



Submission by the International Transport Workers' Federation (ITF) in response to the Interdepartmental Review of the Atypical Work Permit Scheme for Non-European Economic Area (Non-EEA) Fishers

2nd February, 2022

Introduction

The International Transport Workers' Federation (ITF) is the global umbrella body for trade unions that organise in the transport, maritime, civil aviation and logistics sectors with some 700 affiliated unions in 150 countries including SIPTU, UNITE and FORSA in Ireland.

The ITF in Ireland has been active representing and advocating for the interests of Non-EEA migrant fishers, both documented and undocumented, since 2008. Our collaboration with the *Guardian* (UK) newspaper culminated in the publication of a lengthy investigative article¹ on 2nd November 2015, which directly led to the then Táiniste and Minister for Agriculture Simon Coveney convening an interdepartmental taskforce,² which sought to assess the scale of undocumented migrant fishers in the Irish fleet and to develop measures to regularise their situation and offer a path to vessel owners thereafter to legally bring migrant fishers into the State.

This ITF submission is both a review of the six years of the Atypical Scheme and more importantly the changes we think are required to bring to an end the unique disadvantages that have been shown to accompany the Scheme relative to other permit schemes available to Non-EEA workers in other sectors. We make further recommendation below for reforms that will serve to improve the conditions of work for migrants (and indeed non-migrants) working in the fishing sector.

Has the Atypical Scheme served to regularise the undocumented fishers in the sector since its inception?

The Atypical Scheme was established by the then government as a rapid response primarily to the phenomenon of undocumented Non-EEA migrants working in the fishing sector. A large element of its overall success or failure therefore has to be judged on the basis of the extent to which the presence of undocumented workers on Irish flagged fishing vessels has been reduced or eliminated.

From the outset the scheme was capped at 500 permits which corresponded with the Taskforce's then estimate of the numbers of undocumented fishers then present in the fleet. From the ITF's perspective at the time this was an underestimation.

The vessel owners' estimation of the scale of undocumented migrants ranged from outright denials³ on the national airwaves to the response of Frances O'Donnell, Chief Executive of the Irish Fish Producers Organisation (IFPO) to the cap of 500 permits when he said the:

"IFPO had argued earlier that 1,000 permits would be needed to account for all the non-EEA fishermen currently used in the fleet".⁴

The first phase of the scheme from February to July 2016 was the 'amnesty' phase where vessel owners had an opportunity to have their pre-existing undocumented crew documented. The WRC in a report⁵ on enforcement described the uptake from vessel owners as 'slow' and that by June 2017 there were only 199 live permits, a pathetic level of compliance.

The ITF contends that it was an error at the outset to give the initiative to the vessel owners to decide whether or not to document their migrant crew rather than giving the initiative to the migrant fishers themselves which would have yielded far higher compliance than what actually transpired.

A total of 468⁶ fishers have been enrolled in the scheme at some point in time since its inception. However, the total amount of live active permits in the course of the last six years has typically remained stuck at around half the cap of 500.

The most recent figure provided for live permits is 256⁷ across the 174 eligible vessels begging the question as to how all of these vessels are being fully and safely crewed. Bord Iascaigh Mhara (BIM) announced a labour force survey in May 2021 the results of which remain to be published. This survey spans the entire fleet of some 1,900 vessels and is based largely on an online survey where they are predominantly reliant on vessel owners to disclose the composition of their crew.

The ITF communicated to BIM its grave misgivings about this methodology as vessel owners were most unlikely to disclose the presence of undocumented crew in their employ. The ITF was then invited to share with Indecon, the firm carrying out the survey for BIM, its observations in terms of undocumented crew. Notwithstanding the fact that we availed of the opportunity to provide our feedback, **the ITF remains highly doubtful that the BIM exercise will capture an accurate picture of the hundreds of undocumented we estimate are still working of Irish flagged vessels or who have moved on to do other work on an undocumented basis.**

In the course of the six years of the Atypical Scheme's existence the ITF has become acquainted with a growing cohort of fishers and former fishers, currently undocumented, who were at some point enrolled in the Atypical Scheme. **The typical scenario recounted by these individuals to the ITF is injury, resulting in extended absences, or acrimony with their employer causing the employment relationship to end after which they are left to**

seek employment on other vessels on an undocumented basis or move on to other undocumented work.

In conclusion the ITF believes that the Atypical Scheme has not been successful in regularising the sector.

Scale of abuses, complaints, non-compliances, investigations and reported problems in the fishing sector during the lifetime of the Atypical Scheme

The ITF representatives who have attended the meetings of the Oversight Committee feel that the representatives of the various Departments have, in their comments, tended to understate and underestimate the scale of problems with the Atypical Scheme.

In preparing this submission the ITF has reviewed all cases of abuse and exploitation reported to us by migrant fishers since the inception of the Atypical Scheme.

To date there have been nine rulings⁸ by the WRC in favour of fishers employed under the Atypical Scheme at adjudication hearings where the complaints typically spanned unpaid wages, holiday pay, pay in lieu of public holidays worked and absence of Sunday premia as well as breaches of working time and rest periods.

Additional to these nine cases have been findings and prosecutions by WRC inspectors against six named vessel owners concerning the pay of migrant fishers documented in their annual reports from 2016 to 2020.⁹

A further four cases for unpaid wages were settled by the ITF with the vessel owners before reaching WRC adjudication.

At the time of writing there are an additional two WRC adjudication cases being currently heard and a further 12 cases are pending for adjudication or investigation on foot of complaints submitted by the ITF and SIPTU on behalf of migrant fishers.

