



Pimlico Plumbers Ltd V Smith Employment Law Update

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As we have previously reported (here and here), the rise in the number of individuals working under flexible working contracts has resulted in a number of high profile legal cases dealing with the question of employment status. Under UK employment law, individuals are entitled to a sliding scale of basic employment rights depending upon whether they are classified as an employee, a worker or an independent contractor.

The question of employee status has always been an important one, and the courts have developed specific tests to determine employee status. However, with the rise of the so-called 'gig-economy', the distinction between these categories has become even more significant. The recent Supreme Court decision in Pimlico Plumbers Ltd and Mullins v Smith [2018] UKSC 29 has added to a growing body of case law dealing with this important issue.

Why is 'employee status' important?

The distinction in employment law between an employee, worker and self-employed independent contractor is important primarily because of the legal protections afforded to each category. At the 'top' end of the scale, employees are entitled to a range of employment rights including, for example, the right not to be unfairly dismissed and the right to receive a statutory redundancy payment in cases of redundancy.

At the 'bottom' end of the scale are genuinely self-employed independent contractors, who are afforded no such rights, primarily because they work for themselves and are generally engaged and provide services under a contract for services. A third category, that of the 'worker', sits uneasily between these two poles, and reflects the fact that some individuals, while not employees, should be entitled to some basic employment rights.

How is the status of an individual determined?

In most cases whether an individual is an employee will be clear from the fact that they are engaged under a 'contract of service' (or not, as may be the case). However, some cases can be blurred. Think, for example, of Uber, Deliveroo, and the various courier firms, whose disputes regarding the status of their workers have all hit the press in recent years.

Where an individual's employment status is called in to question, the courts use a number of tests to establish an individual's employment status. This can be the case even though the express terms of a contract 'define' the relationship between the parties – the court will readily look behind the contract and seek to establish the 'true nature' of the relationship between the parties. In particular, they will usually look at the extent to which there is:

- **Mutuality of obligations** – this means that the employer has an obligation to provide work and the employee has an obligation to be available for work;
- **Personal service** – the service has to be provided by the individual, they cannot send a substitute;
- **Control** – the employer controls what, how and when;

- **Exclusivity** – the individual cannot work for anyone else without the employer's express permission;
- **Provision of facilities and equipment** – the company provides the individual with the facilities and equipment required by them to carry out their job;
- **Benefits** – they may receive a pension, bonus, private medical insurance, company car or other benefit and be entitled to holiday pay and company sick pay;
- **Integration** – the individual is integrated into the company. For example, their name appears on the internal telephone directory, they have a company e-mail address, they wear a uniform and/or they have a company business card.

How the individual is classified in terms of employment status is therefore highly fact specific.

What happened in Pimlico?

Between August 2005 and April 2011, Mr Smith, who is by trade a plumbing and heating engineer, was engaged to undertake work for Pimlico Plumbers Ltd. Mr Smith suffered a heart attack and did not work for approximately 4 months, after which Pimlico ended their relationship with him. Mr Smith issued proceedings in the employment tribunal alleging, amongst other things, that he had been unfairly dismissed.

Whether Mr Smith would be successful in his claim hinged upon whether he was an employee or worker under the employment legislation. As such, the Employment Tribunal had to consider whether Pimlico had engaged Mr Smith under a contract of service or, if not, whether he fell within the extended definition of a 'worker' in the employment legislation. If neither were the case, and Mr Smith's true relationship with Pimlico was that of an independent contractor, then he could not succeed in his claims.

Detailed consideration was therefore given to the contractual documentation between the parties. By way of summary, this documentation stated that Mr Smith:

- was an independent contractor and in business on his own account;
- was under no obligation to accept work from Pimlico;
- must drive a Pimlico branded van, wear a Pimlico uniform, and carry a Pimlico identity card (although Mr Smith had to provide his own materials and tools);
- took the brunt of the financial risk where, for example, a customer failed to make payment he would not receive payment;
- was subject to restrictive covenants, including one that, in effect, prevented him from being a plumber in the Greater London area for three months following termination.

The Employment Tribunal found in Mr Smith's favour, holding that, whilst he was not an employee, there was sufficient evidence that he was a 'worker' within the statutory definition. Pimlico appealed to the Employment Appeal Tribunal and the Court of Appeal and, in both cases, their appeals were rejected. They were, however, given leave to appeal to the Supreme Court.

Supreme Court's Decision

The Supreme Court rejected Pimlico's appeal, focusing on two points in particular. First they found that, whilst Mr Smith had a right to substitute his personal service, this right was insignificant because the clear expectation was that he would carry out work for Pimlico personally. Where he was entitled to substitute his personal performance, this was tightly controlled and he had to substitute it with somebody who was already a Pimlico operative and who was engaged on similar

terms. Therefore, the dominant feature of his contract was the obligation to provide personal performance.

Second, the court found that Pimlico was not a client or customer of Mr Smith's. Throughout the duration of this case, Pimlico has maintained that it was a client of Mr Smith on the basis that his contract stated that he was not obliged to accept work from Pimlico. However, his contract also stated that he must work a minimum of 40 hours per week. Further, despite Mr Smith accepting that he could reject work, even if this meant working less than 40 hours per week, the court found that he was obliged to keep himself available to work up to 40 hours per week. This was without prejudice to his right to decline work. Further, Pimlico had an obligation to offer work to Mr Smith when work was available. Therefore the court decided that, on balance, Mr Smith was working under an umbrella contract. They also pointed to the fact that Pimlico retained strict control over Mr Smith's conduct, including the uniform he should wear, the vehicle that he should drive and the requirement to carry Pimlico ID card with him.

Implications of the Pimlico Decision

What are the implications of the Supreme Court's decision and does it clarify the legal position with regard to employee status?

Whilst the decision will undoubtedly add substance to a growing body of case law regarding how the courts lean when deciding an individual's employment status, it is arguable that the decision does not substantially change the law or clarify the position more generally. The same factors as described above will still be considered in determining an individual's employment status, and the issue will always, therefore, revolve around the facts specific to an individual case. Ultimately Mr Smith's status as a worker appears to have come down to the specific facts of his relationship with Pimlico. The Pimlico case therefore reinforces the view that the tests for employment status will be highly fact specific, and again highlights that the courts will readily look beyond the written terms of a contract to establish its true nature.

Contact Us

For further help or advice about this or any area of employment law, please get in touch with a member of our team:

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