



June 2018 Update

Welcome to this month's update - where we discuss the latest legislation and guidance.

GDPR

We can still assist your business with GDPR compliance for employee and customer data.

When the 25th May 2018 came around, the regulatory body (Information Commissioner's Office - ICO) website crashed – typical!

In this month's edition, we report on:

- Self Employed or not Self Employed? – That is the question
- Payslips
- Constructive Dismissal

Self Employed or not Self Employed? – That is the Question

The Supreme Court has just found in the Pimlico Plumbers case that the Employment Tribunal was right to conclude a plumber who worked under a contract describing him as an independent contractor, was a worker.

Mr Smith was a plumber, who carried out work solely for PP Ltd from August 2005. The contract stated he was an independent contractor, in business on his own account, that PP Ltd was not obliged to offer him work and he was under no obligation to accept it. However, guidelines said he had to complete a minimum of 40 hours' work per week, hire and drive a PP Ltd-branded van and wear a PP Ltd uniform.

There was no express right of substitution in the contractual documentation but PP Ltd.'s plumbers could swap assignments between themselves. When PP Ltd terminated its arrangement with Mr Smith on 3 May 2011, he brought claims against them in the employment tribunal including failure to pay holiday pay, unlawful deductions from wages and disability discrimination. An employment judge therefore had to determine whether Mr Smith was a worker under S.230(3)(b) ERA (a 'limb (b) worker'), a worker for the purposes of the WTR and/or an employee for the purpose of the extended definition under S.83 EqA.

The employment judge held that Mr Smith was a limb (b) worker, a WTR worker and an EqA employee. In the judge's view, the main purpose of the contractual documentation was for Mr Smith personally to provide work for PP Ltd and he did not have an unfettered right to substitute at will. He was therefore obliged to provide his services personally, satisfying the key element of the 'worker' definition. The EAT dismissed PP Ltd.'s appeal against that decision, as did the Court of Appeal. The Court agreed that Mr Smith was required to provide personal service. Although individual plumbers working for PP Ltd were able to swap assignments, that was at most, an informal concession. Furthermore, Mr Smith was not in business on his own account, which would negate worker status under S.230(3)(b) ERA; he was an integral part of PP Ltd.'s operations and was subordinate to it. PP Ltd appealed to the Supreme Court.

The Supreme Court has now dismissed the appeal. With regards to the question of Mr Smith's right to provide a substitute, it held that the employment judge had found, and had been entitled to find, that Mr Smith's only right of substitution was that of another PP Ltd.'s operative. Thus, the substitute had to come from the ranks of those already bound to PP Ltd by an identical suite of heavy obligations. In the Supreme Court's view, this was the converse of a situation in which the employer is uninterested in the identity of the substitute, provided only that the work gets done. The employment judge was therefore entitled to conclude that this limited right of substitution was not inconsistent with an obligation to perform services personally. Mr Smith was therefore a limb (b) worker unless it could be said that PP Ltd status was, by virtue of the contract, that of a client or customer of his.

On the 'client or customer' question, the Supreme Court noted first that the tribunal had legitimately found that there was an umbrella contract, placing a continuing obligation on Mr Smith to make himself available for work. PP Ltd argued that, despite that obligation, Mr Smith was entitled to reject work and was free to take outside work. It also pointed out that

PP Ltd did not supervise or otherwise interfere in the way Mr Smith carried out his work, and that he bore some financial risk in taking on work through PP Ltd. However, the Supreme Court held that the employment judge had been entitled to have regard to a number of factors that strongly militated against recognition of PP Ltd as a client or customer of Mr Smith's. These included the requirement that he wear a branded uniform, drive a branded van, carry an identity card and closely follow the administrative instructions of its control room; the severe terms as to when and how much PP Ltd was obliged to pay Mr Smith; the contractual references to 'wages'; 'gross misconduct' and 'dismissal'; and the suite of restrictive covenants regarding his working activities following termination. Thus, the tribunal was, by a reasonable margin, entitled to conclude that Mr Smith was a limb (b) worker. This conclusion meant that Mr Smith was also a worker for the purposes of the WTR and in employment for the purposes of the EqA.

Employers: This is very case specific. The key thing about the right of substitution is that the contractor is able to put forward a substitute that the client does not necessarily know.

Contact us: We can help with an assessment of contractor agreements.

Payslips

The catchily named Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No.2) Order 2018 requires businesses to provide all 'workers' with an itemised pay slip.

Previously, only employees were entitled to receive itemised statements. So, workers will now also have the right to bring an employment tribunal claim if businesses do not comply, and this extension of the right will now mean many people in the gig economy (self-employed but classed as workers) will be entitled to an itemised pay slip as well. More paperwork it seems.

This law comes after a recommendation by the Low Pay Commission in 2016 and following the Taylor Review on Modern Working Practices. The change is so that low paid workers can work out whether they have been paid correctly.

The only good news for businesses is that this new requirement is not scheduled to come in until April 2019 so there is time to get the necessary systems in place. The change will not apply to wages paid for work done before this date.

Employers: Check who may be classed as a 'worker' to consider if they will need an itemised pay statement.

Contact us: We can help with reviewing whether any people you contract with could be seen as workers.

Constructive Dismissal – Imposing a Pay Cut

Employees sometimes resign and then claim constructive dismissal based on a breach of the implied term of trust and confidence.

An employer must not behave in a way which damages trust and confidence without 'reasonable and proper cause'. The Employment Appeal Tribunal has looked recently at whether there can ever be reasonable and proper cause for an employer to impose a pay cut.

Mr Mostyn was employed by S and P Casuals as a Sales Executive with reducing sales figures in recent years. The company did not undertake a formal capability process and instead asked Mr Mostyn to take a significant pay cut. He refused to agree to this and the company said they were going to cut his pay anyway. Mr Mostyn resigned and claimed constructive dismissal.

Mr Mostyn lost at the tribunal. The tribunal found that the employer had behaved in a way which could damage trust and confidence, but they said that the company had reasonable and proper cause for cutting pay. The tribunal did take into account Mr Mostyn's bad sales figures and his lack of action to address this. So, Mr Mostyn appealed.

It seems that the Employment Appeals Tribunal agreed with Mr Mostyn. They found that by cutting Mr Mostyn's pay, the employer had also breached an express term of Mr Mostyn's contract. It seems there cannot be a reasonable basis for breaching the implied term of mutual trust and confidence where the breach consists of a unilateral pay cut.

Employers: This leaves employers in a more difficult position when wanting to reduce an employees' pay when they are not performing.

Contact us: We can help advise you through this process as there are other ways of achieving the result you may require as an employer.

For more information or assistance Email: enquiries@employmentlawsupport.co.uk



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Business Forum

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