While these pending cases remain to be heard and investigations concluded the ITF views the testimony and evidence relating to them as being of equivalent strength to the prior cases that were found in favour of the migrant fishers.

In total, the ITF, in the course of the lifetime of the Atypical Scheme, has identified 34 vessel owners or vessel owner families (26 current and 8 former) against whom either:

- findings have been made by the WRC in adjudication or inspection
- are under ongoing Garda investigations for human trafficking and/or
- are respondents in pending WRC or Labour Court cases and/or
- have settled¹⁰ unpaid wages claims on foot of ITF/SIPTU representations and/or
- have been found guilty in the District Court or are due prosecution in the District Court by the WRC or MSO over some non-compliance related to their engagement of Non-EEA migrants and/or
- have been reported by the ITF to the Sea Fisheries Protection Authority on foot of testimony from migrant fishers of being coerced into participating in over-quota fishing.

Those 26 current vessel owners or vessel owner families referred to above represent 21% of the 121 vessel owners or vessel owning families eligible to employ Non-EEA fishers under the terms of the scheme. However, these 26 owners own 68 vessels between them or 39% of the 174 currently eligible fleet.

The high instance of abuses and complaints amongst vessel owners who have engaged migrants under the scheme is even more acute than the above figures suggest. In a PQ¹¹ response on 15th June 2021 revealed that only 68 eligible vessel owners at that point in time spanning 93 vessels, 55% of the then total, actually employed documented Non-EEA migrants under the terms of the scheme.

Again, the question is also begged as to how the remaining 45% of vessels are being crewed.

The above statistics speak to endemic problems in the sector among that segment of the fleet where workers are employed under the Atypical Scheme.

Furthermore, a study of the annual WRC annual reports, the Migrant Rights Centre of Ireland report¹² from 2017 and the Maynooth University Law Department report¹³ of October 2021 which employed a similar methodology as the MRCI report and was based exclusively on interviews with fishers employed post the April 2019 settlement agreement¹⁴ reached between the ITF and the State, all taken together demonstrate no discernible improvement in terms of levels of compliance in the sector over the six years.

While the 2021 WRC Annual report remains to be published in an answer to a PQ on 25th January 2022 the Táiniste and Minister for Enterprise Trade and Employment reported that in the course of 2021

“50 contraventions of employment rights or employment permits legislation, relating to 20 vessel owners, were detected by WRC Inspectors in 2021. This brings to 365 the number of contraventions detected by WRC Inspectors since the introduction of the Atypical Scheme.”¹⁵

The Hidden Exploitation

In addition to the above instances of documented rulings, settlements and investigations there is a further cohort of discontented fishers enrolled in the Atypical Scheme with whom the ITF has contact for whom complaints have not yet been submitted to the WRC for reasons we set out in detail in a recent submission to the WRC regarding their outreach work among migrant fishers.

To summarise briefly here why it is the case that migrant fishers in the Atypical Scheme often do not promptly seek redress from the WRC or disclose matters of concern to WRC Inspectors is that to do so will precipitate the ending of their employment relationship with the vessel owner.

It is a simple matter for the vessel owner to write to the Department of Justice and inform them that the employment relationship with the migrant fisher has ended. Once this happens the Department of Justice then writes to the fisher seeking a response from them

within 28 days as to whether they have located another eligible vessel owner to employ them under the terms of the Atypical Scheme otherwise the fisher becomes undocumented.

Therefore, in all of the WRC adjudication cases and certainly all of the WRC Inspector investigations arising from ITF referrals the fisher was no longer working for the vessel owner at that point.

The pragmatic approach of the unhappy migrant fisher in the Atypical Scheme who is mid-contract is to endure the abuses to safeguard an income and Visa status (which is tied to the vessel owner) and once the employment relationship eventually does end for reasons of contract non-renewal, dismissal or injury they then give the ITF leave to try retrieve to the greatest degree possible sometimes vast amounts of unpaid wages that can arise from years of exploitation.¹⁶

Failures in medical care for injured fishers

The 2015 Taskforce report made the following recommendation:

The contract must provide for the provision, at the expense of the employer (licence holder), of health insurance cover for the employee (crew member). Such health insurance cover to be provided by a health insurer registered with the Health Insurance Authority and to provide for access to acute hospital care for the employee (crew member). Page 22

This recommendation was never enforced and support from vessel owners for injured fishers in medical expenses has been inconsistent. The ITF is acquainted with a number of fishers documented in the Atypical Scheme who received back, finger, hand and foot and injuries in the course of their duties who incurred medical expenses themselves.

Deficiencies in performance of the Oversight Committee

The underestimation by the Department of Justice in particular, of the problems with the scheme appear to lie in a deficit of information being shared by other Departments and statutory bodies who encountered breaches in the Scheme.

For example, at a meeting¹⁷ of the Oireachtas Committee for Enterprise, Trade and Employment on 21st October 2021 which discussed the performance of the WRC in vindicating the rights of migrant fishers it was revealed when questions were posed to a senior WRC official by Deputy Louise O'Reilly that the WRC did not, as a matter of course, supply information to the Department of Justice about prosecutions or adverse findings against vessel owners under the terms of Atypical Work Permit Scheme which according to the terms of the Scheme could lead to a vessel owner being effectively barred from applying for future permits.

