



Report of the Employment Status Group - PPF

Introduction

This document has been prepared by the Employment Status Group set up under the Programme for Prosperity and Fairness (PPF).

The group was set up because of a growing concern that there may be increasing numbers of individuals categorised as ‘self employed’ when the ‘indicators’ may be that ‘employee’ status would be more appropriate. The purpose of the document is to eliminate misconceptions and provide clarity. It is not meant to bring individuals who are genuinely self-employed into employment status. The remit of the group is contained in the PPF document at page 18, paragraph 9 as follows:

“The Office of the Revenue Commissioners and the Department of Social, Community & Family Affairs, in consultation with the Social Partners, will seek a uniform definition of ‘employee’ based on clear criteria, which will determine the employment status of an individual”.

The group consisted of representatives from the following organisations:

- ➔ Irish Congress of Trade Unions
- ➔ Irish Business and Employers Confederation
- ➔ Revenue Commissioners
- ➔ Department of Social, Community and Family Affairs
- ➔ Department of Enterprise, Trade and Employment
- ➔ Department of Finance.

Considerations

The group considered two approaches in their deliberations. They considered a legislative approach – to define in statute the traits or indicators of ‘employee’ status using criteria established by common law over many years. The other approach was to reaffirm the criteria as a Code of Practice and to distribute the material to as widely a relevant audience as possible.

It was felt by some members that a statutory definition would provide clarity for anyone dealing with or considering the issue of a person's employment status. It was felt by other members that the case law and criteria laid down by the courts over the years provided flexibility and that a statutory approach would interfere with that flexibility, while others felt that a statutory definition might prove detrimental to 'employee' status.

It was decided to issue the report as a Code of Practice which would be monitored by the Group with a view to reviewing the position within 12 months. While it was accepted by the Group that the Code of Practice does not have legislative effect, it was expected that its contents would be considered by those involved in disputes on the employment status of individuals or groups of individuals.

It was noted that the Revenue Commissioners and the Department of Social, Community & Family Affairs have already jointly produced a leaflet in September 1998 entitled **Employed or Self-Employed – A Guide for Tax and Social Insurance**. The Revenue Commissioners also produced a leaflet aimed at the Construction Industry but which would equally have general application. The Department of Enterprise, Trade & Employment also have a range of explanatory leaflets which, while not specifically relating to 'employee' status, set out comprehensively the rights of employees under different aspects of employment law.

This Code of Practice is also recommended for the consideration of all appropriate adjudication agencies where issues concerning employment status are the subject of a dispute.

Legal Background

The terms "employed" and "self-employed" are not defined in law. The decision as to which category an individual belongs must be arrived at by looking at what the individual actually does, the way he or she does it and the terms and conditions under which he or she is engaged, be they written, verbal or implied or a combination of all three. It is not simply a matter of calling a job "employment" or "self-employment".

In the Irish Supreme Court case of *Henry Denny & Sons Ltd. T/A Kerry Foods v The Minister for Social Welfare* - [1997] Irish Tax Reports Volume V - Page 238 the fundamental test as to whether a person who has been engaged to perform certain work performs it "as a person in business on their own account" was considered among other matters. This fundamental test was drawn from the UK case of *Market Investigations Ltd v Minister of Social Security* - [1969] QB 173 which has received extensive judicial approval in this country as well as in the UK and other common law jurisdictions. This fundamental test in that case was amplified by a series of specific criteria, as follows:

Does the person doing the work:

- ➔ assume any responsibility for investment and management in the business or
- ➔ otherwise take any financial risk or
- ➔ provide his own equipment or helpers or

→ have the opportunity to profit from sound management in the performance of his/her task

From consideration of such tests one is better able to judge whether the person engaged is a free agent and has an economic independence of the party engaging the service.

In most cases it will be clear whether an individual is employed or self-employed. However, it may not always be so obvious, which in turn can lead to misconceptions in relation to the employment status of individuals.

