

OPENING STATEMENT TO THE JOINT OIREACHTAS COMMITTEE ON EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION'S HEARING ON BOGUS SELF-EMPLOYMENT BY THE PRESIDENT OF IALPA, CAPTAIN EVAN CULLEN

Tuesday, 21 May 2019

Introduction

On behalf of the country's airline pilots, I want to thank the Committee for giving us this opportunity to address the issue of bogus self-employment of pilots operating for Irish-registered airlines.

We hope that your deliberations will result in long overdue action to tackle this pernicious problem which has detrimental effects on the pilots themselves and wider Irish society. In addition, reputational damage has been caused to Ireland in many European countries where pilots are based and are subject to bogus self-employment with Irish airlines, resulting in at least two European states initiating investigations around the effects of these types of employment.

Irish-Registered 'Contractor' Pilots

I want to begin by pointing out that approximately half of pilots operating in Irish-registered airlines are not employed directly by the airline they fly for. That is an extraordinarily high-level for such an important skilled and safety-critical profession which bears little or no comparison to other similar professions.

Indeed, it's worth pointing out that – according to the Ricardo study on working conditions for aircrew which was completed for the European Commission – approximately 18% of European pilots have non-permanent indirect employment status. In this context, Ireland's rate of 'contractor' pilots is approximately three times that of the European average. It is also worth mentioning that the same Ricardo study found that 93% of self-employment in European aviation is fake.

A 2015 study by Ghent University, titled '*Atypical Employment in Aviation*' – also carried out for the EU Commission – showed that young pilots are particularly affected by precarious employment terms, with almost 40% of such young pilots having no direct employment relationship with the operator they fly for. We know from our own experience in Ireland that the vast majority of the 'contractor' pilots in Ireland are also relatively young. In fact, for many new pilots entering our profession, they are effectively forced to become contractors out of necessity rather than choice, if they want to become airline pilots.

Use of Intermediary Companies

It is important to point out that while the position of these self-employed contractors appears to be legal under Irish law, different pieces of legislation may view these contracts in different ways, a confusing situation mirrored in the UK.

The convoluted manner in which their services are contracted has been carefully crafted to appear to meet the requirements of Irish law, but should they prove not to comply with the law, then the pilot will be potentially subject to sanction for a contracting arrangement that was effectively foisted on them.

So how does this 'contractor' model work?

Under the Irish version of this model, receiving a contract is subject to the pilot becoming a director and shareholder of a pre-existing limited company. That company will typically have between three and eight other directors, but the pilot will not be told who those directors are even when that information is requested. The company will not have normal employees other than the directors. The accountant who will manage the billing, expense claims, etc for the contractor pilot is a director too. The pilot will only be allowed to fly for one airline under this model and the whole arrangement is normally put in place by an intermediary agency.

This contracting arrangement can have several consequences:

- a) The airline does not have to pay the 10.85% employer PRSI contribution with all the long-term consequences of that for the contractor pilot;
- b) The pilot does not enjoy the benefits or protections of employment law rights – for example access to unfair dismissal legislation, paid maternity and paternity leave, sick leave benefits etc – vis a vis the airline to which they supply services;
- c) The pilot's rights to participate in any form of collective bargaining and industrial action are effectively neutralised. In effect, the pilot's relationship with the airline whose aircraft s/he operates and whose uniform s/he wears is based solely on contract law.

However, the question as to whether a pilot is or is not a direct employee of the airline is an objective analysis based on a number of factors which will be explored below.

Revenue Guidance

In their guidance on the subject¹, the Revenue Commissioners list a number of indicators of employee status and the situation in relation to contractor pilots is assessed below under those Revenue criteria:

¹ <https://www.revenue.ie/en/employing-people/becoming-an-employer-and-ongoing-obligations/guide-to-pay-as-you-earn-payee/index.aspx>

Employee Indicators	Contractor Pilots	
	True	False
Airline controls how, when and where the work is carried out	✓	
Pilot supplies labour only	✓	
Airline pays fixed rates of hourly, weekly or monthly wage	✓	
Pilot cannot subcontract work (in practice)	✓	
Airline supplies materials and equipment other than small tools	✓	
Pilot is not exposed to financial risk in carrying out the work	✓	
Pilot does not assume responsibility for investment and management in the business	✓	
Pilot cannot provide for management, scheduling or performance of the work	✓	
Airline sets the work hours	✓	
Pilot works for one airline only	✓	
Airline pays pilot for subsistence or travel	✓	
Pilot is entitled to extra pay or time off for overtime	✓	