Nor do we presume has the Department of Justice sought this information from the WRC or other state agencies such as the Marine Survey Office (MSO) who have had occasion to prosecute vessel owners in relation to non-compliances connected with their engagement

of Non-EEA fishers. This is effectively admitted to by the Minister for Justice in a response to a series of PQs on 13th July 2021:

“Investigation and prosecution of breaches of employment law is a matter for the Workplace Relations Commission. **To date, my Department has not been made aware of any confirmed breaches requiring the barring of a vessel owner from employing future individuals under the Scheme.** The 2015 Task Force Report, which sets out the terms and requirements of the Atypical Working Scheme for non-EEA crew in the Irish fishing fleet, includes the requirement that “Where the contract is breached by the licence holder (employer), no further Atypical Worker Permission will be made available for the purposes of employment to the licence holder (employer)”¹⁸.” *ITF emphasis*

This deficit of information seeking and information sharing by the different Departments and statutory bodies, all of which are represented on the Oversight Committee, which meets quarterly, is inexcusable and has contributed to a sense of impunity amongst abusive vessel owners.

Detrimental and discriminatory impact of the Atypical Work Permit scheme on incomes of Non-EEA migrant fishers

The introduction of the Atypical Scheme was intended to eliminate abuses of migrants on Irish vessels. It was observed by the ITF that a cohort of super-exploited migrant fishers who tend to live on the vessels and suffered the worst abuses prior to the introduction of the Atypical Scheme were precisely the type of fisher that was not enrolled into the Atypical Scheme by the vessel owners in 2016.

A number, hundreds in the ITF’s estimation, kept working undocumented and hidden until such events such as dismissal¹⁹ career ending injury²⁰ or the sinking²¹ of their vessel resulting in their abandonment or they reached a point where they could no longer endure their abuse and they made contact with the ITF for assistance.

Conversely among the cohort of between 100 and 200 Non-EEA migrant fishers, who worked in the sector prior to the establishment of the Atypical Work Permit scheme before then being enrolled by their vessel owner the common narrative is that their enrolment heralded a deterioration in their pay and conditions.

How can this seeming paradox be explained? These fishers had worked pre 2016 on a share of the catch basis, albeit undocumented, and reported a typical monthly income of on average €2,500. They had a mobility as undocumented fishers and this created a certain market pressure that maintained a standard of pay.

Between €2,500 to €3,500 per month is still reported to the ITF to this day as the typical share of the catch income for the EU based migrants working in the fleet predominantly from eastern Europe and of the small cohort of Non-EEA migrants with Stamp 4 Visas typically obtained via marriage to EU citizens.

The standard Atypical Scheme contract is based on a notional average 39 hour week and cites the statutory minimum wage as the minimum rate the fishers must be paid and furthermore stipulates that the fishers must be paid for every hour worked.

However, this provision, in the instances that have come to the ITF's attention and formed the basis of past successful and future complaints to the WRC, has translated into fishers being typically paid minimum wage X 39 hours regardless of how many hours they work which is a lot more than a 39 hour average week.

Even the occasional catch bonuses or 'overtime' that appears on some wage slips do not adequately compensate, on an annualised basis, for the hours work meaning that on average the actual rate of pay can be as low as between one third and one half of the statutory minimum wage.

For those non-EEA migrant fishers who worked prior to the establishment of the Atypical Scheme before being enrolled in 2016 they commonly describe a decline in monthly take home pay from the €2,500 share to approximately €1,800 gross despite no change to the hours they have worked. They are acutely aware of their Eastern European crewmates, doing precisely the same amount of work on board earning far in excess of them.

The Atypical Scheme, revealed to the Irish authorities the identity of the individual formerly undocumented fisher. Now that fisher became totally tied to his individual vessel owner employer in a way he was not when undocumented. This in the many cases that have come to the ITF's attention then gave the vessel owner confidence to straightjacket the fisher in a greatly reduced pay structure based on a distorted interpretation of the standard Atypical Scheme contract.

Can Non-EEA migrant fishers simply change employers under the terms of the Atypical Scheme?

The Department of Justice in PQ responses and in the course of the last meeting of the Oversight Committee hold to a position that there is adequate provision within the terms of the Atypical Scheme for fishers to change employers. The figure of 52 such changes of employer out of the 468 that have been enrolled into the scheme at some point since its inception was quoted at the last meeting of the Oversight Committee²², 17 of those in the last year.

The ITF accepts this figure and is aware of instances among those 52 which included the transfer of crew when particular vessels were decommissioned or in general where there is mutual consent between vessel owners to transfer crew.

However, the practical experience, of fishers in unhappy situations needs to be recognised. It is not a realistic proposition for a fisher experiencing abuse and exploitation at the hands of one vessel owner to make confidential overtures to another vessel owner about switching vessels give the small size of the vessel owner community who are well acquainted with each other and are unlikely to consent to a 'poaching' of each other's crew on the initiative of a fisher who has problems with his employer.

Non-dissuasive awards and penalties feeding culture of repeat offending by vessel owners

We refer the review group to the transcript of the ITF's presentation to the Oireachtas Committee for Enterprise, Trade and Employment on 21st October linked in the endnotes. Favourable rulings at the WRC do not translate into the exploited migrant fisher obtaining full wage recovery because of the cognisable period in the Workplace Relations Act limits recovery of most entitlements to the six or occasionally, in extenuating circumstances, twelve months prior to a complaint being submitted the WRC.

While the six month cognisable period does not pose a problem for most workers in the State for migrant fishers whose very legal status in the State is on the line when they leave their employer and eventually embark on a WRC complaint it effectively can mean that the majority of their unpaid wages are not recoverable via the WRC.

