workers. When it is the exact same appeal contention across 20 or 30 people, it can be an efficient way of dealing with the issue'***

FACT As was confirmed by Ministers Doherty & Humphreys, insurability of employment 'class' decisions on group and class of workers, are being created by the Social Welfare Appeals Office and are being used by the Department of Social Protection. That this malpractice has been ongoing for 30 years has a material affect on all workers, particularly on those whose Scope Section Decisions have been appealed to the Social Welfare Appeals Office. The Music Industry worker was denied access to these precedential class decisions. That this 'Erroneous Information' was also sent to the Employer's legal representative. is a matter of great concern.

On 18th May 2022, the Music Industry worker emailed the SWAO repeating the request for details of the aforementioned sample/test cases. He also requested that the question should be referred to the Circuit Court in accordance with section 307(1) of the Social Welfare Consolidation Act 2005 on the basis that the existing procedures are inadequate for the effective processing of the appeal. The Music Industry worker pointed out that the appeals process is a quasi-judicial forum but that the process must adhere to the principles of fair procedure and natural justice.

On 23rd May 2022, the Music Industry worker advised that he would not be in attendance at the oral hearing given the circumstances outlined in his correspondence of 18th May.

On 24th May 2002, an 'Oral Hearing' in the Social Welfare Appeals Office commenced.

Facts about 'Oral Hearings':

1. While appellants can request an oral hearing, there is no absolute right to an oral hearing and a request for an oral hearing will not be necessarily granted in all cases.
2. The decision whether to allow an oral hearing is at the sole discretion of the appeals officer. The Appeals Office does not have written procedures for appeals officers outlining when an oral hearing should be held.

3. Where the Appeals Officer is of the opinion that the appeal can be determined on the basis of the documentary evidence and without the need for an oral hearing she or he may determine the appeal summarily (Article 13).

4. In practice, in forming an opinion as to whether an appeal can properly be determined without an oral hearing an Appeals Officer will have regard to:

   the overall nature of the appeal and the question to be determined,

   any request that has been made for an oral hearing,

   whether there are unresolved conflicts in the documentary evidence presented by the parties as to any matter essential to the determination of the appeal,

   whether there are any disputes as to the facts or differing professional opinions.

   This is not an exhaustive list and as Appeals Officer may determine an appeal on a summary basis it is important that all the documentary evidence and grounds relied on are submitted with the notice of appeal.

5. Where the Appeals Officer considers that an oral hearing is required to determine the question at issue, she or he will arrange for an oral hearing of the appeal (Article 14).

6. The Appeals Office has stated that, in practice, an oral hearing is held in situations where there is a conflict of evidence or a judgement to be made, or where there are multiple parties involved (e.g. insurability of employment).

7. The question before the Appeals Officer for determination is the same question as was before the Deciding Officer/Designated Person who made the initial decision. The Appeals Officer is not confined to the grounds on which the initial decision was based and she or he may consider the question as if it were being determined for the first time (Section 311).

8. Appeals officers consider cases on a de novo basis rather than determining whether a deciding officer's decision is or is not correct.

9. The Appeals Officer will begin the hearing by introducing him/herself and all other persons present. She or he will also indicate if there are other persons whom it is intended to call to give evidence in the course of the hearing. The Appeals Officer will then outline the Deciding Officer's decision against which the appeal is being made, the grounds of the appeal and the Department's response to these grounds. Evidence will be taken from any witnesses.

10. At the hearing the appellant is afforded every opportunity to set out his or her case and to question any evidence offered by witnesses. Alternatively, his or her representative, should she or he have one, may do this on his or her behalf.

11. Following his or her consideration of the appeal, including evidence adduced at the oral hearing, the Appeals Officer will normally be in a position to make a decision within 2/3 weeks of the hearing.

That Appeals are heard on a 'de-novo' basis was confirmed on 24th May 2022 by Minister Humphreys in reply to a PQ from Deputy Gannon. In this reply, Minister Humphreys states:

> ***"The time taken to process an appeal reflects a number of factors including that the appeals process is a quasi-judicial process with Appeals Officers being required to decide all appeals on a 'de-novo' basis***"

An account of what transpired at this 'Oral Hearing' is contained in paragraph 5 of Exhibit 43, which states:

> ***'The Oral hearing opened on 24 May 2022.*** (Name of Company)***, the appellant company, was represented by*** (Barrister), (Company Director), (Company Director Employer) ***and*** (One Other)***, The worker and notice party,*** (Music Industry worker)***, did not attend as advised. The communication from*** (Music Industry worker) ***was revealed to the appellant company and after understandable deliberation***, (Employer Company) ***concluded that the request for a referral under section 307(1) of the Social Welfare Consolidation Act 2005 would have to be answered by the Chief Appeals Officer and the hearing adjourned.***

Further evidence contained in Exhibit 43, states that representatives of the Minister, the 'Respondent' to the 'Appellant', were not invited to the 'Oral Hearing' on 24th May 2022, as follows:

> ***"The hearing was told that the*** (Department of Social Protection) ***officials had not been requested to attend"***

In the case of an appeal against the decision of a Deciding Officer/Designated Person, the Chief Appeals Officer is obliged to notify the Minister of the appeal. Under Article 15 of the Social Welfare Consolidation Act, it is the Appeals Officer who decides who should be heard and who should attend an Oral Hearing.

FACTS

- On 24th May 2022, a private meeting took place between the Appeals Officer and the Employer Appellant.
- The 'Notice Party' had been requested to attend by the Appeals Officer but had declined to attend following the failure of the Social Welfare Appeals Office to comply with his request for details of 'Sample/Test' Cases.
- The 'Respondent' to the Appeal is the Minister for Social Protection. Neither the Minister nor representatives of the Minister, were requested to attend at this meeting by the Appeals Officer.

- At this meeting, the only matters discussed were two requests from the 'Notice Party' (The Music Industry worker). The two requests were:

    1. **"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 (Exhibit 17), 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"**

    2. **Upon failure to comply with the Notice Party's request for Sample/Test Cases, a further request from the Notice Party that the Appeal should be referred to the Circuit Court in accordance with section 307(1) of the Social Welfare Consolidation Act 2005 on the basis that the existing procedures are inadequate for the effective processing of the appeal.**

- That 'Sample/Test' Cases exist was stated on 2nd December 2021 by Minister Humphreys in her letter (Exhibit 17) to the Dail Committee on Parliamentary Privileges and Oversight. It was this statement by the Minister which gave rise to the Notice Party's request. In her letter to the Committee, Minister Humphreys states:

    'some appeals involving a number of workers engaged by the same employers, may be determined based on a sample of cases'

- That 'Sample/Test' Cases exist was confirmed by the Social Welfare Appeals Office on:

    9th of January 2019 (Exhibit 8) 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'

    5th of April 2019, the Social Welfare Appeals Office wrote:

    "On a very few occasions over the years the approach of having sample cases has been taken by the Appeals Office'

    5th December 2019, at the Oireachtas Social Welfare Committee, the Chief Appeals Officer stated:

    'I have occasionally, and usually where a number of workers engaged by the same employer are concerned and have individually submitted an appeal, been asked to make decisions on a sample number of cases'

- That ‘Sample Cases’ and ‘Test Cases’ are not two distinct issues was confirmed on 5th December 2019 at the Oireachtas Social Welfare Committee by Mr. Tim Duggan, Assistant Secretary in charge of Pensions, PRSI & International Polices with the Department of Social Protection. Mr. Duggan stated:

  > ***“We do not use that phrase*** (Test Case) ***anymore. Essentially these were sample cases at the time”***

- That the Social Welfare Appeals Office creates ‘Test Cases’ and that the Department of Social Protection accepts and uses these ‘Test Cases’ for the purpose of the wholesale classification of workers in the Courier Employer sector, namely, saying that all Couriers are self-employed because one courier is, was accepted and conceded by the Social Welfare Appeals Office, the Department of Social Welfare and the Minister for Social Welfare in February 2002 and this FACT is contained in an official Report from the Ombudsman dated February 2002.

- That ‘Sample Cases’ and ‘Test Cases’ are not two distinct issues, and further that no legislation exits to allow the use of ‘Test/Sample’ cases, was confirmed by Minister Regina Doherty on 25th March 2019 and was published in the Irish Times. The Minister stated that ***‘Deciding Officers’*** of the Department of Social Protection were making ‘***Class Decisions***’ ***‘on the employment status of groups or classes of workers***’ and that no legislation exists to allow such ***‘Class Decisions’***.

- The ‘Issue’ in contention at this private meeting between the Appeals Officer and the Appellant Employer on 24th May 2022, was the response of the Social Welfare Appeals Office to the Notice Party’s request for ‘Sample/Test’ Cases, which was:

  > ***‘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’***

  and whether that ‘response’ from the Social Welfare Appeals Office justified the Notice Party’s subsequent request to the Social Welfare Appeals Office that the Appeal should be referred to the Circuit Court in accordance with section 307(1) of the Social Welfare Consolidation Act 2005 following the failure of the Social Welfare Appeals Office to comply with the Notice Party’s request for ‘Sample/Test Cases’.

- At this meeting, the Employer Company concluded that the Notice Party’s request for a referral to the Circuit Court under section 307(1) of the Social Welfare Consolidation Act 2005 would have to be answered by the Chief Appeals Officer.

- The meeting adjourned.

- The Music Industry worker did not ask if there had been sample/test cases during the tenure of the Current Chief Appeals Officer nor does the reply that there has been no approach of sample/test cases during the tenure of the current Chief Appeals Officer address that Minister Humphreys told the Dail Committee on Parliamentary Privileges and Oversight that there are Precedential 'Sample' cases. It is also a fact that because the Music Industry worker had been misclassified pre-dating the tenure of the current Chief Appeals Officer that precedential sample/test cases from before 2015 are relevant to the Music Industry worker.

- A TEST CASE approach has been taken by the Social Welfare Appeals Office during the tenure of the current Chief Appeals Officer. In 2016, an Appeals Officer stated that he was going to use 16 individual cases of bricklayers and labourers, which were under appeal by JJ Rhatigan, as ONE 'Test Case'. That this approach of test cases in 2016 occurred was confirmed by the Chief Appeals Officer to the Joint Oireachtas SW Committee on 5th December 2019.

- The Social Protection Minister is the 'Respondent', nobody was at this meeting representing the 'Respondent'. Only the employer and the Appeals Officer were present. It was Minister Humphreys who stated that 'Sample Cases' are used. As the 'Respondent' to the 'Appellant Employer', it is inconceivable that the Minister or her representatives were not asked to appear at this private meeting which was convened because the Minister's statement was directly contradicted by the Social Welfare Appeals Office.

- As the 'Respondent' was not present at this private meeting, the purpose for 'requesting' that the Notice Party attend remains unclear. The Notice Party could not 'Clarify' the refusal of the Appeals Office to comply with the request of the Notice Party for the 'Sample Cases' confirmed to exist by Minister Humphreys.

- As the 'Respondent' was not present at this private meeting, the purpose for 'requesting' the Employer Appellant to attend remains unclear. The Employer Appellant could not 'Clarify' the refusal of the Appeals Office to comply with the Notice Party's request for the 'Sample Cases' confirmed to exist by Minister Humphreys.

- In Exhibit 35, it further states:

  "The hearing was told that the (Department of Social Protection) ***officials had not been requested to attend … as the then prevailing departmental policy had been not to attend hearings, but that policy had recently changed"***

  FACTS

i. Between 1995 and 2019, it was demonstrably the policy of the Department of Social Protection for Scope Section Deciding Officers and Social Welfare Inspectors to attend at 'Oral Hearings' of Social Welfare Appeals Office Appeals of the decisions and investigations they were involved in as representatives of the 'Respondent', the Minister for Social Protection.

ii. The Minister for Social Protection is the 'Respondent'. It is inconceivable that after 2019, the 'Policy' of the 'Respondent' to an appeal was not to attend at an appeal.

iii. The Minister for Social Protection, as the 'Respondent', was not asked by the Social Welfare Appeals Office to attend at this 'Oral Hearing'. At no time has the Minister confirmed that it was Department policy for the Minister, as respondent, not to be represented at appeals between 2019 and 2022.

- It was not 'appropriate' that this private meeting took place. It was not appropriate to seek the Employer Appellant's opinion on an issue that could only be addressed by the Minister or her representatives and the Chief Appeals Officer.

- The absence of the Minister or her representatives as the 'Respondent' at this meeting, confirms that this was not actually an 'Oral Hearing', it was a private meeting between the Appeals Officer and the Appellant Employer. Without the presence of the 'Respondent', nothing at this meeting is relevant to the Appeal of the Deciding Officer's decision.

On an unknown date after 24th May 2022, a decision by the Chief Appeals Officer is recorded in Exhibit 43 as follows:

> ***'The Chief Appeals Officer did not consider that it was appropriate to refer the case to the Circuit Court under the provisions of 307 of the act'***

On 14th July 2022, the SWAO wrote to Music Industry worker and (Employer) Ltd outlining the timeline of the appeal process thus far. In that correspondence the SWAO incorrectly quoted the correspondence from the 16 May 2022 which has been clarified above. The SWAO also agreed with the Music Industry worker's 18th May 2022 assertion that the "appeals process is a quasi-judicial forum" and goes as far as to say that Music Industry worker *"rightly pointed out"* that fact.

On 19th October 2022, an email was sent from the Social Welfare Appeals Office to the Music Industry worker. In this email it states:

> ***'I acknowledge*** (The Music Industry worker'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 (The Music Industry worker's) ***employment status'***

FACTS

i. The 1995 Social Welfare Appeals Office's annual report contains a synopsis of a motorcycle, bicycle, and van couriers 'Test Case' at pages 24&25. That it is a 'Test Case' and the Social Welfare Appeals Office created 'Test Case' and that the Department of Social Protection accepts and uses this 'Test Case' for the purpose of the wholesale classification of workers in the Courier Employer sector, namely, saying that all Couriers are self-employed because one courier is, was accepted and conceded by the Social Welfare Appeals Office, the Department of Social Welfare and the Minister for Social Welfare in February 2002 and this FACT is contained in an official Report from the Ombudsman dated February 2002.

ii. The Appeals Officer's statement that the Appeals Officer in the 1995 'Courier' 'Test Case' found critical features of self-employment for couriers to be deemed as self-employed are:

- the absence of control
- substitution
- freedom to refuse a job
- flexibility of the hours of availability'

is a FALSE STATEMENT. The critical features of self-employment for couriers to be deemed as self-employed, by group and class, found the by the Appeals Officer in the 1995 'Courier' 'Test Case' are:

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

iii. The Appeals Officer's statement:

'***While these are still relevant considerations***'

Is a FALSE STATEMENT. The considerations:

- the absence of control
- substitution
- freedom to refuse a job
- flexibility of the hours of availability'

ARE NOT the considerations which determine the employment status of all couriers by group and class. As was confirmed by the Ombudsman in 2002 and again by the Revenue Chairperson in 2021 to the Public Accounts Committee, all couriers are labelled as self-employed by group and class based on the considerations:

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

No other considerations apply for couriers. The Revenue Chairperson, the Social Protection Minister, the Chief Appeals Officer and the Secretary General of the Department have all stated that they believe the 'Criteria/Considerations' from the 1995 'Test Case' are reflected in the 'Code of Practice'. The 1995 'Test Case' 'Criteria/Considerations' are not reflected in the 'Code of Practice' but it is significant that the Revenue Chairperson, the Social Protection Minister, the Chief Appeals Officer and the Secretary General of the Department believe that they are and that one must look 'FIRST' to the 'Code of Practice', a point the Revenue Chairperson has been adamant on. Because the Revenue Chairperson, the Social Protection Minister, the Chief Appeals Officer and the Secretary General of the Department insist on looking to the 'Code of Practice' before considering the Case Law and precedents handed down by the Courts, their only 'Criteria/Considerations' are:

- Do you own your own vehicle?
- Are you paid in an A-typical way?

These two 'Criteria/Considerations' are used to prevent individual couriers from successfully challenging their employment status in the Social Welfare Appeals Office. Couriers are not informed that they are self-employed by group and class because of a 1995 'Test Case'. Couriers have not been asked if they 'Agree' to a Special Arrangement between the Department of Social Protection, the Revenue Commissioners and Courier Employers to label them as 'Self-employed' by group and class for which no legislation exists.

Couriers are unaware that in the Social Welfare Appeals Office, once it has been established that the courier owns his/her own vehicle and is paid in an A-typical way, the courier is automatically deemed to be self-employed.

Couriers are unaware that everything after that point in a Social Welfare Appeals Office appeal hearing is theatre and will not in any way impact on the pre-determined group/class decision that they will be found to be self-employed.

iv. The Appeals Officer's statement:

> ***'a previous appeals officer's decision is not binding or precedent setting'***

is a FALSE STATEMENT. The 1995 'Test Case' is both 'Binding' and 'Precedent Setting'. That is the very purpose of a 'Test Case'.

v. The Appeals Officer's statement that pervious 'Sample/Test' cases have:

> ***'no relevance to this appeal relating to*** (The Music Industry worker's) ***employment status'***

is a FALSE STATEMENT.

- **The FACT, that since at least 1993, the Department of Social Welfare and the Social Welfare Appeals Office have been creating and using 'Class Decisions' 'on the employment status of groups or classes of workers' and that no legislation exists to allow such 'Class Decisions', most definitely has relevance to the Music Industry worker who is labelled as self-employed by group and class.**
- **The Fact, that from 1993 – 9th January 2019, the Department, Ministers and the Social Welfare Appeals Office accepted and conceded to the use of 'Test Cases' but that since 9th January 2019, the Department, Ministers and the Social Welfare Appeals Officer have been denying the use of 'Test Cases', most definitely has relevance to the Music Industry worker who is labelled as self-employed by group and class.**
- **It is not the position of the Appeals Officer to decide that previous 'Test Cases', for which no legislation exists, have no relevance to the Music Industry worker. 'Relevance' can only be determined upon examination of the previous 'Test Cases' by the Music Industry worker and the Appellant Employer who have every right to sight of previous 'Test Cases' in order to make or defend their position.**

On 1st November 2022, the 'Private Meeting/Oral Hearing' RESUMED. The Music Industry worker was not present due to the continuing refusal of the Social Welfare Appeals Office to

comply with his request for sight of previous 'Test Cases' and the failure of the Chief Appeals Officer to refer the appeal to the Circuit Court. The Appellant Employer Company was represented by the same people as it was on 24th May 2022.

The Scope Section Deciding Officer and the Social Welfare Inspector who investigated the case were invited by the Appeals Officer on this occasion. The Appeals Officer has stated that it was not the policy for the 'Respondent', the Minister for Social Protection, to be represented at 'Oral Appeals' between the period of 2019 and 2022 and that his invite to the 'Respondent' was as a result of a policy change at some time in 2022.

At no time has the Minister confirmed that it was Department policy for the Minister, as respondent, not to be represented at appeals between 2019 and 2022. At no time has the Minister confirmed that policy changed in 2019 and then changed back again in 2022. It would be a serious matter of concern if the 'Respondent' has not responded to appeals between 2019 and 2022.

Consequences of SIPO's Failures

For Workers:

For workers in the Courier industry:

The Final Report of the Joint Oireachtas Committee on Family Affairs and Social Protection investigating Bogus Self-Employment was released in June 2021. In '**Recommendation 1**' (Exhibit 9), it states:

> *'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 and are still affecting workers that were included in them.*
>
> *The Committee is of the opinion that the Department should take action to resolve the issue of past legal decisions informing subsequent Scope determinations and the impacts they continue to have'*

The inexplicable failure of SIPO to follow its own guidelines, and to accept Exhibit 11 as 'Clarification' of the Chief Appeals Officer's erroneous denials of 'Test Cases' to the Joint Oireachtas Committee on Family Affairs and Social Protection investigating Bogus Self-Employment, has resulted in the Committee Report containing 'Erroneous Information'.

It is an undeniable fact, that despite SWAO, Ministerial and Departmental denials of the 1995 'Test Case' since April 2019, a Precedential Class Decision on a Group/Class of workers was created in 1995 to label those workers 'Not Employees' yet treat them as 'Employees' under

the PAYE system in order for employers to deduct tax and employees PRSI at source from the workers and for employers to evade employer's PRSI.

It is an undeniable fact, that the precedent of 'Owner/Driver' which was created as a result of the 1995 'Test Cases', continues to result in couriers being misclassified by group and class as 'Not Employees'.

It is an undeniable fact, that for 30 years, the SWAO and the Department have taken it upon themselves to grant themselves the power to 'create' tailored employment law specially to aid and abet selected employers and sectors evade employers PRSI. The courts are clear in High Court case John Grace Fried Chicken and Others v Catering Joint Labour Committee and Others (07 July 2011) (which gave rise to the destruction of the then joint labour committee system), that there is one lawmaking body in the Republic, namely, the Houses of the Oireachtas.

It is an undeniable fact, that for 30 years. SWAO and the Department have been engaged in the MALPRACTICE of granting themselves the power to 'create' tailored employment law specially to aid and abet selected employers and sectors evade employers PRSI.

It is an undeniable fact, which is confirmed by the Joint Oireachtas Committee on Family Affairs and Social Protection investigating Bogus Self-Employment, that the action to resolve the issue of 30 years of MALPRACTICE informing subsequent Insurability of Employment determinations and the impacts they continue to have lie exclusively with the Department and the Minister.

It is an undeniable fact, that during a debate on Wednesday, 19th December 2018, the Minister for Employment Affairs and Social Protection made the following comments:

> ***"The one thing I can safely say is that we are all in agreement regarding the fact that there are people in this country who are made bogusly self-employed through no fault or acquiescence on their part"***

It is an undeniable fact, that SIPO's failure to act on its finding of fact that the Chief Appeals Officer gave 'Erroneous Information' to the Joint Oireachtas Committee on Family Affairs and Social Protection investigating Bogus Self-Employment, is denying courier industry workers their right to hold the Department and the Minster liable for 30 years of malpractice.

For RTE workers:

30 years of MALPRACTICE, by the Department, successive Ministers, and successive Independent Chief Appeals Officers of the Social Welfare Appeals Office, for which the Department, successive Ministers and successive Independent Chief Appeals Officers are entirely responsible, has a significant impact on who is liable for the losses suffered by RTE workers for their misclassifications as 'Self-Employed'. It is an undeniable fact, that during a debate on Wednesday, 19th December 2018, the Minister for Employment Affairs and Social Protection accepted that are people in this country who are made bogusly self-employed through no fault or acquiescence on their part. SIPO's failure to act on its finding of fact that the Chief Appeals Officer gave 'Erroneous Information' to the Joint Oireachtas Committee

on Family Affairs and Social Protection investigating Bogus Self-Employment, is denying RTE workers their right to hold the Department and the Minster liable for 30 years of malpractice.

