Fictional self-employment in the aviation sector

On 5 April 2022 the London East Employment Tribunal handed down judgment in a ruling on worker status which will cause tremors in the aviation sector where pilots are engaged on a "contractor basis" via a service company.

As EJ Housego noted in the opening paragraph of the Judgment, whilst this was, *"a hearing to decide…about Mr Lutz's status in his role as a pilot…it has, of course, a far greater significance than Mr Lutz's personal claim, as there are many pilots in precisely the same position as Mr Lutz"*. The full public Tribunal judgment can be found here.

Background

The pilots' trade union BALPA supported a member and former Ryanair pilot, Jason Lutz in bringing claims for holiday pay under the UK Civil Aviation (Working Time Regulations) 2004 ("CAWR"), and for parity in respect of basic working conditions under the Agency Workers Regulations 2010 ("AWR").

Mr Lutz applied to become a pilot at Ryanair. He attended a selection interview at Ryanair's headquarters in Dublin. He was subsequently contacted by a third party, McGinley Aviation Ltd ("MCG") and told that he had passed the selection process and that he was to be engaged by MCG as a contractor pilot to be supplied to its client, Ryanair. MCG dictated that he needed to set up a service company. Thereafter, Mr Lutz entered into a 5-year fixed term contract as a named party with MCG and also the service company to undertake flying duties for Ryanair. He was paid for each schedule hour of block flying, payments were channelled by MCG via the service company which in turn paid Mr Lutz. He never received any holiday pay.

Supported by BALPA, Mr Lutz brought a claim against MCG for holiday pay. The Tribunal decided as a preliminary issue that he was both a worker and "crew member" engaged by MCG, signalling that he was therefore entitled to holiday pay.

This is possibly the first occasion where a Tribunal has considered the legal meaning of *"crew member"*, which has a significant impact on the aviation industry. The Tribunal found that he was engaged under a contract by MCG and that he was a *"crew member"*. The Tribunal further commented:

> *"More fundamentally it would be extraordinary if the CAWR did not apply to Mr Lutz. This is a health and safety regulation. The need for such regulation for those flying passenger aeroplanes is obvious. It cannot be that a salaried pilot is subject to the CAWR but his/her contracted counterpart is not. It is impossible to contemplate that it is a proper construction of CAWR that these regulations, put in place to make sure that the pilots who fly passenger planes are not impaired by being overtired, apply to neither pilot of a passenger jet carrying hundreds of people…".*

The Tribunal also decided that he was an agency worker supplied by MCG temporarily to work for Ryanair as "hirer". This paves the way for Mr Lutz to pursue his claim for entitlement to the same basic working and employment conditions as directly employed Ryanair pilots.

The Tribunal found that Mr Lutz was *"patently"* not *"self-employed"* in the sense of operating a genuine business on his own account with Ryanair or MCG being customers or clients of his service company. He was instead a worker and a crew member of MCG, and also agency worker of Ryanair as the hirer. The Tribunal found that Mr Lutz *"had no say in anything. He just did what he was told. This is the polar opposite of running a business."* The Judge also went so far as to describe these work arrangements as a *"fiction in practice"*.

The Tribunal further rejected arguments by Ryanair and MCG that Mr Lutz was not required to perform flying duties personally because of the existence of a substitution clause in the contract that he entered into with MCG. This did not reflect the reality of the situation and was a *"sham"*. There was no unfettered right of substitution.

Martin Chalk, General Secretary of BALPA said: "*This is a landmark moment and is not only good news for Jason Lutz, but also for all "self-employed" contractors in the aviation sector engaged under the same terms and conditions. Given the strength of the findings on all counts of the claim, we urge Ryanair and MCG Aviation Ltd to take note of the judgment and to focus on working with BALPA to remedy the position*."

BALPA was represented by David Hunt, Alice Yandle, and Caitlin Farrer of Farrer & Co, and Michael Ford QC and Stuart Brittenden of Old Square Chambers.

Farrer & Co and Old Square comment that: "*This ruling has immense implications for the use of the pilot contractor model in the aviation sector, and leaves the way open for other potential claims by pilots engaged under similar arrangements*."