This injustice will likely become more pronounced as the most recent WRC cases submitted for adjudication include complaints of wage exploitation spanning up to the six years since the inception of the Atypical Scheme.

The consequences of these very partial awards provided by the law is that the vessel owner can still enjoy a net gain for their exploitation of the migrant fisher over the whole period the Non-EEA migrant fishers was in their employ even though they have lost the case taken by the migrant fisher against them at the WRC.

The situation for undocumented migrant fishers is even more dire. The only route to seeking wage recovery is via Section 2B (6) of the Employment Permits Act 2003 as amended in 2014. This provision allows the Minister for Enterprise, Trade and Employment to initiate a civil case against an employer for wage recovery on behalf of exploited undocumented migrants.

The ITF in 2018 sought that this provision of the Act be used to recover unpaid wages for four undocumented crew in a high-profile case. What transpired was a decision by the WRC, which was tasked by the Minister to investigate the matter, to not prosecute because it judged the evidence and testimony as insufficient whereas the ITF estimated it to be of equivalent strength to that of documented exploited migrant fishers who we represented at WRC adjudications.

In the course of enquiries about this particular case made via PQs²³ it was then revealed in a response on 13th July 2021 from the Táiniste and Minister for Enterprise Trade and Employment that this provision of the Employment Permits Act had never been successfully employed to recover unpaid wages for any undocumented worker in the seven years since the Act was amended!²⁴

This has led the ITF and others to call on the government to transpose the Employers Sanctions Directive²⁵ in a manner that will enable undocumented migrants and their representatives take the initiative for seeking wage recovery from WRC adjudication.

Furthermore, we would highlight here that the obligation on WRC Inspectors to report undocumented fishers they encounter to the Garda National Immigration Bureau which can play directly into the hands of abusive vessel owners who use this fear of detection to keep undocumented fishers hidden from WRC other State agencies.

In addition to the inadequate awards arising from WRC cases that have found in favour of the migrant fisher the typical fines applied to vessel owners arising from the District Court cases taken by the WRC and Marine Survey Office (MSO) against them over various non-compliances related to their engagement of Non-EEA migrants are likewise non-dissuasive typically ranging from €500 to €1,000.

In the case of MSO prosecutions where the prosecution of the vessel owner involves the employment of undocumented migrant crew working on an ostensible share basis fewer charges apply because the legal obligations on a vessel owner are fewer than the case with direct wage earning employees enrolled in the Atypical Scheme!

Breaches of working time at sea regulations going unpunished and uncompensated

The inadequate awards made in the successful WRC cases are further exacerbated by the failure of the government to correctly transpose the Working Time at Sea Directive. The impact of this failure is that most instances the WRC and Labour Court have ruled that they do not have jurisdiction to hear complaints of breaches of working time regulations and compensate the migrant fisher for dangerous overwork in addition to awarding unpaid wages.

Included in an appendix below is a submission made by the ITF to Captain Stephen Clinch, who was appointed by Minister Eamon Ryan in early 2021 to make recommendations regarding reform of the Marine Casualty Investigation Board. This technical submission provides details of the mis-transposition of the Directive and the various detrimental implications for the safety and wellbeing of fishers²⁶.

The ITF notes the response of Táiniste Leo Varadkar on 25th January 2022 to a PQ²⁷ committing to legislation in the Spring that will give the WRC and Labour Court jurisdiction to hear Working Time at Sea related complaints. **While welcome, this is long overdue and immediately poses the question as to whether the 12 as yet unheard WRC cases and three pending Labour Court cases, if they take place post the legislative amendment, can have Working Time at Sea related breaches heard.**

The reforms needed

The ITF restates its support for the various changes in employment and maritime law and operational practices alluded to above and in the appendix that will serve to enhance the rights, safety and welfare of migrant fishers and others.

We reiterate again our call for Ireland to ratify the Work in Fishing Convention ILO C188.

For the purpose of the review of the Atypical Scheme however we wish to lay emphasis to two areas reform we see as necessary to the work permit regime as well as a fresh path to documentation for the undocumented fishers and former fishers.

1. Eliminate the disadvantages of the Atypical Scheme relative to the permit schemes for Non-EEA workers administered by the Department of Enterprise, Trade and Employment

There is no other section of Non-EEA workers that suffer the comparable disadvantages as the fishers enrolled in the Atypical Work Permit scheme. Besides fishers only Non-EEA locum health workers come under Atypical Schemes administered by the Department of Justice and in their case for only short fixed periods of time.²⁸

The reality that has unfolded over the last six years is that the Non-EEA migrant fishers duration in the sector bears more of a resemblance to that of workers in the Department of Enterprise, Trade and Employment's Critical Skills Permit Scheme or General Employment Permit Scheme.

With these two schemes minimum income thresholds apply ranging from €27,000 to €32,000 per annum compared to the circa €21,000 annual minimum of the Atypical Scheme for Fishers.

The definition that applies for eligibility for consideration of the Critical Skills Permit in particular, applies to that of fishers. For example BIM's *Business in Seafood* report published in March 2021

“The economic performance of Ireland’s offshore fleet (which comprises 220 vessels over 18 metres) during the period 2009 - 2020 indicates a general recovery since the height of the economic downturn in 2010. Since 2016 the offshore fleet has generated consistent strong gross profits above €50m per annum. The fleet continues to face significant challenges, including increased operating costs **as well as the sourcing and retention of skilled crew.**”²⁹ *ITF emphasis*

The BIM Labour Force Survey conducted last year, alluded to earlier in this submission, and which remains to be published was likewise undertaken arising from the reported recruitment and retention crisis and the observed undesirability of working in the sector in the eyes of Irish citizens.³⁰

The proposed vessel decommissioning scheme³¹ whereby the segment of the fleet eligible to employ Non-EEA fishers will be reduced from 174 to approximately 120 vessels strengthens the case in the view of the ITF to improve the pay and conditions and status of Non-EEA migrant fishers given the promise that the decommissioning will result in a more sustainable business for the remaining vessels.

