

The

G



ig is up

Unemployment has fallen – but in its place are many new ‘jobs’ involving badly paid, insecure work. **Roisin Killeen** takes a look at the precarious nature of the so-called ‘gig economy’

Irish unemployment is at its lowest level since 2008, officially at 6.1 per cent as of January. But, according to the Irish Congress of Trade Unions (ICTU), many of the newly-created jobs are low paid and insecure. An ICTU study, published in December 2017 and titled *Insecure & Uncertain: Precarious Work in the Republic of Ireland and Northern Ireland*, concluded that, for many workers, there has been an alarming growth in precarious employment since 2008 and that legislation urgently needs to be introduced to protect them.

Eight per cent of workers saw significant variations in their hours of work, from week to week or month to month, according to the report. Some 7 per cent were in temporary employment in 2016. And most significantly, there was a dramatic rise, of 34 per cent, in the category ‘part-time, self-employed without employees’ since 2008, a rise which ICTU said can be indicative of bogus or false self-employment.

Employers’ body Ibec contests the figures. It cites CSO statistics that the number of temporary employees fell by 20 per cent from 2011 to 2016 and the number of people working variable hours is currently the lowest it has been since 2000. Also, the number of people working part time or underemployed fell by 43 per cent since 2012.

Here we have two different narratives on the same economy, while another recent study has an interesting recommendation. Published by the Economic

and Social Research Institute (ESRI) and Trinity College Dublin, the report *Atypical Work and Ireland’s Labour Market Collapse and Recovery* (where atypical work refers to part-time, temporary and self-employed work, as opposed to permanent, full-time work) posited that the labour market should be measured in terms of quality of jobs, as well as number of jobs. It also concluded that more atypical jobs are being created as the economy recovers.

Precarious rights

A number of these low-paid jobs make up what is called the gig economy or sharing economy, which features jobs with short-term contracts or freelance work as opposed to permanency. Gig workers usually have self-employed status, but, compared to more traditional self-employed work, the projects or gigs are smaller and more sporadic.

Such workers have very few employment rights. On the plus side, they have the flexibility to work when they choose and the gig economy gives some people access to employment who otherwise wouldn’t have too many opportunities.

Zero-hour contract workers fall into this mix of precarious employment. They’re paid by the hour, but have no set minimum number of hours per week. They are, however, and unlike gig workers, entitled to certain benefits, such as holiday pay and the minimum wage. An extensive 2015 study by

the University of Limerick and commissioned by Ged Nash, the then minister of state for business and employment, concluded that there was not a significant prevalence of such jobs in Ireland.

However, whether such jobs are prevalent or not, the government is looking to address this sector of the labour market. The Employment (Miscellaneous Provisions) Bill 2017, published in December will ban zero-hour contracts. The bill also contains provision for the introduction of new banded-hour contracts. These will apply to employees who are on low-hour contracts, but who consistently work more hours each week than their contracts provide for. They will be entitled to be categorised in a band of hours that better reflects their employment situation, meaning that the employee will be guaranteed a minimum number of hours each week, within that band.

Ibec is concerned about the bill. “The Employment (Miscellaneous Provisions) Bill 2017 as drafted will have significant adverse consequences. It will deprive employees and employers of the ability to make their own flexible working arrangements and to adapt to change collaboratively,” says Rhona Murphy, Ibec’s head of employment law services.

She also believes that the bill goes far beyond its intended purpose of protecting workers with low pay/low-hour contracts. “The result all but eliminates flexibility for the majority of employers, many of whom operate in sectors where flexibility is necessary for the work that they do.”

The gig economy is most often associated in people’s minds with Uber drivers or Deliveroo couriers logging onto an app to pick up jobs. It can also include professionals such as journalists, graphic designers or software developers. However, the jobs aren’t always based around a technology platform: the



“Anne, a university lecturer with a PhD, is hired on a term-by-term basis and paid an hourly rate for lectures. There is no pay for preparing or grading

Anne, for example, is a university lecturer with a PhD (she didn't want to reveal her full name). She's hired on a term-by-term basis and is paid an hourly rate for her lectures. There's no payment for preparation or grading. This is insecure employment.