The Revenue Commissioners also include a number of indicators of contract status:

Contractor Indicators	Contractor Pilots	
	True	False
Pilots owns his or her own business ²	✓	
Pilot is exposed to financial risk		X
Pilot assumes responsibility for investment and management		X
Pilots can profit from management, scheduling and performance of work		X
Pilot has control of what, how, when and where the work is done and whether they do it personally		X
Pilot is free to hire other people, on separate terms, to do the work which has been agreed upon		X
Pilot can provide same services to more than one airline at a time		X

² The proposition that contractor pilots own their businesses is an interesting one. When a pilot accepts his or her contract, the pilot must choose from a limited group of approved accountants to assist them with their business. These accountants will typically use a pre-existing limited company in which the pilot is made a director and allocated up to 16% of the company shares along with a number of other directors whose identities are not disclosed to each other. In addition, the contractor pilot cannot use this limited company for anything other than working with the airline in question. The pilot's hours worked are provided by the airline through the agency to the accountants. The pilot just submits their expenses each month to the accountant who prepares the required company documentation.

Pilot provides materials, equipment and machinery for the job		X
Pilot has fixed place of business where materials or equipment can be stored		X
Pilot costs and agrees a price for the job		X
Pilot provides his or her own insurance cover		X
Pilot controls the hours of work in fulfilling the obligations		X

Of the 24 criteria, Irish ‘contractor’ pilots only meet one of the contractor criteria, and that is on a partial and qualified basis. They meet 23 of the employee criteria. Based on this assessment, it is IALPA’s view that these contractor pilots are subjected to bogus self-employment and should be deemed to be employees and not self-employed contractors.

Other Factors

We are aware that this Revenue guidance is not definitive and there are other factors which need to be taken into account in determining the status of the contractor pilots.

The following are important to note:

- a) “Mutuality of obligation” exists between the pilot and the airline for which they work. This means that there is an expectation or understanding that the airline will provide work and the pilot will perform that work. Note, that the contractor pilot is rostered for work a number of weeks in advance and there is **no** casual element to the contractor pilot’s obligation to operate their rostered flights.
- b) The contractor pilots are performing identical work, under the same administrative and operational requirements, and the same workplace terms and conditions with other individuals who are categorised as employees by the airline.
- c) The pilots are not engaged in independently marketing their services to a number of airlines. Their companies have no independent public trading identity.
- d) While agreements between the parties might label the pilot as an independent contractor, whether they are an employee is a question of substance over form, easily tested by reference to the Revenue Commissioners guidelines as previously outlined.
- e) The contracts are for definite durations (normally three to five years) and are not short, ad hoc or project specific.
- f) It is IALPA’s view that any objective review of the contracts will show them to be unconscionable and one-sided.

It is conceivable that certain pilots may be properly considered contractors. For example, test or training pilots who sell their services to a number of airlines generally and operate on short-term or specific-purpose contracts. Experience indicates that the number of pilots operating in this way is very limited and is entirely out of the intention and design of these pilots in question

However, based on the assessment of the Revenue criteria and the other factors that have to be taken into account, it may be generally said that ordinary pilots should be considered to be employees of the airline they work for, and not genuine contractors engaged as such on a voluntary basis. The actual working lives of contractor pilots subject to bogus self-employment arrangements do not vary in any meaningful detail from their employee pilot colleagues.

European Interest

In 2011, a German prosecutor asked the British authorities to search the UK premises of a company that provides pilot services to an Irish airline. The prosecutor alleged that the company in question was in breach of tax and social security law.

The prosecutor pointed out that all work sequences for the pilot – including their uniforms – were specified by the airline. The airline in question determines which flights the pilot has to make and when, scheduling those flights weeks in advance. The contract concluded between the company in question and the pilots includes provisions that the pilots are bound to comply with specifications by the airline.

A pilot witness stated that he was recruited by the airline and received an offer for employment from them once he had obtained the required aircraft type licences. After obtaining this licence, the witness was further trained by the airline to comply with its procedures and standards. Only afterwards was he referred to the agency in question by the airline, and this agency finalised the contract formalities by email. The pilot witness never saw any office of the agency that completed the contract formalities.

The German prosecutor stated that the agency in question was responsible for processing the monthly work performance for approximately 1,600 ostensibly self-employed pilots with the airline, through 300 Irish companies which had the legal form of a limited company. These companies were administered by accountancy firms specified on a list of ‘acceptable accountants’ that the pilots could engage with for the purpose of complying with the contract requirements. According to the German prosecutor, these companies may only serve to conceal an employment relationship with the airline.

