

17<sup>th</sup> July 2018

**EMPLOYERS UPDATE: DEVELOPMENTS IN EMPLOYMENT LAW  
JULY 2018**

For this Newsletter, I am going to concentrate on the effect of the recent Supreme Court judgement in the case of *Pimlico Plumbers Limited -v- Smith*. You remember. It made all the papers.

The case concerned Mr Smith's claims that he had been denied employment rights to which he was entitled.

The *Daily Mail Online's* take on the case, asked in its headline was "*Is this the death of the gig economy?*".

Beneath the headline it adds "*Pimlico plumbers fought him in the courts but Judges agree he was employee*".

No they didn't.

In the text below, the *Mail* goes on: "*Gary Smith, who worked for Charlie Mullins' business for nearly 6 years until he had a heart attack, should have been treated as an employee, Judges have ruled.*"

No they have not.

The *Mail* goes on: "*He successfully claimed was (sic) a staff worker because he was required to use the firm's van for assignments and contractually obliged to do a minimum number of hours a week.*"

Once again, the *Mail's* legal analysis is as accurate as its proofreading. There is no such state as a "*staff worker*". The term means nothing to lawyers.

The *Mail* report correctly states that the Supreme Court confirmed that Mr Smith was entitled to "*worker*" status, despite having been described in his contract as a "*self-employed operative*."

It goes on "*as a 'worker', he is entitled to employment rights including holiday and sick pay.*"

Holiday pay: yes; sick pay: no.

The *Mail* then reports "*Mr Smith will now be able to go ahead with his Employment Tribunal claim for unfair dismissal against Pimlico Plumbers as a 'worker'*".

No he will not. Only employees can bring unfair dismissal claims.

Let us go back to the beginning.

Mr Smith originally claimed in the Employment Tribunal that he had been unfairly dismissed but the Tribunal found against him, on the basis that he had not been an employee.

Mr Smith also claimed that if he was not an employee then he had been a "*worker*" and was entitled to money wrongly withheld and to paid holiday, which had not been granted to him. He also alleged that he had been discriminated against by reference to a disability and the company had failed to make reasonable adjustments to accommodate it.

The Tribunal agreed that he could pursue these claims. That has not yet happened. At that point the parties began their appeal processes.

Mr Smith appealed the Tribunal's decision that he was not an employee and the company appealed the finding that Mr Smith had instead been a "*worker*".

The matter was heard in the Employment Appeal Tribunal. Both parties lost their appeals.

As a consequence, despite what the *Mail* says, Mr Smith's unfair dismissal claim has failed and cannot be revived.

The same is true with regard to sick pay. In the same way that only an employee can bring an unfair dismissal claim, only an employee is entitled to statutory sick pay. A worker is not.

The Court of Appeal upheld the Tribunal's original findings. The matter then progressed to the Supreme Court.

I should perhaps explain that, in cases such as this, the individual's legal status can fall into one of three categories: employed, a "*worker*" or genuinely self-employed.

An employee is someone who works under a Contract of Employment. The Tribunal (and indeed HMRC, for PAYE purposes) apply a number of tests before finding that an individual is employed. Employees have numerous rights, in respect of unfair dismissal, on redundancy, to sick pay, holiday pay, to be protected against discrimination and other wrongs and a whole host of other entitlements.

Suffice it to say that the Tribunal found against Mr Smith in this regard, upheld on appeal and that is the end of it.

There is no actual definition of self-employed status but, for the most part, the law will recognise it when it sees it. I am self-employed. The people I work for are my clients. I could not claim unfair dismissal against them if they stopped instructing me.

For the most part, the entitlement of a genuinely self employed person would be limited to what is set out in his/her Contract.

The intermediate status of "*worker*" covers an individual who has a Contract to perform personally any work or services for another party where that party is not a client or customer of any professional or business undertaking carried on by the individual.

"*Workers*" have some protection. They cannot claim unfair dismissal, but do share some of the rights an employee has. They are protected against discrimination and are entitled (amongst other things) to paid holiday, rest breaks and to be paid at the rate of the National Minimum Wage

The neighbour you pay to tidy your garden every week might be a "*worker*" if he fits the definition above, but someone doing precisely the same work but running a gardening business would be self-employed.

In this case, one of the Judges took the view that Pimlico Plumbers wanted to have their cake and eat it. They wanted to present their operatives to the public as part of their workforce but, at the same time, to render them self-employed. The contractual documents were drafted with the latter objective in mind. The Judge also noted that the company wanted to exert a substantial measure of control over its operatives and essentially it was this aspect that the various Judges (all of them) felt prevented Mr Smith from being genuinely self-employed. One slightly unpalatable aspect of the case is that Mr Smith treated himself as self-employed for the purposes of Income Tax and VAT (Mr Mullins would say when it suited him to do so). He set his motor and other expenses against Tax.

In explaining its decision that Mr Smith was not self-employed, the Supreme Court looked at a number of other decided cases. An arbitrator was found not to be a worker. The European Court of Justice had found that a musician in a Dutch orchestra was not self-employed, neither was a minister of the Church of Scotland. None of them were employees.

The Supreme Court noted that, although there were arguments going both ways, the original Employment Tribunal had been entitled to conclude that Pimlico Plumbers were not a client or customer of Mr Smith and that he was therefore not genuinely self-employed. That meant that he was a "*worker*".

Accordingly, the Supreme Court dismissed Pimlico's appeal.

What this meant in practice was that Mr Smith was entitled to go back to the Employment Tribunal to pursue his "*worker*" claims, including the claim for discrimination, but not the employee claims. As noted above, he was not claiming sick pay and is not permitted to claim unfair dismissal.

When an earlier appeal went against the firm, the TUC General Secretary issued a press release, part of which read: "*This case has exposed once again the growing problem of sham self-employment. Unscrupulous bosses falsely claim their workers are self-employed to get out of paying the Minimum Wage and providing basics like holidays and rest breaks.*"

I am not sure that the Minimum Wage played a very big part in the case. The Law Report

confirms that, in the year to April 2011, Mr Smith received about £131,000. In *his* press release, after the Supreme Court ruling, Pimlico Plumbers' founder and CEO, Charlie Mullins, said that Gary Smith had been paid by the company more than £500,000 over three years

One final point. Mr Smith's engagement (to use a neutral term) with Pimlico Plumbers ended in April 2011. He issued his proceedings in the Employment Tribunal in August 2011. He is now entitled to go back there and have his claims heard.

Given the delays that I have been experiencing in the London South Employment Tribunal, I doubt that the case there will be concluded this year. There is also the possibility of an appeal, whichever way the Tribunal decides.

As always, these Newsletters are only a guide to some changes in Employment Law. They are by no means exhaustive nor an alternative to getting proper advice about your particular problem. Expressions of opinion are to be taken as my own and do not necessarily represent the view of the firm. Please call me for more help on any employment matter.

With best wishes,

A handwritten signature in black ink that reads "Malcolm Lawrence". The signature is written in a cursive, slightly slanted style.

**MALCOLM LAWRENCE**

e-mail : [mjl@copleyclark.co.uk](mailto:mjl@copleyclark.co.uk)