When Hurricane Ophelia temporarily closed universities, Anne's lecture was cancelled. She wasn't paid. The Department of Education confirmed that the unions are still in discussion with the universities regarding Michael Cush's recommendation of granting a CID entitlement after two years.

The recommendation, however, has since been implemented in the institutes of technology and has been available for second-level teachers since September 2015. The Teachers' Union of Ireland (TUI), which includes institutes of technology and vocational, community and comprehensive schools in its membership, said it is making a positive difference.

In addition, since September 2016, and following intensive campaigning by the TUI, teaching hours or posts that become available in secondary schools must be offered, in the first instance, to serving teachers on part-time hours who are suitably qualified.

“Before these procedures became effective, we would have estimated that up to 30 per cent of second-level members and 50 per cent of those under 35 were on contracts of less than full hours, but we are confident that both percentages have since fallen as a result of the new measures,” said a TUI spokesman.

Depending on who you talk to, the gig economy can be a good or bad thing. The way ICTU sees it, the gig economy isn't a problem if workers are enjoying the benefits, such as the flexibility. The problem is where people are working this way because they aren't able to access more stable employment.

But whether it's good or bad, there is definitely an increased focus on looking at employment rights around the gig economy, both in Ireland and internationally.

work may be for more traditional companies that are sub-contracting out roles that were previously carried out by in-house staff.

In late 2017, RTÉ's Drivetime programme researched “bogus or false self-employment” in RTÉ and in other organisations, where longstanding employees are required to register as self-employed rather than receive full-time employment contracts and the benefits that come with them. RTÉ reporter Philip Boucher-Hayes noted: “They're self-employed because RTÉ requires them to effectively sign away those rights and become self-employed in order to get paid for the work that they are doing.”

Though the term “false self-employment” has been used for many years to discuss unlawful employment practices, it only became an official classification in the Competition (Amendment) Act 2017. This Act allows three categories of self-employed individuals (voiceover actors, session musicians and freelance journalists) to bargain collectively with employers in relation to working conditions and terms of employment.

“It is difficult to know whether this type of classification will have a wider application in Irish employment law in future, but it is easy to foresee workers and trade unions adopting the terms and the definitions in the 2017 Act for the purposes of challenging self-employed status,” said Emmet Whelan, a solicitor and partner with ByrneWallace.

Insecure employment

Gigging can turn up in unexpected places: education, for example. A government-commissioned report by senior counsel Michael Cush, published in 2016, revealed that two-thirds of lecturing staff in some higher education institutions were not full time or permanent.

Among universities, the average percentage of core lecturing staff who were not full time and permanent was 45 per cent, with NUI Galway having the lowest number of full-time, permanent, at 75 per cent. The report also highlighted the increase of zero-hour contracts within the sector and recommended that contracts of indefinite duration (CID), or permanent contracts, be offered after two years.

This can be very difficult for the lecturer involved.

The European perspective

The OECD, the Organisation for Economic Cooperation and Development, is due to publish an updated jobs strategy this year (the last update was in 2006). The strategy aims to achieve an inclusive labour market in the context of demographic change, environmental challenges, globalisation, digitalisation and changes in work organisation. It will be structured according to three overarching objectives: (1) increased labour market participation, job creation and job quality; (2) a fairer distribution of opportunities and outcomes; and (3) more resilient and adaptable labour markets.

And last December, the European Commission published a long-awaited proposal for a directive on transparent and predictable working conditions in the European Union. In the last ten years, the Commission says, more than half of all new jobs were “non-standard” (including permanent part-time and temporary full-time and part-time). The directive proposal creates new minimum standards to ensure that all workers, including those on atypical contracts, benefit from more predictability and clarity as regards their working conditions.

