Pimlico Plumbers loses appeal against worker status (Supreme Court)

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In *Pimlico Plumbers Ltd and Mullins v Smith [2018] UKSC 29* the Supreme Court has upheld an employment tribunal's decision that a plumber was a limb (b) worker.

Speedread

The Supreme Court has upheld the judgments of an employment tribunal, the EAT and the Court of Appeal that a plumber was a worker for the purposes of the Employment Rights Act 1996 and the Working Time Regulations 1998 as well as being an employee within the extended meaning of that term in the Equality Act 2010. This finding was despite the plumber's contract labelling him as an independent contractor.

In a largely fact-sensitive decision, the court determined that personal service was the dominant feature of his contract, notwithstanding a limited right of substitution. It was further clear that he was not an independent contractor, having regard to his obligations to work (albeit subject to some limits) and the tight controls to which he was subject.

The decision comes at a time of continued interest in worker status issues and highlights the difficulties that parties can face in determining an individual's legal status for employment law purposes. However, the case is likely to have limited precedent value.

(*Pimlico Plumbers Ltd and Mullins v Smith [2018] UKSC 29*.)

Background

Definitions
A worker is defined under section 230(3) of the Employment Rights Act 1996 (ERA 1996) as an individual who has entered into or works under (or, where the employment has ceased, worked under):

- A contract of employment.
- 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. (This is sometimes referred to as a "limb (b)" worker contract.)

The above definition is also found in regulation 2(1) of the Working Time Regulations 1998 (WTR 1998).

The Equality Act 2010 (EqA 2010) defines an employee as an individual who is employed "…under a contract of employment…or a contract personally to do work" (*section 83(2), EqA 2010*). A contract personally to do work has been held to mean, in essence, the same as a limb (b) contract (see, *Clyde and Co LLP and another v Bates van Winkelhof [2014] UKSC 32*, at paragraphs 31 and 32). This was not disputed in the case considered below.

An individual who does not work under a contract of employment and who does not come within the limb (b) worker test or the extended definition of employee is often described as being truly self-employed or a truly independent contractor.

The statutory limb (b) worker test (and the extended employee definition under the EqA 2010) has three components:

- There must be a contract.
- The contract must require personal service by the putative worker.
- What is the business or professional relationship between the putative worker and employer? More particularly:
    - does the individual have a profession or a business undertaking; and, if yes,
    - can the putative employer be characterised as a client or customer of that profession or business undertaking?

In practice, it is the second two issues which attract the most litigation.

Personal service
The requirement for personal service often involves consideration of whether the putative worker has a right to substitute another person to provide the services. In *James v Redcats (Brands) Ltd [2007] ICR 1006* the EAT approved a line of authority that tribunals should enquire into whether personal service was the dominant purpose of the contract, although preferred the term dominant feature to purpose.

Client or customer status
Determining whether the relationship is one of business and customer frequently involves analysis of factors such as control, or subordination, and integration. One way of approaching the analysis is to consider whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer), or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations (*Cotswold Developments Construction Ltd v Williams [2006] IRLR 181*, at paragraph 53). Another approach is to consider whether the individual performs services for and under the direction of another, in return for remuneration, or whether the individual is an independent provider of services who is not in a relationship of subordination with the person who receives the services (*Jivraj v Hashwani [2011] IRLR 827*). However, there is no single test supplanting the statutory language (see paragraph 38 of the *Bates van Winkelhof* case).

Rights of limb (b) workers

In the absence of a contract of employment, establishing limb (b) worker status is a prerequisite for a number of employment law rights. Those rights include:

- Entitlement to paid annual leave (*regulation 13, WTR 1998*).
- Protection from unlawful deductions from wages (*section 13, ERA 1996*).
- Protection from discrimination (*section 39, EqA 2010*).

Facts

(Some of the facts summarised below are distilled from the Court of Appeal judgment.)

Pimlico Plumbers (PP) engaged Mr Smith as a plumber for approximately five and a half years. PP terminated the relationship approximately four months after Mr Smith suffered a heart attack. Mr Smith subsequently issued proceedings in the employment tribunal claiming unfair dismissal, wrongful dismissal, entitlement to pay during medical suspension, holiday pay, unlawful deductions from wages and disability discrimination.

As preliminary issues, the employment tribunal had to consider whether Mr Smith was:

- An employee for the purposes of the ERA 1996; that is to say, had PP engaged him under a contract of employment? (Employment status.)
- A limb (b) worker for the purposes of the ERA 1996 and the WTR 1998, and an employee within the extended meaning of that term under the EqA 2010. (Limb (b) worker status.)