In summary, the ITF as a trade union body favours equal treatment of all workers across borders and therefore is not inclined to enthuse about any type of work permit scheme which, by definition, discriminates on the basis of country of origin.

That said, looking within the frame of references of the various permit schemes in this State the Atypical Scheme for Non-EEA fishers is decidedly disadvantageous relative to the other schemes referred to here at the level of both pay and Visa status and the conversion of the Non-EEA fishers from the Atypical Scheme to the Critical Skills Permit list would be widely welcomed by the fishers with whom the ITF has contact.

It is already on record that the Government is not adverse to bringing the migrant fishers under one of the comparatively advantageous Department of Enterprise, Trade and Employment Permit Schemes. In a response to a series of PQs³² on 13th July 2021 the Minister for Justice said:

“It is open to the fishing industry to apply for inclusion in the DETE employment permit scheme and I understand that my colleague, Minister English, advised them of this at a recent meeting with industry representatives. Inclusion in the employment permit system would secure Stamp 4 status.”

The problem is that the fishing industry representatives are most unlikely to make such an application to the Department of Enterprise, Trade and Employment because to do so would result in an improvement of pay level for migrant fishers and in general loosen the power the bad vessel owners have over them as the fisher would have a clear path to a stamp 4 within one or two years.

2. Give the undocumented migrant fishers a path to regularising their situation and open up the path to stamp 4 Visas to documented fishers in the Atypical Scheme

The question of how a cohort of undocumented Non-EEA fishers are still working in the sector as well as the presence of former fishers now undocumented, who remain in the state pending WRC and Labour Court hearings has been addressed already in this submission.

Many of these undocumented fishers and former fishers looked to the Department of Justice's Documentation Scheme as a means of regularising their situation and for those that suffered injuries in the course of their work in fishing to legally engage in less physically demanding employment in some other sector so that they may still provide for their families.

Tragically, and despite repeated calls³³ from the ITF and other organisations to make the documentation scheme simple and inclusive, the majority of undocumented fishers who have been in the State for more than four years, with whom the ITF has contact, cannot avail of the scheme for the simple reason that they were documented at some point within the last four years.

Similarly, many of the currently documented Atypical migrant fishers that have been in the scheme for the last four years or more are looking askance as a path to a highly advantageous Visa stamp 4 is open to a handful of their peers who have been undocumented for the last four years or more while they remain tied to an employer that some of them want to leave and work elsewhere without jeopardising their status in the State.

The ITF has recommended to those fishers, both undocumented and currently enrolled in the Atypical Scheme seeking a Stamp 4 to obtain legal representation for an application for a change of status to be made to the Department of Justice. The ITF is aware of a number of such applications already made in recent months and more impending applications from other fishers and former fishers.

A number of these change of status applications raise serious issues in relation to the human rights of fishers who have resided lawfully in the State for significant periods of up to five years or more.

In particular, serious concerns have been raised in relation to the working conditions that fishers are exposed to under the Scheme. There has been a consistent refusal by the Minister to consider these applications and the serious human rights issues raised. This refusal is in breach of the Minister's statutory obligations and recourse to the Courts may be necessary to address this arising from the individual change of status applications.

The ITF makes the call again for a clear and simple path to stamp 4 documentation for all of these fishers and former fishers so that the original mistake in 2016 of leaving the initiative to document the undocumented fishers with the vessel owners can be corrected.

¹ <https://www.theguardian.com/global-development/2015/nov/02/revealed-trafficked-migrant-workers-abused-in-irish-fishing-industry>

² Report of the Government Taskforce on Non-EEA workers in the Irish Fishing Fleet December 2015 DECEMBER 2015 <https://assets.gov.ie/126303/974f378d-1943-448e-b7d9-fb3923ddc042.pdf>

³ <https://www.rte.ie/radio/radio1/clips/20873191/>

⁴ <https://www.theguardian.com/global-development/2015/dec/17/ireland-trafficked-migrant-fishermen-2010-trawlers-guardian-investigation>

⁵

https://www.workplacerelements.ie/en/publications/forms/report_on_wrc_enforcement_of_the_atypical_worker_permission_scheme_in_the_sea_fishing_fleet.pdf

⁶ PQ 3443/22

⁷ This figure obtained in PQ responses 54123/21, 54124/21 on 9th November 2021 and is lower than live 'letters of approval' from the Department of Justice as not every fisher issued a letter of approval takes up their job offer and even for those who do take up their job offer on foot of receiving a letter of approval there can be a time lag.