Actors in RTE have been misclassified as self-employed, in some cases up to 30 years. Many of these actors paid 'A' class PRSI (Employee) through the PAYE system, RTE paid employer's PRSI through Revenue's PAYE system, yet the Department of Social Protection, the Revenue Commissioners and RTE labelled them as 'Self-Employed'. This is prima facia evidence of a specific agreement between RTE, the Dept. of Social Protection and Revenue to misclassify, what are in fact and in law 'Employees' as 'Self-Employed' This is a very serious matter for all workers in RTE and beyond.

For workers in the Construction, Forestry and Meat sectors:

30 years of MALPRACTICE, by the Department, successive Ministers, and successive Independent Chief Appeals Officers of the Social Welfare Appeals Office, for which the Department, successive Ministers and successive Independent Chief Appeals Officers are entirely responsible, has a significant impact on who is liable for the losses suffered by workers in the Construction, Forestry and Meat sectors for their misclassifications as 'Self-Employed' by virtue of Employers being allowed to deduct tax and employee PRSI through the PAYE system, permits the employer to label groups and classes of employees as 'Not Employees' in order to evade employer's PRSI. It is an undeniable fact, that during a debate on Wednesday, 19th December 2018, the Minister for Employment Affairs and Social Protection accepted that are people in this country who are made bogusly self-employed through no fault or acquiescence on their part. SIPO's failure to act on its finding of fact that the Chief Appeals Officer gave 'Erroneous Information' to Joint Oireachtas Committee on Family Affairs and Social Protection investigating Bogus Self-Employment. is denying Construction, Forestry and Meat sectors workers their right to hold the Department and the Minster liable for 30 years of malpractice.

For workers in the Home Tutor sector:

30 years of MALPRACTICE, by the Department, successive Ministers, and successive Independent Chief Appeals Officers of the Social Welfare Appeals Office, for which the Department, successive Ministers and successive Independent Chief Appeals Officers are entirely responsible, has a significant impact on who is liable for the losses suffered by workers in the Home Tutor sector who are all classified as self-employed based on an unlawful precedential 'Test (sample) Case' which was created by the SWAO in its overturning of a Scope Section decision that an individual Home Tutor was an employee. This 'Test (sample) Case', was unlawfully accepted by the Social Protection Minister as a precedential 'Test (sample) Case' for the purpose of the wholesale classification of workers in the Home Tutor sector as 'Self-Employed' because one tutor was found to be in a Social Welfare Appeals Office appeal of a Scope Section decision that one 'individual' Home Tutor was an employee.

SIPO's failure to act on its finding of fact that the Chief Appeals Officer gave 'Erroneous Information' to Joint Oireachtas Committee on Family Affairs and Social Protection

investigating Bogus Self-Employment. is denying workers in the Home Tutor sector their right to hold the Department and the Minster liable for 30 years of malpractice.

For workers in the Music Industry

On 20th January 2023, an appeal decision (Exhibit 43) issued from the Social Welfare Appeals Office in the Appeal against the Scope Section Deciding Officer's decision that the Music Industry Worker was an employee. The Social Welfare Appeals Office Appeals Officer overturned the decision of the Scope Section Deciding Officer. In the Appeal decision of the Social Welfare Appeals Office, it states:

> ***'I attempted to assuage the*** (Music Industry worker's) ***concerns but was unable to provide him with the test cases he is seeking. While test cases may have been used in the past, they have been used in very limited and specific circumstances and are certainly not relied upon as precedents'***

FACTS

- 3 years and 46 days after the Chief Appeals Officer told the Joint Oireachtas Committee on Family Affairs and Social Protection Committee that:

  > ***'our office does not use test cases'***

  the Appeals Officer in Exhibit 43 admits:

  > ***'While test cases may have been used in the past'***

- 'Test Cases' were not only used in the past, 'Test Cases', the precedents arising from them and the overriding precedent that the Social Welfare Appeals Office and the Department of Social Protection can make group/class insurability of employment 'class' decisions on workers, without legislation to do so, are still being created and used presently.

- ***'they*** (Test Cases) ***have been used in very limited and specific circumstances'*** is a false statement. The evidence shows that 'Test Cases' and the precedents they create, are used across a wide variety of employment situations, by sector, by employer and by groups of employers.

- ***'are certainly not relied upon as precedents'*** is a false statement. The 1995 'Test Case' created precedents in the form of 'Criteria', created an entire self-employed class of worker known as 'Owner/Driver' and is used as a precedent by the Social Welfare Appeals Office and the Department of Social Protection to allow them to continue to misclassify group/classes of workers as self-employed in other sectors such as construction.

- ***'was unable to provide him with the test cases he is seeking'*** is a false statement. On 19th October 2022, the Appeals Officer clearly identified that:

'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 this 'case' was a 'Test Case' was accepted and conceded by the Minister and the Department in 2002 and that FACT is recorded in the Ombudsman's report of February 2002. The Appeals Officer WAS ABLE to provide this 'Test Case' to the Music Industry worker but chose not to.

The Appeals Officer could have supplied the Music Industry worker with the 'Test Cases' which gave rise to:

- Actors in RTE being labelled as 'self-employed' by Social Protection, Revenue and RTE, despite tax and employee's PRSI and RTE employer's PRSI being deducted, at source from RTE, through the PAYE system.
- 'Employees' in the Construction Sector being labelled as self-employed through the use of the eRCT system and despite the Social Welfare Appeals Office confirming in 2017 that Construction workers were misclassified as self-employed by use of eRCT, no action has been taken to prevent this misclassification.
- Up to 600 workers in RTE being misclassified by group and class.
- Mental Health Cllrs being misclassified as self-employed by group and class.
- Music Industry workers being misclassified as self-employed by group and class.

The Appeals Officer could have supplied the Music Industry worker with every copy of the SWAO Annual Report since 1993 as the SWAO Annual report contains 'Test Cases' which are not identified in the SWAO Annual Report as 'Test Cases', but, according to the Ombudsman in 2002, any or all of these 'case studies' in the SWAO Annual Report can be 'Test Cases' if the Department of Social Protection so decides.

This is not an exhaustive list of where the Appeals Officer could have provided the Music Industry worker with 'Test Cases'. The motorcycle courier appeal in 2000 was used as a precedent in the 2001 bicycle Scope Decision, which in turn is the precedent used today for workers who deliver post, parcels, pizzas etc. by bicycle.

- ***'I attempted to assuage the*** (Music Industry worker's) ***concerns'*** is a false statement. Although within in his power to do so, the Appeals Officer DID NOT attempt to assuage the Music Industry worker's concern about the existence and use of test cases.

FACTS

1. The Appeals Officer refused to comply with the Music Industry worker's request for 'Test/Sample' cases on 25th April 2022.
2. The Appeals Officer refused to comply with the Music Industry worker's request for 'Test/Sample' cases on 5th May 2022.
3. The Appeals Officer refused to comply with the Music Industry worker's request for 'Test/Sample' cases on 16th May 2022.
4. The Appeals Officer refused to comply with the Music Industry worker's request for 'Test/Sample' cases on 18th May 2022.
5. On 24th May 2002, the Appeals Officer had a private meeting with the Employer Appellant and did 'assuage' any concerns the employer appellant had in regard to the issue of 'Test Cases' raised by the Music Industry worker.
6. It is untrue to say that the Appeals Officer was 'Unable' to supply test cases to the Music Industry worker, the true factual position is that the Appeals Officer was unwilling to admit to the use of Test Cases and therefor was unwilling to supply test cases to the Music Industry worker.
7. AT ALL TIMES, the Music Industry worker was fully entitled to sight of all previous test cases. That the Appeals Officer refused to supply or even admit to the use of 'Test Cases' guaranteed that the Music Industry worker could not get a fair Appeal Hearing in or from the Social Welfare Appeals Office.
8. AT ALL TIMES, it was essential for the Music Industry worker to have sight of test cases in order for the Music Industry worker to have access to the same 'Test Cases' and 'Precedents' used by the Social Welfare Appeals Office and the Department.
9. AT ALL TIMES, the Appeals Officer and the Social Welfare Appeals Office engaged with unacceptable bias against the Music Industry worker and bias for the Appellant Employer.

In the appeal decision (Exhibit 43) which issued from the Social Welfare Appeals Office on 20th January 2023, it further states:

> ***'In the absence of the notice party worker, and in fairness to him, I did not conduct the hearing on a de novo basis'***

The statement ***'In the absence of the notice party worker, and in fairness to him'*** is a false statement.

- The Notice Party was absent due to the unfair decisions of the Appeals Officer not to comply with the Notice Party's requests for 'Test Cases'.

- That an Oral Hearing proceeded without 'Test Cases' being supplied was unfair in the extreme to the Notice Party.
- Than an Oral Hearing proceeded without the acknowledgement of the use of 'Test Cases' by the Social Welfare Appeals Office was unfair in the extreme to the Notice Party.
- It was not the ***'Fairness'*** of the Appeals Officer which forced the Appeals Officer not to hear the appeal 'De-Novo', it was the refusal of the Notice Party to attend. An Appeals Officer may, by giving notice in writing, require a person to attend an oral hearing and to produce any relevant documents. A person failing to comply with such a notice is guilty of an offence and, on summary conviction, may be fined up to €1,500 (Section 314). This provision has been availed of to require witnesses to attend to give evidence on the question being determined. This happened with courier 'Notice Party' in 2000 and with the 16 Construction worker 'Notice Parties' in 2016.

  It was given in evidence to both the Public Accounts Committee and the Social Protection Committee that worker 'Notice Parties' were being forced to attend at Social Welfare Appeals Office appeals, under threat of fine, with no legal representation, where the Social Welfare Appeals Office then used secret 'Test Cases' to overturn Scope Section decisions. In the case of the Music Industry worker, the fact that the worker was a 'high profile' case prevented the Appeals Officer from enforcing the unfair provisions of Section 314 and that is which forced the Appeals Officer to hear the case 'De Novo'.

  The Appeals Officer simply could not accept any new evidence in an 'Oral Hearing' from the Employer Appellant without the 'Notice Party' present to answer to any new evidence adduced.

In the appeal decision (Exhibit 43) which issued from the Social Welfare Appeals Office on 20th January 2023, the Appeals Officer further states:

'***I did not conduct the hearing on a de novo basis'***

FACTS

- In all of the cases referred to in this evidence, the appeal of the Music Industry worker's Scope Section decision that he was an employee, is the only Social Welfare Appeals Office which was NOT HEARD 'De Novo'.
- As a 'Not De-Novo' appeal hearing, the Appeals Officer is confined to the grounds on which the decision of the deciding officer was based and cannot accept any further evidence, in particular, any evidence adduced at the 'Oral Hearing'. What that means is that it's Scope Section v Social Welfare Appeals Office. No new evidence, all that exists is the Scope Section decision and the written 'Grounds for Appeal' given by the Employer Appellant.

- Both the Scope Section Deciding Officer and the Social Welfare Appeals Office have looked at the same evidence and the exact same grounds for appeal. The Scope Section did not review its decision in light of the Grounds for Appeal. The Social Welfare Appeals Office, looking at the exact same evidence and exact same grounds for appeal, decided to overturn the Scope Section Deciding Officer's decision.

- Both the Scope Section and the Social Welfare Appeals Office are offices of the Department of Social Protection, manned by Social Protection employees who serve at the pleasure of the Minister and can serve elsewhere in the Department at the discretion of the Minister.

- The only question is could the Appeal's Officer reasonably overturn the Scope Section Deciding Officer's decision with no new evidence and confined to the grounds on which the decision of the deciding officer was based.

- Clearly, two offices of the Department of Social Protection are making different determinations based on the exact same evidence. Only one of them can be correct.

- As this appeal decision was not de novo, and is a dispute between two offices of the Department of Social Protection on the applicable legislation, neither of which is a legal authority, it is now incumbent on the Minister to seek a judicial review in order to rectify what she herself calls a matter of:

'***Public importance, public interest and significant public concern'***

It is unfair in the extreme that the Music Industry worker should be forced to the High Court to 'settle' a dispute between two offices of the Department of Social Protection on the correct application of the statutory provisions in Social Welfare legislation as well as the legal principles set down in relevant caselaw, when both offices are in dispute over the exact same evidence because the case was not heard de novo and both offices claim to be applying the same statutory provisions in the Social Welfare legislation as well as the same legal principles set down in relevant case law. This time, because the appeal decision is not de-novo, the obligation to seek a judicial review lies squarely with the Minister.

30 years of MALPRACTICE, by the Department, successive Ministers, and successive Independent Chief Appeals Officers of the Social Welfare Appeals Office, for which the Department, successive Ministers and successive Independent Chief Appeals Officers are entirely responsible, has a significant impact on who is liable for the losses suffered by workers in the Music Industry Sector.

For all workers:

30 years of MALPRACTICE, by the Department, successive Ministers, and successive Independent Chief Appeals Officers of the Social Welfare Appeals Office, has resulted in significant losses to the exchequer. At the Joint Committee on Employment Affairs and Social Protection debate on 31st January 2019, just 22 days after the Social Welfare Appeals

Office admitted to the use of, and approach of, 'Test Cases' (Exhibit 8), the General Secretary of the Irish Congress of Trade Unions, gave the following evidence of the significant losses to the Exchequer:

> *'Over the past year, two significant reports have been issued which have sought to identify the extent of the problem. In January 2018, the Department of Employment Affairs and Social Protection and the Department of Finance published a joint report entitled The Use of Intermediary-Type Structures and Self- Employed Arrangements: Implications for Social Insurance and Tax Revenues. The Revenue Commissioners were also involved in the preparation of the report. This report showed that in the period between 2007 and 2017, there was an increase in the level of self-employment in seven of the 14 major sectors of the economy which make up the CSO NACE series. The report also highlighted the very high rate of self-employment in the construction sector when compared with other sectors. The report also examined the potential loss to the Exchequer arising from the misclassification of workers as being self-employed. The following is a direct quote from the report:*
>
> > *"**Although illustrative, the data does indicate the potential loss to the exchequer for a person engaged in work at a rate equivalent to the average industrial wage (€37,500) amounts to €5000 per annum. This rises to €8000 per annum at a payment level of €60,000 and €15,000 per annum at a payment level of €100,000 per annum.***
>
> *The annual report of the Comptroller and Auditor General published in September 2018 also examined the issue of self-employment, with a specific emphasis on PRSI contributions by the self-employed. As part of the report, the work of the special investigations unit of the Department of Employment Affairs and Social Protection and the joint investigations unit, JIU, is highlighted. The report notes that, in 2017, the JIU initiated a campaign specifically focused on the construction sector. As a result of this activity, €60.2 million was recovered by the Revenue Commissioners and nearly 500 subcontractors reclassified as employees. The Comptroller and Auditor General concluded that because there is no employer PRSI contribution for workers who are classified as self-employed, this creates an economic incentive for certain individuals to be improperly treated as self-employed. The report went on to make a number of recommendations, including an increase in the level of compliance activity'*
>
> *'The issue of bogus self-employment was recently discussed in the Oireachtas as part of the debate on the Employment (Miscellaneous Provisions) Bill 2017. During the debate on Wednesday, 19 December 2018, the Minister for Employment Affairs and Social Protection made the following comments:*
>
> > ***"The one thing I can safely say is that we are all in agreement regarding the fact that there are people in this country who are made bogusly self-employed through no fault or acquiescence on their part"***
>
> *She also stated:*

"I totally accept and appreciate that we have a difficulty in this country with people who are bogusly self-employed"

Congress believes that the problem of bogus-self employment is a very significant one and needs interventions at a number of levels'

'As for potential loss to the State, members may be happy to know they do not have to rely on our figures. I suggest they look at the Comptroller and Auditor General's report from November 2018. I will match that with figures from the Central Statistics Office to give the committee an estimate of what it could be looking at in this regard'

'The Comptroller and Auditor General said that a ***person on €100,000*** *who is* ***paying tax and PRSI in the normal way*** *would have a* ***yield to the State of €44,600. The take for the State from a self-employed person would be €29,648. The take to the State for a person operating through a company*** ***and so on*** ***would be €29,900****. The* ***difference between a PAYE contributor and the self-employed or company person is €15,000 per individual worth €100,000'***

*'The sector*** *with the highest number of people who are self-employed with no employees is construction*****. This is a big indicator. If we take the €100,000 figure and the €15,000 loss per person, we can multiply it by 32,000 workers. It would not be entirely correct, however, to use the whole 32,000 because some people are genuinely self-employed with no employees. I married one of them so a few of those could be removed as engineers, architects and so on fall into that category. I always have to be careful when I say that because I usually have to go home. The 32,000 figure for self-employed with no employees, with a €15,000 difference if they were all earning €100,000,* ***would be a loss to the State of €480 million'***

'*I do not have an accountant's background but it might be safe to divide that figure in two, so* ***one is looking at a €240 million loss to the State just in one sector****, in both PRSI and tax'*

'This is not just a PRSI problem, it is also a tax issue'

'By any standard, this is a potential huge financial loss to the State'

'the Comptroller and Auditor General was bold enough to put this in the report. People have a strong respect for the Office of the Comptroller and Auditor General and what it does on behalf of the State. This represents one very strong indicator from just one sector'

'One of the reasons is very clearly highlighted in the Comptroller and Auditor General's report. The Revenue Commissioners do not view themselves as having a role in questioning any of that; they are mere collectors of the money into a fund and they pass it on to the Department of Employment Affairs and Social Protection'

'Apart from the big economic incentive of not having to pay the employer PRSI at 10.9%, the employers divest themselves of all employment law responsibilities'

On 31st January 2019, at the same Joint Committee on Employment Affairs and Social Protection debate, Deputy John Brady stated:

> *'If one were to apply that figure* (240 million) *to all sectors, we would be dealing with a conservative annual figure in excess of €1 billion, yet in all areas of the scope section and the joint investigations unit, we see minuscule numbers of people being cited'*

***On 31st January 2019, the General Secretary of ICTU used the Construction Sector as an example of the Sector with the highest number of people who are self-employed with no employees. However, the measurement of rates of Bogus Self-Employment is considerably underestimated by reliance on 'Self-Employed with No Employees'. How reliance on 'with no employees' considerably underestimates the scale of Bogus Self-Employment was contained in replies to questions from Deputy Paul Murphy to the Chairperson of the Revenue Commissioners, on 24th of January 2019, at the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach debate. The Chairperson of the Revenue Commissioners stated:

> *'The real challenge is that the nature of that bogus self-employment is now mostly done through different corporate structures such as the personal service companies and the managed service companies. We do not have look-through provisions to look through a limited company'*
>
> *'There was growth over the past ten years in personal service companies and managed service companies. There are a number of companies whose business model is establishing those types of processing. There are thousands of these companies and many people are perfectly happy to have moved to a director position. During our examination of the contractors, I was fascinated by some of the managed service companies because, generally, they have six directors and often they do not know each other and they tend to be professionals. Essentially, it is a different way of providing that model'*
>
> *'It is a legal corporate structure, and if we want to have a provision to look through that legal structure, change has to take place in the law. We carried out a contractors project a few years ago and it was subject to study by the Comptroller and Auditor General. In that, we looked at personal service companies and managed service companies, and while there were challenges around overclaiming of expenses etc., we were not looking through the limited liability corporate structure, and things that flow from that. This report was done in parallel with the work that the Taylor commission carried out in the UK. There have been recent cases in the UK that have looked through because they have provisions that allow them to look through'*
>
> *'The big challenge is that there is a fiscal advantage to having a self-employed structure in employer's PRSI. That is the monetary driver'*

'The reality is that in many of these areas the contractual arrangements are such that unless either party to the contract decides to tell us that it is not a legitimate contract, we cannot overthrow it'

'In a case in the UK recently, which was covered on "Panorama" or "Newsnight" and which involved the plumbing industry, everything was fine until a particular person had an accident at work. Everybody was happy with the arrangement and there were very high earners but a difficulty arose with the health entitlements of a person following an accident. That case has been through all the courts in the UK. The facts of a case are important. We try to follow the line of the Department of Employment Affairs and Social Protection in terms of social insurance contributions and entitlements'

'The issue is around moving towards a limited company type process rather than what we would term a self-employed schedule D person. If there is a schedule D type operation, it is very easy to turn that into a limited process. We do not have that look-through provision in Irish legislation'

Fact

Reliance on 'Self-Employed with no employees' considerably underestimates the scale of bogus self-employment because the nature of that bogus self-employment is now mostly done through different corporate structures such as the personal service companies and the managed service companies. It is very easy to turn that into a limited process. There was growth over the past ten years in personal service companies and managed service companies. There are a number of companies whose business model is establishing those types of processing. There are thousands of these companies. There is a fiscal advantage to having a self-employed structure in employer's PRSI. That is the monetary driver.

However, in the Scope Section decisions on 16 construction workers in 2016, an intermediary corporate structure in place between the construction workers and the employer was dismissed in all 16 cases. Although these decisions were overturned on Appeal to the Social Welfare Appeals Office, it would suggest that the Department of Social Protection can dismiss intermediary corporate structures as PRSI evasion mechanisms.

There were approximately 159,300 (full-time and part-time) construction sector employees in Q1 2022 representing 6% of total employment, with an estimated bogus self-employment rate of 22%. However, the growth in corporate structures to disguise bogus self-employment is largely in other sectors such as multinationals and the digital sector. MNCs in Ireland in 2022, equated to 12% of the total labour force employing 301,475 people. The digital sector directly employs more than 270,000 people. On these numbers it is a reasonable assumption that bogus self-employment is far greater in other sectors than in the construction sector. The rate of bogus self-employment under investigation in RTE for example is between 25% and 33% which is greater than the estimated 22% bogus self-employment rate in the Construction Sector. The bogus self-employment rate in some sectors such as the courier industry and sections of the entertainment industry has been operating at almost 100% for 30 years.

On 14th November 2019, the National Transport Agency, a statutory non-commercial body, which operates under the aegis of the Department of Transport, confirmed to the Public Accounts Committee, that the number of its agency staff far exceeds the number of its full-time staff. The Public Accounts Committee (PAC) heard that on average full-time staff at the NTA are paid about €73,000 a year including PRSI and pension payments, while the average cost of each agency worker is nearly €140,000. It was further explained to the committee that the vast majority of these agency workers are not performing specialised work but fulfilling "day-to-day" activities. The NTA stated:

> *"Until such time as approval is granted to recruit additional personnel the NTA is required to operate within its sanctioned payroll limit for permanent employees"*

This is an extremely important point made by the NTA, the political imperative to limit the number of payroll permanent employees working across the public sector as an indicator of 'Fiscal Prudence' is one of the biggest drivers of bogus self-employment in the public sector. The workload doesn't change by cutting permanent employees, the gaps in public services are then filled by workers compelled by employers to work in corporate structures such as personal service companies, who are made bogusly self-employed through no fault or acquiescence on their part, to provide the service previously provided by employees but the use of corporate structures costs more than twice as much as direct employment to the taxpayer thus rendering such 'Fiscal Prudence', 'Fiscal Folly'.

