MACFARLANES

THE COURT OF APPEAL CONSIDERS THE CASE OF PIMLICO PLUMBERS - THE LATEST "GIG" ECONOMY CHALLENGE

On Friday, the Court of Appeal considered the case of *Pimlico Plumbers Limited & Mullins v Smith* [2017] EWCA Civ 51, upholding the decision of the Employment Tribunal that Mr Smith was a "worker" of Pimlico Plumbers Limited (PP), rather than being self-employed. This is an important decision on employment status in the so-called "gig" economy era. It follows the recent Tribunal decisions in *Uber* and *Citysprint*, where drivers and couriers respectively were similarly held to have "worker" rather than "self-employed" status. Nonetheless, it is fact-sensitive. Accordingly, each future case on worker status will be considered on its own facts.

Put simply, workers have the right to certain minimum rights, including national living wage, holiday and discrimination. Employees have more extensive rights, including the right not to be unfairly dismissed.

WORKER OR NOT?

In *Pimlico Plumbers*, Mr Smith claimed that he was a worker within the meaning of Section 230(3)(b) of the Employment Rights Act 1996 (ERA) (for the purposes of an unlawful deduction of wages claim) and Regulation 2(1) of the Working Time Regulations 1998 (WTR) (for the purposes of a holiday claim) and that he was in "employment" under Section 83(2)(a) of the Equality Act 2010 (EA) (for the purposes of a disability discrimination claim).

Under Section 230(3)(b) ERA, a 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…"*

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 EA provides that employment means *"…employment under a contract of employment… or a contract personally to do work."*

THE PERSONAL PERFORMANCE ISSUE

On the first issue of whether Mr Smith undertook to do or perform personally work or services for PP, the Court held that the issue turned entirely on the terms of the contract between PP and Mr Smith. It summarised the applicable principles as to the requirement for personal service (at paragraph 84):

"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."

The Court held that the Tribunal was correct to find that on the interpretation of the relevant contractual documentation, Mr Smith undertook to provide his services personally within the meanings of Section 230(3)(b) of the ERA and Regulation 2(1) of the WTR and that he was in "employment" under Section 83(2)(a) of the EA. There was no express right of substitution or delegation in the contractual documentation and there were no grounds to imply it.

THE BUSINESS/CUSTOMER ISSUE

On the second issue of whether the relationship was one between Mr Smith's "business undertaking" and PP as "customer" for the purposes of the second limb of Section 230(3)(b) ERA, the Court held (paragraph 94):

"… 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…"

The Court held that the Tribunal was entitled to conclude that the degree of control exercised by PP over Mr Smith by virtue of the contractual documentation was inconsistent with PP being a customer or client of a business run by Mr Smith. They specifically referred to the finding of the Tribunal that Mr Smith was contractually obliged to do a minimum number of hours work a week, that Mr Smith was subject to onerous restrictive covenants which included a covenant precluding him from working as a plumber in any part of Greater London for three months after termination of the contractual arrangements and that there were various working arrangements binding on operatives, including the renting of PP's logo'ed vans. It held at paragraph 116:

"… the ET rightly stood back and asked and answered… 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…"

On a final procedural point, the Court of Appeal considered that in complex and important cases, having final submissions dealt with in writing without oral submissions carried considerable risk and should be avoided by Tribunals.

Worker status remains a hot topic in the growing "gig" economy. Many decisions are pending both in the Tribunal and on appeal. The government has in the meantime commissioned an independent review of modern working practices, which will look into this aspect of worker status in light of ever-changing business models.

CONTACT DETAILS
If you would like further information or specific advice please contact:

SEÁN LAVIN
PARTNER
EMPLOYMENT
DD +44 (0)20 7849 2695
sean.lavin@macfarlanes.com

SUSAN DORIS-OBANDO
BARRISTER
EMPLOYMENT
DD +44 (0)20 7791 4225
susan.doris-obando@macfarlanes.com

FEBRUARY 2017

MACFARLANES LLP
20 CURSITOR STREET LONDON EC4A 1LT
T +44 (0)20 7831 9222 F +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com