⁸ <https://www.workplacerelements.ie/en/cases/2019/january/adj-00012854.html>
<https://www.workplacerelements.ie/en/cases/2020/july/adj-00022124.html>
<https://www.workplacerelements.ie/en/cases/2018/september/adj-00008053.html>
<https://www.workplacerelements.ie/en/cases/2019/september/adj-00018491.html>
<https://www.workplacerelements.ie/en/cases/2019/march/adj-00009463.html>
<https://www.workplacerelements.ie/en/cases/2018/december/adj-00012683.html>
<https://www.workplacerelements.ie/en/cases/2021/november/adj-00026812.html>

<https://www.workplacerelations.ie/en/cases/2019/january/adj-00012505.html>

<https://www.workplacerelations.ie/en/cases/2018/september/adj-00009467.html>

⁹ [annual-report-2020.pdf \(workplacerelations.ie\)](#)

[annual-report-2019.pdf \(workplacerelations.ie\)](#)

[annual-report-2018.pdf \(workplacerelations.ie\)](#)

[workplace relations commission - annual report 2017.pdf \(workplacerelations.ie\)](#)

[wrc annual report 2016.pdf \(workplacerelations.ie\)](#)

¹⁰ Migrant fishers represented by the ITF have occasionally opted to settle their claim with the vessel owner rather than face the prospect of a wait of several years for a WRC hearing and likely Labour Court Appeal as often transpires in successful WRC cases. This pressure to settle can be exacerbated if they become undocumented

¹¹ PQ 31184/21

¹² <https://www.mrci.ie/app/uploads/2020/01/MRCI-FISHER-REPORT-Dec-2017-2KB.pdf>

¹³

<https://www.maynoothuniversity.ie/sites/default/files/assets/document/Experiences%20of%20Non%20EEA%20Workers%20in%20the%20Irish%20Fishing%20Industry.pdf>

¹⁴ This agreement was reached in the aftermath of a High Court action against the State initiated by the ITF seeking the suspension of the Atypical Scheme when it became apparent the in the hands of some vessel owners the scheme itself was a tool for abuse to such an extent that 24 out of the 32 migrant fishers admitted to National Referral Mechanism for suspected victims of human trafficking in 2017 and 2018 were actually enrolled in the Atypical Scheme. The settlement agreement reached at the end of the process consisted of some 20 reforms of the Atypical Scheme which on paper were intended to eliminate the abuses.

¹⁵ PQ 3446/22

¹⁶ <https://www.independent.ie/irish-news/news/fisherman-was-underpaid-by-114000-politicians-told-40961936.html>

¹⁷

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_enterprise_trade_and_employment/2021-10-20/2/

¹⁸ PQs 37340/21, 37341/21, 37345/21, 37351/21

¹⁹ <https://www.irishtimes.com/news/ireland/irish-news/ghanaian-men-in-possible-trafficking-case-are-in-state-care-1.3462579>

²⁰ <https://www.irishtimes.com/news/social-affairs/undocumented-fisherman-s-injuries-at-sea-are-under-investigation-1.3339955>

²¹ <https://www.irishtimes.com/news/social-affairs/lack-of-papers-for-fishermen-rescued-off-cork-coast-under-investigation-1.4540769>

²² A different figure of 68 was provided in PQ response 58710/21 on 9th November 2021

²³ PQs 37343/21, 37344/21, 37350/21

²⁴ Internal correspondence between Department of Enterprise Trade and Employment officials related to this case obtained by the ITF on behalf of one of the undocumented fishers under Freedom of Information claimed that this provision of the Act was successfully employed on one occasion contrary to the PQ response.

²⁵ Ireland and Denmark are the only EU two member states who have not transposed this directive

²⁶ This report was completed and submitted to the Minister in July 2021 and remains unpublished to this day

²⁷ PQ 3446/22

²⁸

https://www.citizensinformation.ie/en/moving_country/working_in_ireland/employment_permits/atypical_work_scheme.html#:~:text=The%20Atypical%20Working%20Scheme%20allows,allowed%20to%20work%20in%20Ireland.

²⁹ <https://staging.bim.ie/wp-content/uploads/2021/03/BIM-The-Business-of-Seafood-2020.pdf> Note the 220 vessels to which the quote refers includes the majority of 174 vessels eligible to employ fishers under the Atypical Scheme as well the Killybegs RSW fleet and vessels engaged in Aquaculture that are excluded from the Atypical Scheme

³⁰ <https://thefishingdaily.com/latest-news/labour-issues-in-irish-fishing-industry-focus-of-new-bim-study/>

³¹ https://bim.ie/wp-content/uploads/2021/02/bim_Building_a_Sustainable_Future_for_Ireland's_Fishing_Fleet..pdf

This report only makes a passing reference to Non EEA fishers. The ITF had it confirmed by the WRC that fishers enrolled in the Atypical Scheme whose employment ends mid-contract arising from a vessel decommissioning and have served a minimum of two years with the vessel owner have an entitlement to redundancy. The ITF

would add that the redundancy calculated ought to be on the hours the fishers actually worked and the pay they ought to have received in the course of their service with the vessel owner

³² PQs 37340/21, 37341/21, 37345/21, 37351/21

³³ <https://www.irishtimes.com/news/social-affairs/fishermen-risk-not-qualifying-for-undocumented-migrants-scheme-1.4673072>

Appendix

Letter sent to Captain Stephen Clinch on behalf the International Transport Workers' Federation on 28th May 2021. Captain Clinch was appointed by Minister Eamon Ryan to review the performance of the Marine Casualty Investigation Board. His report was submitted to the Minister July 2021 and remains unpublished.

Dear Captain Clinch,

I am writing to you on behalf of the International Transport Workers Federation ('ITF') in the context of your review of Ireland's marine casualty investigation structures to bring your attention to certain deficiencies in the rules regulating employment on Irish fishing vessels.

As no doubt you are aware, ITF is a federation of 686 affiliated trade unions, representing more than 19.5 million transport workers in 148 countries. ITF represents workers on land and sea, and while historically its main maritime emphasis has been on the protection of seafarers working in the merchant marine, in recent years it has become increasingly concerned at the mounting levels of abuse of migrant fishers, including on Irish-flagged fishing vessels.

