What Does
Pimlico Plumbers v Smith [2017] EWCA Civ 51
Tell Us About Employment Status?

by Colin McDevitt

Mr Smith was a plumber who worked for Pimlico Plumbers. While working, both he and Pimlico proceeded on the basis that Mr Smith was self-employed. However, when he became ill and Pimlico terminated their relationship, Mr Smith alleged he had been employed and brought the following claims

(i) unfair dismissal
(ii) wrongful dismissal
(iii) entitlement to pay during medical suspension
(iv) holiday pay
(v) arrears of pay
(vi) direct disability discrimination
(vii) discrimination arising from disability
(viii) failure to make reasonable adjustments

A Preliminary Hearing was held to determine

(i) Was Mr Smith an employee of PP?
(ii) Was Mr Smith a worker of PP?
(iii) Did Mr Smith's working situation meet the definition of "employment" in section 83(2)(a) of the EqA 2010?
(iv) Alternatively, was Mr Smith genuinely self-employed in business on his own account.

The Statutory Provisions

Section 230 of the ERA, which defines an "employee" and a "worker" is as follows (so far as material):

> 230 Employees, workers etc
>
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

…

The definition of "worker" in regulation 2(1) of the WTR is in materially the same terms as section 230(3) of the ERA.

Section 83(2)(a) of the EA provides (so far as relevant) that "employment" means

> "employment under a contract of employment … or a contract personally to do work". As a result of the jurisprudence of the European Court of Justice it is implicit that a relationship in which an independent contractor is doing work or providing services to another as a client or customer is excluded from that definition as in the case of section 230(3)(b) of the ERA and regulation 2 of the WTR

Result of Preliminary Hearing:

(i) Mr Smith was not an employee
(ii) Mr Smith was a worker – a limb (b) worker
(iii) Mr Smith was employed within the meaning of the EqA 2010
(iv) Mr Smith was not self-employed on his own account.

Appeals

Pimlico and Mullins appealed to the EAT – they lost

Pimlico and Mullins appealed to the Court of Appeal – they lost

Pimlico and Mullins might appeal to the Supreme Court. When intimating this to the BBC, Mr Mullins said, "Like our plumbing, now our contracts are watertight"!

THE JUDGMENT (ABRIDGED)

SIR TERENCE ETHERTON MR:

1. The question on this appeal is whether the Employment Tribunal was correct to hold that the respondent, Gary Smith, was a worker within the meaning of section 230(3)(b) of the Employment Rights Act 1996 ("the ERA") and regulation 2(1) of the Working Time Regulations 1998 ("the WTR") and his working situation fell within the definition of "employment" in section 83(2)(a) of the Equality Act 2010 ("the EA") during the period that he worked for the first appellant, Pimlico Plumbers Limited ("PP").

3. The case puts a spotlight on a business model under which operatives are intended to appear to clients of the business as working for the business, but at the same time the business itself seeks to maintain that, as between itself and its operatives, there is a legal relationship of client or customer and independent contractor rather than employer and employee or worker.

The background facts

4. Mr Smith is a plumber. He carried out plumbing work for PP between 25 August 2005 and 28 April 2011. He claims that, following a heart attack in January 2011, he was unfairly or wrongfully dismissed on 3 May 2011.

5. PP is a plumbing and maintenance company. The second appellant, Charlie Mullins, is its founder and owner. At the time of the ET's decision it had 75 office staff and 125 people, like Mr Smith, carrying out plumbing and maintenance work on its behalf.

The 2005 Agreement

6. Mr Smith signed an agreement with PP on 25 August 2005 ("the 2005 Agreement") which described PP as "The Company" and Mr Smith as the "sub contracted employee".

7. Above Mr Smith's signature, it stated:

"The terms of your agreement are detailed in the Company Procedures and Working Practice Manual which you must read and agree to comply with before signing.

I agree to the terms of conditions as laid out in the Company's Procedures and Working Practice Manual and accept that this forms part of my agreement with the Company".

The Manual

8. The Company Procedures and Working Practice Manual ("the Manual") contained the following relevant provisions.

9. There were provisions governing personal appearance. It said:

"After performance you and the Company are judged on your appearance which must be clean and smart at all times…The Company logo'ed uniform must always be clean and worn at all times."

10. Under the heading "Working times", the Manual provided:

"Normal Working Hours consist of a 5 day week, in which you should complete a minimum of 40 hours. ...

Adequate notice must be given to Control Room for any annual leave required, time off or period of unavailability. Any leave or time off must be taken in full days."