By far the biggest growth in corporate structures to disguise bogus self-employment is in Health, 'Human and Social Work Activities which is dominated by the State as 'The Employer'. There are 331,100 people employed in Health, Human and Social Work Activities. The rate of bogus self-employment is unknown. In order to establish the rate of bogus self-employment in this sector, the state as investigator, would have to investigate the state as PRSI evader, and then the State would have to play the role of Judge in its own malpractice. The state is the biggest abuser of employment status.

FACT The real cost of bogus self-employment far exceeds the conservative estimate of 1 billon euro annually. That this malpractice has been ongoing for 30 years, outside of the law, is deliberate destruction of the social contract which has resulted in 30-year deficits in Health, Housing, Pension Fund etc. SIPO's failure to act on its finding of fact that the Chief Appeals Officer gave 'Erroneous Information' to Joint Oireachtas Committee on Family Affairs and Social Protection investigating Bogus Self-Employment. is denying the public their right to hold the Department and the Minster liable for 30 years of malpractice.

Consequences of SIPO's Failures

For the Oireachtas:

For Oireachtas Committees

The Joint Committee on Social Protection, Community and Rural Development and the Islands (Investigating Bogus Self-Employment):

Irrefutable evidence of the use of Precedential 'Test Cases' was presented to the Committee. This evidence took the form of 20 years of documentation from the Department, the Revenue Commissioners and the SWAO confirming, accepting and conceding to the use of 'Test Cases'.

All of this evidence was presented by a private citizen, who had previously made a Protected Disclosure to the Social Protection Minister about the unlawful use of Test cases.

Evidence of 'Test Cases' was overwhelming and irrefutable.

In direct reply to this overwhelming and irrefutable evidence, the Independent Chief Appeals Officer issued a verbal denial and a claim that 'Test Cases' were not used, nor was the approach of 'Test Cases' used during her 'tenure'.

During the course of questioning at the Committee. The Chief Appeals Officer admitted to use of the approach of 'Test Cases' during her tenure, and the assistant Secretary General of the Department admitted that the term 'Test Cases' had been used but that before the Committee hearing, a decision was taken to deny the use of what were and are undoubtedly 'Test Cases'. The assistant Secretary General admitted that the term 'Sample Cases' was being applied retrospectively by the Department to what were, and were accepted by Department and the Ombudsman, as 'Test Cases'.

Upon the Report of the Committee being published, the private individual who had given the evidence of 'Test Cases' contacted the Chairperson of the Committee Mr. Denis Naughten. The private individual supplied the Committee Chairperson with the 'Finding of Fact' from SIPO and requested that Chairman Naughten withdraw his report as it was demonstrably 'Factually Incorrect'.

Chairman Naughten refused to withdraw the Report containing 'erroneous information' and refused to seek clarification from SIPO.

Ever person in this country has a constitutional right to the protection of their good name. In refusing to withdraw the Report or seek clarification from SIPO, Chairman Naughten failed to protect a private citizens' constitutional right to their good name. Chairperson Naughten allowed false evidence from a civil servant, which he knew to be false, be included in the Report. Chairperson Naughten is an elected TD, he is constitutionally bound, as a TD and Chairperson of an Oireachtas Committee, to protect the good name of any private citizen giving evidence to the Committee. The Report he published into the public domain is clearly defamatory of the private citizen who gave evidence in good faith to the Committee.

The Committee on Procedure, formerly known as Committee on Parliamentary Privileges and Oversight

Irrefutable evidence that the Minister for Social Protection was continuing to defame the private citizen in replies to PQs, where the Minister continued to deny the evidence of the use of Precedential 'Test Cases', was presented to the Committee on Procedure. A written denial from the Minister, which demonstrably contained false information, and further defamed the private citizen, was accepted over the irrefutable evidence of the use of 'Test Cases' presented by the private individual to the Committee on Procedures.

Every person in this country has a constitutional right to the protection of their good name. In accepting false statements from the Minster and ignoring the irrefutable evidence that 'Test Cases' do exist and that the Minister is defaming the private citizen who, in good faith and honestly, gave irrefutable evidence to the Joint Committee on Social Protection, Community and Rural Development and the Islands (Investigating Bogus Self-Employment), the Chairperson of the Committee on Procedure failed to be impartial, and further allowed the Minister defame the private citizen in the false information contained in her letter to the Procedures Committee.

The Public Accounts Committee

The roles of the Committee and of the C&AG are interlinked as the bodies that are audited by the C&AG are those that are accountable to the Committee.

In 2000, in reply to a query from the PAC Chairperson to the Department of Social Protection, the Secretary General of the Department unequivocally admits to the use of a 1995 'Test Case' for the specific purpose of the wholesale classification of workers in the courier industry by group and class, namely, saying that all courier workers are 'self-employed' because one worker is.

In 2000, in replay to a query from the PAC Chairperson to the Revenue Commissioners, the Chairperson of the Revenue Commissioners admitted to a 'Special Tax Agreement' between the Revenue Commissioners and courier industry employers to treat all couriers as 'Not Employees' yet to deduct tax and PRSI from those 'Not Employed' couriers, through the PAYE system, which was confirmed by the Finance Minister on 27th September 2022, to be Revenue's treatment for employees.

In February 2021, in direct response to questioning from the Public Accounts Committee, the Revenue Chairman wrote to the Public Accounts Committee and acknowledged that all couriers are still deemed to be self-employed by way of the precedent set by the Department of Social Welfare in 1995.

In March 2001, Mr. McMahon appeared at the PAC as a witness and provided over 300 documents, in a 'book of evidence', documents from the Department, the Revenue Commissioners and the SWAO confirming the ongoing use of an unlawful 'Test Case' from 1995 used to label all courier workers as self-employed.

The Public Accounts Committee, has to hand, 21 years of evidence from the Department of Social Welfare, the Revenue Commissioners and Mr. McMahon,

which proves beyond all doubt, that the SWAO 'creates' 'Test Cases' which are then used by the Department of Social Welfare for the specific purpose of the wholesale classification of workers in the courier industry by group and class, namely, saying that all courier workers are self-employed because one worker is.

In opposition to this evidence, the Public Accounts Committee has verbal denials, only since 2019, of the use of 'Test Cases' by the Secretary General of the Department of Social Protection who was responsible for employment status in the Department from 2010 to the present date.

The Chairperson of the Public Accounts Committee has stated that the Committee cannot make a judgement on the veracity of statements given to it by the Secretary General and is refusing to do so. The PAC Chairperson's refusal to make a judgement on the veracity of the Secretary General's denials of Test Cases further allowed the Secretary General and the Department defame the private citizen.

There is a mistaken belief among Committees that 'guidelines', issued in the wake of wealthy private citizens taking legal action against Committees, preclude Committees from making judgements on the veracity of evidence presented before them. 'Guidelines' cannot, and do not, negate a Committee's Constitutional obligation to protect the good name of citizens who appear before the Committee and who cannot afford to take legal actions against Committees to have their good names restored. At the very least, where there is clear evidence that civil servant has misled the Committee, the onus must be on the Committee to make a complaint to SIPO and let SIPO decide on the veracity of statements given to Committees by civil servants. It is a dereliction of duty on the part of the PAC that no action has been taken by the Committee to either make a judgement on the veracity of prima facia misleading comments by a civil servant, or to refer the issue to SIPO for a decision.

Every person in this country has a constitutional right to the protection of their good name, particularly when giving evidence to an Oireachtas Committee. In accepting false statements from the Secretary and ignoring the irrefutable evidence that 'Test Cases' do exist, the Chairperson of the PAC failed to protect a private citizens' constitutional right to their good name.

For Elected Members

Every elected member, who sat on The Joint Committee on Social Protection, Community and Rural Development and the Islands, the Public Accounts Committee and the Procedures Committee, has failed in their constitutional obligation to uphold the good name of a witness to those Committees. Elected Members' refusal to make a judgement on the veracity of the denials of Test Cases further allowed the Minister, the Secretary General and the Department defame the private citizen. At the very least, where there is clear evidence that a civil servant has misled Elected Members, the onus must be on each Elected Member individually to make a complaint to SIPO and let SIPO decide on the veracity of statements given to Elected Members by civil servants. It is a dereliction of duty on the part of individual Elected Members that no

action has been taken by them to either make a judgement on the veracity of prima facia misleading comments made by a civil servant, or to refer the issue to SIPO for a decision.

For the Electorate

Where the issue of bogus self-employment is concerned, over the course of 30 years, no body or arm of the State has fulfilled its duty to hold those in power responsible for the use of unlawful test cases to misclassify groups and classes of employees as self-employed. Twice since 2019, the Secretary General of the Department of Social Protection misled the PAC in his denials of 'Test Cases'. In September 2002, the Minister for Social Protection stated in a PQ:

> *'I am further advised that the information supplied by the Secretary General to the Public Accounts Committee in relation to classification of employment for PRSI purposes was, and remains, correct'*

For the Secretary General to be 'correct' and for the Minister to be 'correct', the following list of people and events need to be 'Incorrect':

Annual Report of SWAO	in 1995	must be 'INCORRECT'
Assistant Principal Officer V. Long	in 2000	must be 'INCORRECT',
Secretary General Sullivan	in 2000	must be 'INCORRECT'
Chairman of the Revenue Commissioners	in 2000	must be 'INCORRECT'
Minister for Social Welfare Ahern	in 2002	must be 'INCORRECT'
Dept. Social Welfare	in 2002	must be 'INCORRECT'
Ombudsman	in 2002	must be 'INCORRECT'
Comptroller & Auditor General	in 2002	must be 'INCORRECT'
Approach of test cases in SWAO	in 2016	must be 'INCORRECT'
Minister Varadkar (Now Taoiseach)	in 2016	must be 'INCORRECT'
SWAO (Exhibit 8)	in 2019	must be 'INCORRECT'
Minister Doherty in the IT	in 2019	must be 'INCORRECT'
Mr. McMahon in the SW Committee	in 2019	must be 'INCORRECT'
SIPO's finding of 'Erroneous Information'	in 2021	must be 'INCORRECT'
Revenue Commissioners in PAC	in 2021	must be 'INCORRECT'
Mr. McMahon in the PAC	in 2021	must be 'INCORRECT'
Appeals Officer Decision 'test cases'	in 2023	must be 'INCORRECT'

Ministers and senior civil servants can mislead the Oireachtas with impunity. SIPO, through inexplicable failure to follow its own guidelines, has proven that civil servants are IMMUNE from being held to account for failing to maintain the highest standards of probity, by engaging in dishonesty and by failing to be impartial.

It is abundantly clear, because of the repeated dishonesty of Ministers in relation to 30 years of malpractice in insurability of employment, that some mechanism for holding Ministers to account for dishonesty is sorely needed to police recidivist Ministers.

Minister Humphreys has repeatedly denied the use of 'Test Cases'. She achieves this by selectively parsing false and misleading specific words/phrases, extracted from longer false answers and misleading statements from her own senior management to Committees, while ignoring 30 years of the documented use of 'Test Cases' and admittances of the use of test cases from the most senior officials and politicians, including the sitting Taoiseach.

CONCLUSION

It is into this 30-year quagmire of malpractice, failure to follow guidelines, dishonesty and unaccountability that I commit my complaint.

Bogus self-employment is NOT a 'Process or Procedure Matter' as was claimed by SIPO on 1st December 2022. The issue of Bogus Self-Employment is, according to Minister Humphreys in her letter to the Procedures Committee of 2nd December 2021, a matter of:

> '***Public importance, public interest and significant public concern***'

SIPO already accepted jurisdiction in this matter by making a 'Finding of Fact' that denial of 'Test Case' to an Oireachtas Committee by a civil servant in 2019 is 'Erroneous Information'.

I do not expect better from SIPO, but because SIPO is the only body which can make a determination on whether the Secretary General maintained the highest standards of probity on December 1st 2022 in his statement to the Public Accounts Committee, it is to SIPO I must go with this complaint.

SIPO has already made a finding of fact that denial of test cases to an Oireachtas Committee is 'Erroneous Information'. All that remains to be seen is if SIPO will, once again, fail to follow its own guidelines and allow a senior civil servant to mislead the Dáil.

The only question which lies before SIPO, is whether the statement:

> ***"We do not use test cases for the purpose of the wholesale classification of workers in a particular sector, namely, saying that all workers are one way because one worker is"***

made by a specified person, the Secretary General of the Department of Social Protection, is inconsistent with the ethical obligations of the Secretary General's position.

That is all SIPO is asked to do, that is what SIPO is mandated to do, please do it.

Exhibit 1

Mr Jim Mitchell, T.D.,
Chairman
Committee of Public Accounts
Leinster House
Dublin 2
2 October 2000

Dear Deputy

I refer to your letter dated 22 September 2000 regarding the employment status of motorcycle / cycle Couriers - with particular reference to issues raised by Mr Martin McMahon, Ashbourne, Co Meath in an earlier letter to your office.

The employment status of Couriers has been under review for some time. Some Couriers consider that they are 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 & Safety legislation. In order to resolve the matter a number of representative 'Test Cases' were selected in 1993/4 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 12 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, insurance, maintenance etc., and
(c) Payment was made on the basis of rate per job plus mileage allowance.

This 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.

The matter has recently been raised again by senior trade union representatives at meetings of the social partners held under paragraph 1.3 (b) 9 of the Programme for Prosperity and Fairness (dealing with the definition of 'employee'). It is claimed that there have been changes in the terms and conditions of employment of most couriers. Meetings are due to take place shortly between officials of this Department and all of the interest groups involved with a view to clarifying the position and establishing whether any significant changes have actually occurred.

In addition to the matter being raised at senior trade union level, the Department has also received requests from individual couriers for decisions on their insurability under the Social Welfare Acts (for PRSI purposes). Mr Martin McMahon who has written to your office has been to the forefront of the current situation and was among the first to apply for a formal decision in relation to his employment as a motorcycle courier with Securicor Omega Express Irl Ltd. A Deciding Officer of the Department considered that the terms and condition of Mr McMahon's employment differed from those of the 1995 'Test Case' and decided that he was employed under a Contract of Service (i.e. as an employee) - and that the PRSI Class A rate of contribution applied. Securicor Omega Express Irl Ltd. has, however, lodged an appeal against this decision and the matter is currently being referred to the Social Welfare Appeals Office for determination

As mentioned above, the general issue of the employment status of couriers is currently being re-examined and meetings with various interest groups will take place shortly.

Yours sincerely

E. Sullivan
Secretary-General

Exhibit 2

Department of Social, Community
and Family Affairs

Created: 02-Oct-2000 04:28pm
Posted: 02-Oct-2000 04:35pm

Document: 028157
Tel No: (01)8748444 x3038
From: Vincent Long, AP (LONG_V)
TO: Veronica Scanlan, P Sec (SCANLAN_V)
CC: Bernadette Lacey, Assistant Secreta (LACEY_B)
CC: Eimar Coleman, PO ** (COLEMAN_E)
Subject: Couriers - Reply to reps

Veronica

Attached is a prepared reply for signature by the Sec General to recent reps from Deputy Jim Mitchell, T.D. (Your ref: 000166)

The reply is fairly self-explanatory and is, effectively, a follow-on to the note I circulated on 21.9.00 in connection with a protest by couriers at Government Buildings.

This whole issue of the insurability and employment status of couriers is quite complex and is likely to run for another while.

Regards
Vincent

Exhibit 3

'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'

Exhibit 4

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

11 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:

1 The decision of the Appeals Officer in ruling your insurability as self-employed was contrary to fair administration, with your constitutional, civil and labour rights having been abused,

2 Securicor Omega Express Irl. Ltd. is not a 'person' in accordance with Social Welfare legislation and as a result were not legally entitled to appeal the decision of the Deciding Officer,

3 Securicor Omega Express Irl. Ltd. appealed the decision outside the time limit specified and submitted evidence at oral hearing that should have been submitted prior to hearing,

4 The Department referred to test cases from 1995 in determining your insurability. You assert that the test cases should have been presented to the Oireachtas within 6 months and that this was not done.

5 Breach of confidentiality - you stated that your case was discussed by the PPF Group and that you had not given consent for your case to be so discussed,

6 You questioned the independence of the Appeals Office.

I will deal with each issue in turn.

1 The decision of the Appeals Officer in ruling your insurability as self-employed was contrary to fair administration.

I have carefully examined the decision of the Appeal Officer and the factors that influenced his conclusion that you were employed under a contract for services.

In hearing the appeal the Appeal Officer had to consider the evidence before him. This evidence included legal submissions made by the Department and by yourself in support of the case that your employment was a contract of service (employee), and legal submissions made by Securicor Omega Irl. Ltd in support of the case that your employment was a contract for services (self

Omega Irl. Ltd in support of the case that your employment was a contract for services (self employed). As there was a conflict in the evidence presented in these submissions, and the interpretation of same, the Appeals Officer was in the position of having to make a judgement as to the weight to be adduced to the respective elements. He ultimately concluded that the evidence in support of the contention that you were employed under a contract for services was more persuasive than that presented in support of the view that you were employed under a contract of service.

The question that arose for this Office was whether the decision of the Appeals Officer was reasonable given the circumstances of your case, and in the context of the evidence presented at the appeal hearing, i.e. was the Appeals Officer decision capable of being supported by the evidence presented?

The Ombudsman Act, 1980, sets out the functions of the Ombudsman. His main role is to examine complaints that certain public bodies have not carried out their administrative functions in a proper manner, and to ensure that public bodies deal with individuals properly, fairly and impartially. Generally he seeks to ensure that the material relied upon by decision makers is capable of supporting the decision, and that in exercising decision making powers they act in a reasonable manner, taking all relevant factors into consideration and ignoring irrelevant facts. In summary, he seeks to ensure that each application receives bona fide consideration on its own merits.

Having considered the matter very carefully, I have come to the conclusion that the Appeals Officer had evidence before him in your case which was reasonably capable of supporting the determination that he made.

I note that you have presented details of your case (apparently including new evidence) to the Employment Appeals Tribunal and to the Data Protection Commissioner. Your letter of 29 January, 2002 seems to indicate that the Employment Appeals Tribunal made certain determinations in this regard. In this event I suggest that you refer the matter back to the Chief Appeals Officer of the Department for further consideration.

2 Securicor Omega Express Irl. Ltd. is not a 'person' in accordance with Social Welfare legislation,

You queried the ***locus standi*** of Securicor as a ***person*** entitled be heard at the appeal hearing. Under Irish law a Limited Company has a legal personality. The authority for this is the case of ***Salomon v Salomon & Co.*** In that case S, a cobbler, formed a limited company, holding the majority of the shares. He lent money to the company by way of debentures. The company became insolvent, and S attempted to exercise his rights as a creditor of the company. The court held he could so do, that a company is a legal person and must account for its debts in its own name. In addition Section 11 (c) of the Interpretation Act, 1937 provides a statutory definition of the term 'person' which is to apply in statute, except the specific statute makes clear that some other definition applies. The definition given is: ***the word 'person' shall, unless the contrary intention appears, be construed as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons as well as an individual.*** Consequently as Securicor Ltd. was effected by the Deciding Officer's decision, it had the right to appeal under section 257 of the Social Welfare (Consolidation) Act, 1993.

3 Securicor Omega Express Irl. Ltd. appealed the decision outside the time limit specified and submitted evidence at oral hearing that should have been submitted prior to hearing,

Article 9 of S.I. 108 of 1998 provides that '***The time within which an appeal may be made shall be any time up to the expiration of 21 days from the date of notification of the decision of a deciding officer'.*** The date of notification of the Deciding Officers decision was 6th September, 2000. Notice of appeal was lodged with the Appeals Office on 26 September, 2000. This was within the time frame provided for under legislation. You also made reference to the process of submitting additional material at the oral hearing by Securicor. *Article 12 and 18 of S.I. 108 of 1998* determines procedure for additional information and for oral hearings. Article 12 states that the Appeals Officer to whom an appeal is referred may at any time - ***allow the amendment of any notice of appeal, statement, or particulars at any stage of the proceedings ...*** and Article 18 states that at the oral hearing '***the appeals officer may admit any duly authenticated written statement or other material as prima facie evidence of any fact or facts in any case in which he or she thinks it appropriate'.***

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.

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5 Breach of confidentiality - you stated that your case was discussed by the PPF Group and that you had not given consent for your case to be discussed,

The Appeals Officer decision regarding your insurability was made on 5 June, 2001. The PPF Working Group reported on the role, deliberations and conclusions of the Group in the April 2001 issue of Tax Briefings. This Group was set up because of a growing concern that there is an increasing number of individuals categorised self employed when the indicators are that employee status would be more appropriate. It would seem to me that the circumstances surrounding your case would be highly relevant to the Group's deliberations. Consequently it would be difficult to conclude that the Department acted in bad faith in this regard. In addition, and notwithstanding the overlapping time period of the PPF Working Group report and the Appeals Officer's decision, it is difficult to see how you have been adversely effected by the discussion of your case at the Working Group. No reference was made to your case, or to any relevant discussions, in the PPF Report. No reference was made to any such discussions by the Appeals Officer in his report outlining his decision. It is only in a case where the Ombudsman finds that (a) the actions of a public body amount to maladministration and (b) such actions have adversely affected the complainant, that he can recommend action designed to mitigate the adverse affect.

6 The independence of the Appeals Office,

The Appeals Office is an administrative tribunal and the courts have ruled that the essential role of Appeals Officers in the exercise of their statutory functions ***'is laid upon him by the Oireachtas and he is required to perform it as between the parties that appear before him freely and fairly as becomes anyone who is called upon to decide on matters of right or obligation'*** **and** ***'appeals officers ... are, and are required to be, free and unrestricted in discharging their function under the Act'*** **[McLoughlin v Minister for Social Welfare, Supreme Court (1958) I.R.5]** In your case the evidence actually supports the contention that the Appeals Office did indeed act independently in the matter. This is illustrated by the fact that the decision of the Department's Deciding Officer of 6 September, 2000 was overturned by the decision of the Appeals Officer on 5 June, 2001.

On the basis of the foregoing the Ombudsman would not have the basis on which he could ask the Department to review its decision in your case. However as I have indicated above I note that you have presented details of your case (apparently including new evidence) to the Employment Appeals Tribunal and to the Data Protection Commissioner. Any issues arising out of your contacts with those sources should be referred back to the Chief Appeals Officer of the Department for further consideration.

Yours sincerely

Edel Higgins

Edel Higgins
Investigator

Exhibit 5

Written answers (Question to Social)

Minister for Social Protection

Scope section in the Department of Social Protection makes statutory decisions on insurability of employment under the Social Welfare Act. Employers, employees and the self-employed may apply to Scope for an investigation of an employment status and a determination of the correct class of PRSI. Scope decisions are based on all available evidence, including a report from a social welfare inspector where appropriate, and the case law from previous court judgements.