The UK’s tax authorities, the HMRC, conducted a separate enquiry into the status of ‘contractor’ pilots for tax purposes which led to a £47 million protective assessment against a UK based agency engaging pilots. However, individual pilots are also being subjected to HMRC scrutiny and find themselves having to explain a complex contrived structure which was not of their making.³

³ <https://www.theguardian.com/business/2017/oct/03/ryanair-pilots-hmrc-investigation-airlines-uk>

Impact on Pilots

For the pilots engaged as contractors, their status has a number of practical implications for them:

- The airlines are not bound by all normal employer obligations to these pilots – for example for paid maternity and paternity leave – through this mechanism;
- The rights of contractor pilots to participate in any form of collective bargaining on pay and conditions, as well as their rights to take industrial action in the event of a dispute, are effectively neutralised.

From the pilot's perspective this device of being a contractor or an employee of his/her own company is a difficult place to be, as it flies in the face of accepted Revenue custom and practice in most other sectors of employment. The arrangement causes difficulties for many pilots based outside Ireland as local revenue and social authorities have difficulties comprehending these intricate structures and there is no local equivalence of these types of arrangements. In addition, we are aware of contractor pilots who experience great difficulties in getting mortgages to buy a house or secure bank loans because of the uncertainty of their positions.

As a final observation, the majority of the pilots subjected to these Irish arrangements, are not Irish nationals, do not speak English as their native language, and do not live or work in Ireland.

Possible Safety Implications

The 2015 University of Ghent study on *Atypical Employment in Aviation* said that such employment practices raise potentially serious concerns about the safety of the industry as the way that pilots are employed can have repercussions on safety-decision making in the cockpit.

According to the University of Ghent, nearly half of self-employed pilots struggle to amend instructions of the airline based on their own safety or liability objections – so atypical employment can have an influence on the independent decision-making process and safety choices made by crews during or before flights.

Similar conclusions were reached by a 2016 London School of Economics study on safety culture, involving 7,000 European pilots. Their survey found that atypical employees are:

- Less encouraged to voice safety concerns;
- Feel more obliged to take uncomfortable risks;
- Less confident on fair treatment of the safety reporter;
- Less satisfied with the confidentiality of reporting and investigation;
- Less involved in safety activities;
- Feel more inclined to go to work when sick;
- More often tired at work;

- Less confident to file fatigue reports.

The safety culture that exists in any airline is moulded and sustained by a positive relationship between management and operational employees. It is obvious that a normal direct employer-employee relationship is the most conducive relationship to the existence of a good safety culture.

Losses to the State

In addition to the impact on the pilots and possible safety implications, the fact that in the region of 2,000 Irish-registered pilots are working as contractors means that the State loses out on the 10.85% Employers' PRSI on those pilots' salaries.

Based on data published by the Department of Finance and the Department of Employment Affairs and Social Protection in 2018 (*The use of intermediary-type structures and self-employment arrangements: Implications for social insurance and tax revenues*)⁴, IALPA conservatively estimates that this could cost the State around €15 to €16 million per year on an ongoing basis – a not insignificant sum.

More Rigour from Revenue and Social Protection

The Revenue Commissioners are ordinarily extremely vigilant in policing the practice of a person acting as a contractor whereby they provide their entire services to a single client company/customer. In all such cases this is deemed to be an employer-employee direct relationship, and as such, there must be a PAYE employee relationship established and sustained.

It is IALPA's view, that the Irish Revenue Commissioners and the Department of Employment Affairs and Social Protection need to approach their investigations into the status of Irish airlines' contractor pilots with the same focus and intensity as the authorities in Germany and the UK.

Stronger Legal Protection

As I pointed out earlier, the convoluted manner in which 'contractor' pilots' services are availed of by Irish airlines has been designed in such a way as to appear to be in line with the requirements of Irish law. IALPA questions that assumption.

We need legislative change to ensure that this practice cannot continue. These changes should be based on:

- Presumption that all workers are employees unless the opposite is proven;

⁴ <https://www.welfare.ie/en/downloads/ReportIntermediaryStructuresSelfEmploymentJanuary2018.pdf>

- Putting the burden of proof on the employer not the employee.
- Ensuring that such arrangements are not imposed on any worker through duress or threat of contract refusal. The status of the contracting arrangements should be analysed independently of the individual worker.

We need your assistance as legislators to put such legislation in place and we look forward to working with you on such an undertaking.

Thank you.