11. Under the heading "On-Call Rota" there was a provision that:

"Operatives must always be available during their shift to take on-call work".

12. Under the heading "Operatives Telephone Procedure", there was provision for operatives to telephone the control room fairly frequently and for all customer contact, appointments and scheduling to be made through the control room.

13. There were detailed requirements as to timesheet procedures, invoice procedures, estimate procedures and additional labour charges.

14. Under the heading "Unpaid Invoices", it was provided:

"No payment will be made to the Operative until payment in full has been received by the office. If any payment fails to be honoured a deduction will be made from the Operative who has already been paid.

A 50% deduction will be made from the Operative's percentage if payment is received by the office later than 1 month from the job date.

Invoices which remain unpaid after six months from the date of the job will be written off."

15. There was provision for every operative to be issued with a PP I.D. card, which had to be carried when working for PP, and for the supply of "complete logo'ed uniforms of various combinations" and the issue of a mobile telephone. The operative could select the preferred tariff. The Manual provided that mobile telephone charges plus VAT "will be deducted from wages on a monthly basis".

16. There were provisions relating to collecting and purchasing materials. The operative was required to collect and order the materials for jobs and charge the customer at cost plus 20% trade mark-up plus VAT.

17. Under the heading "Private Work" it was provided that:

    "Any individual undertaking private work for or as a result of contacts gained during your working week and contravening the signed contract will be dismissed immediately and may be subject to legal action by the Company.

    Any Operative using information gained while working for the Company for anything other than the Company's benefit will be prosecuted."

18. Under the heading "Termination of Contract", it was provided that:

    "Operatives who fail to observe the rules outlined in this working practice manual in respect of procedures or conduct, will be given a warning and may thereafter be subject to instant dismissal.

    Wherever possible the Company will give reasonable notice of termination of contract. Operatives are required to give reasonable notice of leaving and complete the following formalities: …"

19. Under the heading "Wages", it was provided that:

    "1. Wages will be paid directly into the Operatives designated bank or building society account …

    2. Wage slips may be collected at Paying-in or sent by post."

20. The Manual provided for a standard rate of £120 + VAT for rental changes for PP's vans (which were marked with PP's logo), payable monthly in advance, which "allows Operatives to work on a Self-employed basis".

21. Under the heading "Working Practices and Customer Relations" it was provided that the operative must follow ten personal conduct guidelines, including arriving punctually, not smoking, not using the customer's telephone or toilet, keeping the customer informed if the operative needed to leave the job for any reason, removing all rubbish and tidying up completely after finishing, keeping all mobile phone calls to a minimum and job related so as

not to waste the customer's time and money, and keeping visits to the van to a minimum so as to avoid customer dissatisfaction.

The 2009 Agreement

22. The 2005 Agreement was replaced by a longer and more detailed agreement in the form of a letter from PP to Mr Smith which was countersigned by Mr Smith ("the 2009 Agreement"). The title to the body of the letter was: "Agreement – Self-Employed Operative". PP was defined as "the Company."

23. Sub-paragraph 1.1 provided that the 2009 Agreement would continue (subject to earlier termination in accordance with other provisions) until terminated by either party giving to the other not less than one week's notice.

24. Sub-paragraph 1.2 provided for termination by notice in writing in specified circumstances, including if Mr Smith was to:

    "commit an act of gross misconduct or do anything which brings or may bring the Company into disrepute or, after notice in writing, wilfully neglect to provide or if you fail to remedy any fault in providing the Services or if, in the Company's opinion, your work is of poor quality or you do not perform the Services to a satisfactory standard."

25. Sub-paragraph 2.1 provided that Mr Smith was to**:**

    "provide such building trade services as are within your skills and all such ancillary services as are reasonable to the Company and/or its clients in a proper and efficient manner ("the Services") for the duration of this Agreement."

26. Sub-paragraph 2.2 provided that Mr Smith was to:

    "provide the Services for such periods as may be agreed with the Company from time to time. The actual days on which you will provide the Services will be agreed between you and the Company from time to time. For the avoidance of doubt, the Company shall be under no obligation to offer you work and you shall be under no obligation to accept such work from the Company. However, you agree to notify the Company in good time of days on which you will be unavailable for work."

27. Under sub-paragraph 2.4 Mr Smith warranted and undertook that he was competent to perform the work he agreed to carry out and that he would:

    "...promptly correct, free of charge, any errors in your work which are notified to you by the Company or, at the Company's option, repay to the Company the cost of correcting such errors."