A number of test cases in relation to the Electricity Supply Board (ESB) Contract Meter Readers were investigated by Scope in recent years. Although it was determined by Scope that the work of ESB Contract Meter Readers was insurable at PRSI class S during the period from 1994 to 2009, this decision was changed to class A following an appeal to the Social Welfare Appeals Office. The Office operates independently of the Minister for Social Protection and of the Department and is responsible for determining appeals against decisions of Scope section. The contribution records were amended to class A for this period.

Exhibit 7

/S.

February 13th 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 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.

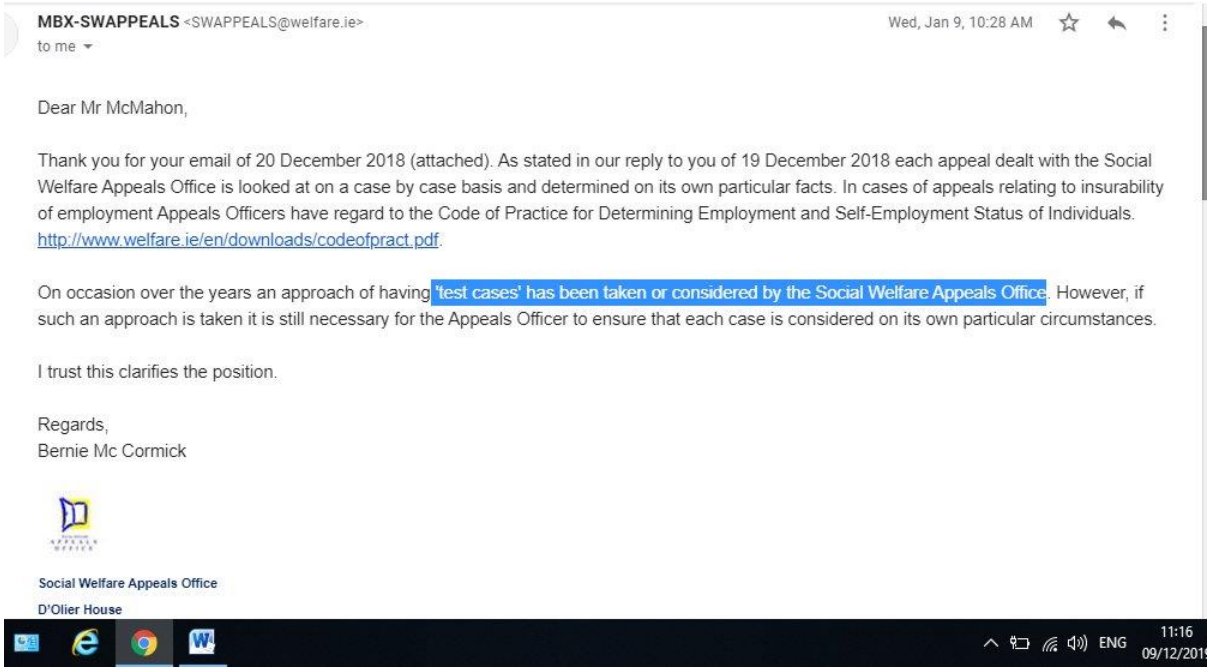
As to your treatment at the Social Welfare appeal hearing, it seems to me, on the basis of your account of events, that you may have grounds for a complaint to the Ombudsman. I want to assure you that, in suggesting this course of action, I am not merely fobbing you off to yet another organ of the State. 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.

Yours sincerely

John Purcell
Comptroller and Auditor General

Exhibit 8



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

ENG 11:16 09/12/201

Exhibit 9

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.

Exhibit 10

For Written Answer on : 18/12/2019
Question Number(s): 449 Question Reference(s): 53652/19
Department: Employment Affairs and Social Protection
Asked by: Paul Murphy T.D.

QUESTION

To ask the Minister for Employment Affairs and Social Protection if the record will be corrected in relation to the statement by the Chief Appeals Officer of the Social Welfare Office Appeals to the Oireachtas Joint Committee on Employment Affairs and Social Protection that the Social Welfare Appeals Office does not use test cases in view of the fact this contradicts a letter of 9 January 2019 (details supplied). (Details Supplied) from the SWAO which states "an approach of having 'test cases' has been taken or considered by the Social Welfare Appeals Office', and it contradicts a letter from former Secretary General Sullivan to the Chairperson of the Public Accounts Committee which unequivocally states that 'test cases' are created by the SWAO and accepted by the DEASP?

Exhibit 11

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.

Exhibit 12

SIPO Complaints Shared Mailbox <complaints@sipo.ie> Mon, Feb 22, 2021, 4:10 PM

to me

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,
Rachael Lord

Exhibit 13

Both emails relate to

- evidence given by the Chief Appeals Officer of the Social Welfare Appeals Office to the Joint Committee on Employment Affairs and Social Protection of the 32nd Dáil on 5 December 2019; and
- correspondence between you and the Standards in Public Office Commission (SIPO) in that regard.

Your emails were considered by the Joint Committee at its meeting today, 14 July 2021.

In relation to your email of 6 July, the Joint Committee noted that the Office of the Ceann Comhairle's reply advised that, as SIPO is an independent statutory body, you should consider raising the claims you made in relation to SIPO directly with SIPO itself. The Joint Committee has nothing further to add in relation to those claims.

In relation to the specific questions raised in your email of 26 June and the claim made in your email of 26 June that "the Chief Appeals Officer deliberately misled the Oireachtas Committee", the Joint Committee has not received any correspondence from the Minister or from SIPO in relation to what SIPO referred to, in its email to you of 22 February, as "erroneous information".

Exhibit 14

To: SIPO Complaints Shared Mailbox <complaints@sipo.ie>

Dear SIPO,

On the 24th of November 2020, I made a complaint to SIPO that the Chief Appeals Officer of the Social Welfare Appeals Office deliberately misled the Oireachtas Social Welfare Committee in stating "Our Office does not use test cases".

I supplied SIPO with indisputable evidence that the Social Welfare Appeals Office (and the Social Welfare Department) does indeed use test cases to make group and class decisions on the employment status of workers and that the approach of using test cases has been used by the Social Welfare Appeals Office during the tenure of the current Chief Appeals Officer. SIPO accepted the indisputable evidence that the SWAO and the Dept. both uses test cases.

However, SIPO did not address that the Chief Appeals Officer deliberately misled the Oireachtas Social Welfare Committee and further stated that the Minister had 'Clarified' the 'Erroneous Information' supplied by the Chief Appeals Officer to the Committee.

On foot of SIPO's reply, I wrote again to SIPO again and exposed that the Minister had not, in fact, clarified the 'Erroneous Statement' given to the Oireachtas SW Committee by the Chief Appeals Officer. Deputy Paul Murphy likewise wrote to SIPO to reiterate that the Minister had not clarified the 'erroneous information'. Both times, SIPO replied to the effect that SIPO would not revisit their decision.

For the record, what the Minister actually wrote is as follows -

"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"

This written reply from the Minister, is not, nor can it be construed, as the Minister subsequently clarifying the erroneous information given by the Chief Appeals Officer to the Oireachtas Social Welfare Committee. This written reply from the Minister is a very clear DENIAL that the Chief Appeals Officer gave erroneous information to the Committee.

The Report of the Oireachtas Social Welfare Committee was published in June of this year. Nowhere in the report does it contain a clarification that the Chef Appeals Officer gave, as cited by SIPO, 'erroneous information', to the Committee and the 'erroneous information' is recorded in the Committee Report as fact. I wrote to the Committee and asked had the Minister actually clarified that the Chief Appeals Officer gave erroneous information to the Committee. Last Thursday, the Committee replied as follows -

The Report of the Oireachtas Social Welfare Committee was published in June of this year. Nowhere in the report does it contain a clarification that the Chef Appeals Officer gave, as cited by SIPO, 'erroneous information', to the Committee and the 'erroneous information' is recorded in the Committee Report as fact. I wrote to the Committee and asked had the Minister actually clarified that the Chief Appeals Officer gave erroneous information to the Committee. Last Thursday, the Committee replied as follows -

Both emails relate to

- evidence given by the Chief Appeals Officer of the Social Welfare Appeals Office to the Joint Committee on Employment Affairs and Social Protection of the 32nd Dáil on 5 December 2019; and
- correspondence between you and the Standards in Public Office Commission (SIPO) in that regard.

Your emails were considered by the Joint Committee at its meeting today, 14 July 2021.

In relation to your email of 6 July, the Joint Committee noted that the Office of the Ceann Comhairle's reply advised that, as SIPO is an independent statutory body, you should consider raising the claims you made in relation to SIPO directly with SIPO itself. The Joint Committee has nothing further to add in relation to those claims.

In relation to the specific questions raised in your email of 26 June and the claim made in your email of 26 June that "the Chief Appeals Officer deliberately misled the Oireachtas Committee", the Joint Committee has not received any correspondence from the Minister or from SIPO in relation to what SIPO referred to, in its email to you of 22 February, as "erroneous information".

I now seek immediate clarification from SIPO on who informed SIPO that the Minister had 'clarified' the 'Erroneous Information' given to the Oireachtas Committee by the Chief Appeals Officer, also I seek immediate clarification from SIPO as to why a very clear denial from the Minister that 'Erroneous Information' was given to Oireachtas Committee by the Chief Appeals Officer was construed by SIPO to be, and I quote -

"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"

The failure of SIPO to properly address my complaint calls into question the irrefutable evidence I gave to the Committee, besmirches my good name, and in my opinion, allows the SWAO and the Department to continue to defame me.

I expect immediate action from SIPO to rectify their glaring errors in dealing with my complaint.

Yours sincerely, Martin McMahon

Exhibit 15

From: SIPO Complaints Shared Mailbox <complaints@sipo.ie>
Date: 21 July 2021 at 16:34:30 GMT+1
To: Martin Mcmahon <martymannn@gmail.com>
Subject: RE: complaint

Dear Mr McMahon,

I refer to the above, and to your most recent correspondence in respect of same.

As previously stated, the Commission noted that information, which was provided by the Chief Social Appeals Officer, was subsequently clarified by the Minister in response to a PQ made by Deputy Murphy on 18 December 2019. In these circumstances, where the information was clarified, the Commission considers that there is no evidence of a breach of the Ethics Acts for the Commission to investigate. The Commission has considered the matter in full and is of the view that the complaint does not warrant further investigation.

The matter is accordingly closed.

Exhibit 16

Martin McMahon

[redacted]

Dear Clerk of the Dáil,

I make this submission pursuant to Standing Order 71. I am adversely affected by utterances contained in a Dáil reply from Minister Heather Humphreys to Parliamentary Question 353 of 6th July 2021 (PQ ref. no. 36092/21) to Deputy Paul Murphy.

These utterances adversely affect my reputation in respect of dealings and associations with others particularly elected representatives, the media and all and any other stakeholders in the area of employment rights.

These utterances injure my reputation as a respected whistleblower and explicitly contradict evidence I have given to a number of Oireachtas Committees. The undermining of my evidence and my reputation as an expert whistleblower is the intent of these utterances.

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 Social Welfare Appeals Office 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 Social Welfare Appeals Office from the 2016 cases, where the construction workers wrote to vehemently oppose the approach of test cases being used by the Social Welfare Appeals Office. 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 wideranging 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 particular 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 & 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 of 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 of 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. It is worth noting that workers in the courier industry have been classified as self-employed en mass since the 1995 test case and this precedent setting yet unlawful test case is still used today by the Department to classify all couriers as self-employed. This particular point goes to the heart of how Minister Humphreys is undermining my reputation and the evidence I have given to Oireachtas Committees in regard to test cases.

This fact, that the Department and the Social Welfare Appeals Office use test cases, and that they have taken the approach of test cases since at least 1993 (Refer to SecGen letter of 2000 to PAC Chairperson) was vehemently denied by the Chief Appeals Officer in the Oireachtas Social Welfare Committee in December 2019. I subsequently made a complaint to SIPO that the CAO had misled the Committee in denying the use and approach of using, test cases. SIPO ruled that the CAO's denial of test cases was 'erroneous' but that the Minister had clarified the erroneous statement. However, Minister Humphries reference to test cases as 'so-called test cases' completely fails to clarify the CAO's erroneous statement re. test cases and, in fact, once again denies the use of test cases.

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 Dept. SW and the SWAO, workers are still determined by the Dept. 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 Social Welfare Appeals Office 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 Employment Status Group, 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 Social Welfare Appeals Office.

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, **I supplied 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 3 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 the Scope Section, nor did the Social Welfare Appeals Office, 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 but which Minister Humphreys is repeating here again in her Dáil reply. This statement by the Minister is a direct attack on me, a direct undermining of the fully documented, irrefutable evidence I gave to two Oireachtas Committees. it also reveals that the Minister is less than honest in clarifying the 'erroneous statements' made by the Chief Appeals Officer in the Oireachtas Social Welfare Committee.

I cannot express strongly enough the injury to my reputation from this dishonesty from the Minister. I am not an elected representative, 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 appeared at Oireachtas Committees and told the truth, the whole truth, and nothing but the truth. For the Minister to so casually rubbish my reputation in her Dáil reply, with information she knows to be erroneous, is deeply hurtful and has caused me great anguish.

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 in any other industry is subjected to these unlawful 'criteria' before the Dept. SW and the Social Welfare Appeals Office 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 Dept. SW 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 State Solicitors Office delivered in writing by Mark Connaughton SC to the Social Welfare Appeals Office 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 ie. by delivery, by brick laid, by potato picked, is not and never was a 'criteria' 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 'critera' 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 are made in accordance with Case Law and Oireachtas legislation which 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' any more. From at least 1993 until April 2019, the Department, the Social Welfare Appeals Office and Social Welfare Ministers were quite happy to use the term 'test cases'. 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 Social Welfare Appeals Office 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"

This statement from the Minister in her Dáil reply, is entirely false. Following the disclosure of this particular statement at the Public Accounts Committee earlier this year, 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. The creation and use of test cases was not done or agreed on a 'tripartite basis'. It was and is, exclusively a process used by employers, Dept. SW, SWAO and the Revenue Commissioners.

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 Employment Status Group, the details of which are contained in "Tax Briefing, Issue 43, April 2001". The Employment Status Group was established and had its first meeting between the dates of 15th 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 for Securicor. I knew nothing about the special tax agreement nor why my employer, Revenue and Dept. SW were labelling me as self-employed. On the 15th of 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!"***

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12 April, 2001

Mr. Martin McMahon

Ashbourne
Co. Meath

Dear Mr. McMahon

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

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

Anyway, I hope this is helpful.

Regards

Jerome Flanagan
Office of the Chairman

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

To this day, I am very annoyed 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 was also a Deputy Chief Appeals Officer in the Social Welfare Appeals Office 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 Dept. SW, 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 Social Welfare Appeals Office. The continuing use of the voluntary Code of Practice 21 year 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 worker's 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 Social Welfare Appeals Office 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 Social Welfare Appeals Office to create its own precedents with test cases. That Group and Class decisions are ultra vires is further confirmed in a letter dated 9th of 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 Dept. SW, to me in writing by the Social Welfare Appeals Office, to SIPO by the Minster herself, 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 these 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 March 25th 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, 16 construction workers, some bricklayers, some labourers and 2 others who had been forced 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 16 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 Dept. 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 which means that there is no legal recourse for couriers, as a group/class, to take 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 illegal 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 Social Welfare Appeals Office 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 2 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. No working courier was present in the SWAO for the 1995 Appeal which was confirmed by the Appellant Employer to the Employment Appeals Tribunal.

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 2 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'.

I respectfully request that the Clerk of the Dáil treat this matter with urgency as every moment these false utterances are allowed to exist on the Oireachtas record is more injury and adverse effect done to my reputation.

Yours sincerely,

Martin McMahon

Exhibit 17

TAB C

Oifig an Aire Coimirce Sóisialaí
Office of the Minister for Social Protection

Ms. Elaine Muldoon
Clerk to the Dáil Committee on
Parliamentary Privileges and Oversight
Leinster House
Dublin 2
DO2 XR20

2nd December 2021

Dear Ms. Muldoon,

I refer to your correspondence dated 16th November 2021 in relation to a complaint from Mr Martin McMahon referred to the Committee on Parliamentary Privileges and Oversight by the Ceann Comhairle for consideration under the Dáil Standing Orders 71 and 71A.

Standing Order 71 provides that:

71. *(1) For the purpose of this Standing Order, Standing Order 71A and Standing Order 72— "adversely affected by an utterance" means that a person has been referred to in proceedings by name or in such a way as to be readily identifiable, and there is a significant likelihood that that person, to a substantial degree—*

(a) has been adversely affected in reputation, or in respect of dealings or associations with others,
(b) has been injured in occupation, trade, office or financial credit, or
(c) has had their privacy unreasonably invaded,

by reason of that reference to them: Provided that an utterance which has had an adverse effect on a person will not necessarily constitute an abuse of privilege within the meaning of these Standing Orders.

Accordingly, it is clear that Mr McMahon must demonstrate that my utterance both readily identifies him and that there is a significant likelihood that the utterance adversely affects him to a substantial degree. In particular, in order for an utterance to be deemed to have had an adverse effect, both the Standing Orders and the Guidelines published thereunder require the person allegedly affected to first be readily identifiable.

Mr McMahon cites 10 excerpts of utterances I made in the Dáil. With respect to 9 of the 10 excerpts particularised by Mr McMahon, he does not make any claim to be identifiable – readily or otherwise – from the text of the excerpts chosen. The prior debates, statements and other materials selectively chosen by Mr McMahon and detailed by him under each of these excerpts cannot reasonably be relied upon as a basis to conclude that the excerpts themselves

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Office of the Minister for Social Protection

readily identify Mr McMahon. It is the case that neither he nor any other person is identifiable – readily or otherwise – from at these excerpts.

With regard to the remaining excerpt (excerpt 6) Mr McMahon infers that the word 'observers' must refer to him and only to him. This inference relies first on ignoring the plural form of the term and second, on constructing an allusion between the utterance in the excerpt and an unmentioned appearance by him at an Oireachtas committee meeting. Neither this committee meeting nor his appearance at it was referenced at all in the answer to the parliamentary question. Accordingly, this perceived allusion cannot in any way be considered to refer to him in name or in a way that he is readily identifiable.

As a result:

(i) Mr McMahon does not in his complaint establish that he has been referred to by name or in such a way as to be readily identifiable from the answer provided to the parliamentary question, in addition,

(ii) Mr McMahon does not detail or particularise to any meaningful degree how he has been adversely affected, as defined in Standing Order 71, 71A and the Guidelines published in respect of same,

(iii) Nor does Mr McMahon describe how any adverse effect, if it had been particularised, meets the standard of "substantial degree" set out in the standing order.

The absence of this essential and basic information means that the complaint, and any investigation of the complaint, cannot satisfy the requirements of fair procedure, natural and constitutional justice as required under standing order 71A(7).

Without prejudice to this position I would make the following points:

1. Mr McMahon repeatedly refers to what he perceives are inconsistencies between elements of the answer given to Parliamentary Question 353 of 6th July 2021 and prior statements of officials and previous Ministers. He does this by selectively parsing specific words and phrases extracted from longer answers, statements and debates while ignoring other parts of those answers, statements and debates without which any interpretation of the answers, statements and debates as a whole is irredeemably flawed.
2. The matters which are the subject of the perceived inconsistencies relate to the issue of the insurability status of workers as being either employed or self-employed. These are matters of public importance, public interest and significant public concern within the meaning of Paragraphs 7 and 8 of Standing order 71A as is evident from the fact that

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they have been the subject of debate on a number of occasions in public fora, including Oireachtas Committees.

3. The inconsistencies perceived and presented by Mr McMahon are disputed by my Department and by the Chief Appeals Officer The Department has previously responded at Oireachtas Committees to questions regarding to the insurability of workers as employed/self-employed and the answer to Parliamentary Question 353 of 6th July, when read in its entirety, is consistent with the answers given at these committees.
4. With regard to the 6th excerpt, reliance is placed by Mr McMahon on the words "*as seems to have been inferred by some observers.*"
   Mr McMahon asserts that he is the person referred to as an observer in the answer given to Parliamentary Question 353 of 6th July 2021. To achieve this interpretation, he ignores the fact that the reference in the question was, in fact, to observers (plural) and then further asserts he was the only person who presented evidence at an Oireachtas committee and could have made the inference to which my utterance referred. However, there was no reference at all in the answer to an Oireachtas Committee such as would direct any listener or observer to the proceedings of any particular Committee. In addition, as stated above the perceived use of "test cases" to determine insurability decisions on a group basis has been the subject of debate at a number of fora and a number of people, including Oireachtas members, have raised questions and made statements in relation to this matter. The reference to observers is a simple statement of fact. It cannot therefore be asserted, as Mr McMahon has done, that the reference to observers in the answer provided is to him.

5. 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.

6. Mr McMahon bases his claim to have been adversely affected on the fact that the answer provided to the Parliamentary Question does not accord with his own view, based on his interpretation of statements of previous Ministers and officials, which he has put on public record, of how insurability decisions are determined. He believes that

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Office of the Minister for Social Protection

the answer undermines this view and by extension his reputation. However, it cannot be the case that a Minister is constrained in providing factual information in answer to a Parliamentary Question by the fact that another person has previously provided different information or opinion, even in situations where that person genuinely believes in the veracity of their own information/opinion. If any harm is done to a person's reputation in such an instance (which in this case is denied) it arises not from any fault in the information provided in the answer to the parliamentary question.

7. The utterance on 6th July 2021 was made in the public interest, in the terms set out Standing Orders 71/71A and in the Guidelines drafted pursuant to Standing Orders 71A(7) and 119(2)(b)(ii.)

8. In particular, my utterance was made on a matter of public concern, was made responsibly and in good faith and was made as part of my parliamentary duty. For the avoidance of doubt, at no point was I instructed by the relevant Chair to cease making my utterance.

Mr McMahon has also advised the Committee on Parliamentary Privileges and Oversight that, following a complaint he made to the Standards in Public Office Commission (SIPO) that the Chief Appeals Officer had misled the Joint Committee in denying the use of test cases, the SIPO ruled that the CAO's denial of test cases was 'erroneous' but that I had clarified the erroneous statement. I am advised that neither the Chief Appeals Officer nor the Department have ever been contacted by SIPO in relation to the complaint and were not notified of any such ruling.

I trust this clarifies the position.

Yours sincerely,

Heather Humphreys, T.D.,
Minister for Social protection

The Minister is a Designated Public Official under the Regulation of Lobbying Act, 2015 (details available on www.lobbying.ie)

Exhibit 18

Gmail Martin Mcmahon <martymannn@gmail.com>

Complaint to the Standards Commission

Martin Mcmahon <martymannn@gmail.com> Wed, Aug 17, 2022 at 2:38 PM
To: SIPO Complaints Shared Mailbox <complaints@sipo.ie>

Dear Ms. Lord, on the 22nd of February 2001 you wrote to me and stated "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"

In December 2001, the Minister for Employment Affairs and Social Protection wrote to the Privileges Committee and completely denied that she had clarified the Chief Appeals Officer's denial of test cases to SIPO and states clearly that SIPO never bothered to contact the department or the SWAO at all.