Of particular concern to ITF is a decades-long pattern of non-enforcement of laws designed to protect workers against overwork by the Marine Survey Office.

In 2018, ITF brought legal proceedings against Ireland for failure to protect migrant fishers against exploitation and human trafficking in the fishing fleet. In April 2019, those proceedings were compromised on the basis of a detailed agreement which included a provision that Ireland would properly transpose the rules on working time in the Agreement to implement ILO Convention 188 on Work in Fishing annexed to Directive 2017/159 EU into Irish law. The European Union (International Labour Organisation Work in Fishing Convention) (Working Hours) Regulations 2019 (SI 672 of 2019) purport to effect this transposition.

SI 672 of 2019 applies to fishing vessels flying the Irish flag. It purports to transpose the rules on maximum hours of work and minimum hours of rest in Article 11 of the Agreement, but only in relation to employed fishers; it does not apply to share fishers, which is problematic given that these are covered by Convention 188 and by the Agreement.

Regulation 6 states:

An owner or master shall not permit a fisherman to work more than an average of 48 hours a week, calculated over a reference period that does not exceed 12 months.

The language in Regulation 6 echoes Article 11(1)(b) of the Directive, which states:

Each Member State shall...adopt laws, regulations or other measures requiring that owners of vessels flying its flag ensure that fishermen are entitled to adequate rest and that the fishermen's hours of work are limited to 48 hours a week on average, calculated over a reference period not exceeding 12 months.

The purpose of the averaging rule in Article 11(1)(b) is to ensure that fishers do not work the maximum hours allowed by Article 11(3) for a prolonged period. The precise specification of the reference period has been left to the Member States, but Ireland has failed to specify how it is to be

calculated. Thus, when MSO surveyors assess whether an individual fisher's hours of work and rest are in compliance with Regulation 6, how is the reference period for the purposes of Regulation 6 to be identified? Is it the amount of time he has been working for the employer? Does it include days off or not? In this regard, SI 672 of 2019 repeats the error in the transposition of Article 21 of Directive 2003/88/EC by the European Communities (Organisation of Working Time) (Workers on Sea-Going Fishing Vessels) Regulations 2003, SI 709 of 2003, which similarly failed to specify how the reference period is to be calculated.

For the purpose of comparison, it is instructive to consider the corresponding provision in the UK, which were adopted before the UK left the EU to transpose Directive 2017/159 EU, and with which you will no doubt be very familiar. Regulation 6 of the UK's Fishing Vessels (Working Time: Sea fishermen) Regulations 2004 provides:

Maximum weekly working time

6.—(1) *A worker's working time, including overtime, in any reference period which is applicable in his case shall not exceed an average of 48 hours for each seven days.*

(2) *An employer shall take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that the limit specified in paragraph (1) is complied with in the case of each worker employed by him in relation to whom it applies.*

(3) *Subject to paragraph (4) the reference period which applies in the case of a worker is any period of 52 weeks in the course of his employment.*

(4) *Where a worker has worked for his employer for less than 52 weeks, the reference period applicable in his case is the period that has elapsed since he started work for his employer.*

(5) *For the purposes of this regulation, a worker's average working time for each seven days during a reference period shall be determined according to the formula—*

$\frac{A - B}{C}$

C

where— A is the aggregate number of hours comprised in the worker's working time during the course of the reference period;

B is the aggregate number of hours comprised in his working time during the course of the period beginning immediately after the end of the reference period and ending when the number of days in that subsequent period on which he has worked equals the number of excluded days during the reference period; and

C is the number of weeks in the reference period.

(6) *In paragraph (5), "excluded days" means days comprised in—*

(a) any period of annual leave taken by the worker in exercise of his entitlement under regulation 11;

(b) any period of sick leave taken by the worker; and

(c) any period of maternity, paternity, adoption or parental leave taken by the worker.

The British law makes clear the necessity to specify a method for calculating the reference period and for calculating the average so that it does not exceed 48 hours a week as required by Article 11(1)(b) of the Agreement. Without such a method, the rule is not effective as a measure to protect workers against exploitation by overwork.

The same is true in the context of the offences created by SI 672 of 2019. Under Regulation 16(1)(a), failure to comply with Regulation 6 is an offence. Yet it is a general principle of criminal law that a criminal offence must be sufficiently clear to enable a person to understand what is demanded by the law and the consequences of a breach. Plainly, if the reference period is unclear, then the application of Regulation 6 is necessarily unclear, and the offence of failure to comply with it is void for vagueness. In short, the failure to specify a reference period makes Regulation 6 a dead letter. ITF further notes, for the sake of completeness, that the deficiency in SI 672 of 2019 is replicated in SI 331 of 2020, which implements the working time rules in respect of fishing vessels flying the flags of other EU Member States.

Our concern is not limited to the letter of the law, but extends to the spirit in which it is enforced. The MSO is responsible for the enforcement of the rules relating to working time on fishing vessels under SI 672 of 2019, just as it was of the earlier regulations, the EC (Organisation of Working Time) (Workers on Sea-Going Fishing Vessels) Regulations 2003 (SI 707 of 2003), yet it plainly has no appetite for this task. Although the MSO has consistently frustrated efforts to obtain information about its inspections under the Freedom of Information Act 2014, in response to a question asked by Mick Barry TD, the Minister for Transport said on 19 November 2020 that in 2018, MSO had carried out only 12 unannounced inspections. Due to ITF complaints and a new protocol for referrals agreed with the WRC (which has jurisdiction over payment of wages) the number of inspections in 2019 increased to 40, but in 2020 (to 19 November) there were only 10.