28. Sub-paragraph 2.6 provided as follows:

    "You acknowledge that you will represent the Company in the provision of the Services and that a high standard of conduct and appearance is required at all times. While providing the services, you also agree to comply with all reasonable rules and policies of the Company from time to time and as notified to you, including those contained in the Company Manual."

29. Paragraph 3 was headed "Fees and Expenses". Sub-paragraph 3.1 provided, so far as relevant:

"you shall be paid a fee in respect of the Services equal to 50 per cent of the cost charged by the Company to the client in relation to labour content only, provided that the Company shall have received clear funds from the client, and there are no outstanding complaints relating to the Services performed by you."

30. Sub-paragraph 3.3 provided:

    3.3 Your fees will be paid by the Company only against receipt of your invoice (showing VAT separately, if applicable). Invoices should be submitted weekly in arrears and will be paid once the Company has received cleared funds from the relevant client. If an invoice remains unpaid for more than one month, the fee payable to you will be reduced by 50 per cent. If an invoice remains unpaid for more than six months, you will not receive a fee for the work.

31. Sub-paragraph 3.4 provided:

    "you will account for your income tax, value added tax and social security contributions to the appropriate authorities. You will indemnify the Company against any liability or claim made by any competent authority against the Company in respect of any income tax, National Insurance or similar contributions or any other taxation, in each case relating to the provision of the Services to the full extent permitted by law …"

32. Sub-paragraph 3.5 required Mr Smith to provide all his own tools, equipment, materials and other items required for performance of the Services unless it had been agreed that those should be provided through the Company. If Mr Smith provided his own materials, he was to be entitled to up to 20 per cent trade mark-up on such materials provided the cost of such materials used was at least £3,000 (excluding VAT). If the cost of the used materials was less than £3,000, he was entitled to a trade mark-up of 12.5 per cent.

33. Sub-paragraph 3.7 provided that, save as expressly set out in the 2009 Agreement, Mr Smith was to bear all expenses incurred by him in providing the Services and the Company was not obligated to reimburse him for any such expenses.

34. Sub-paragraph 3.9 provided that:

    "You will have personal liability for the consequences of your services to the Company and will maintain suitable professional indemnity cover to a limit of £2 million … [to] cover you in respect of any liability incurred in the provision of your Services."

35. Paragraph 4 was headed "Restrictions". Sub-paragraph 4.1 provided that Mr Smith was obliged to inform the Company of his other activities:

    "which could give rise to a direct or indirect conflict of interest with the interests of the Company, provided that, without limiting this clause 4.1, you shall not be permitted at any time to provide services to any Customer or Prospective Customer...other than under this Agreement."

36. Sub-paragraph 4.2 provided:

    "You have no authority (and shall not hold yourself out as having authority) to bind the Company save in so far as you are specifically authorised to do so by the Company in writing to the extent necessary for the provision of the Services."

37. Sub-paragraph 4.4 contains 8 covenants restricting the business activities of Mr Smith after the termination of the 2009 Agreement. They are set out in the annexe to this judgment. It is

sufficient to refer here only to the provision in sub-paragraph 4.4.1 that Mr Smith would not, directly or indirectly, on his own behalf or on behalf of or in conjunction with any firm, company or person for three months following termination be engaged, concerned or involved (whether as agent, consultant, director, employee, owner, shareholder or in any other capacity) with any part of the business of PP, with which he was involved to a material extent during the period of 12 months ending on the termination.

38. Sub-paragraph 5.4 provided that Mr Smith was under no circumstances to provide a customer with his contact details, save PP's office number.

39. Sub-paragraph 6.1 provided:

    "You are an independent contractor of the Company, in business on your own account. Nothing in this Agreement shall render you an employee, agent or partner of the Company and the termination of this Agreement (for whatever reason) shall not constitute a dismissal for any purpose."

    Other facts found by, or agreed in, the ET

42. Mr Smith worked solely for PP although other colleagues did at times do private work and by arrangement left for a period to do other jobs and then returned. Mr Smith could reject particular jobs taking into account, for example, the nature of the job and how far he would have to travel. He could also make a decision about when to go home on a working day. He decided his own working hours. Mr Smith agreed that PP had no obligation to provide him with work on any particular day and, if there was not enough work, PP would not have to provide him with work and he would not be paid.

43. In relation to a particular plumbing job Mr Smith could exercise his discretion in relation to the work needed for a customer and whether to negotiate on price. He was unsupervised in relation to the plumbing work itself. He decided when he would do a job and how it would be done. He could decide the number of days it would take and whether to use another engineer to help him. Mr Smith only worked on average about 20 hours a week in the last weeks of his relationship with PP.