Mr McMahon has also advised the Committee on Parliamentary Privileges and Oversight that, following a complaint he made to the Standards in Public Office Commission (SIPO) that the Chief Appeals Officer had misled the Joint Committee in denying the use of test cases, the SIPO ruled that the CAO's denial of test cases was 'erroneous' but that I had clarified the erroneous statement. I am advised that neither the Chief Appeals Officer nor the Department have ever been contacted by SIPO in relation to the complaint and were not notified of any such ruling.

I trust this clarifies the position.

Yours sincerely,

Heather Humphreys, T.D.,
Minister for Social protection

Simple question, why did SIPO lie to me?

Exhibit 19

SIPO Complaints Shared Mailbox <complaints@sipo.ie> Aug 22, 2022, 12:23 PM

to me

Dear Mr McMahon,

I wish to acknowledge receipt of your correspondence of 17th August 2022 to the Standards in Public Office Commission (the Commission). I also wish to inform you that Ms Lord no longer works for the Commission but that records of all issued correspondence, with respect to your complaint, are intact.

I draw your attention to an email of 21st July 2021 from Ms Lord which outlined the Commission's decision. It was noted that the response provided by the Minister to a Parliamentary Question posed by Deputy Paul Murphy on 18th December 2019 clarified the issue regarding the use of test cases. As previously stated, as the matter was already publicly clarified by the Minister, the Commission determined that there was no cause for further action in this regard.

As advised, your complaint was fully considered and the matter is closed.

Regards,

Exhibit 20

SIPO Complaints Shared Mailbox <complaints@sipo.ie> Aug 23, 2022, 10:15 AM
to me

Dear Mr McMahon,

I wish to acknowledge receipt of your correspondence of 22nd August 2022 to the Standards in Public Office Commission (the Commission).

As part of the initial assessment of the matter the Commission considered the statement issued by the Minister in response to the Parliamentary Question from Deputy Murphy. In her response the Minister stated that:

"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... The Chief Appeals Officer has advised me that the test cases were not used to determine a particular outcome on a 'group basis'... The Chief Appeals Officer has also advised me that she does not as a rule take group decisions based on test cases."

Based on the response from the Minister, the Commission were satisfied that the issue had been clarified and did not consider it necessary to contact the Minister or the Chief Appeals Officer seeking further clarification on the matter.

Exhibit 21

For Written Answer on : 14/09/2022
Question Number(s): 362 Question Reference(s): 44368/22
Department: Social Protection
Asked by: Claire Kerrane T.D.

QUESTION

To ask the Minister for Social Protection if her attention has been drawn to a specific issue with regard to the social welfare appeals office (details supplied); and if she will make a statement on the matter. (Details Supplied) On the 22nd February 2001, the Standards in Public Office Commission advised that the Chief Appeals Officer of the Social Welfare Appeals Office gave 'Erroneous Information' to the Oireachtas Social Welfare Committee investigating Bogus Self Employment. The 'Erroneous Information' was the denial of the use of 'Test Cases' by the Social Welfare Appeals Office. Confirmation is being sought if the Chief Appeals Officer's denial of test case to the Oireachtas Social Welfare Committee is 'Erroneous Information', and if the Minister will confirm her written statement to the Privileges Committee that the Standards in Public Office Commission did not sought 'clarification' from the Minister in regard to the Chief Appeals Officer's 'Erroneous Information'.

Exhibit 22

REPLY

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.

In the details supplied with this question the Deputy states that the Standards in Public Office Commission (SIPO) advised that the Chief Appeals Officer of the Social Welfare Appeals Office gave 'erroneous information' to the Oireachtas Committee investigating "bogus self- employment". This 'erroneous information' is said to be the denial of the use of "test cases" by the Social Welfare Appeals Office.

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 trust this clarifies the matter for the Deputy.

Exhibit 23

Tuesday, 27 September 2022

Questions (303, 325)

Claire Kerrane

Claire Kerrane

Question:

303. **Deputy Claire Kerrane** asked the **Minister for Social Protection** further to Parliamentary Question No. 362 of 14 September 2022, if she will advise on the matter considering that her attention has been drawn to the fact that clarification was not sought from her Department regarding the situation referenced (details supplied); and if she will make a statement on the matter. [46870/22]

View answer

Paul Murphy

Paul Murphy

Question:

325. **Deputy Paul Murphy** asked the **Minister for Social Protection** the action that she has taken to rectify the erroneous information put to the Joint Oireachtas Committee on Social Welfare in December 2019; and the action that she has taken in relation to the repetition of the erroneous information by the Secretary General of the Department at the Public Accounts Committee in 2021 (details supplied). [47057/22]

Exhibit 24

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.

Exhibit 25

For Written Answer on : 05/10/2022
Question Number(s): 236 Question Reference(s): 48872/22
Department: Social Protection
Asked by: Claire Kerrane T.D.

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'.

Exhibit 26

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.

Exhibit 27

Issue 4 – 'Bogus self-employment' in the courier sector

Following the Committee's engagement with Revenue, it received correspondence regarding a voluntary PAYE system agreed by Revenue and courier firms in March 1997. The submissions included correspondence from Revenue which outlines the conditions of the voluntary PAYE system available to couriers, and asserts that couriers that fulfil a number of criteria should "in the interests of uniformity" be treated "as self-employed for tax purposes".

Correspondence from Revenue in February 2021 supports this view, stating "in the interest of uniformity Revenue decided, without prejudice, to treat those couriers as self-employed for tax purposes". Revenue confirmed this arose from a Social Welfare Appeals Officer's decision by which "couriers were regarded as self-employed for PRSI purposes". Revenue also confirmed a voluntary PAYE system was operated for couriers that met a number of conditions on "self-employed courier income net of expenses (expenses agreed at 40% of income for motorcycle and 10% for cycle couriers)".

However, the Committee is concerned that the decision to treat couriers as self-employed has resulted in a loss to the Exchequer in uncollected taxes and a loss to the workers affected by this agreement in benefits that self-employed individuals cannot claim.

Recommendation 4:

The Committee recommends that Revenue commission an independent investigation on the financial and sectoral implications of Revenue's agreement with the courier sector in 1997. This investigation should include an examination into:

- the magnitude of revenue lost to the State as a result of this practice,
- the number of workers impacted by the agreement in the sector, and
- the financial cost to those workers.

Exhibit 28

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To Clerk of Public Accounts Committee

Bogus Self Employment

I refer to your recent correspondence regarding the above and would advise as follows:

In the first instance it is important that I confirm to you, that while ICTU participates in hearings of the Social Welfare Tribunals the body which hears appeals in relation to unsuccessful claims for Job Seekers Benefit, ICTU has no other involvement in the Social Welfare Appeals system.

For many years ICTU has sought to highlight the severe negative impact of the practice of Bogus Self Employment on State revenue, workers employment rights, their income and security of employment tenure.
To date, the State has chosen to deal with this matter through a variety of means none of which to date, have in our view, been satisfactory. It appears also that there are varying arrangements by the Revenue Commissioners, agreed with employers alone, operated within economic sectors.

In the construction, forestry and meat sectors , for instance, the Revenue Commissioners introduced a system of withholding tax known as RCT (Relevant Claims Tax). This scheme operates three tax rates , 0%, 20%, and 35%. It permits the main contractor to classify workers.
ICTU has consistently argued that this system is fundamentally flawed and unfair resulting in very negative consequences as referred to above, and no employment status choices offered to the prospective employee. The Revenue Commissioners have always taken the view that that their system is fair and misclassifications are captured through their inspection process. We fundamentally disagree with this proposition and have sought and advocated legislative intervention, but so far this has not transpired. Losses of PRSI payments to the State, albeit collected by Revenue, are within the remit of the Department of Social Protection whose 'Scope' section oversees relevant inspections. While this Department has declared its intention to increase

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In the construction, forestry and meat sectors , for instance, the Revenue Commissioners introduced a system of withholding tax known as RCT (Relevant Claims Tax). This scheme operates three tax rates , 0%, 20%, and 35%. It permits the main contractor to classify workers.
ICTU has consistently argued that this system is fundamentally flawed and unfair resulting in very negative consequences as referred to above, and no employment status choices offered to the prospective employee. The Revenue Commissioners have always taken the view that that their system is fair and misclassifications are captured through their inspection process. We fundamentally disagree with this proposition and have sought and advocated legislative intervention, but so far this has not transpired. Losses of PRSI payments to the State, albeit collected by Revenue, are within the remit of the Department of Social Protection whose 'Scope' section oversees relevant inspections. While this Department has declared its intention to increase the number of inspectors to their target number of 12, and offered some cursory amendments to the Code of Practice, no effective legislative measures to resolve the matter have been implemented. The basis of their ineffective response ,is probably best explained in this Department's submission to the Oireachtas Committee on Social Protection. December 2019 which opines that the magnitude of the problem is overstated. It is worth noting that in a recent answer to a Parliamentary Question to the Minister for Finance he estimated that in the years 2016,2017,and 2018, €54m, €60.2m and €50.6m had been lost in PRSI foregone, €164.8m in total.

For the record, ICTU has had no direct involvement with the case relating to employees of Courier companies.

On the matter of the status of employment of those working in the so called 'Gig Economy' generally, I believe it is worth noting the High Court judgement in Karshan (Midlands) Limited (t/a Domino's Pizza) v Revenue Commissioners (2019) IEHC 894 delivered in December 2019.

This judgement is significant for a number of reasons:

For the first time, It finds that there is 'no comprehensive statutory or common law definition of contract for service or contract of service'. It also noted that employers cannot utilise a 'tick Box' exercise when classifying work but that each case must be looked at, based on the fact of the case, and a close scrutiny of the relationships between the parties carried out. Accordingly, the

Page 1 / 2

ocument.pdf For the first time, It finds that there is 'no [Open with] statutory or common law definition of contract for service or contract of service'. It also noted that employers cannot utilise a 'tick Box' exercise when classifying workers but that each case must be looked at, based on the fact of the case, and a close scrutiny of the relationships between the parties carried out. Accordingly, the

nsent of the Chair, in advance of tomorrow's engagement, please find attached submissions from the following: Irish Co

correct categorisation of employment status in any given situation is inherently fact specific. However, in the absence of legislative provision, this unfortunately means that individual workers will be forced to pursue costly civil cases.

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

I trust the above is in order.

Exhibit 29

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 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.

Exhibit 30

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 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,

Audrey Fleming

Audrey Fleming,
Private Secretary.

Exhibit 31

an Árd-Chigire Cánach,
1, Ionad Setanta,
Thobair Phádraig,
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.

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.

Certificates of tax free allowances will be issued on the basis of the list - individual tax returns for couriers are not required at this stage. If any courier has additional allowances/reliefs to claim over and above the basic personal and PAYE allowances and expenses e.g. mortgage interest, VHI etc., they can be claimed directly by 'phoning or writing to Unit 967, 14/15 Upper O'Connell St., Dublin 1 or by calling in person to the Central Revenue Information Office, Cathedral St., Dublin 1, immediately they receive their tax free allowance certificate.

Courier firms who do not opt for the voluntary PAYE system will be visited or contacted bt 'phone etc., shortly to obtain a list of couriers in order to set the couriers up on the self-assessment system for tax and PRSI purposes.

I will be kept informed of progress and will be available to clarify matters of policy etc. Apart from that, I am now regarding the matter as closed - the administration of the voluntary PAYE system is now with PAYE 4 District and the relevant outdoor personnel who are fully aware of the matter.

Des Murray can be contacted by 'phone at 8746821, Extensions 4671, 4672, 4673, 4675 or by fax at 8786920. Some courier firms have already made contact on the basis of my letter of 7 March 1997. Contact from other Courier firms will be expected by Des Murray and his staff over the coming week.

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.

I would be obliged if you could arrange to have this lettercirculated immediately to the Courier Industry as before.

Yours Sincerely,

Bob Dowdall

Exhibit 32

an Árd-Chigire Cánach,
ıar 1, Ionad Setanta,
áid Thobair Phádraig,
ıile 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

7 March 1997

Re: Couriers

1. Introduction

1.1 While this letter is addressed to you because of your professional involvement in discussions to date, it also has an immediate impact on courier firms and couriers engaged by the courier firms. To ensure that this letter reaches the courier firms and couriers please arrange, as discussed, to have it circulated to all known courier firms, particularly those represented at the meeting in the Burlington Hotel on Monday, 3 March 1997. The courier firms, in turn, should make the contents known to their couriers

1.2 For some time past the taxation and PRSI position of couriers has been under discussion.

L3 It would appear that there is a generally held perception that certain return compliance and tax/PRSI obligations of courier firms and couriers were "put on hold" until the status of couriers for tax and PRSI purposes was concluded. This was not the case. Because the PAYE system for tax and PRSI purposes was not generally applied by courier firms on couriers earnings

- there was always an obligation on courier firms to make a return of all couriers who were paid in excess of £3,000 (gross) and
- there was always an obligation on couriers to make annual tax returns and pay their tax liability under self-assessment.

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.

2.2 It should also be noted that any arrangement in relation to the status of couriers and the voluntary PAYE option referred to in paragraph 4 below is for tax purposes only, unless a change in status is warranted by a future change in circumstances (e.g. by an overriding decision made in another Tribunal or Court of Law). This arrangement should not be taken as a precedent in any other area of law where the status of couriers may be a factor. The matter, if relevant in the future, should be taken on its own merits.

3. *Couriers Expenses*:

Again, in the interest of uniformity, simplification reducing the compliance burden on courier companies and couriers, I agree the following standard expenses regime for the coming five years 1997/98 - 2001/2002 inclusive to allow for a reasonable period of stability for all concerned. The expenses position is without prejudice to either Revenue, the couriers or courier firms proposing that the matter be reviewed or withdrawn at the end of that period. It also does not override an individual's statutory right in relation to claiming appropriate expenses incurred "wholly and exclusively" for the purpose of the trade.

3.1 *Motor Cycle Couriers*

Motor Cycle couriers' expense allowance figure, to exclude wear and tear on the motorcycle, is agreed at 40% of a courier's gross earnings.

Wear and tear element on the motorcycle will be regarded as additional to the 40% expenses. To avoid couriers, courier firms and Revenue having to compute wear and tear on an ongoing basis, particularly each time a motorcycle is changed, I agree to allow 5% of the courier's gross earnings as an additional expense to cover wear and tear on the motorcycle. This will give a total expense allowance of 45% of gross earnings for motorcycle couriers.

3.2 *Cycle Couriers*

While cycle couriers would obviously not have a similar level of expenditure to that of motorcycle couriers, I propose to agree a composite flat-rate expenses figure of 20% to cover wear and tear, replacement of the bicycle and spare parts and the purchase , replacement and cleaning of specialist gear etc.

3.3 *Van Owner/Driver Couriers*

Because of the limited numbers and the particular circumstances of owner van driver couriers there is no point in agreeing a flat-rate expense for this category. They may claim expenses incurred "wholly and exclusively" for the purpose of the trade in the normal way.

4. *PAYE*

4.1 Because I propose to treat couriers as self-employed for tax purposes, courier firms will not be obliged to deduct tax and PRSI through the PAYE system.

4.2 However, as discussed, to avoid couriers having to comply with self-assessment procedures and courier firms having to comply with annual return filing for self-employed persons to whom they make payments over £3,000 etc I would suggest that the option of operating PAYE and PRSI class S through the PAYE system **on a voluntary basis** for motorcycle and cycle couriers be seriously considered.

4.3 Operating the PAYE system voluntarily would not compromise the statutory rights of the courier firm or couriers in any way. The main advantages would be that

- even though operating the PAYE system would be voluntary, the PAYE allowance of £800 will be given to the couriers,
- approval can be given to courier firms to operate PAYE and PRSI Class S on the earnings of motorcycle or cycle couriers reduced by 45% or 20% expenses, as appropriate,

- Income tax and PRSI is collected in a structured fashion. This will avoid the couriers having to comply the the provisions of the self-assessment system, e.g. annual return form 11 filing, payment of preliminary tax, exposure to surcharge provisions for late filing etc.

- a separate PAYE registration number could be allocated, if required, to operate PAYE on the couriers. This is obviously not a necessity - the existing PAYE registration number can be used and will avoid the delay of additional registration etc.

4.4 I would hope for a unified response from courier firms on the issue of voluntary registration for PAYE in order to bring the matter to a final conclusion shortly and with a view to introducing a voluntary PAYE system for the couriers from 6 April 1997.

I will require from each courier firm a list of couriers currently employed by them showing -

- Full name and address
- RSI number
- Date of birth and mother's maiden name
- Whether the courier is single or married, if that information is available to the courier firm.

The courier firm should also state their own PAYE registered number.

The start date of 6 April for the voluntary PAYE system is not negotiable as most courier firms would already be registered for PAYE purposes anyway.

4.5 The courier firm should indicate that the voluntary PAYE option is being taken up. From these lists the couriers will be set up on the PAYE system for the issue of PAYE documentation.

4.6 When the list of couriers is submitted under the PAYE option a Notice of Tax Free Allowances will be issued shortly afterwards to the courier and a Certificate of Tax Free Allowances or Tax Deduction Card (depending on whether the courier firm is computerised or not) will be issued to the courier at the same time in order to implement the PAYE system with effect from 6 April 1997.

4.7 If you do not hold a Certificate of Tax Free Allowances or Tax Deduction Card at 6 April 1997 for a courier a concessional temporary Tax Free Allowance may be used from 6 April 1997 until you receive the appropriate tax documentation.

- For a single courier the temporary concessional allowance is the personal allowance 2,900 + 800 PAYE allowance = 3,700 x 1/52 = £72.

- For a married courier the temporary allowance is personal allowance 5,800 + PAYE allowance 800=6,600 x 1/52= £127.

4.8 The concessional temporary tax-free allowance or the subsequent official tax-free allowance may be used against the couriers earnings after allowing for expenses as outlined above in paragraph 3.

5. *Non-PAYE*

5.1 Some courier firms may not opt for the voluntary PAYE option.

5.2 As previously stated, return compliance and tax/PRSI obligation were never "put on hold". Consequently, courier firms which do not opt for the voluntary PAYE and who have not made a return of all couriers who were paid in excess of £3,000 gross will be visited shortly after 5 April 1997 to obtain that list for 1995/96 (1996/97 should be returned in due course on or before the appropriate return filing date).

5.3 On the basis of the list, appropriate assessments or preliminary tax charges will be raised on the couriers based on the 1995/96 position and other relevent information.

6. *New Courier Firms*

6.1 Because of the historic background and discussions surrounding the courier industry to date, new courier firms set up will be visited for the foreseeable fixture to make them aware of the voluntary PAYE option and other tax/PRSI obligations.

Yours sincerely

Bob Dowdall

Exhibit 33

Re: Your previous correspondence in relation to:

"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"

Firstly, I would wish to apologise for the delay in issuing this reply.

As stated to you in our previous replies of 19 December 2018 and 9 January 2019 each appeal dealt with by the Social Welfare Appeals Office is looked at on a case by case basis and determined on its own particular facts. [On a very few occasions over the years an approach of having sample cases has been taken by the Appeals Office, with the agreement of all parties to the appeal.]

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

It is noted that in your correspondence of 9 January 2019 you referenced the decision of the Supreme Court in *O and others v Refugee Appeals Tribunal [2006] IESC 53*. However, that case is readily distinguishable from the situation pertaining to the Social Welfare Appeals Office. Firstly, the case at issue in that matter relates to the political state of certain countries and therefore consistency of decisions is required to ensure there is no different assessment of countries where there is no evidence of change. The decision making carried out by the Social Welfare Appeals Office centres on whether a particular person meets the requirements set out in statute and is far removed from such decision making which was at issue in *O and Others*.

For your information there is no open database of Appeals Officers' decisions which is available to the public or to the Department of Employment Affairs and Social Protection, therefore there is no "inequality of arms issue".

In summary, social welfare appeal decisions are individual decisions which are determined on their particular facts and which do not form binding precedent. Accordingly, the Social Welfare Appeals Office is not in a position to provide you with "precedential decisions of the SWAO regarding insurability of employment" as requested.

Kind regards

Grace O'Reilly

Exhibit 34

employed by Scope. The reason given? My case and the McAuliffe High Court case.

A decision has been requested by Mr Richard McArdle of Clondalkin, Dublin 22 in respect of the employment status and PRSI position of his employment with Securicor Omega Express Irl Ltd (ref:9544490J), Ballymount Rd Lr, Walkinstown, Dublin 12.

Mr McArdle was employed by this company as a pushbike courier and has been regarded / treated as self-employed by the company.

Whether a person is employed (contract of service) or self-employed (contract for service) is a mixed question of law and facts. The facts (i.e. terms and conditions of employment) must be established and tested against the criteria set out in the Code of Practice for determining Employment or self-employment status of Individuals. [The tests / criteria in question are derived from many different court judgements over the years]. In applying these tests to this case I have outlined the points in favour of a contract of/for service as follows:-

Contract of Service Indicators

(1) Mr McArdle states he was under the control of the company as the base controller decided what work would be done and where.

(2) He stated he must render personal services and could not send a substitute.

(3) He worked fixed weekly hours (9am-6pm) 5 days a week.

(4) He had to log in with the base controller.

(5) He states he could not refuse a delivery.

Per the INS 1 form completed by Securicor Omega the company disagree with points 1,2,4 & 5.

Contract for Service Indicator

(1) Mr McArdle supplied his own transport, protective clothing, mobile phone and paid for the maintenance of same.

[This point was highlighted in the judgement in the High Court case McAuliffe v Minister for Social Welfare. In that

case the Judge held that where a person supplied his own transport, covered his own costs, derived a profit or suffered a loss on the basis of good or bad business management - was in business on his own account (contract for service)].

(2) He had no entitlement to holiday/sick or expenses.

(3) He stood to gain or lose depending on the number of deliveries he made.

(4) He was paid piecemeal (i.e. per the number of deliveries he made daily).

(5) If he could not attend for work then he was not paid.

Conclusion

The employment status and PRSI position of couriers has been examined in great detail at an oral hearing recently. This hearing was attended by three legal teams who addressed all the points for and against a contract of/for service. After some deliberation the appeals officer found the courier to be self-employed.
This case is very similar in many respects to those previously examined in that the courier supplies his own transport and is responsible for the maintenance of same. He is paid per delivery and if he does not attend then he receives no remuneration. This would appear to be a contract for the transportation of goods and not a contract of service. Based on the information on file the most important points are in favour of a contract for service rather than of service therefore I am satisfied that Mr McArdle was engaged under a contract for service and insurable at PRSI Class S.

Accordingly, I decide that the employment from 23 June 1999 to 06 April 2001 with Securicor Omega was insurable under the Social Welfare Acts at PRSI Class S provided the reckonable income is at least £2500 a year. [If the income falls below this figure then Class M is returned].