The Commission estimates that two to three million additional workers on atypical contracts such as domestic workers, workers accessing work from apps, or workers on very short contracts, will be covered and protected by the proposal, compared to existing legislation.

However, it's early days. The draft has to be adopted by the European Parliament and the European Council. After that the directive will be transposed into member states' legislation and will be implemented through social partners' collective agreements. It's a long road ahead.

An ongoing employment case in Britain, involving ride-hailing app company Uber, will be closely watched, both in Ireland and across Europe. Uber lost an appeal in November after a London employment tribunal upheld a ruling that Uber must treat its drivers as workers entitled to the minimum wage and holiday pay. The test case will now go to the Court of Appeal and possibly to the Supreme Court.

Could such a situation arise in Ireland? “There

are no hard and fast rules that can be applied in determining whether a worker is an employee or self-employed, and each case must be considered on its own merits,” said Whelan of ByrneWallace.

However, he says that there are certain factors that are important. “Mutuality of obligation” is one, and relates to whether there is an obligation on the employer to provide work for the employee, and on the employee to perform that work. Other deciding factors regarding the relationship between an employer and a worker include the level of control, instruction and management that the employer has in respect of the worker.

As Whelan sees it, many of the factors considered in the Uber case could have relevance in Ireland. “In the Uber case, the fact that there was a mutuality of obligation and significant control was important. The tribunal concluded that the drivers were obliged to take fares when they were on duty and also considered how Uber interviews and recruits drivers, controls key information, sets the route, fixes the fare, instructs drivers how to do their work and penalises the drivers in some instances,” he says.

“Also, there was no real right of substitution for Uber drivers. Uber's case was not helped by the determination of the tribunal that Uber runs a transportation business.”

It's a determination that was reaffirmed by the European Court of Justice in December and which means that Uber, as a taxi operator, will now be answerable to stricter regulation and licensing within the EU.

But another recent British case looking at the same issue and involving Deliveroo workers ruled that the workers did not have employee rights. “There was no requirement to perform the work personally, which is a requirement of the worker test in Britain, and will also be an important consideration for any Irish court or tribunal analysing such arrangements. In this context, the fact that there were no adverse consequences for Deliveroo riders not accepting jobs is also important from the point of view of the control test,” says Whelan.

However, Ireland is not Britain. A case that has been running since 2008, involving the Minister of Agriculture and five temporary veterinary inspectors, who, when they lost their jobs in 2004, claimed they were employees, shows how difficult and fact-specific each case can be.

“The case, which has been ongoing for well over a decade, was heard last year for a third time by the Irish Employment Appeals Tribunal, after two outings in the High Court and one in the Supreme Court,” says Whelan. “In the latest instalment, the tribunal found that the veterinary inspectors were not employees, as there was not sufficient mutuality of obligation. However, those fearful that the tribunal's decision might be the final episode in this long-running series, fear not, as we understand that a challenge has been lodged in the High Court.”

Whelan also points out that Ireland differs to Britain in that there is no category called a worker here, which Britain classifies as the middle ground between an employee and a contractor.

“While the term ‘worker’ is to be found in Irish employment legislation, the term does not denote the existence of similar employment entitlements to those available to workers under British legislation,” he says. “In the absence of a recognised middle-ground worker category in Ireland, adjudicators may well be less inclined to classify users of internet platforms as employees. The introduction of this middle ground could also be a means by which the government may address any perceived lack of protection for gig workers in Ireland.”

Technology is changing the way we work and with it comes social and economic challenges. Work can now be found through an app and developments in artificial intelligence could mean that a robot could replace your job in the near future. Other developments such as cloud computing, mobile and communication technology and GPS are all fundamentally changing the way we work. Policy makers must ensure that these new ways of working are not less favourable than more traditional types of employment. Anything less feels truly insecure. ■