EMPLOYMENT NEWS HEADLINES JULY-AUG 2018 ISSUE 16

PIMLICO PLUMBERS WERE WORKERS – PIMLICO PLUMBERS LTD V SMITH (SUPREME COURT)

Regular readers of Maxlaw Global Employment News (Issue 8) will be aware on the Court of Appeal ruling on Mr Smith's status as worker and not a genuine self-employed contractor. Earlier this Summer the Supreme Court confirmed, in an unanimous rejection of Pimlico's appeal, that Mr Smith was indeed a worker.

Although employment status cases are very much fact specific there is a significant body of case law now providing employers with some guidance on the do's and don'ts. This ruling has reinforced some of those elements.

As mentioned in Issue 8 of MLG News, the courts are willing to look beyond the paperwork to get to the true essence of the arrangements. In this case, the Supreme Court focussed on a number of points:

- The Court found that a "dominant feature" of the arrangement was that Mr Smith was required to carry out the work personally himself. Although Mr Smith did have an ability to use a substitute, this was a limited ability as the substitute could only be another Pimlico Plumber operative.
- The Court found the contract itself used terms such as "you or your" and referred to "wages", "dismissal" and "gross misconduct" not ordinarily found in business agreements, also suggesting the true nature of the relationship.
- The Court accepted that Mr Smith did have the right to turn down work on offer from Pimlico, take work elsewhere and bore some financial risk for deficient work. Nor was he supervised by Pimlico in the way he performed the work. However, the Court found these elements did not outweigh the fact that the arrangement "betrayed a grip on [his] economy inconsistent with his being a truly independent contractor".
- Another key focus for the Court was whether or not Pimlico Plumbers Ltd was a client or customer of Mr Smith. In determining this, the Court rejected this argument identifying a number of elements that suggested the contrary:
    - Mr Smith was required to drive a branded van for Pimlico Plumbers which had a tracking device;
    - He was also required to wear a branded uniform when working for Pimlico;
    - He carried a Pimlico Plumbers identification card;

- He was given and required to follow administrative instructions from a Pimlico control room.

What this outcome emphasizes is that there is a need for clear guidance for employers to be able to assess an individual's employment status, particularly, in an increasing fluid and fast- moving gig-economy. The Government has recently consulted on this as a part of the Taylor review. It must be reiterated that this case was fact specific but did provide some good points for all employers to consider when entering into arrangements where branding and service quality are desirable elements to control for efficiency and customer loyalty.

DISCIPLINARY ACTION AND DISABILITY – D&L INSURANCE SERVICES LIMITED V O'CONNOR (EAT)

The case of *D&L Insurance Services Ltd v O'Connor* is an important reminder for employers to:

(a) Carefully consider the justification of disciplinary action against an employee with a disability;

(b) Ensure it fully follows its own internal policy relating to sickness or absences; and

(c) Take the time and make the effort to seek independent medical guidance and expert opinion.

Background

Mrs O'Connor was a customer services rep and had worked for D&L since 2005, a few years later she applied to work more flexibly due to her disability and these 'reasonable adjustments' were accommodated by her employer.

By 2013, the level of sickness absence for Mrs O'Connor increased to a level exceeding the threshold for certain benefits under D&L's sickness absence policy which stated that in cases of high sickness absence levels disciplinary action would be taken. Mrs O'Connor was entitled to full company sick pay. The policy also provided guidance to managers to seek medical advice from Occupational Health or medical specialists when managing a sick employee.

Due to Mrs O'Connor's high levels of absence totalling 60 days for the previous 12 months, disciplinary action was taken, and although D&L accepted that the absences were genuinely due to her disability, a formal warning was issued. The consequence of this was that it resulted in the suspension of company sick pay under D&L's policy for the duration of the warning which was 12 months.

Outcome

Mrs O'Connor brought a claim for disability discrimination and succeeded at first instance. The Employment Tribunal found Mrs O'Connor had been unfavourably treated due to issues arising out of her disability. D&L appealed arguing the action was a proportionate means of achieving a legitimate aim. Namely of getting Mrs O'Connor's attendance back to adequate levels.