John Kellett
Scope Section
07 November 2001

Exhibit 35

PAC32-R-2157 B Meeting 16/05/2019

Oifig an Ard-Rúnaí, An Roinn Gnóthaí Fostaíochta agus Coimirce Sóisialaí
Office of the Secretary General, Department of Employment Affairs and Social Protection

Ms. Éilis Fallon
Committee Secretariat
Committee of Public Accounts
Leinster House
Dublin 2

9th. May 2019

Ref: PAC32-I-1410

Dear Ms. Fallon,

I refer to your correspondence dated 2 May 2019 concerning the use of precedential test cases by the Social Welfare Appeals Office to determine issues in respect of employment, self-employment or bogus self-employment. In this respect you also referred me to the transcript of the Committee meeting on 18 April 2019, item 2093 at pages 10-11.

The role of the Social Welfare Appeals Office is to determine appeals against decisions of Deciding Officers and/or Designated Persons of the Department of Employment Affairs and Social Protection. The legislation governing the appeals process is contained in Chapters 2, 3 and 4 of Part 10 of the Social Welfare Consolidation Act 2005 and the Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108 of 1998).

Section 300(2) of the 2005 Act gives statutory power to Deciding Officers of the Department to determine questions relating to the insurability of employment for social insurance purposes. All such determinations/ decisions can be appealed under the provisions of Section 311 of the 2005 Act to an Appeals Officer. The Department's Scope Section makes some 1,000 employment status determinations each year covering a range of issues including Directors of companies, family employments, partnerships and public sector employments. The number of cases involving employment or self-employment status is relatively small.

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. It is also the case that the legislation does not preclude such an approach.

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. 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

Áras Mhic Dhiarmada, Sráid Stórais, Baile Átha Cliath 1, D01 WY03
Áras Mhic Dhiarmada, Store Street, Dublin 1, D01 WY03
secretary.general@welfare.ie | + 353 1 704 3896 | www.welfare.ie

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 me that 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. She is therefore not aware of any precedential test cases.

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, which is by and large reflected in the Code of Practice for Determining Employment and Self-Employment Status of Individuals. The Office does not categorise cases as 'bogus self-employment' and the Office is only concerned with determining if a worker is correctly classified as an employee or a self-employed person. In such cases the fundamental issue to be examined is the reality of the working relationship between the parties concerned, rather than the motivation behind the organisation of the employment contract in a particular manner.

Members of the Committee will be aware that 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. The Annual Report includes a selection of case studies of appeals determined by Appeals Officers and more recently has included a representative sample of decisions that were subject to a review by the Office under Section 318 of the 2005 Act (error of fact or law). The Annual Report serves as a guide for appellants, their representatives and Department officials, and helps to clarify the process by which appeals are determined. In Chapter 4 of her Annual Report 2015, the Chief Appeals Officer set out a number of issues on the insurability of employment that arise on appeal. This included appeals relating to the question of whether a person was employed under a contract of service or a contract for services. In that Chapter the CAO outlines the main factors considered by Appeals Officers in determining appeals on this issue. The Annual Reports of the Office and a number of case-studies can be accessed on https://www.socialwelfareappeals.ie/

I trust this clarifies the position.

Yours sincerely,

John McKeon
Secretary General

Exhibit 36

Oifig Achomhairc Leasa Shóisialaigh
al Welfare Appeals Office

[redacted]

Re: Insurability of Employment Appeal (Appellant: RTE.) [redacted]

[redacted]

Registration of appeal submitted by RTE

As indicated to you in our email of 5 April 2022, the appeal application from Arthur Cox, Solicitors, on behalf of RTE, which this Office forwarded to you on 11 March 2022, was deemed to meet the necessary criteria required of an appeal application. That correspondence, which was in respect of a Deciding Officer's decision dated 22 February 2022, was received in this Office on 4 March 2022. It was noted that further submissions would be provided by Arthur Cox at a later date but the grounds stated in the application, in bullet point form, sufficed in order for the appeal to be registered. This Office receives and registers appeals in this manner on an ongoing basis.

This Office has subsequently engaged in correspondence with Arthur Cox, Solicitors,seeking their further submission as quickly as possible. When that is received it will be issued to you as the Notice Party to the appeal in line with our standard procedures.

Information on appeal procedures can be found on our website at www.gov.ie/swao

Query in relation to "test/sample cases"

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 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."

ifig Achomhairc Leasa Shóisialaigh, Teach D'Olier, Sráid D'Olier, Baile Átha Cliath 2, D02 XY31
l Welfare Appeals Office, D'Olier House, D'Olier Street, Dublin 2, D02 XY31
18 74 74 34 | swappeals@welfare.ie | www.gov.ie/swao

)ifig Achomhairc Leasa Shóisialaigh
al Welfare Appeals Office

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 2 May 2022 and the procedures of this Office your correspondence and this reply is being shared with the appellant, RTE, via its representatives Arthur Cox, Solicitors.

Yours sincerely,

Sinéad Donegan

Sinead Donegan

Social Welfare Appeals Office

cc Arthur Cox, Solicitors (representatives for RTE, Appellant)

Exhibit 37

November 1999

'Dear Mr. Hughes,

Please could you convey to the Minister for Labour, Trade and Consumer Affairs, Mr. Tom Kitt T.D., my disappointment that he cannot meet my request for a meeting to discuss the issue of Motorbike Couriers.

I am well aware of the organization 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.

It may be, and we are going through the process presently of finding out, that a legal definition of the employment status of Motorbike Couriers would differ from that determined by Revenue and Social Welfare. I understand that there may be cases where Labour Court decisions determined that people who are allegedly self-employed were indeed employees and we are investigating this at present.

Again, I would appreciate if you would reiterate my disappointment to the Minister as the intention of the meeting was to inform him of the concerns of Motorbike Couriers not to seek an explanation of the present situation as it is. However it leaves me no option but to raise the matter with opposition employment spokespersons in order to seek a just situation for our members.

Yours sincerely,'

Exhibit 38

An Roinn Gnóthaí Fostaíochta
Agus Coimirce Sóisialaí
Department of Employment Affairs
And Social Protection

6

The decision of the Deciding Officer is as follows:

The employment

of: Matthew McGranaghan

by: MEPC Music Ltd (Er no: 3230312IH)

from: 1st January 2014 to date

is insurable under the Social Welfare Acts at PRSI Class A provided that the earnings were at least 38 Euro a week. If the earnings were below 38 Euro a week PRSI Class J applies.

Roger Byrne
Deciding Officer
Scope Section

A note on the reason for the decision is set out hereunder:

An insurability decision has been requested on behalf of Matthew McGranaghan in respect of his employment as a musician/band member by MEPC Music Ltd (Er no: 3230312IH), t/a the Michael English band, from 1/1/14 to date.

According to the information in the investigator's report, Matthew McGranaghan works as a fiddle player with the Michael English band. Michael English is the lead singer and musical director of the band. He is also company secretary and majority shareholder of MEPC Music Ltd. Matthew McGranaghan contacted Michael English in 2013 to let him know of his interest in becoming part of Michael English's new band. After a meeting between them Matthew was offered the job. His rate of pay is €250 per gig, increasing to €280 from April 2019. Matthew was asked to issue invoices for payment in August 2014. Payment for the first couple of years was made by cheque and was then made by EFT. He is paid to be a fiddle player with the band (he also plays acoustic guitar in songs of a genre where a fiddle would not be used, such as rock 'n' roll).

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The band derives a lot of its work in the Country and Irish scene, mainly playing at dances throughout Ireland, as well as the UK, Spain and Portugal. The band also does theatre concerts, church concerts and festivals in Ireland and the UK. Most of the work Matthew McGranaghan does with the band is at dances. The duration of these dances is two hours. Doors to the venues normally open two hours before the band starts playing. This means that the band have to be there before the doors open to set up and do sound checks. The only equipment that Matthew McGranaghan carries to gigs is his fiddle. The rest of his equipment and all other band equipment is carried in the band's truck and set up by a crew. (Matthew supplies his own instruments and equipment required to do his job: a fiddle, an acoustic guitar, 2 tuning pedals, 1 octave pedal, a wireless in-ear monitor system and various leads, to the value of €1,200 to €1,500). The start and finish times of the dances can vary but they are usually between 10:30 pm and 12:30 am or 11:00 pm and 1:00 am. Matthew has to drive himself to wherever the gig is taking place (He enquired about fuel costs/travel expenses being reimbursed but received no reply). For theatres and concerts the show normally begins at 8:00pm, or 7:30 pm in the UK. He would have to be at the venue and ready to do the sound check at approximately 5:00 pm. This would generally take 10 minutes but may take an hour if the band was instructed to rehearse something. In respect of performances in Ireland Matthew supplies his own car and covers his own costs in driving to all the gigs (fuel, insurance, tax, tolls, AA Rescue, and maintenance). When the band tours in the UK usually for 20 nights a year, transport is supplied in the UK. Transport is also supplied to get to the UK by ferry or plane. Air travel is also supplied for any other trips outside of Ireland. Accommodation is provided on all travel outside of Ireland. In Ireland accommodation is supplied by MEPC Music Ltd when necessary, for example, for consecutive gigs in the same part of the country.

Matthew McGranaghan said that as a fiddle player with 30 years' experience he doesn't always require direction from someone else. The skill set in the band's genre requires musicians to be able to improvise and play from memory, as distinct from an orchestra, where sheet music is available, and the performer must play what is in front of them. He stated he would also be given recordings of songs and would have to learn them and be able to reproduce the part of the tune played by the fiddle from what he had heard. He said he would have certain freedom to play what was suitable. If it wasn't suitable, the musical director, Michael English, would instruct him what to play. Ultimately the decision lay with the musical director. Michael English would supply him with chord charts/sheet music or recordings of songs that he would have to learn material from. At rehearsals Matthew would be instructed what and where to play in a particular song.

Sometimes he would be told which verse to come in on the fiddle and it would be left to him to play what was appropriate for the style of song. Michael English/MEPC would take the bookings for all the performances and the schedule of performance dates would then be communicated to the musicians in the band. Michael English/MEPC decided what gigs to take, when to take them, and when the band holidays would be. Generally, the musicians were allocated 8-10 days in January and the same in September each year. Matthew is not required to provide public liability insurance. He cannot gain or lose financially from the performance of the work. He states that between 1/1/14 and 15/3/20 he only ever took two nights off from playing in the band for personal reasons, one with 48 hours' notice and one with several months' notice. It was not his responsibility to find a replacement. It would be up to the band to find a replacement if he were unable to perform. He stated that asking for too many nights off could lead to him being seen as unreliable or to him being replaced. From the information supplied to the Inspector, it appears that Matthew McGranaghan has been the band's resident fiddle player since January 2014.

Matthew said on nights off from playing with the band he sometimes stood in with another band when they needed a fiddle player, or on days off he sometimes does some recording work in a studio. In 2019 he did approximately 3 or 4 gigs with other bands, and about 5 recording sessions in a studio. However due to his workload with the Michael English band, which is approximately 220 gigs/days per year, he only did a limited amount of extra work for others and he also turned extra work down in order to have some free personal time. He stated he wouldn't be able to perform as a musician for another band at the same time he was working for the Michael English band.

The work is carried out all over Ireland/Northern Ireland at dances held in hotels, large lounges and marquees. In the summer months the band would perform mostly at festivals throughout the country, on a gig-rig mobile festival stage or in marquees. They also do concerts in theatres, hotel function rooms and churches. In the UK the band performs mainly in theatres. When they perform in the UK, flights to the UK, travel and accommodation is arranged by Michael English/MEPC. When the band performs in Spain and Portugal, they do so as part of Paul Claffey Tours holidays. Flights and accommodation are arranged by Paul Claffey Tours. Paul Claffey is a director of MEPC Music Ltd. The band play 6 gigs in a 7 day period or 9 in a 10 day period. The gigs vary between 45 minutes and 2 hours, including 1 outdoor poolside gig. The band also plays on a cruise ship each year on a week-long cruise for a US promotions company. During his free time on the cruise he was able to perform with bands if they required a fiddle player. This was usually done to pass the time and the other band would pay $50-$100 off his on-board bill on the ship.

He was able to perform with other bands/artists on the cruise ships, provided that it wasn't at the same time as shows for MEPC. Due to the amount of time he works for the Michael English band/MEPC, throughout the year, Matthew McGranaghan didn't have much time to do work with other bands, but did so occasionally, as mentioned earlier. Any earnings from such freelance work is included in his own self-assessment tax returns.

According to the INS1 completed by Matthew McGranaghan he got the job by approaching Michael English, the lead singer. He worked variable hours. He is subject to direction, control and dismissal. He is not free to take up similar work the same time with another business or company. He supplies labour only. He supplies his own instruments, leads and pedals. The P.A, and lighting are supplied by the company. The work is carried out at various locations in Ireland, the UK, Europe and North America. This is decided by the company. He had a say in negotiating his rate of pay. The company supplies transport. Mr McGranaghan is not required to provide Public Liability Insurance. He could not gain or lose from the performance of the business. He has to render personal service and cannot hire an assistant. He can send a substitute. The company would pay the substitute.

The INS1 completed by Michael English agrees with the information in Mr McGranaghan's INS1 except for stating that Mr McGranaghan did not have to render personal service and that he would pay any substitute.

Matthew McGranaghan provided further information stating that in February 2019 he raised the possibility of being an employee of the band. He was told that MEPC Music Ltd had no obligation to offer him employment. He was advised by Paul Claffey, a director of MEPC Music Ltd, that he would be better off to create a limited company and use it as a vehicle to invoice MEPC, rather than continue as an independent contractor. Mr Claffey stated that such an arrangement could be used as a mechanism to legitimately maximize payments from MEPC, tax free. Mr Claffey also suggested that MEPC might be able to make an additional payment towards annual accountancy fees incurred by Mr McGranaghan through this arrangement. Mr McGranaghan did not form a limited company.

I asked Matthew McGranaghan to clarify the travel arrangements for when the band travelled abroad. He said For U.K. tours, the truck and some of the crew would travel on their own generally a day before hand. I asked if the band always travelled together and if each member made their own arrangements. He said the band would travel sometimes from different airports (depends which airport was closest etc) or all together if a ferry was being used. MEPC organised the times and costs of any flights/ferry travel. Sometimes the entire band and crew would all fly together depending on the gig and whether the truck and gear had to travel and be used.

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Michael English provided further information stating that he has worked at various shows/venues since 2014 where he did not require the services of Matthew McGranaghan in his band. He said Matthew McGranaghan is free to decide if a particular show or a fee does not suit him. When this happens Michael English would organize a replacement. Michael gives an example of Matthew declining to perform on an episode of The Late Late Show as he thought the fee offered was not sufficient. However, he did perform with the band later that night at a gig in Mullingar. Matthew McGranaghan is free to perform shows with other bands/entertainers whilst also working with Michael English's band.

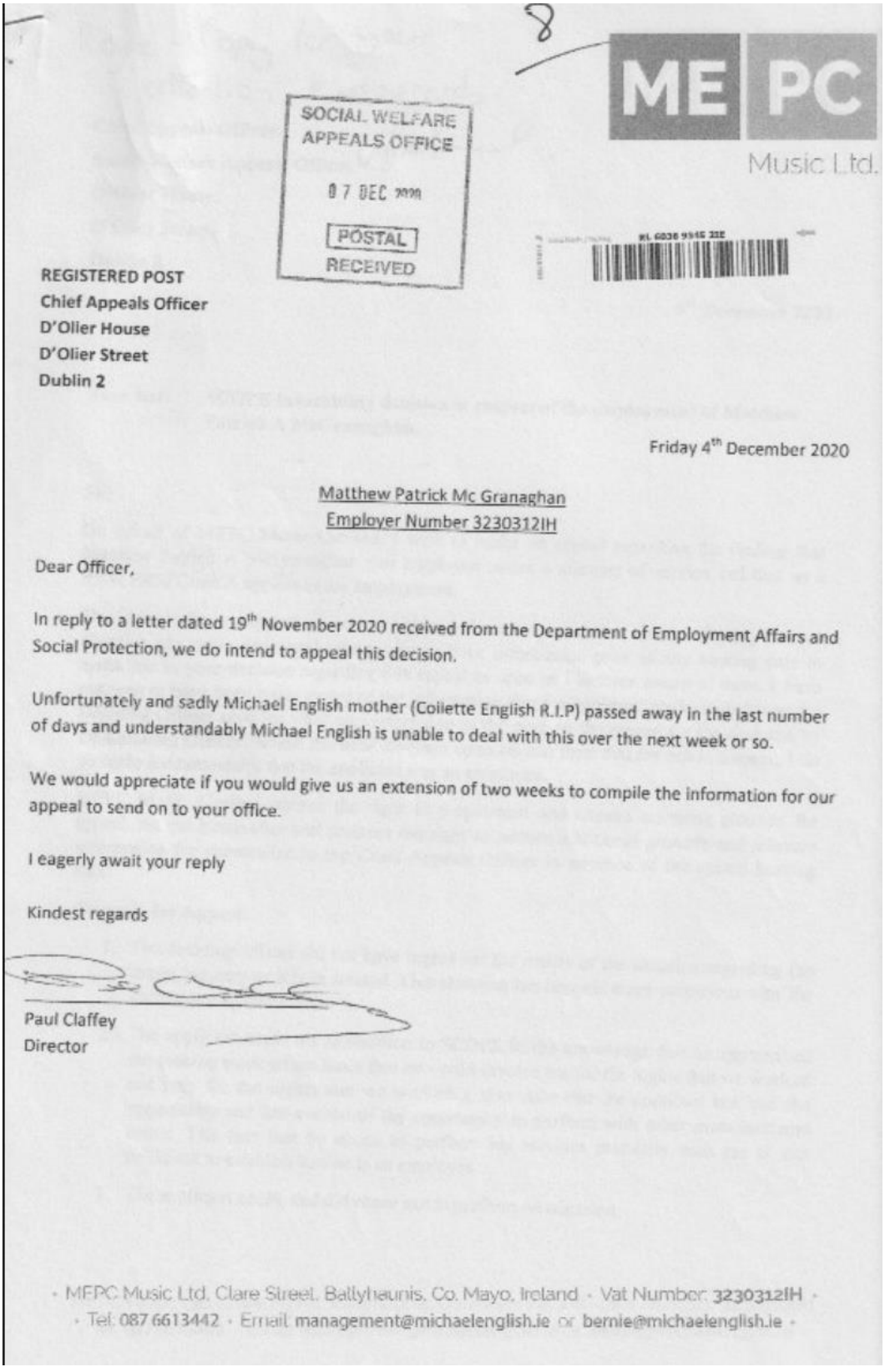
I have considered the conditions of employment and I am more persuaded by the information supplied by Matthew McGranaghan. I find he satisfies the control test, as he was under the instruction of the musical director and he had no say in determining the job specifications, he performed as part of a band of musicians, performing a set list of tunes. He had some discretion as to how he played, but if it was not deemed suitable the musical director would instruct him what to play. The musical director had the final say. Matthew could be told which verse of a song to play in, and was routinely given recordings of songs to learn so he could play them at gigs. He supplied labour and his own instruments. He has no say in determining his own hours of work. He had no say in sourcing the employment. Michael English/MEPC would take the bookings for all the performances and the musicians in the band would be told the schedule of performance dates. He satisfies the exclusivity test as although he occasionally played with other bands in his time off, because of his commitments to the Michael English band, he did not have the time to work elsewhere, I am satisfied that working with Michael English was his main employment, given the amount of work he did with him, and that he would give priority to the work with him.

Considering factors such as mutuality of obligation and integration, he was offered almost continual work by the company for 6 years. I am aware of one example where he declined an offer of work from them because he was not satisfied with the fee offered, but the same example says he worked with the band at a second gig that same night. He was reluctant to ask for too much time off as he thought this would mean he would be seen as unreliable and possibly be replaced. His holidays were decided by the company. The band members were allocated 8-10 days in January and the same in September. When the band performed outside Ireland, travel (by air/sea) and accommodation was arranged and paid for by the company in the UK and by Paul Claffey Tours when they toured mainland Europe. Mr McGranaghan could not take holidays at his own discretion and did not have to pay for his own air/sea travel or accommodation with regard to performances with the band.

Matthew McGranaghan worked hours determined by the times of the gigs. His work was dictated by MEPC as regards content. He is directed by MEPC as to what work is done, how the work is done (his skill and experience notwithstanding), and when the work is done. The work was carried out on premises booked by MEPC. In effect MEPC decided where the work was done. Travel expenses and accommodation for overseas engagements are covered by MEPC.

I am satisfied that, on the balance of the information, he is employed under a contract of service. PRSI Class A applies to the employment.

Exhibit 39



SOCIAL WELFARE APPEALS OFFICE
07 DEC 2020
POSTAL RECEIVED

ME PC Music Ltd.

REGISTERED POST
Chief Appeals Officer
D'Olier House
D'Olier Street
Dublin 2

Friday 4th December 2020

Matthew Patrick Mc Granaghan
Employer Number 3230312IH

Dear Officer,

In reply to a letter dated 19th November 2020 received from the Department of Employment Affairs and Social Protection, we do intend to appeal this decision.

Unfortunately and sadly Michael English mother (Collette English R.I.P) passed away in the last number of days and understandably Michael English is unable to deal with this over the next week or so.

We would appreciate if you would give us an extension of two weeks to compile the information for our appeal to send on to your office.

I eagerly await your reply

Kindest regards

Paul Claffey
Director

MEPC Music Ltd. Clare Street. Ballyhaunis. Co. Mayo. Ireland · Vat Number: 3230312IH
Tel: 087 6613442 · Email: management@michaelenglish.ie or bernie@michaelenglish.ie

Roger - Copy for your attention kind regards.

Chief Appeals Officer,
Social Welfare Appeals Office,
D'Olier House,
D'Olier Street,
Dublin 2.

9th December 2020

Your Ref: **SCOPE Insurability decision in respect of the employment of Matthew Patrick A McGranaghan.**

Sir,

On behalf of MEPC Music Limited, I wish to make an appeal regarding the finding that Matthew Patrick A McGranaghan was employed under a contract of service and that as a result PRSI Class A applies to the employment.

The grounds for my appeal are set out below and are not exhaustive and I will bring to your attention any other additional relevant grounds or information prior to any hearing date to assist you in your decision regarding this appeal as soon as I become aware of them. I have not seen or have been made aware of the information that the applicant made available to the Deciding Officer save for what was referred to in the note on the reason for the decision by the Deciding Officer. Whilst the note is reliant upon certain facts that are not in dispute, I do disagree fundamentally that the applicant was an employee.

MEPC Music Limited reserve the right to supplement and expand on these grounds for appeal, set out hereinafter and reserves the right to adduce additional grounds and relevant information for submission to the Chief Appeals Officer in advance of the appeal hearing date.