The *Denny* case which is an important precedent in the area of whether a person is engaged under a contract of service (employee) or under a contract for services (self-employed) is of assistance because of the atypical nature of the engagement. The main features of the *Denny* case were:

- The facts were fully established and articulated and relevant legal principles applied by the Social Welfare Appeals Officer. The High Court or the Supreme Court did not disturb the decision.
- The employment was atypical - the person engaged was a demonstrator / merchandiser of food products in supermarkets
- The employment was also casual in nature and would have included a pool of demonstrators to be drawn from
- Because of the casual nature of the employment 'mutuality of obligation' would have been an issue i.e. whether or not the person engaged had an obligation to take each engagement when offered
- The right of substitution was an issue albeit with the approval of the employer
- The employment included fixed term contracts
- References were made to imposed conditional contracts
- It was confirmed that the Appeals Officer was correct in deciding not to be bound by an unreported Circuit Court judgement, dealing with a similar issue under an unfair dismissal claim under employment law, which he did not agree with. The Appeals Officer was correct in considering "the facts or realities of the situation on the ground" i.e. to look at and beyond the written contract to arrive at the totality of the relationship. Certain statements included in the contract and other notes of engagement such as
 - "*deemed to be an independent contractor*",
 - "*It shall be the duty of the demonstrator to pay and discharge such taxes and charges as may be payable out of such fees to the Revenue Commissioners or otherwise*",
 - "*It is further agreed that the provisions of the Unfair Dismissals Act 1997 shall not apply etc*",
 - "*You will not be an employee of Kerry Foods*",
 - "*You will be responsible for your own tax affairs*",were not contractual terms but that "they purported to express a conclusion of law as to the consequences of the contract between the parties".

In other words, the fact that such or similar terms are included in a contract is of little value in coming to a conclusion as to the work status of the person engaged.

Code of Practice in determining status

The criteria set out in the next paragraph should help in reaching a conclusion. It is important that the job as a whole is looked at including working conditions and the reality of the relationship, when considering the guidelines. The overriding consideration or test will always be whether the person performing the work does so “as a person in business on their own account.” Is the person a free agent with an economic independence of the person engaging the service?

Criteria on whether an individual is an employee

While all of the following factors may not apply, an individual would normally be an employee if he or she:

- Is under the control of another person who directs as to how, when and where the work is to be carried out
- Supplies labour only
- Receives a fixed hourly/weekly/monthly wage
- Cannot sub-contract the work. If the work can be subcontracted and paid on by the person subcontracting the work, the employer/employee relationship may simply be transferred on.
- Does not supply materials for the job
- Does not provide equipment other than the small tools of the trade. The provision of tools or equipment might not have a significant bearing on coming to a conclusion that employment status may be appropriate having regard to all the circumstances of a particular case.
- 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 extra pay or time off for overtime.

Additional factors to be considered:

- An individual could have considerable freedom and independence in carrying out work and still remain an employee
- An employee with specialist knowledge may not be directed as to how the work is carried out
- 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
- Some employees work for more than one employer at the same time.
- Some employees do not work on the employer's premises
- There are special PRSI rules for the employment of family members

- ➔ Statements in contracts considered in the ‘ Denny’ case, such as “*You are deemed to be an independent contractor*”, “ *It shall be your duty to pay and discharge such taxes and charges as may be payable out of such fees to the Revenue Commissioners or otherwise*”, “*It is agreed that the provisions of the Unfair Dismissals Act 1977 shall not apply etc*” , “*You will not be an employee of this company*”, “*You will be responsible for your own tax affairs*” are not contractual terms and have little or no contractual validity. While they may express an opinion of the contacting parties they are of minimal value in coming to a conclusion as to the work status of the person engaged.

Criteria on whether an individual is self-employed

While all of the following factors may not apply to the job, an individual would normally be self-employed if he or she:

- ➔ Owns his or her own business
- ➔ Is exposed to financial risk, by having to bear the cost of making good faulty or substandard work carried out under the contract
- ➔ Assumes responsibility for investment and management in the enterprise
- ➔ Has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks
- ➔ Has control over what is done, how it is done, when and where it is done and whether he or she does it personally
- ➔ Is free to 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 etc.
- ➔ Controls the hours of work in fulfilling the job obligations.

Additional factors to be considered:

- ➔ Generally an individual should satisfy the self-employed guidelines above, otherwise he or she will normally be an employee
- ➔ The fact that an individual has registered as self-employed or for VAT under the principles of self-assessment does not automatically mean that he or she is self-employed
- ➔ An office holder, such as a company director, will be taxed under the PAYE system. However, the terms and conditions may have to be examined by the Scope Section of Department of Social, Community and Family Affairs to decide the appropriate PRSI Class.

- ➔ It should be noted that a person who is a self-employed contractor in one job is not necessarily self-employed in the next job. It is also possible to be employed and self-employed at the same time in different jobs.