44. Mr Smith accepted that whilst working with PP he believed the arrangement was that he was self-employed. He was registered with the Construction Industry Scheme. He engaged an accountant to prepare income and expenditure accounts throughout the period of his relationship with PP. He filed tax returns on the basis that he was self-employed. He was registered for VAT and presented monthly invoices to PP for VAT.

45. Mr Smith's income and expenditure accounts demonstrate that he had to cover substantial costs of materials himself. In the last full year he worked for PP he paid £52,887 on materials. He also provided his own protective clothing. He paid his wife £4,680 per year for minimal secretarial duties and also claimed a sum of £520 per year to reflect the use of a room in his home as his office. He also set off sums for accountancy charges, insurance, telephone and internet, tools and equipment hire and motor vehicle expenses. Against receipts of £130,753 Mr Smith set off expenses totalling £82,454.

    <u>The statutory provisions</u>

46. Section 230 of the ERA, which defines an "employee" and a "worker" is as follows (so far as material):

    230 Employees, workers etc

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly. …"

47. The definition of "worker" in regulation 2(1) of the WTR is in materially the same terms as section 230(3) of the ERA.

48. Section 83(2)(a) of the EA provides (so far as relevant) that "employment" means "employment under a contract of employment … or a contract personally to do work". As a result of the jurisprudence of the European Court of Justice it is implicit that a relationship in which an independent contractor is doing work or providing services to another as a client or customer is excluded from that definition as in the case of section 230(3)(b) of the ERA and regulation 2 of the WTR: *Bates van Winkelhof v Clyde & Co* LLP [2014] UKSC 32, [2014] ICR 730.

The proceedings

49. Following the termination of the 2009 Agreement, Mr Smith presented a claim form in which he complained of

unfair dismissal

wrongful dismissal

entitlement to pay during medical suspension

holiday pay and

arrears of pay.

He also claimed against both PP and Mr Mullins

direct disability discrimination

discrimination arising from disability and

failure to make reasonable adjustments.

50. A pre-hearing review was listed to address the issues whether

Mr Smith was an employee of PP

Mr Smith was a worker of PP

Mr Smith's working situation met the definition of "employment" in section 83(2)(a) of the EA

Mr Smith was, alternatively, genuinely self-employed in business on his own account.

Decision of the ET

52. On the issue of whether or not Mr Smith was an employee, Judge Corrigan concluded that Mr Smith was not an employee for the following reasons:

"39. In my view the Claimant was not an employee. The irreducible minimum obligation on the First Respondent was missing. The first contract was silent about the obligations on the First Respondent. However, I have accepted that the Claimant signed the second contract which states that there is no legal obligation on the First Respondent to provide work. In any event the Claimant accepted in evidence that that did reflect the reality of the obligations between the parties.

40. Secondly there was more than one circumstance when, under the agreement, the First Respondent had no obligation to pay the Claimant for the work done. Firstly, when a customer's invoice had been outstanding more than six months (even if the customer then paid the First Respondent for the work). Secondly, where the Claimant had an obligation in the agreement to rectify problems with his own work at his own cost. The Claimant agreed that these clauses reflected reality.

41. Although the obligation on the employer can vary I consider that there was insufficient obligation to provide work or pay for this relationship to be one of employer and employee.

42. I also find this consistent with what the parties themselves thought during the duration of the contract as it was the clear and ongoing intention of the parties that the Claimant was self-employed rather than an employee. The Claimant employed an accountant and sought to make full use of the tax advantages of being self-employed.

43. Moreover, the Claimant was VAT registered and elected to take advantage of the 20% mark up available on materials as it was financially beneficial for him to do so. This applies to the self-employed but not to employees. I therefore find this inconsistent with an employment contract.

44. I also find the financial risk borne by the Claimant, which included the payment for materials in advance, the risk that he might have to work without payment in the two circumstances outlined at paragraph 40 above, as well as the risk of the work taking longer than estimated and therefore being less lucrative than expected, are all inconsistent with there being a contract of employment."

53. Judge Corrigan did, however, find that Mr Smith was a worker within section 230(3) of the ERA and that his working situation met the definition of "employment" in section 83(2)(a) of the EA.

54. In summary, she gave as her reasons the following.

    (1) The agreement, and its main purpose, was for Mr Smith personally to provide work for PP.

