

INTRODUCTION BY MS. JOAN GORDON, CHIEF APPEALS OFFICER OF THE SOCIAL WELFARE APPEALS OFFICE, TO THE JOINT COMMITTEE ON EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION

Thursday 5 December 2019

Chairperson, Committee Members,

I would like to thank the Chairman and the Committee for the invitation today to discuss the issue of insurability of employment for social insurance purposes. At the meeting of the Committee on this matter on 24th October 2019 a number of statements were made by a witness that are inaccurate and unsubstantiated. However, I do not intend to address these but rather I will outline the appeal process that applies in such cases.

I am the Chief Appeals Officer of the Social Welfare Appeals Office and I am joined by my colleague, Mr. Brian Duff, who is the Deputy Chief Appeals Officer.

I have provided an advance copy of this statement which I hope that members will find useful.

By way of background, the Appeals Office was established in 1990, is headed by a Chief Appeals Officer and has its own Appeals Officers who are independent in their decision making.

The role of the Office is to determine appeals against decisions of Deciding Officers of the Department of Employment Affairs and Social Protection. The legislation governing the appeals process is contained in the Social Welfare Consolidation Act 2005 and Regulations made thereunder.

While the legislation provides that a decision of an Appeals Officer is final and conclusive a number of routes for review and revision including references and appeals to the Courts are also provided for in the legislation. All decisions of Appeals Officers and revised decisions of the Chief Appeals Officer are subject to judicial review and the Ombudsman can examine complaints about everyday administrative activities carried out by the Appeals Office.

The appeals process is quasi-judicial with Appeals Officers being required to decide all appeals on a de-novo basis. While the issues that are dealt with on appeal are based on the provisions in the Social Welfare Consolidation Act 2005 and associated Regulations, the Office is not a Court but must observe the principles of natural justice and fair procedures.

Appeals may be disposed of by way of summary decision or by means of an oral hearing. It is a matter for the Appeals Officer to decide if a case can properly be determined without an oral hearing. Decisions of Appeals Officers are made on the facts pertaining to the individual case, the decisions do not create precedents – however the Office strives to achieve consistency in its decision making.

Turning to the specific issue of determining the status of a worker for social insurance purposes, 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 decisions can be appealed under the provisions of Section 311 of the 2005 Act. Appeals relating to employment status cover a range of issues including directors of companies, family employments, partnerships and public sector employments. The number of cases involving the determination as to whether a person was employed under a contract of service or a contract for services 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. 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 very limited circumstances and only with the agreement of both the employer and the workers concerned. However, I wish to emphasise 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 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.

I can also advise that this approach has not been adopted during my time as CAO 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. The parties to that appeal were not happy to proceed on this basis and the Appeals Officer proceeded to determine the appeals in each individual case.

I have outlined that all appeals are determined on a case by case basis and on the particular facts of each appeal. While appeal decisions do not themselves create precedents, the Office endeavours to be consistent in its decision making and strives to ensure that the same conclusion is reached in cases that are based on the same or similar factual circumstances. In the case of appeals on the insurability of employment consistency is achieved by applying the precedents emerging from the case-law of the Courts and by reference to the Code of Practice for Determining Employment and Self-Employment Status of Individuals. The Office does not categorise cases as 'bogus self-employment' or 'false self-employment' and the Office is only concerned with determining if a worker is correctly classified as an employee or a self-employed person. It is also the case that Appeals Officers cannot be concerned about the implications arising from their decisions and the Supreme Court has said that Appeals Officers are required to be 'free and unrestricted in discharging their functions'. [*McLoughlin v. Minister for Social Welfare*] [1958] IR1.

Where an appeal against the decision of a Deciding Officer on a worker's status is received notification of that appeal and the grounds of appeal are provided to the other interested parties – those interested parties are invariably the worker, the company or companies that engaged the worker and the Scope Section of the Department. All parties are afforded full opportunity to make submissions on the appeal contentions, and if an oral hearing is convened all parties are notified and requested to attend. The appeal decision is issued to

all these interested parties. Any party to the appeal including the appellant, and in addition to recourse to the Courts or the Ombudsman's Office, can invoke the provisions of the 2005 Act providing for revision of the Appeals Officer's decision based on new facts or evidence and/or error of fact or law.

Turning to some statistics, the Department processes around 2 million new claims each year. About 85% of these are successful. By comparison, 19,436 (less than 1%) appeals have been made to the Social Welfare Appeals Office to the end of October 2019 (18,854 in full year 2018). Of this number, 57 relate to appeals against decisions made by Deciding Officers in the Scope Section of the Department covering a range of issues – 26 of these 57 appeals relate specifically to the question of whether a person was employed under a contract of service (employee) or a contract for services (self-employed).

A total of 41 appeals were determined by the Office in the period from 1st January 2018 to end of October 2019 relating to the question of whether a person was employed under a contract of service or a contract for services.

I will be pleased to take any questions that members may have.

ENDS