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Consequences arising from the determination of an individual's status

The status as an employee or self-employed person will affect:

- ➔ The way in which tax and PRSI is payable to the Collector-General.
 - An employee will have tax and PRSI deducted from his or her income.
 - A self-employed person is obliged to pay preliminary tax and file income tax returns whether or not he or she is asked for them.
- ➔ Entitlement to a number of social welfare benefits, such as unemployment and disability benefits.
 - An employee will be entitled to unemployment, disability and invalidity benefits, whereas a self-employed person will not have these entitlements.
- ➔ Other rights and entitlements, for example, under Employment Legislation
 - An employee will have rights in respect of working hours, holidays, maternity / parental leave, protection from unfair dismissal etc.
 - A self-employed person will not have these rights and protection.
- ➔ Public liability in respect of the work done.

Consequence for the person or company engaging the service of an individual

In most instances a person's work status will be clear. It is however crucial for a person or company to ensure that a person engaged to perform a service is correctly categorised as an employee or self-employed particularly where there is a doubt. There may, in certain borderline instances, be a divergence of opinion between the contracting parties assumptions and that of the Revenue Commissioners, the Department of Social, Community and Family Affairs or the adjudication systems established under Employment and Industrial Relations legislation.

While it is accepted that the operation of the PAYE and PRSI systems and compliance with the rights of employees under Employment legislation creates an administrative burden for employers, the integrity of the systems very much depends on employers operating them correctly.

Under Tax and Social Welfare law if the status of 'employee' is found to be appropriate the person engaging the 'employee' is the accountable person for any PAYE tax and PRSI deductible while that person was engaged (whether or not any deductions were made) together with appropriate interest and penalties that may arise.

There may also be penalties under various Employment Legislation for wrong categorisation of a person's employment status.

Deciding Status - Getting Assistance

Where there are difficulties in deciding the appropriate status of an individual or groups of individuals, the following organisations can provide assistance.

Tax and PRSI

The Local Tax Office or The Local Social Welfare Office, (a listing of Tax and Social Welfare Offices is in the telephone book). Scope Section in the Department of Social, Community and Family Affairs may also be contacted for assistance.

If a formal decision is required, relevant facts will have to be established and a written decision as to status issued. A decision by one Department will generally be accepted by the other, provided all relevant facts were given at the time and the circumstances remain the same and it is accepted that the correct legal principles have been applied to the facts established. However, because of the varied nature of circumstances that arise and the different statutory provisions, such a consensus may not be possible in every case.

Employment Appeals Tribunal

The purpose of the Employment Appeals Tribunal is to determine matters of dispute arising under the Acts relating to Redundancy Payments, Minimum Notice and Terms of Employment, Unfair Dismissals, Protection of Employees (Employers' Insolvency), Worker Protection (Regular Part-time Employees), Payment of Wages, Terms of Employment (Information), Maternity Protection, Adoptive Leave, Protection of Young Persons, Organisation of Working Time, Parental Leave, and Protections for Persons reporting Child Abuse. Disputes in relation to any matter arising under the above-mentioned legislation may be referred either directly, or on appeal (from a Rights Commissioner, where appropriate) to the Tribunal.

Labour Court

The main functions of the Labour Court are: to investigate industrial disputes under the Industrial Relations Acts 1946 to 1990, and to issue recommendations for their settlement; to make determinations on appeals against recommendations of equality officers, or for the implementation of such recommendations; to make orders in cases of dismissal under the Employment Equality Act 1998, and the Pensions Act 1990; to decide on appeals against recommendations and decisions of Rights Commissioners under the Industrial Relations and Organisation of Working Time Acts; to establish joint labour committees, to make employment regulation orders prescribing legally enforceable pay rates and conditions in employments covered by the relevant joint labour committees; to register employment agreements, which become legally binding; to register joint industrial councils; to approve and register collective agreements under the Organisation of Working Time Act 1997.

Department of Enterprise, Trade and Employment

The Employment Rights Information Unit of Department of Enterprise, Trade and Employment may also be contacted for information on labour law issues. This Unit has a range of leaflets on employment law that are available on request.

Irish Congress of Trade Unions

The Irish Congress of Trade Unions is the single umbrella organisation for trade unions in Ireland representing a wide range of interests.

Irish Business and Employers Confederation

The Irish Business and Employers Confederation represents and provides economic, commercial, employee relations and social affairs services to some 7,000 companies and organisations from all sectors of economic and commercial activity.