Grounds for Appeal:

1. The deciding officer did not have regard for the reality of the situation regarding the music industry as it is in Ireland. This situation has become more precarious with the current health restrictions.
2. The applicant made his application to SCOPE in the knowledge that he approached me seeking work on the basis that he would invoice me for the nights that we worked and only for the nights that we worked. I also state that the applicant has had the opportunity and has availed of the opportunity to perform with other musicians and bands. The fact that he chose to perform his services primarily with me is not sufficient to establish that he is an employee.
3. The applicant could, and did chose not to perform on occasion.

· MEPC Music Ltd. Clare Street Ballyhaunis, Co. Mayo. Ireland · Vat Number 3230312IH ·
· Tel 087 6613442 · Email management@michaelenglish.ie or bernie@michaelenglish.ie ·

4. There is no evidence that MEPC Music Limited did or would have found the applicant unreliable or would have had him replaced if he requested too many nights off. It was his choice.

5. The control test referred to does not make allowance for the fact that all musicians playing together must take instruction from a band leader to play the music at the required tempo or rhythm.

6. It is long established custom and practice that musicians working with bands travel with the band and do not have to supply their own transport to distant gigs.

7. The applicant did by his own information provide service to different people and bands.

8. There is no evidence that the applicant had to turn down any work from other people requiring his services.

9. It is also long established custom and practice that musicians have their accommodation covered by the band, in this case MEPC Music Limited. This practice is not indicative of a master and servant situation.

10. There is no indication of whether the applicant did make the relevant returns to revenue as a self-employed person.

11. It is denied that MEPC Music Limited was ever in a position to dismiss the applicant as the applicant was always in control of what work he provided and when he provided it.

12. The applicant could send a substitute and MEPC would pay that substitute, it was often the case that MEPC Music Limited would look for a replacement for musicians at short notice due to many different reasons outside of the control of MEPC Music Limited.

13. It is submitted that the decision is erroneous and is a mistake in law and on that facts and did not take account of those facts and additional information that were referred to in the information supplied by MEPC Music Limited.

14. The exclusivity test cannot be satisfied if the applicant provides services to other bands. This is a mistaken belief.

15. There was no obligation for MEPC Music Limited to provide services to the applicant and similarly there was no obligation on the applicant to provide services on MEPC Music Limited behalf. There is no mutuality of obligation and integration.

16. Holidays are a matter for MEPC Music Limited and its staff and did not and do not apply to the applicant as he was free to decline the offer to provide services. The lack of bookings for a period of time is not defined as holidays and MEPC Music Limited would have continued its business despite not having bookings.

17. The applicant could take his holidays anytime and has not demonstrated any examples of when he was unable to take his holidays. In any event that is a matter for the

applicant and MEPC Music Limited denies that it was responsible for the applicant's alleged forbearance of his holidays.

Yours Sincerely,

Michael English

Director/Company Secretary

Signed for on and on behalf of MEPC Music Limited.

Exhibit 40

Inventory of Evidence -
MMG = Matthew McGranaghan
MEPC = MEPC Music Ltd owned by Michael English & Paul Claffey

Filename	Description	Date (Approx)
PDF: 001	Initial email from MMG to SCOPE requesting an adjudication on his employment status.	08 May 2020
PDF: 002 INS MMG	INS 1 Form completed by MMG	
PDF: 003 INS MMG	Additional information from MMG for inclusion in his INS 1 Form	
PDF: 004 INS MEPC	INS 1 Form completed by MEPC	
PDF: 005	Letter from Social Welfare Inspector Tom Fagan to SCOPE section. Email from Roger Byrne, SCOPE, to MMG and reply from MMG to Roger Byrne.	31 Aug 2020 17 Nov 2020
PDF: 006	The decision of the Deciding Officer, Roger Byrne.	Nov 2020
PDF: 007	MEMO from Roger Byrne, Deciding Officer, 18 November 2020.	18 Nov 2020
PDF: 008	Letter of intention of appeal MEPC. Letter of appeal from MEPC.	4 Dec 2020. 9 Dec 2020
PDF: 009	Summary following appeal from Deciding Officer, Roger Byrne.	
PDF: 010	Email from MMG in response to the appeal from MEPC.	10 Jan 2021
PDF: 011	Letter from Tony Fennessy, Appeals Officer to MMG & MEPC.	30 Apr 2021
PDF: 012	Letter from MEPC to Tony Fennessy, Chief Appeals Officer.	12 Aug 2021
PDF: 013	Letter from Tony Fennessy, Appeals Officer to MMG & MEPC.	16 Aug 2021

Filename	Description	Date (Approx)
PDF: 014	Email from MMG to Tony Fennessy, Chief Appeals Officer which included two attachments which are detailed below under 014a & 014b.	26 Aug 2021
PDF: 014a Dates Combined	List of dates supplied to MMG for his work with MEPC	
PDF: 014b Band Member Options	Email from Paul Claffey (MEPC) to MMG outlining the options for band members including forming their own limited company. Email from 13 Feb 2019.	
PDF: 015	Email from MMG to Tony Fennessy, Chief Appeals Officer.	27 Aug 2021
PDF: 016	Email from Paul Claffey (MEPC) TO MMG	22 Sep 2021
PDF: 017	Reply Email from MMG to Paul Claffey (MEPC), including 3 attachments detailed below.	28 Sep 2021
PDF: 017a ME Email 03/08/21	Email correspondence between Michael English (MEPC) and MMG dated 03 Aug 2021	
PDF: 017b ME Email 06/07/21	Email correspondence between Michael English (MEPC) and MMG dated 6 July 2021 and 10 July 2021.	
PDF: 017c Revenue 30/03/2021	Amended Tax Credit Certificate for MMG from Revenue.	
PDF: 018	Letter from Alan Dodd, Executive Officer to Matt McGranaghan including a letter from Tony Fennessy, Chief Appeals Officer, to MEPC Music Ltd.	04 Oct 2021

Exhibit 41

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 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.

Exhibit 42

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

Kind regards,

Aidan Hodson

Higher Executive Officer

Exhibit 43

n Oifig Achomhairc Leasa Shóisialaigh
ɔcial Welfare Appeals Office

MEPC Music Ltd
Clare Street
Ballyhaunis
Co.Mayo

20 January 2023

Appeal No: 20/22476
Appeal Type: Insurability

Dear Sirs,

The Chief Appeals Officer has asked me to write to you about your Insurability appeal, and to tell you that the Appeals Officer's decision is as follows:

Decision of Appeals Officer:

"The appeal by MEPC Music Limited is allowed."

The text of the Appeals Officers formal decision is set out below.

Question at Issue:

The question at issue is whether the worker, Matthew McGranaghan, has been working for the appellant company, MEPC Music Ltd., under a contract of service or under a contract for services during the period from 1 January 2014 to 26 August 2021 when Mr McGranaghan claims he had effectively been fired. The issue arose when the worker sought a determination on his employment status on 8 May 2020. Mr McGranaghan, in an email of 28 September 2021, advised that MEPC would only require his services in a self-employed capacity.

Reasons for Decision:

Background:

1. The worker, Mr McGranaghan, is a well-known and accomplished musician. He had been performing in the band (trading as MEPC Music Ltd) backing popular singer, Michael English, from September 2013 to lockdown in March 2020. On 8 May 2020, Mr McGranaghan sought a determination on his working status and this Department's Scope Section undertook an investigation. Scope determined that the worker had ben working under a contract of service and was therefore insurable at PRSI Class A. MEPC appealed that decision.

Decision under Appeal:

2. Under appeal is the Scope decision of 18 November 2020 deciding that Matthew McGranaghan has been working under a contract of service for MEPC Music Limited from 1 January 2014 and has been insurably employed at the PRSI Class A rate where earnings exceeded €38 per week.

3. The Deciding Officer (DO) noted that the worker works mainly as a fiddler and sometimes acoustic guitarist with the Michael English band. Mr English is the lead singer and musical director and is the company secretary and majority shareholder with MEPC Music Limited. The DO further noted that Mr McGranaghan had joined the band after having approached Mr English in 2013 and expressing an interest in joining his band. According to the worker, it was agreed that he would be paid €250 per gig, increased to €280 from April 2019. The DO took note of invoices which had been submitted by the worker for payment by cheque and latterly EFT. The DO also noted that, while the band mostly performs in Ireland, they also tour UK, Spain and Portugal. The DO found that the worker supplies his own instruments and minor equipment such as wireless in-ear monitor and that no travel expenses are paid in respect of gigs in Ireland but transport and accommodation is provided by the company when the band is performing outside Ireland or when playing consecutive nights at a remote venue. Scope acknowledged that a musician with 30 years' experience would not always require direction and would have freedom to improvise. Scope noted that Mr English, as the musical director, selected the set list and arrangements. The appellant company also booked the venues. The DO noted that holidays were taken in January and September each year and the worker provided no insurance cover. With regard to substitution, Scope reported that this rarely had happened and it was not the worker's responsibility to get a replacement. The DO took account of the fact that the worker sometimes stood in with other bands and also did session work in the recording studio but that this was limited and most of his work came from MEPC.

Appeal:

4. In its appeal submission, MEPC Limited assumed that the question would be dealt with by oral hearing and reserved the right to submit further evidence. The company argued that Scope did not have regard for the reality of the precarious nature of the music industry in Ireland and listed the following grounds of appeal:
   - The worker had approached MEPC seeking work on the basis that he would invoice the company for the nights that he worked.
   - The worker could, and did on occasion, choose not to perform.
   - There is no evidence that MEPC would have found the worker reliable or would have replaced him if he had requested too many nights off.
   - The control test does not take account of the fact that all musicians must take instruction from the band leader.

- It is long established practice that musicians working with bands travel with the band and do not use their own transport to distant gigs.
- The worker did provide his services to other people and bands.
- There was no evidence that the worker had had to turn down any work from other people requiring his services.
- It is long established custom and practice that musicians have accommodation covered by the band and this is not indicative of employee status.
- There is no indication as to whether the worker made tax returns as a self-employed worker.
- It is denied that MEPC had ever been in a position to dismiss the worker as he had always been in control of what work he provided and when he provided it.
- The worker was able to send a substitute in his place and MEPC would pay that substitute and it is common for MEPC to have to seek a replacement musician at short notice.
- It is submitted that the Scope decision is erroneous and a mistake in law as it did not take account of the facts outlined and additional information supplied in its submission.
- The exclusivity test cannot be satisfied if the worker provides services to other bands.
- There was no obligation on MEPC to provide services to the worker and no obligation on him to provide services therefore there was no mutuality of obligation.
- Holidays are a matter for MEPC and its staff and did not apply to the appellant as he had been free to decline the offer to provide services. The absence of bookings for the band for a period of time cannot be defined as holidays and the business of MEPC would have continued.
- The worker had been in a position to take his holidays anytime he wished and did not submit examples of being unable to take holidays.

5. Questions regarding employment/self-employment are determined on the basis of whether a worker is employed under a contract of service or working under a contract for services. The Supreme Court has held in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1997] IESC 9 that "each case must be considered in light of its particular facts and circumstances". The Court also held that an Appeals Officer was correct on applying the legal principles laid down in High Court and Supreme Court decisions to the facts of the case. In addition to *Denny,* other leading cases will be referenced such as: *Castleisland Cattle Breeding Society Ltd v. Minister for Social and Family Affairs* [2004] 4 IR; *Neenan Travel Limited and Minister For Social and Family Affairs* [2008 No.440SP]: *Minister for Agriculture & Food –v-*

Barry & Ors [2008]; *Karshan (Midlands Limited) trading as Domino's Pizza and The Revenue Commissioners* [2022] IECA 124 (under appeal to the Supreme Court).

Oral Hearing of 24 May 2022:

6. After the unavoidable delays due to the pandemic, the appeal was eventually scheduled for an in-person oral hearing on 24 May 2022.

7. On 18 May, Mr McGranaghan first signalled his reluctance to continue in the process and applied to have the case referred to the Circuit Court under the provisions of section 307(1) of the Social Welfare Consolidation Act 2005 and he submitted as follows:
The failure of the Social Welfare Appeals Office and the Chief Appeals Officer to furnish me with full details of these, hitherto, unknown sample/test cases, the failure of the Social Welfare Appeals Office and the Chief Appeals Officer to notify me that such sample/test cases existed and the insistence from the Chief Appeals Officer that I attend at the Social Welfare Appeals Office appeal hearing despite the glaring inequality of arms issue, leaves me with no choice but to insist that the Chief Appeals Officer immediately certifies that the ordinary appeals procedures are inadequate to secure the effective processing of my appeal, and the Chief Appeals Officer should cause a direction to be issued to the person who has submitted the appeal directing the person to submit the appeal not later than 21 days from receipt of the direction to the Circuit Court and the Circuit Court may, on hearing the appeal as it thinks proper, affirm the decision or substitute the decision of the deciding officer. Mr McGranaghan advised that he would not be attending the oral hearing but the notification was received too late to cancel the hearing. Mr McGranaghan had engaged in the appeal process up to this, even confirming his availably for the oral hearing as late as his email of 14 April 2022.

8. The oral hearing opened on 24 May 2022. MEPC, the appellant company, was represented by: Mr Derek Ryan BL, Mr Paul Claffey, Mr Michael English and Ms Bernie Greally. The worker and notice party, Mr McGranaghan, did not attend as he had advised. The communication from Mr McGranaghan was revealed to the appellant company and after understandable deliberation, MEPC concluded that the request for a referral under section 307(1) of the Social Welfare Consolidation Act 2005 would have to be answered by the Chief Appeals Officer and the hearing adjourned. The Chief Appeals Officer did not consider that it was appropriate to refer this case to the Circuit Court under the provisions of section 307 of the Act.

Reconvened Oral Hearing of 1 November 2022:

9. On 19 October 2022, Mr McGranaghan was urged to participate in the oral hearing and was advised as follows: *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.

0. It is unusual that a party who has partaken in the process should withdraw from the appeals process in advance of an oral hearing. I attempted to assuage Mr McGranaghan's concerns but was unable to provide him with the test cases he is seeking. While test cases may have been used in the past, they have been used in very specific and limited circumstances and are certainly not relied upon as precedents. Mr McGranaghan was informed of the case law and guidelines which would be relied upon. In the absence of the notice party worker and in fairness to him, I did not conduct the hearing on a de novo basis.

1. The oral hearing reconvened on 1 November 2022: MEPC was again represented by Mr Derek Ryan BL, Mr Paul Claffey, Mr Michael English and Ms Bernie Greally. Mr McGranaghan did not attend as he had advised. The Department was represented by Brenda Moran and Cathy Duffy from Scope Section and Tom Fagan Social Welfare Inspector. The hearing was told that the officials had not been requested to attend the previous hearing as the then prevailing departmental policy had been not to attend hearings but that policy had recently changed.

2. Mr Ryan, for the appellant company, began by rejecting the Deciding Officer's application of the mutuality of obligation and exclusivity tests when finding that: (*the worker) was offered almost continual work by the company for 6 years* and that there was just one example of him declining work because of the fee offered.

3. The barrister asserted that the Deciding Officer (DO) had not had regard for the reality of the music industry in Ireland and that Mr McGranaghan had sought work from MEPC and had performed with other artists when he had not been working with MEPC.

4. Mr Ryan argued that Mr McGranaghan could have and did choose not to work for MEPC and had admitted this in his form INS1 declaration. Mr Ryan went on to say that musicians take instruction and direction from the band leader but that this was different to the control that an employer exercised over an employee.

5. MEPC's barrister said that it was custom and practice that members of the band traveled together when performing abroad. He said that this differed from domestic gigs. He pointed out that Mr McGranaghan had not been paid travel expenses when performing in Ireland but

conceded that, on occasion, accommodation was provided when the band was playing successive nights at a remote location.

16. Mr Ryan said that it is not disputed that worker had played over 200 gigs a year but pointed out that the worker was paid on the basis of the invoices that he submitted.

17. Mr Ryan questioned whether Mr McGranaghan had registered for VAT and whether he had made other declarations as to his working status for PUP and re-start grants.

18. Mr. Ryan for the appellant company referred to an e-mail exchange of 21 February 2019 in which Mr McGranaghan advised MEPC of the dates when he would not be available.

19. MEPC's barrister submitted that substitution was a feature after working relationship and that Mr McGranaghan could have sent a substitute on the dates that he was not available to perform. Mr. Ryan submitted that the exclusivity test cannot be satisfied and mutuality of obligation cannot exist in circumstances where the worker is able to dictate his availability and choosing not to work on occasion.

20. Mr. Ryan went on to say that what have been referred to as holidays were in fact periods of shallow bookings and this did not equate to the musicians being on holidays. He added that MEPC had other enterprise interests could operate during those periods without a band and using recordings.

21. MEPC said that it was custom and practice in the industry that replacement musicians had to stand-in in the event of double bookings etc. MEPC submitted that it had had no problem with substitution once the replacement was a suitably proficient.

22. Mr Ryan stated that the gig economy has been a feature of the country's economy from music industry to food delivery even extending into the legal profession. Referring to the recent *Karshan* case, Mr Ryan submitted that the Court of Appeal had reaffirmed that where mutuality of obligation did not exist, there can be no contract of service. He argued that there was no written agreement in this case so there had been no requirement for Mr McGranaghan to make himself available for work for the company. He said that the company had suggested the introduction of a written contract but this had not been acceptable to the workers.

23. Mr Ryan pointed out that there had been no sanction for non-attendance or non-availability and this had been noted in the decision by the Deciding Officer.

24. Mr. Ryan submitted that the worker had signed up for work but had not been contracted to do the work and, similar to *Karshan*, the worker had been offered a list of dates and he responded by signaling his availability. Mr. Ryan said that there had been no exploration of this issue in the

Scope decision and he further submitted that the worker had not been obliged to do the work and there had been no consequences for the worker refusing to do the work.

25. Mr. Ryan said that control was not a determining factor. He said that Mr McGranaghan had played with other bands and had worked as a studio musician.

26. Mr Ryan told the hearing that when working on ships/cruises, the worker had only committed to performing for a 2-hour gig per night during the week-long trip. Outside of this, he had opportunities to perform with other musicians and bands on the cruise.

27. Mr Ryan pointed out that the worker had not been paid travel expenses to gigs in Ireland and any implied contract could only come into being once he turned up to perform.

28. Mr. Ryan referred to the leading case of *Castleisland Cattle Breeding Society* where the Supreme Court held that there was *nothing unlawful or necessarily ineffective about a company deciding to engage people on an independent contractor basis* but the decider must look at *how the contract is worked out in practice as mere wording cannot determine its nature.*

29. Mr. Ryan argued that the company had no knowledge of Mr McGranaghan's tax status and whether he had availed and any social welfare or pandemic unemployment payments. MEPC said that Mr McGranaghan's social media profile identified him as representing the music industry workers. Mr Ryan stressed that Mr McGranaghan had been paid on the basis of invoices submitted for contractor services.

30. Mr. Ryan argued that Mr McGranaghan's PRSI status was central to this appeal and the potential consequent liability. Scope clarified that the full outstanding potential non-compliance would fall to the appellant company.

31. Scope questioned whether the worker had been offered a contract of service or a contract for services when the written agreement was proposed.

32. The hearing heard that a separate company, Paul Claffey Tours Ltd, operated cruises and booked bands to perform on the cruises and more than one band was booked per cruise and which provided the worker with opportunity for additional earnings.

33. The hearing also heard that MEPC had planned a musical for 2020 which was to be performed in 60 to 70 venues and that the band musicians were not required for the musical.

34. The appellant company reminded the hearing that Mr McGranaghan had admitted doing studio work and work with others. Mr Ryan referred to Mr McGranaghan's media profile where he pointedly omits any reference to MEPC.

35. Scope referred to the number of yearly gigs which MEPC had engaged Mr McGranaghan and argued that, even at the admitted 200 gigs a year, this was still a substantial level of commitment.

36. MEPC said that not every gig is profitable and cited putting on a 6th gig on a Scotland tour which was at a smaller venue yet the band members got paid for the gig. Even though the booking had not been viable, it was desirable fill the tour with gigs.

37. Scope argued that that the evidence was that Mr McGranaghan had been working for a body as opposed to being in business on his own accord and while it was accepted that he had done work for other bodies, the question at issue was his work with MEPC.

38. Scope said that the evidence was that Mr McGranaghan had been paid a fixed rate per gig and had not therefore been exposed to financial risk and was paid the agreed rate whatever the takings for the booking. Mr Ryan's response was that the Deciding Officer had not taken this into consideration in arriving at his decision.

39. MEPC's BL rejected the assertion that Mr McGranaghan was seen as part of MEPC's band and argued that the worker had been identified as a fiddle player rather than the band's fiddle player. Mr Ryan went on to say that even so, the COA had held in *Karshan* that a worker who is closely identified with a brand was not a relevant consideration.

40. MEPC asserted that Mr McGranaghan had only raised the issue of his working status in May 2020 and the appellant company denied that the issue had been raised at any time during 2019. Mr English produced an exchange of texts from May 2020 which appeared to be amicable.

41. MEPC said that it did employ employees and conceded that one of its musicians was employed by them but differentiated him on the basis that he did additional work in addition to being a musician such as being engaged in music selection and production. The company further explained that it employed a driver who also worked as a roadie and sold merchandise.

Mutuality of Obligation:

42. Mutuality of obligation is the sine qua non of a contract of service. The appellant company argued that Mr McGranaghan could have and did choose not to work for MEPC and had admitted this in his form INS1 declaration. It was not disputed that the worker had consistently played with MEPC's band and that that commitment extended to a considerable over 200 gigs in a year. This number includes the cruise work for Paul Claffey Tours Limited. While Mr Claffey is both a director of both MEPC Ltd and Paul Claffey Tours Ltd, these are separate corporate entities.

43. Despite the level of commitment, Mr McGranaghan did not work under a written contract and in the absence of a written agreement, the actual working relationship must be ascertained by examining how the parties had conducted themselves and whether an implied contract existed. Mr. Ryan for MEPC said that the worker had signed up for work but had not been contracted to do the work and, similar to *Karshan*, the worker had been offered a list of dates and he responded by signaling his availability. Mr Ryan argued that there had been no exploration of this issue in the Scope decision and he submitted that the worker had not been obliged to do the work and there had been no consequences for the worker refusing the work.

44. In *Karshan*, the Court of Appeal held that even where a worker was rostered to do delivery work they were at all times free not to work regardless of the rostering arrangements. Costello J also held that if a driver was not obliged to work a rostered shift, the requirement that mutuality of obligation subsists for the duration of the discrete contracts cannot be satisfied. Furthermore, the COA held that the implications of the absence of an obligation on a driver to work a particular shift should be set out.