Upholding the ET findings, the appeal tribunal focused on primarily the objective justification reasoning. It identified a number of flaws in D&L's argument:

- It had not followed its own policy in seeking Occupational Health or other specialist medical advice before any disciplinary sanction had been issued knowing Mrs O'Connor had a disability;
- The disciplining manager had failed to speak to Mrs O'Connor's line manager about the impact of her absence on the rest of the team and the service delivery;

- It was unable to explain or provide evidence as to how the disciplinary sanction would improve Mrs O'Connor's attendance levels.

The EAT found that D&L although had adopted a very careful approach with Mrs O'Connor and had treated her with sensitivity and sympathy over the years, it had failed to show, in this instance, how its actions were a proportionate means of achieving a legitimate aim. Mrs O'Connor had been discriminated against on the grounds of her disability.

ZERO HOUR CONTRACTS AND EMPLOYMENT RIGHTS – RODDIS V SHEFFIELD HALLAM UNIVERSITY (EAT)

The case of *Roddis v Sheffield Hallam University* is an interesting case about the correct comparator when asserting employment rights.

Mr Roddis was a lecturer employed on a zero hours contract and brought a claim for less favourable treatment under the Part-Time Workers (Prevent of Less Favourable Treatment) Regulations 2000. (PT Regs)

In order to the bring the claim, Mr Roddis compared himself to a full-time lecturer on an indefinite contract of employment. The Employment Tribunal at first instance dismissed Mr Roddis' claim stating that using a full-time lecturer as his comparator was incorrect. Mr Roddis appealed.

The EAT ruled that in order to bring a claim under the PT Regs, the worker must show he or she is:

- Employed by the same employer, in this case, Sheffield Hallam University;
- Employed on the same *type* of contract i.e., a contract of employment as opposed to as a worker or on an apprenticeship;
- Based at the same establishment;
- Employed in the same or broadly similar work, a critical factor in the assessment.

It stated that a contract cannot be treated as a different type of contract just because the terms and conditions it lays down are different nor because the employer chooses to treat the worker differently. In this case, it ruled that the difference in the number of hours does not mean that the contract is a different type otherwise the purpose of legislation would be defeated. The case has been remitted back to the Employment Tribunal for further consideration.

PETTIGREW V HMRC – FIRST TIER TRIBUNAL (FTT)

In another case on PT Regs relates to payments made in settlement of such claims and whether they are taxable. The case of *Mr Pettigrew v HMRC,* although an FTT case and, therefore, not binding, indicates the general direction of travel for HMRC when it comes to taxation of employment related payments.

Mr Pettigrew settled a claim against the Ministry of Justice in a discrimination claim under the PT Regs where he received a payment plus interest in lieu of historical underpayments in the sum of around £55,000.

This sum was taxed by HMRC under PAYE in the amount of £22,000. Mr Pettigrew argued that it was a non-taxable lump sum payment as it was not employment income but rather damages for a statutory breach under the PT Regs and, therefore, compensatory in nature.

HMRC argued that it was income arising out of employment even though the payment itself was not set out in Mr Pettigrew's terms and conditions, it did arise primarily out of his employment situation. It further argued that employment need not be the sole cause but only a sufficiently substantial cause and that a payment will usually take its taxable character from the payment which it substitutes, in this case, historic underpayment due to discrimination under the PT Regs. It was, therefore, taxable as earnings because it was his employment that was the cause of the payment being made. The FTT has agreed with HMRC's argument and ruled that the payment was taxable as an earning as the lump sum itself, although settling a legal action, did arise out of his employment.

AND FINALLY… DRESS CODE GUIDANCE FROM THE GOVERNMENT'S EQUALITY OFFICE

Regular readers will remember the petition and parliamentary debate that ensued following the heels at work incident reported in Maxlaw Global News (Issue 3). Last Summer in (Issue 10) we reported that the Government planned to publish guidance for employers on dress codes and sex discrimination. This guidance has now been published by the GEO.

Details can be found at: https://www.gov.uk/government/publications/dress-codes-and-sex-discrimination-what-you-need-to-know

It confirms the position that although employers can legitimately enforce dress codes these standards do not have to be identical for men and women but should be equivalent and not be any less favourable because of gender which would amount to sex discrimination. Health & Safety considerations and accommodating disabilities should also be important factors to consider when drawing up a dress code policy. Further guidance from ACAS will follow.

For further information and guidance on any issue addressed in this edition, please contact Max Woodley at mwoodley@maxlawglobal.com

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