    (2) The Manual obliged Mr. Smith to work a normal week of 40 hours. Alternatively, Mr Mullins' evidence was that there was a minimum obligation to work 36 hours a week. In any event, Mr Smith's contract required him to provide work on the days agreed with PP.

    (3) Although there was some flexibility, PP expected engineers to discuss their working hours with, and to agree them with, PP. Mr Smith had sufficient obligation to provide his work personally to be a worker.

    (4) There was not an unfettered right to substitute at will. There was no such right given to Mr Smith by the contractual documents and no evidential basis for such a practice. Even though in practice engineers with PP swapped jobs around between each other, and also used each other to provide additional help where more than one person was required for a job or to do a job more quickly, and there was evidence that external contractors were sometimes required to assist a job due to the need for further assistance or to conduct specialist work, the fact was that Mr Smith was under an obligation to provide work personally for a minimum number of hours per week or on the days agreed with PP.

    (5) Although Mr Smith had autonomy in relation to the estimates and work done, PP exercised very tight control in most other respects. That included a high degree of restriction on Mr Smith's ability to work in a competitive situation, which suggested that he was not in business on his own account and was certainly inconsistent with PP being a customer or client of any such business.

    (6) PP could not be considered to be a client or customer of Mr Smith's business but is better regarded as a principal. Mr Smith was an integral part of PP's operations and subordinate to PP. He was not in business on his own account.

55. According to the ET's decision, therefore, the ET does not have jurisdiction to consider Mr Smith's claims for unfair dismissal, wrongful dismissal, entitlement to pay during the period of a medical suspension and failure to provide particulars of employment. It does, however, have jurisdiction to consider his complaints of direct disability discrimination, discrimination by reason of failure to make reasonable adjustments, and in respect of holiday pay as well as in respect of unauthorised deductions from wages.

    Decision of the EAT

56. PP and Mr Mullins appealed, and Mr Smith cross-appealed, to the EAT.

57. Judge Serota gave a lengthy, detailed and conscientious judgment, in which he dismissed both the appeal and the cross-appeal.

58. On the issue whether or not Mr Smith was an employee, Judge Serota QC considered that the ET's conclusions were based on the evidence. He said that, having stood back and looked at the facts as found by the ET as a whole, "the relationship simply does not look

anything like a contract of employment and the Employment Judge was correct in finding that [Mr Smith] was not an employee."

59. On the issue of whether or not Mr Smith was a worker, Judge Serota said that the contract terms and the Manual clearly envisaged that Mr Smith would be providing his services personally. Judge Serota concluded that there was not an unfettered right to provide services through a substitute. He said that, at most, PP was willing to tolerate a form of job-sharing or shift swapping between the operatives but without any legal obligation to do so. He said that was in itself sufficient to determine the appeal on the "worker" issue.

60. Judge Serota considered that the ET was entitled to find that the extent of the restrictive covenants limiting Mr Smith's right to work were also inconsistent with Mr Smith being in a business on his own account.

The appeal

62. PP and Mr Mullins appeal to this Court. Mr Smith did not.

Discussion

66. A distinction is to be drawn between

(1) persons employed under a contract of service;

(2) persons who are self-employed, carrying on a profession or a business undertaking on their own account, and who enter into contracts with clients or customers to provide work or services for them; and

(3) persons who are self-employed and provide their services as part of a profession or business undertaking carried on by someone else: cf. Lady Hale in the *Bates van Winkelhof* case at [25] and [31].

The persons in (3) fall within section 230(3)(b) of the ERA and regulation 2 of the WTR and their employment falls within the definition of "employment" in section 83(2)(a) of the EA. I shall for convenience refer to them as a "limb (b) worker". The question on this appeal is whether the ET was wrong to decide that Mr Smith was a limb (b) worker rather than falling within category (2).

67. In broad terms, the case of PP and Mr Mullins on this appeal is that the ET was wrong to find that Mr Smith undertook with PP "to do or perform personally … work or services" for PP; and was also wrong to conclude that the relationship between Mr Smith and PP was not one falling within category (2), that is to say a relationship under which the status of PP was, in the words of section 230(3)(b), "that of a client or customer … of … [the plumbing] business undertaking carried on by" Mr Smith.

68. Mr Thomas Linden QC, for PP and Mr Mullins, submitted that Mr Smith was not obliged personally to do work offered to him by PP because the 2009 Agreement entitled him to arrange for such work either to be done by another PP operative or, with the prior consent of PP, any other person.

[After a review of the authorities the Master of the Rolls continued -]

84. I would summarise as follows the applicable principles as to the requirement for personal performance.

    Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally.

    Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional.

    Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance.

    Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance.

    Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.

85. In the present case the ET was correct to find that, on the proper interpretation of the 2009 Agreement, Mr Smith undertook to provide his services personally within section 230(3)(b) of the ERA, regulation 2 of the WTR and the definition of "employment" in section 83(2) of the EA.

86. The express wording of the 2009 Agreement requires personal performance by Mr Smith. It provides, for example, in sub-paragraph 2.1 that: "You shall provide such building trade services are within your skills"; in sub-paragraph 2.2 that "You shall provide the Services for such periods as may be agreed with the Company … The actual days on which you will provide the Services will be agreed between you and the Company …"; in sub-paragraph 2.4 that "you will be competent to perform the work which you agree to carry out", and "you will promptly correct … any errors in your work …"; in sub-paragraph 2.5 that "If you are unable to work due to illness or injury … you will notify the Company"; and in sub-paragraph 3.9 that "You will have personal liability for the consequences of your services to the Company" (in all cases emphasis supplied).

87. Unlike each of those cases cited above neither the 2009 Agreement nor the Manual contains an express right of substitution or delegation.

88. Mr Linden submitted that, in view of the widespread general practice of PP operatives substituting for other PP operatives at the time the 2009 Agreement was made, the word "you" in the passages which I have quoted should be read as "you or any other PP operative who substitutes for you". That seems to me to be an impossible interpretation for four reasons….

89. There is no scope for an implied term conferring an unfettered contractual right to substitute another operative of PP. In the light of the factual findings of the ET about the practice of substitution, such a right was not so obvious that it went without saying; nor was such a right necessary to give the 2009 Agreement commercial or practical coherence.

91. … the challenge to the ET's finding of an obligation on Mr Smith of personal performance by virtue of the express terms of the 2009 Agreement must fail.

93. Turning to the second principal line of Mr Linden's submissions, he contended that the ET made serious errors in arriving at the conclusion that Mr Smith's relationship with PP was not one between a self-employed person and his customer or client but rather that of a limb (b) worker.

94. In deciding whether a worker is a limb (b) worker or falls within the second category in paragraph 66 above, the ET carries out an evaluative exercise, with an intense focus on all the relevant facts

    There is no single touchstone, such as whether there is a relationship of subordination of one party to another, for resolving the issue

    Subordination might, nevertheless, be relevant, as might be such factors as whether there are a number of discrete separate engagements, whether obligations continue during the breaks in work engagements (sometimes called an "umbrella contract"), and also the extent to which the claimant has been integrated into the respondent's business

109. Despite the comprehensive and skilful arguments of Mr Linden on this part of the appeal, I reject them. The starting point is that the Manual, including the provision for a normal working week of 5 days and a minimum of 40 hours, undoubtedly formed part of the 2005 Agreement. The ET was, therefore, both entitled and right to conclude that, under the terms of the 2009 Agreement, Mr Smith was obliged to work a normal 40 hour week, even if that was not enforced.

112. The evidence before the ET was clear and consistent, on the part of both Mr Mullins and Mr Smith, that the relationship between PP and its operatives would only work if the operative was given and undertook a minimum number of hours' work. Mr Smith, like the other operatives, was required to use the PP logo'ed van for work assignments and also a mobile phone issued to him by PP. The Manual provided that the van was to be rented to the operative at a standard rate of £120 per month in advance plus VAT. In fact, the accounts of Mr Smith (who only ever worked for PP) show that in the tax years 2007 to 2011 his motor vehicle expenses were never less than £19, 000 and in three of those years exceeded £21,000. So far as concerns the telephone, the Manual provided that the mobile telephone charges, plus VAT, were to be deducted from "wages" on a monthly basis. The operative had to earn sufficient from work assignments to be able to pay those expenses and, presumably, to provide an income for Mr Smith's ordinary living expenses. His case was that would have to be a minimum of 36 hours a week. At the same time, PP's business depended on earning a profit from taking half the labour costs of the operatives. As Mr Mullins said in his witness statement, quoted above, "the engineer will need to work sufficient hours to make it worth both his and Pimlico's while". In cross-examination he said that "it has to be worth both Pimlico's and the operatives while. We both have to make money". If they did not, then the one or the other could, and presumably would, give not less than one week's written notice to terminate the 2009 Agreement in accordance with sub-paragraph 1.1. There was clear evidence as to the financial consequences of the van rental and of the telephone issued to operatives, and there was no need for the ET to refer to them specifically.