45. Costello J, also in *Karshan*, approved *Barry* where the relevant obligations were identified by Edwards J *as the obligation of the employer to provide work for the employee and the corresponding obligation on the employee to perform work for the employer. These are the obligations which are at issue in assessing mutuality of obligation. They are not to be confused with the obligation to perform the work once undertaken and to pay for the work once undertaken. Counsel for the appellant submitted that the test must be applied before the workers actually "do the work". One must ascertain whether the employer has an obligation to provide work to the employee prior to actually reaching agreement to provide and perform that work.*

46. Furthermore, in *Karshan*, Costello J noted that Revenue had not addressed the *McKayed v Forbidden City Ltd* [2016] IEHC 722), judgment where the defendant (putative employer) had agreed to try and give the plaintiff work but made no guarantee of work as the putative employer had no control over the work and the plaintiff had been free to work for others and whilst work had regularly been provided this did not amount to a legal obligation.

47. The worker, Mr McGranaghan, has declared (Q19(c) of his INS1) that he had been free to send a substitute. Mr. Ryan for the appellant company referred to an e-mail of 21 February 2019, from Mr McGranaghan to MEPC, in which he had identified dates when he would not be available. The band members were issued in advance with forthcoming gig dates/bookings and I note that Mr McGranaghan had on occasion sought the bookings details from MEPC and had undertaken to provide this schedule/updates to the other band members as an email of 5 January 2016 shows. On 9 April 2017, Mr McGranaghan had sought details of bookings up to the end of September that year.

48. In a submission of 26 August 2021, Mr McGranaghan provided a pdf file showing the list of gigs emailed from 2014 onwards. He argued that the list, emailed weeks or months in advance, indicated a commitment to provide work which imply an understanding of work and availability on an ongoing basis.

49. In the same submission, Mr McGranaghan asserted that he had been restricted from working elsewhere and could only do so in circumstances where MEPC did not require his services. In his response to MEPC's appeal submission, Mr McGranaghan had (in email of 11/01/2021) stated that he had started with the band on 27 November 2013 but had officially commenced with the band from 1 January 2014. In this email, Mr McGranaghan also revealed that had taken opportunities to play with other bands but only on nights when he was not working with MEPC.

50. At the very least, there had been a commitment by MEPC to provide work and a commitment by Mr McGranaghan to do the work. MEPC had entered into bookings, presumably contractual, to play at various venues. There were at least 2 to 3 gigs a week and the worker undertook to perform or to advise of dates he was not available; this had been infrequent. I regard this as different from *Karshan* where Haughton J held that *a Contractor 'signs up' but has no obligation to make himself or herself 'available' for work.* The working relationship between MEPC and Mr McGranaghan was more than the promise or prospect of work. The dates, venues and available band members had all to be confirmed in advance. I regard the exchange of emails outlining the forthcoming gigs as a firm offer of work which the worker had largely committed to in advance.

51. Also in *Karshan*, is her dissenting judgement, Whelan J concluded that the real question was whether the fact that either side could choose not to fulfil individual contracts and, the extent to which if at all, that occurred in practice without any possibility of sanction is material. In *Karshan*, rosters had been put in place based upon the availability of the delivery drivers and the anticipated need of the company. That is very different from this case where the appellant company had committed to play at venues months in advance and was only able to do so by being able to rely on its musicians. There could have been little ad hoc about who played in the band as the music had to be selected and rehearsed in advance.

52. There is no evidence that Mr McGranaghan had not been available to perform except on rare occasions which he had indicated in advance. He told the inspector that he had only taken 2 nights off between 2104 and March 2020. He listed just three occasions when he chose not to perform; 13/08/2018, 21/12/2018 and 29/11/2019. In an email from February 2019, Mr McGranaghan indicated that he would not be available on 22/03/2019, 29/11/2019 and possibly 30/11/2019.

53. Mr Ryan pointed out that there had been no sanction for non-attendance or non-availability of the worker and this had been noted in the decision by the Deciding Officer. The worker was the band's regular fiddle player and essential to the band's performance. This was again very different from Karshan where the company offered the work to a rota of workers. It is fair to say

that Mr McGranaghan had been expected to perform unless he had signaled his non-availability in advance.

54. Mr Ryan reminded the hearing that the worker had not been paid travel expenses to gigs in Ireland and any implied contract could only come into being once he turned up to perform. I agree with this assertion with the proviso that the implied contract could only have come into effect when the worker began work, in this case, began preparing/rehearsing for the gig.

55. The Deciding Officer found that there had been a mutuality of obligation because of the 6 years almost continual offer (and acceptance) of work and where there had been just one example of work being refused. The Deciding Officer did not find any consequences for this refusal. There were other examples of the worker signaling his unavailability but such instances were not common.

56. Having regard to the worker's role as an integral member of the band, the band's advance commitment to perform at venues, the band's offer of work and the worker's confirmation of his availability, I find that mutuality of obligation existed.

57. I am directed that, in the context of the awaited Supreme Court judgement in *Karshan*, this finding can be the subject of a section 317 review by either party. Section 317 of the Social Welfare Consolidation Act 2005 provides for a revision by an Appeals Officer where new facts or evidence have been provided which were not before the Appeals Officer when the appeal decision was made which, had they been brought before him/her would have rendered that decision erroneous.

Control:

58. Counsel for the appellant company went on to say that musicians take instruction and direction from the band leader but that this was different to the control that an employer exercised over an employee and the element of control is no longer as significant a consideration as it once was. This is the case and while a musician is not instructed how to perform, the type of music, the arrangement, the venue and the date are all in the control of the company and therefore Mr McGranaghan was working work under the control and direction of MEPC. However, I agree with Mr. Ryan in his assertion that control is not a determining factor and the circumstances recounted here could apply equally to an employee or contractor.

Travel Expenses:

59. MEPC accepted that it had been the practice that members of the band traveled together when performing abroad but that they were not paid travel expenses when performing in Ireland. The hearing heard that, on occasion, accommodation was provided when the band was playing successive nights at a remote location.

60. When performing outside Ireland, the band travelled together and accommodation was provided. I do not regard this as important because it would have been desirable and cost effective to keep the band together while touring. I find that the absence of travel expenses to gigs in Ireland is significant particularly in light of the extensive travel involved. Mr McGranaghan has stated that he did, on average, 1,000 miles a week driving to and from gigs.

61. Mr McGranaghan has recounted spending up to 5 hours travelling to and from gigs. The invoices make no provision for the time spent travelling to and from gigs and Mr McGranaghan was paid a fixed rate for each gig whether down the road or hundreds of km away. Mr McGranaghan must have factored this into his negotiations with MEPC but any exploration further is not possible in his absence.

Substitution:

62. MEPC's barrister submitted that substitution was a feature of the working relationship and that Mr McGranaghan could have sent a substitute on the dates that he was not available to perform. Mr. Ryan submitted that the exclusivity test cannot therefore be satisfied and mutuality of obligation cannot exist where a worker is not required to provide personal service.

63. MEPC said that it was custom and practice in the industry that replacement musicians had to stand-in in the event of double bookings etc. MEPC submitted that it had had no problem with substitution once the replacement was a suitably qualified musician.

64. While substitution did arise on rare occasions, it was not a common feature and the worker did provide personal service. There have been just 3 instances where he chose not to work. Mr McGranaghan gave the impression to the inspector (report of 28/07/2020) that frequent unavailability would have been frowned upon by the company. This is understandable. The company has strongly argued that it had engaged a fiddle player regardless of who that was. MEPC's position is that it had been indifferent as to who performed once they were competent. In *Karshan*, the Court of Appeal approved the UK Court of Appeal in "*Deliveroo*" [2021] EWCA Civ 952 and the finding that a right of substitution might not be inconsistent with rendering personal service where the extent to which the right of substitution is limited or occasional or where a contractor is unable to carry out the work.

Holidays:

65. Counsel for MEPC made a valid point is asserting that what has been referred to as holidays were periods of shallow bookings and this did not equate to the musicians being on holidays. He added that MEPC had other enterprise interests and performed without a band, using recordings.

66. I note that the worker worked without the benefit of holiday pay or sick pay. He was only paid for the gigs performed. Mr McGranaghan worked during the period of work in question without complaint.

67. I find that the worker did not avail of or seek holidays and I disagree with the Deciding Officer who found that holidays were decided by the company. Periods of inactivity are not holidays and there is no dispute that the worker had only been paid on the basis of his performance.

Financial Risk:

68. As counsel for the appellant submitted, the reality of the music industry is that musicians can be both employed and self-employed and the music industry was the origin of the gig economy. Conditions differ as can be seen by the more beneficial conditions enjoyed when touring overseas.

69. Mr McGranaghan's absence from the hearing prevented any exploration of his working history up to joining MEPC. He has admitted in submissions that he did do some "freelance" work which he said he included in his self-assessment tax return. This included studio recording work and gigs with other bands. The worker told the investigating officer that he had 3 to 4 gigs with other bands in 2019 and about 5 recording sessions. In his absence, it was not possible to obtain any further elaboration.

70. Mr McGranaghan had been paid on the basis of invoices submitted and was not paid if he did not work. He was paid a fixed rate per gig and he negotiated this rate with the appellant company. The rates paid differed when performing on cruises The worker was paid €1,000 in respect of a 7-day cruise and €1,500 for a 10 day cruise with no travel or accommodation costs.

71. MEPC told the hearing that when working on ships/cruises, the worker had only committed to performing for a 2-hour gig per night during the week-long trip. Outside of this, he had opportunities to perform with other musicians and bands on the cruise.

72. MEPC revealed that a separate company, Paul Claffey Ltd., operated cruises and booked bands to perform on the cruises and that more than one band was booked with up to 15 lead singers with musicians booked for a typical cruise. This difference in working conditions between Ireland and overseas was not captured in the considerations of the Deciding Officer.

73. While the worker had been paid €250 per gig on commencement, this increased to €280 from March 2019. This figure included the costs associated with performing the work the main cost being travel. As the appellant company argued, it is not possible to explore Mr McGranaghan's tax status and whether he had availed of tax relief for motor expenses.

74. Mr McGranaghan had a long working relationship with the appellant company. It is significant that he approached Mr English of the company and negotiated his fee. Mr McGranaghan was satisfied to work without the benefit of a written contract.

75. Scope argued that the evidence was that Mr McGranaghan had been working for a body as opposed to being in business on his own accord and while it was accepted that he had done work for other bodies, the question at issue was his work with MEPC. However, the circumstances under which the contract was entered into remains of importance as is whether the worker had a history of self-employment or whether the terms were being imposed upon him/her. While the file does not contain details of Mr McGranaghan's work history, he has stated that he had approached the appellant company for the work because the prospect of a regular slot with a busy popular band had appealed to him. I take it that he preferred this to the "freelancing" work he had been doing.

76. An enduring working relationship is not necessarily indicative of a contract of service although a contract for service can evolve into a contract of service where there is an exclusive relationship. That is not the case here.

77. Scope said that the evidence was that Mr McGranaghan had been paid a fixed rate per gig and had not therefore been exposed to financial risk and was paid the agreed rate whatever the takings for the booking. While the worker had been paid a fixed rate per gig, an exposure to financial risk arose from the location of the gigs. The gigs involving less travel were naturally more profitable. There would have been some scope to reduce travel costs by managing travel and accommodation in the most efficient manner. It is also significant that Mr McGranaghan went into this arrangement with his eyes open when negotiating the rate as his email of 14 November 2013 confirms.

The Worker's Tax Status:

78. In Castleisland, Geoghegan J regarded two factors as fundamental; firstly, the circumstances in which the workers became self employed and paying tax as self-employed contractors; secondly, that the workers had to carry their own insurance.

79. Mr McGranaghan joined the band in January 2014 after approaching the appellant company in 2013 and expressing an interest. No vacancy was advertised and the worker, an accomplished and well-known fiddle player, was offered the place in the band after a meeting with Mr English. Mr McGranaghan has declared that a rate of €250 per gig was negotiated.

80. Mr McGranaghan did not express any dissatisfaction with his working status until 2020 when he claimed that he had only become conscious of what he termed the "bogus self-employment" coverage.

81. MEPC's counsel argued that the company had no knowledge of Mr McGranaghan's tax status and whether he had availed and any social welfare or pandemic unemployment payments. MEPC said that Mr McGranaghan's social media profile now identifies him as representing music industry workers.

82. Mr. Ryan argued that Mr McGranaghan's PRSI status was central to this appeal and the potential consequent liability. The Supreme Court in *Castleisland* regarded the tax status of the workers as significant and whether they had claimed reliefs under the self-assessment system. It is inconceivable that Mr McGranaghan did not avail of the reliefs available when declaring himself as self-employed and paying PRSI at the self-employed S rate particularly in the context of being paid a flat rate per gig. This issue could only have been resolved by Mr McGranaghan himself but he chose not to participate in the hearing.

83. Counsel for the appellant company pointed out that Mr McGranaghan was not present to clarify what tax reliefs connected to his work that he had availed of or what declaration he had made in relation to his tax status. It has been confirmed, and admitted on the worker's INS1 declaration, that PRSI has been submitted at the self-employed S rate.

84. Mr Ryan questioned whether Mr McGranaghan had registered for VAT and whether he had made other declarations as to his working status for PUP and re-start grants. In the absence of Mr McGranaghan, it was not possible to clarify these issues.

85. In his July 2020 submission, attached to the INS1 declaration, Mr McGranaghan recounted details of a meeting with MEPC in February 2019 regarding possible employment status. Mr McGranaghan outlined an option whereby band members with turnover in excess of €37,500 would register for VAT and invoice MEPC accordingly. He described that proposal as *similar to the current arrangement*. As Mr McGranaghan was paid €50,000pa or thereabouts for his 200 gigs, then he had to register for VAT. In the absence of evidence to the contrary, I am assuming that the worker did register for VAT and claimed the reliefs available to him as a self-employed contractor.

86. MEPC asserted that Mr McGranaghan had only raised the issue of his working status in May 2020 and the appellant company denied that the issue had been raised at any time during 2019. Mr English produced an exchange of texts from May 2020 which appeared to be amicable. While not determinative on the issue, I do note that Mr McGranaghan had expressed no dissatisfaction with his status until 2020.

Integration:

87. The hearing also heard that MEPC had planned a musical for 2020 which was to be performed in 60 to 70 venues and that the band musicians, such as Mr McGranaghan, were not required for the musical.

88. While the Deciding Officer did take account of the work done for Paul Claffey Tours, this overseas was not differentiated in the decision although the working conditions were quite

different from those pertaining to Irish tours. When abroad, accommodation and travel was provided thus removing any financial risk even at the loss making venues described.

89. Mr McGranaghan had admitted doing studio work and performed with other bands in addition to MEPC. This would include Paul Claffey Tours Ltd.

90. Mr Ryan, for MEPC, referred to Mr McGranaghan's media profile where he pointedly omits any reference to MEPC or previous involvement with MEPC. Mr McGranaghan's social media profile reveals that he has worked with Dolores Keane, Nathan Carter, Mary Black, Philomena Begley, Brendan Shine, Dominic Kirwan *to name but a few*.

91. MEPC's counsel rejected the assertion that Mr McGranaghan was seen as part of MEPC's band and argued that the worker had been identified as a fiddle player rather than the band's fiddle player. Mr Ryan went on to say that, even so, the COA had held in *Karshan* that a worker who is closely identified with a brand was not a relevant consideration.

Code of Practice:

92. The revised Code of Practice for Determining Employment has identified typical characteristics of employee status which are: the worker is under the control of another person who directs them as to how when and where the work is to be carried out; supplies labour only; receives a fixed hourly/weekly/monthly wage; cannot subcontract the work; does not supply materials for the job; does not provide equipment other than the small tools of the trade; is not exposed to personal financial risk in carrying out the work; does not assume any responsibility for investment and management in the business; does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements; works set hours or a given number of hours per week or month; works for one person or for one business; receives expense payments to cover subsistence and/or travel expenses; is entitled to sick pay or extra pay for overtime; is obliged to perform work on a regular basis that the employer is obliged to offer to them (this is known as 'mutuality of obligation'); has their tax deducted from their wages through the PAYE system.

93. The same Code identified typical characteristics of self-employment and advised that while all of the following factors may not apply to the job, an individual would normally be self-employed if he or she: owns their own business; is exposed to financial risk by having to bear the cost of making good faulty or substandard work carried out under the contract; assumes responsibility for the investment and management of the enterprise; has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks; has control over what is done, how it is done, when and where it is done and whether he or she does it personally; is free to hire other people, on his or her terms, to do the work which has been agreed to be undertaken; can provide the same services to more than one person or business at the same time; provides the materials for the job; provides equipment and machinery necessary for the job, other than the small tools of the trade or equipment which in an overall context would

not be an indicator of a person in business on their own account; has a fixed place of business where materials, equipment etc. can be stored; costs and agrees a price for the job; provides his or her own insurance cover e.g. public liability cover etc; controls the hours of work in fulfilling the job obligations; is not obliged to take on specific work offered to them; is registered for self-assessment tax returns or VAT.

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94. Mr McGranaghan was under a certain degree of control and direction but not to the extent that he was supervised. He was told what to play and where the gig was. The worker supplied labour only but is an accomplished musician who also provided his services elsewhere. The worker received a fix rate per gig. He was free to send a substitute who was paid by the company. No overtime was paid.
The worker provided his own instruments and some equipment. The provision by the worker of his transport is an important consideration as without transport, the worker would not have been in a position to do the work. The worker was exposed financially because his gain was dictated by the location of the gig. Mr McGranaghan advised that he had to drive to wherever the gig had been and travel time was anything from 30 minutes to 5 hours and stated that he had been doing 1,000 miles a week on average.

95. I find there was scope for the worker to gain additional profit by being able to play for other bands such as when on cruises. There were no set hours and the level of preparation and effort varied according to venue and location. The worker did not work exclusively for the appellant company. While the figure of 200 gigs a year was cited, this included work overseas and gigs on cruises run by a different company. The worker also worked for other bands although he states that the opportunity to do so diminished because of the commitment demanded by the appellant company. No travel expenses were paid in respect of travel on the island of Ireland regardless of location. The worker did not have holiday periods and there was no provision for either holiday pay or sick pay. The worker paid tax and PRSI as a Schedule D self-employed worker.

Conclusion:

96. I disagree with the Deciding Officer's grounds for finding that mutuality of obligation existed based on the length of time that work had been offered. In Karshan, the Court of Appeal held that the mutuality test had to be applied before the work was undertaken not once it had been undertaken. While the Deciding Officer noted that there had been one incidence of the worker refusing work, he had on other occasions signaled his unavailability in advance. The worker had signed up for work and had been offered a list of gig dates to which he responded by signaling his availability. Mr Ryan correctly argued that there had been no exploration of this issue in the Scope decision and he submitted that the worker had not been obliged to do the work and there had been no consequences for the worker refusing the work.

97. The Deciding Officer failed to distinguish between the work done on the island of Ireland and the work performed overseas where different conditions applied and, in the case of the cruises, the work was done for a different company, Paul Claffey Tours Limited.

98. As already stated, I believe that at the very least, there had been a commitment by MEPC to provide work and a commitment by Mr McGranaghan to do the work. MEPC had entered into bookings, presumably contractual, to play at various venues. There were at least 2 to 3 gigs a week and the worker undertook to perform or to advise of dates he was not available which was infrequent. I regard this as different from *Karshan* where Haughton J held that *a Contractor 'signs up' but has no obligation to make himself or herself 'available' for work.* The working relationship between MEPC and Mr McGranaghan was not the promise or prospect of work. The dates and venues would have had to be confirmed and Mr English would not have been able to perform without the backing of the worker. In such circumstances, I find that mutuality of obligation existed.

99. Mr McGranaghan agreed to a fee per gig regardless of the gig's location. No travel expenses were paid so this arrangement is more akin to a contract for services with the worker clearly exposed to financial risk. It is difficult to imagine an employee agreeing to such terms.

100. Mr McGranaghan was paid on submission of invoices. No provision was made for travel time, rehearsals, set-up etc. The rate paid was a flat rate regardless of the time or effort involved.

101. In his email of 11 January 2021, Mr McGranaghan stated that when performing in Ireland, he supplied his own transport to gigs and that driving from his home in Donegal to Cork had been a regular occurrence. He confirms that he covered the cost of his transport and associated costs. In the absence of the worker's participation, it has not been possible to explore whether he claimed the tax reliefs available to a Schedule D taxpayer but it is inconceivable that someone, who was travelling 1,000 miles a week, did not do so.

102. Mr McGranaghan made returns under Schedule D self-employment which would have allowed him claim for the running and capital costs of his vehicle. The fee per gig is only attractive in such circumstances and is therefore a strong indication of self-employment.

103. It is not disputed that the worker worked elsewhere performing live for other bands and doing studio session work. This lack of exclusivity is reflective of a contract for services. Mr McGranaghan's social media profile reveals that he has worked with Dolores Keane, Nathan Carter, Mary Black, Philomena Begley, Brendan Shine, Dominic Kirwan to name but a few. There is no suggestion that Mr McGranaghan was employed by those artists and in the 11 January 2021 email, Mr McGranaghan explains that he had only provided his services to other musicians or bands on his nights off from MEPC. That is unsurprising as he would had committed to MEPC months in advance.

104. The appellant company performed on cruises and other bands were also booked. The hearing heard that these cruises were booked by Paul Claffey Tours Limited and not MEPC and Mr McGranaghan was paid by Paul Claffey Tours. This diminishes the working relationship with the appellant company however closely associated.

105. On these cruises, the worker has admitted that he had opportunity for some additional earnings. He described standing in with another band who then paid $50-$100 off his on-board bill.

106. Mr McGranaghan performed over 200 gigs a year with both MEPC and Paul Claffey Tours. This provided financial security and reduced financial risk especially when performing overseas. Mr McGranaghan did not seek employment with MEPC but was seeking the financial security that playing in a busy popular band would offer.

107. Mr McGranaghan did not protest his self-employed status until May 2020 when he sought a determination on his working status. He declared that he was deemed to be self-employment but had been working for one company (MEPC) since 2014. The evidence is that Mr McGranaghan had been working for a number of companies/individuals in that time.

108. The appellant company submitted that it had engaged a musician not an individual and were indifferent as to who performed once they were able to perform competently. The company's evidence is that there was no sanction for not turning up. I accept Mr McGranaghan's assertion that frequent absences would have been frowned upon by the band and the instances of absences were so infrequent that it was not inconsistent with rendering personal service.

109. In an email from February 2019, Mr McGranaghan had told the MEPC that he would not be available on 22 March and 29 November and possibly 30 November depending on location of gig. It is significant that the worker provides no explanation for his unavailability and the communication does not seek permission and is far from an application for leave.

110. I do not accept that the worker availed of holidays but had not worked during the slack periods of what was described as shallow bookings.

111. Had Mr McGranaghan attended the oral hearing, he may have been able to provide persuasive explanations for the unresolved issues.

112. On balance, I find that the worker was employed under a contract for services and the appeal by MEPC Limited is allowed."

We have sent the file and a copy of this letter to Scope Section. If you have any questions about the implementation of the Appeals Officer's decision you should contact that Section.

Yours sincerely

Laura Blair
Decisions Section