EMPLOYMENT NEWSLETTER - JULY 2018

1. Plumber was a worker not a self-employed contractor

The Supreme Court has upheld the Court of Appeal's decision that a plumber was a worker under the Employment Rights Act 1996 and the Working Time Regulations 1998, not a self-employed contractor.

Background

Mr Smith worked as a plumber for Pimlico plumbers for five years. The contractual documentation, amongst other things, stated that he:

- Was an independent contractor, in business on his own account (something he agreed to when giving evidence).
- Was not under any obligation to accept work and the company was not obliged to offer him any work, although a separate provision stated that he should complete a minimum of 40 hours a week. He agreed in evidence that he could reject work.
- Had to drive a company branded van (which had a tracker in it), wear the company's uniform, and carry a company identity card.
- Had to provide his own materials and tools.
- Bore a significant proportion of the commercial risk. For example, if a customer didn't pay he wouldn't be paid and he was responsible for taking out 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 the company and filed tax returns on the basis that he was self-employed.

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What does this mean?

Dismissing the appeal, the Supreme Court held that Mr Smith had undertaken personally to perform the work and the company was neither his client nor his customer. He was therefore a worker rather than a self-employed contractor.

The Court said that in relation to personal service, Mr Smith's right to substitute another of the company's plumbers was not inconsistent with an obligation of personal performance. The Court stated that the right to substitute was regarded as so insignificant as to not be worthy of recognition in his 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. 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 company plumber bound to the company by an identical suite of heavy obligations.

As to whether the company was a client or customer of Mr Smith, the Court agreed with the Tribunal's findings that the company had a contractual obligation to offer work to him, 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 the company 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 also said that the evidence also showed that the company exercised tight control over Mr Smith and 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 the company was obliged to pay him. It also mentioned the post-termination restrictive covenants in this regard.

What should employers do?

Courts and Tribunals will look at the reality of the situation when deciding a person's worker or employment status. This case serves as a warning to companies that have people working in their businesses who are currently classified as independent contractors. All contractual documents and working practices should be checked to ensure that these people are not actually workers entitled to certain benefits such as holiday and protection from discrimination

Case reference: Pimlico Plumbers Limited and Mullins v Smith

2. New suspension guidance has been published by ACAS

ACAS has published new suspension guidance for employers: http://www.acas.org.uk/index.aspx?articleid=6548

The guidance explains the circumstances in which employers may consider suspending someone and stresses that suspension should not be used as a disciplinary sanction. The guidance has sections on:

- Suspension as part of a disciplinary procedure, including the alternatives to suspension and additional considerations to take into account
- Suspension on medical grounds
- Suspension due to a risk to a new or expectant mother
- How an employee should be suspended
- Pay during suspension
- How long suspension should last
- Communications during a suspension
- Ending a suspension
- Options for employees if they believe that their suspension has not been handled fairly

3. Tackling tobacco, alcohol and drug abuse

Public Health England and Business in the Community have published a toolkit aimed at helping employers tackle tobacco, alcohol, and drug abuse. Click here to view.

The toolkit sets out a number of steps employers can take to help their staff and combat substance abuse. These include:

- Leaders making a clear commitment and receiving adequate training to tackle substance abuse
- Making reasonable adjustments for staff who are required to take time off work to deal with substance abuse
- Encouraging staff to consider whether their consumption is putting their health at risk.

4. Disciplinary was discriminatory

The Employment Appeal Tribunal (EAT) has held that an employer had failed to objectively justify its decision to issue a sickness absence warning to a disabled employee. And the right to object to processing. Cick here to view.

Background

Mrs O'Connor had a disability which resulted in high absence levels over a number of years. Her employer treated her with sensitivity and sympathy but, in 2016, it issued a written warning for the 60 days' absence that Mrs O'Connor had had in the last 12 months. This meant her contractual sick pay ceased for future absences. Mrs

O'Connor claimed discrimination arising from disability under the Equality Act 2010.

What does this mean?

This case focussed on the issue of objective justification. The EAT held that the warning was not a proportionate means of achieving the employer's legitimate aims of ensuring adequate attendance levels and seeking to improve Mrs O'Connor's attendance.

The employer was unable to explain how the warning would assist their aims, other than by referring to generalisations about the impact of absences. The disciplining manager had not asked Mrs O'Connor's line manager about the possible impact of the absences.

It was accepted that Mrs O'Connor had been genuinely ill and could not have avoided the absences. In those circumstances, the employer had not discharged the burden of proving proportionality. It also failed to follow some of its own internal processes such referring Mrs O'Connor to occupational health. This contributed to the evidential gap on the issue of justification.

What should employers do?

This case is a reminder to employers to deal with disability related absences very carefully. An employer must be able to explain why it is appropriate in such a case to issue a warning and refer to the specifics of the employee's case rather than generalisations.

Case reference: DL Insurance Services Limited v O'Connor

5. Umbrella company arrangement challenged

An agency worker who was forced by his agency to enter into an arrangement with an umbrella company in order to be paid has received compensation from the agency following a successful claim for unlawful deduction of wages and holiday pay.

Background

Mr Blakely, a pipe fitter, was told by the agency that he would be paid by an intermediary. The intermediary umbrella company paid him weekly after deducting a weekly fee of £18 by way of a "Management Company Margin". He was also charged employer's national insurance contributions. He made a claim against the agency for unlawful deduction of wages.

An Employment Tribunal dismissed the claim on the basis that the agency had not intended to create legal relations with Mr Blakely. However, the Employment Appeal Tribunal (EAT) overturned this decision, finding that the commercial reality was that there was a contract of some sort between Mr Blakely and the agency.

What does this mean?

The EAT held that:

- Mr Blakely was a worker.
- When deciding whether there was a contract an Employment Tribunal should consider the intentions of the worker and not just the employer.
- There was a contract between Mr Blakely and the agency and the use of an umbrella company did not avoid this relationship
- Agency workers paid via an umbrella company could be a worker of the agency, the umbrella company or both.

Case reference: Blakely v On-Site Recruitment Solutions Limited

6. Time off for public duties

From 1 October 2018, the range of public duties for which employees are entitled to take unpaid time off work will be extended. The right to unpaid time off will be made available to the following groups of volunteers in the criminal justice system:

- Lay Observers (those who monitor conditions in court custody and in cellular vehicles)
- Independent Prison Monitors (those who monitor conditions in Scottish prisons)
- Immigration Visiting Committees (those who monitor conditions in Immigration Removal Centres)
- Short Term Holding Facilities Visiting Committees (those who monitor conditions at immigration facilities at ports and airports).

Reference: Time Off For Public Duties Order 2018

7. Zero hours lecturer on the same type of contract as a permanent full-time lecturer

The Employment Appeal Tribunal (EAT) has held that a zero hours lecturer was employed on the same type of contract as a permanent, full-time lecturer.

Background

Mr Roddis was employed by Sheffield Hallam University on a zero hours contract as a part-time lecturer. He brought a claim under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, seeking to compare himself to a permanent full-time lecturer. An Employment Tribunal held that he had not identified a valid comparator on the basis that they were not employed on the same type of contract as required by the Regulations.

What does this mean?

The EAT held that the Tribunal was wrong and Mr Roddis and his comparator were both employed under the same type of contract, i.e. a contract of employment. It held that a contract is not of a different type just because the terms and conditions it lays down are different. If a part-time worker's hours were seen as a distinctive feature of dissimilarity compared to that of a full-time worker, it would defeat the purpose of the Regulations.

Case reference: Roddis v Sheffield Hallam University

Find out more

Please contact us to discuss your requirements or to find out more.

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