A further difficulty is that workers on Irish fishing vessels cannot enforce the rules on working time themselves via the ordinary workplace complaint procedures of the Workplace Relations Commission. On land, over-worked workers can complain to the WRC of violations of the Organisation of Working Time Act 1997 and claim up to two years remuneration as compensation for over-work. Workers at sea have no such recourse, because SI 672 of 2019 contains no comparable redress provision and because the Workplace Relations Act 2015, which governs the WRC's jurisdiction, does not confer upon it jurisdiction to adjudicate claims for violations of SI 672 of 2019. This omission – which also affected SI 709 of 2003 – was brought to the State's attention by the ITF but still remains uncorrected.

Yet another difficulty affecting workers on Irish fishing vessels is under-crewing. You will be aware that SI 673 of 2019 contains rules in relation to the number of deck and engineering officers to be carried on Irish fishing vessels. SI 673 of 2019 also amends the Fishing Vessels (Certification of Deck Officers and Engineer Officers) Regulations 1988, SI 289 of 1988 to require that vessel owners obtain a safe manning document from the MSO. The owner proposes a particular manning level, which is then approved (or not approved) by the MSO. Once a safe manning document has been issued, the vessel cannot proceed to sea without being manned at the level prescribed by the document. ITF is concerned that the MSO, in approving manning levels, does not take proper account of how many Irish fishing vessels operate to ensure that they are adequately crewed. As you know, modern vessels frequently operate as floating factories, sorting, processing, packing and freezing the catch on board. Based on information ITF has received from migrant fishers working on vessels 15-24 metres in length to whom it has provided assistance, many Irish fishing vessels in this category are seriously under-crewed, meaning that deck-hands are required to work harder and longer, and increasing the risk of accidents as the result of exhaustion and fatigue. ITF also notes that SI 673 of 2019 nominates as the effective date for requirement to have a safe manning document, for vessels in the 15-24m category, the date of completion of the next MSO survey for the grant or renewal of a fishing vessel safety certificate or the date of completion of the next intermediate survey, whichever

occurs later. Based on the survey rules in the Merchant Shipping (Safety of Fishing Vessels) (15-24 Metres) Regulations 2007, SI 640 of 2007, this could be as far as four years away.

All of these issues lead ITF to the conclusion that workers on Irish fishing vessels have no effective protection against over-work. In this regard, we note that exhaustion is a leading cause of marine accidents. Indeed, for all its flaws, the Marine Casualty Investigation Board's report into the sinking of the MFV 'Tit Bonhomme' on 15 January 2012 concluded, at paragraph 5.1:

Notwithstanding the many other safety related factors highlighted by this casualty, the single overriding causal factor is considered to be insufficient rest for the crew and that the regulations on hours of work and rest appear not to have been complied with. In the 40 hours between departing Union Hall and the grounding, all crew appear to have had at most four to five hours sleep. This resulted in fatigue and inadequate watchkeeping arrangements on board the vessel and it steamed into and stranded on Adam's Island during the hours of darkness in poor weather conditions and this resulted in five of the six persons on board losing their lives.

The report expressly recommended that the SI 709 of 2003, the precursor of SI 672 of 2019, be enforced. The level of seriousness with which the MSO treated this recommendation is illustrated by the fact that a drafting error in SI 709 of 2003 which rendered the rules on working hours meaningless was not even noticed by the MSO until it was brought to the State's attention by ITF in 2018.

In summary then, ITF is concerned that Ireland has no effective rules in relation to mandatory hours of rest on its fishing vessels, and that this deficiency is largely attributable to the fact that the MSO is a captive regulator, whose priorities align with those of vessel owners rather than workers or the public interest.

In 2017, the Migrants' Rights Centre Ireland published a report entitled 'Left High and Dry: The Exploitation of Migrant Workers in the Irish Fishing Industry'. The report revealed that 65% of migrant workers on Irish fishing vessels worked over 100 per week, far in excess of the statutory maximum of 72 hours. Given the attitude of the MSO, ITF has no reason to believe that the situation has improved.

ITF regrets that the current situation is likely to lead to avoidable loss of life on Irish fishing vessels in the future. Given that the Department of Transport and the MSO bears the primary responsibility for this state of affairs, it is absolutely imperative that the Chief Surveyor have no role whatsoever in the investigation of marine casualties in Ireland.

Finally, you will be aware that Article 12 of the Agreement annexed to Directive 2017/159/EU requires that every fishing vessel carry a crew list, a copy of which is to be provided to an authorised person ashore. The question of to whom the list should be left is left to the competent authority of the Member State, which is, in Ireland, the MSO. SI 333 of 2020 purports to transpose Article 12 into Irish law, requiring that the crew list be carried on board and left by the master with the owner or, if the owner is also the master, with a member of his family, to be made available for search and rescue purposes if necessary. In ITF's view, this mechanism is vulnerable to abuse and manipulation in the case of a marine accident, and is likely to hamper any subsequent investigation. It is manifestly unsatisfactory that the crew list be left only with the owner or a member of his or her family. To ensure that such lists are not altered or interfered with so as to protect the integrity of future investigations, crew lists should be left with an independent person; ideally this should be the harbourmaster of the harbour out of which the vessel sails.

ITF appreciates your consideration of the matters raised above and hopes that they will be useful to you in the conduct of your review. Please do not hesitate to contact us if you require any further information.

Yours etc.