113. … As with any contract, the 2009 Agreement has to be interpreted in the light of the relevant and admissible facts which form its background. For the reasons I have given, it is perfectly possible to interpret the express words of sub-paragraph 2.2 in a way that does so: namely that Mr Smith normally had to be available to take on work for a minimum of 40 hours

per week, but PP did not have to offer him work if there was none to offer him, and Mr Smith was not obliged to take on any particular assignment on any particular day if he was unable or unwilling for any reason to do so. The fact that PP might choose not to insist on the full 40 hours work in any particular week is not inconsistent with those legal obligations, which give practical effect to the combination of the express terms of the 2009 Agreement, the Manual and the practical financial and other realities of the working relationship.

115. … Having rejected PP's case that Mr Smith had an unfettered right of substitution and did not have to do the work personally, and having found that Mr Smith was contractually obliged to do a minimum number of hours work a week, the ET concluded and was entitled to conclude that the degree of control exercised by PP over Mr Smith by virtue of the 2009 Agreement was also inconsistent with PP being a customer or client of a business run by Mr Smith. In particular, the ET was entitled and right to place weight on the onerous restrictive covenants in sub-paragraph 4.4, which, on the face of it, included a covenant in sub-paragraph 4.4.1 precluding Mr Smith from working as a plumber in any part of Greater London for three months after the termination of the 2009 Agreement. Furthermore, although not specifically mentioned in paragraph 53 of its decision, the ET had already set out relevant provisions of the Manual governing the working arrangement binding on operatives, including the renting of PP's logo'ed vans.

116. Having considered all those factors, the ET rightly stood back and asked and answered (in paragraphs 52 and 53 of the decision) the over-arching question whether the better conclusion was that PP was a client or customer of Mr Smith's business or rather PP should be "regarded as a principal and Mr Smith was an integral part of PP's operations and subordinate to [PP]". In carrying out its evaluation and reaching its conclusion that it was the latter, the ET made no error of law or principle and did not reach a decision outside the ambit of what was judicially permissible.

Conclusion

118. For all those reasons, I would dismiss this appeal.

LORD JUSTICE DAVIS:

120. I agree with both judgments.

LORD JUSTICE UNDERHILL:

INTRODUCTORY

121. I agree that this appeal should be dismissed. My reasons are essentially the same as those given by the Master of the Rolls, but since I have not found the case entirely straightforward I think I should express them in my own words.

143. … As will be apparent, the resolution of this issue has depended on an analysis of the contradictory and ill-thought-out contractual paperwork in the context of the Judge's findings about what happened on the ground. That means that although employment lawyers will inevitably be interested in this case – the question of when a relationship is genuinely casual being a very live one at present – they should be careful about trying to draw any very general conclusions from it.

[End of Judgment]

COMMENTARIES

The judgment finds no fault with the tribunal's decision that this was not a business/client relationship, stressing in particular the work that was in practice expected of the claimant, the amount of de facto control exercised over him and (interestingly) the existence of a particularly strong restraint of trade clause should the claimant leave.

Underhill LJ gave a concurring judgment, agreeing on both of these points, but containing a point that was picked up in the media coverage, namely the effect of the judgment as a precedent. He made much of what he considered to be a serious issue in many employment disputes, namely inconsistencies between various parts of the company's documentation (including that well-known bugbear, the company handbook). This had the effect of widening the tribunal judge's discretion to look beyond the written material at the practical working of the arrangement. However, one further effect of that was to make the eventual decision more specific to its own facts. At [143] the judge gave this warning:

> *`As will be apparent, the resolution of this issue has depended on an analysis of the contradictory and ill-thought-out contractual paperwork in the context of the Judge's findings about what happened on the ground. That means that although employment lawyers will inevitably be interested in this case - the question of when a relationship is genuinely casual being a very live one at present - they should be careful about trying to draw any very general conclusions from it.'*

Two final points are worth a mention:

(1) This case is being hard fought by the company, whose whole business model is under challenge; its owner has already talked of an appeal to the Supreme Court.