The relevant contractual documentation (a 2009 Agreement and a Company Manual) stated, amongst other things, that Mr Smith:

- Was an independent contractor of PP, in business on his own account. Mr Smith agreed in evidence that he had considered himself an independent contractor while working for PP.
- Was under no obligation to accept work from PP, and it was not obliged to offer him any work. However, there was a separate provision stating that Mr Smith should complete a minimum of 40 hours a week. Mr Smith agreed in evidence that he could reject work.
- Had to drive a PP branded van (which had a tracker in it), wear a PP uniform, and carry a PP identity card.
- Had to provide his own materials and tools.
- Bore a significant proportion of the commercial risk. For example, if a customer failed to make payment he would not receive payment; liability arising from his services lay with him and he was responsible for procuring liability insurance.
- 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.

Mr Smith was registered for VAT, submitted invoices to PP and filed tax returns on the basis that he was self-employed.
There was no express right of substitution in the contractual documentation. In practice, there was a fettered ability to substitute, the tribunal finding as a fact that PP plumbers could swap assignments between themselves. In addition, Mr Smith was permitted to bring in external contractors for specialist jobs for which he, or other PP plumbers, did not have the necessary skills, provided that he obtained PP's consent to do so.

The employment tribunal decided that Mr Smith did not have employment status but did have limb (b) worker status. PP unsuccessfully appealed to both the EAT and the Court of Appeal on limb (b) worker status. Mr Smith unsuccessfully cross-appealed on employment status in the EAT and did not pursue this further. PP sought and obtained permission to appeal to the Supreme Court on the limb (b) worker status finding.

Decision

The Supreme Court (Lord Wilson, with whom Lady Hale, Lord Hughes, Lady Black and Lord Lloyd-Jones agreed) dismissed the appeal.

Personal service was required

In relation to personal service, the court framed the question as "was Mr Smith's right to substitute another [PP] operative inconsistent with an obligation of personal performance?" (This question stemmed from the employment tribunal's finding that PP plumbers could swap work between themselves; see *Facts*.) In order to answer the question, the court held that it was helpful to assess the significance of Mr Smith's right of substitution by reference to whether the dominant feature of the contract remained personal performance on his part (*James v Redcats*; see *Personal service*), although stressing that this did not supplant the statutory test. The court stated that the right to substitute was regarded as so insignificant as to not be worthy of recognition in Mr Smith's contract. His written contractual terms were clearly directed to performance by him personally: for example, they referred to "your skills", to a warranty that "you will be competent to perform the work", and to a requirement of a high standard of conduct and appearance. PP's contention that those requirements applied to anyone who substituted for Mr Smith stretched their natural meaning beyond breaking point. The employment tribunal had been entitled to find that the dominant feature of the contract was an obligation of personal performance. The limitation of the facility to appoint a substitute was significant: the substitute had to be a PP operative bound to PP by an identical suite of heavy obligations.

PP was not a client or customer of Mr Smith

PP argued that it was a client or customer of Mr Smith. This issue centred on separate contractual provisions, the first of which stated that Mr Smith was not required to accept work, and the second of which said that he had to work a minimum of 40 hours a week (see *Facts*). The court approved the Court of Appeal's construction of the tribunal's findings in this regard: PP had a contractual obligation to offer work to Mr Smith, but only if it was available. Mr Smith's contractual obligation was to keep himself available to work up to 40 hours on five days each week on such assignments as PP might offer him, without prejudice to his entitlement to decline a particular assignment. The court characterised the above arrangements as an umbrella contract.

The court endorsed *Cotswold Developments* and *Hashwani* as providing helpful approaches to the client or customer issue (see *Client or customer status*). PP relied on a number of factors to support its case: subject to the 40-hour minimum, Mr Smith could reject any offer of work and was free to take up other work, albeit not if offered by PP clients; PP did not reserve the right to supervise Mr Smith's work; Mr Smith bore some financial risk. However, the evidence also showed that PP exercised tight control over Mr Smith and the court considered that the overall picture clearly pointed away from him being a truly independent contractor. It highlighted the uniform, ID card and branded van requirements as well as the "severe" terms about when and how much PP was obliged to pay Mr Smith. It also mentioned the restrictive covenants in this regard.

Comment

Worker versus self-employed status remains a hot topic, being a key feature of the Taylor Review. Although this is a Supreme Court decision, it does not provide any further legal clarity. The decision is highly fact specific, as is so often the case in worker status claims. Indeed, apart from the current public interest in worker and employment status issues, it is difficult to discern from the judgment why the court granted permission to appeal: there is no novel legal point in it or long exposition of the law. Nevertheless, it shows the continued importance of contractual terms seen in the context of the reality of the parties' working practices. It also provides further endorsement of the tests in *Cotswold Developments*, *Hashwani* and *James v Redcats* highlighted in this update.

In terms of guidance, practitioners might find the Court of Appeal's judgment in this case of continued assistance, as it contains a longer analysis and distillation of the relevant authorities. The Supreme Court does not expressly endorse the Court of Appeal's reasoning (save on a couple of points) but does not reject it either.