(2) If this decision stands, it arguably acts as a lesson for employers using this sort of model; namely, that even if all seems to be going well *during* the engagement, it can all blow up on termination (especially if compulsory). One possibly significant fact here was that during the engagement the claimant had clearly considered himself to be self-employed, to the extent not just of paying income tax on a trading basis, but of registering for and paying monthly VAT. On termination, however, he changed tack. Moreover, one other tax angle is ominous for the employer in such circumstances. It is often said that an individual must be careful here if wanting to change status after termination, because they could move from self-employed trading taxation to PAYE employment taxation, allowing HMRC to reassess them (in particular, to remove all the expenses claimed as self-employed - the claimant here in his last year had set off against receipts of £130,753 expenses of £82,454). However, that only occurs if he or she moves from self-employment to *employment*. Because of a mismatch between employment and tax law, it does not happen if he or she moves from self-employment to *worker* status. Thus, this possible disincentive to changing status cannot be relied on by the employer where worker status may be a possibility under this decision. Indeed, only half flippantly, it could be said that from an accounting standpoint the claimant here was lucky that he failed in his claim for employment status / unfair dismissal!

The Taylor Review

On 30th November 2016 the Government announced the Taylor Review.

- regional tour visiting different sectors to inform modern practices review
- 3 expert panel members of Taylor review named
- government to launch research project to reveal the scale of 'gig' working and the reasons people take it up

A country-wide evidence gathering tour of the modern labour market has been announced, with further details of the Matthew Taylor review on employment practices revealed today (30 November 2016).

The announcement comes after the Prime Minister commissioned Matthew Taylor, the Chief Executive of the Royal Society of Arts, in October 2016 to look at how employment practices need to change in order to keep pace with modern business models.

Today, the team behind the Taylor Review into Modern Employment Practices announced they will travel the country, talking to employees and employers about the UK's labour market.

In particular, the regional tour will visit areas including Maidstone, Coventry and Glasgow, speaking to workers and employers working in sectors such as the gig and rural economies and manufacturing, to fully understand the impact of modern working practices and how different labour markets work.

Three expert panel members have been appointed to support the 6 month review, bringing together expertise in the labour market, start-up businesses and public policy areas. The panel members announced today are:

- Paul Broadbent
- Greg Marsh
- Diane Nicol

Matthew Taylor said:

I am delighted to announce the other members of the review team; they bring a wealth of experience and insight to our work. We have a lot of research and policy to discuss but the most important part of our process is getting out and about to talk to businesses and workers across Britain about their experiences of modern work.

As well as making specific recommendations I hope the review will promote a national conversation and explore how we can all contribute to work that provides opportunity, fairness and dignity.

The review will consider the implications of new forms of work on worker rights and responsibilities - as well as on employer freedoms and obligations.

With 15% of those working in the UK's labour market now self-employed, there has been a rise in the number of people doing 'gig' work – short-term, casual work that is increasingly sought by people through mobile phone apps when they want to work. These roles can include driving, delivering items and DIY tasks.

The explosion of ‘disruptive’ businesses – where new ways of working and technology come together to create new products and services to better meet consumer demand – is also leading to a change in working practices.

The Department for Business, Energy and Industrial Strategy is also to launch a research project into the scale of the gig economy – the first piece of government-commissioned research into the practice. The project will also look at the motivations of people engaging in ‘gig’ work.

Business Minister Margot James said:

The Taylor review is a hugely important step towards us ensuring fairness for everyone in work. Helping us to understand what impact modern employment practices have on workers will inform our forthcoming industrial strategy and also help us ensure our labour market and wider economy works for everyone.

We recognise the importance of being open to new and innovative ways of working – and having a skilled and flexible workforce is part of what makes the UK an attractive place to do business. But it is also crucial that workers receive a decent wage and that people working in all sorts of jobs are able to benefit from the right balance of flexibility, rights, and protections.

The government is determined to create an economy that works for all, not just the privileged few. On Tuesday (29 November 2016), a green paper on reforming corporate governance was launched to ensure there is greater representation for workers and consumers in the boardrooms of Britain’s biggest businesses. The forthcoming industrial strategy will build on our economy’s strengths and look ahead to creating an environment where emerging industries such as disruptive businesses can flourish – with workers at the heart of this.

Notes to editors:

1. The expert panel for the Taylor review are:

    - Paul Broadbent – Paul is Chief Executive of the Gangmasters Licensing Authority (GLA), formerly assistant chief constable at Nottinghamshire Police.

    - Greg Marsh (Entrepreneur) – Founder and formerly Chair and Chief Executive of onefinestay. He works with Amnesty International as an elected member of the charity’s Finance and Audit Committee, and is a Visiting Professor at Imperial College Business School.

    - Diane Nicol (Employment Lawyer) - Diane is a Partner at law firm Pinsent Masons specialising in employment law. She has over 20 years of experience of industrial relations disputes, senior exits and employment terms and conditions.

Colin McDevitt

3PB Barristers

Chambers of Nigel Lickley

27 April 2017