Autumn 2018

Allan Janes
solicitors

Conveyancing Quality

Lexcel Practice Management Standard Law Society Accredited

EMPLOYMENT REVIEW

Your quarterly legal bulletin on Employment Law news from Allan Janes Solicitors

www.allanjanes.com

Supreme Court rejects Pimlico Plumbers' appeal in employment status case

There have been a number of recent cases looking at the precise employment status of those working for employers who like their operatives to appear to clients as their representatives but who operate a model of self-employment. One such 'gig economy' case *(Pimlico Plumbers Limited and Another v Smith)* was recently decided by the Supreme Court, which ruled that a plumber who had worked for Pimlico Plumbers Limited for six years was entitled to workers' rights.

Mr Smith was one of a bank of plumbers who provided their services to Pimlico Plumbers Limited under written agreements which stated that they were in business on their own account and responsible for paying their own income tax and NI contributions. However, they were required to work a minimum number of hours a week and had to wear uniforms, drive vans and carry identity cards that bore the company's logo.

Pimlico Plumbers could monitor the movement of its operatives via GPS fitted in their vans and they were

required to liaise with the company regarding any holiday leave or time off work. If a plumber did not wish to undertake a particular job, they had a limited facility to substitute another Pimlico Plumbers operative to perform the task, although this was not included in the written agreements under which they worked.

Mr Smith launched Employment Tribunal (ET) proceedings claiming, amongst other things, that he was unlawfully and unfairly dismissed after he suffered a heart attack. In the circumstances, a preliminary issue arose as to the basis on which he performed work on Pimlico Plumbers' behalf.

The ET declined jurisdiction to hear Mr Smith's unfair dismissal complaint on the basis that he was not an employee. However, the ET found that, rather than being self-employed as the company claimed, he was a worker within the meaning of Section 230(3) of the Employment Rights Act 1996, Regulation 2(1) of the Working Time Regulations 1998 and Section 83(2) of the Equality Act 2010. He was therefore entitled to proceed with claims that unlawful deductions had been made from his wages, that he had been unlawfully denied holiday pay and that he had suffered disability discrimination. The ET's ruling was subsequently upheld by the Employment Appeal Tribunal and the Court of Appeal.

In dismissing Pimlico Plumbers' appeal against the latter ruling, the Supreme Court noted that the right of substitution was limited by the fact that Mr Smith had to choose another plumber from the company's bank to replace him. Although the terms of his written agreement with the company were somewhat confusing, it was clear that its dominant feature was his obligation to personally perform services.

Also rejecting arguments that the company could be regarded as Mr Smith's client or customer, the Court noted that the contract cast certain obligations upon him even when he was not on an assignment. The company retained tight control over his attire and the administrative aspects of any job he performed. The contract also dictated terms as to when, and how much, he was to be paid and imposed a number of covenants restricting his working activities post termination.

Mr Smith is therefore entitled to workers' rights and can now proceed with his ET claims.

Cases on this topic show that the courts frown on arrangements that seek to deprive staff of the rights conferred by employee or worker status. Please contact Charlotte Braham on charlotte.braham@allanjanes.com for advice on your individual circumstances.

ALLAN JANES SOLICITORS
21-23 Easton Street
High Wycombe
Buckinghamshire
HP11 1NT

Tel: (01494) 521301
Fax: (01494) 442315
Email: charlotte.braham@allanjanes.com

Court of Appeal gives guidance on time limits in employment cases

Employment cases are subject to tight time limits, and delay in seeking legal advice can result in meritorious claims being dismissed without a hearing. However, in an important decision, the Court of Appeal has underlined the wide and unfettered discretion of Employment Tribunals (ETs) to extend time in deserving cases *(Abertawe Bro Morgannwg University Local Health Board v Morgan)*.

The case concerned a psychiatric nurse who suffered from a depressive illness and had to take about 17 months off work prior to her dismissal. Lengthy proceedings culminated in an ET's findings that she had suffered harassment at the hands of a human resources adviser and that her NHS employer had failed in its duty to make reasonable adjustments to cater for her admitted disability.

Although her claim had been lodged outside the three-month time limit specified by Section 123 of the Equality Act 2010, the ET found that it was just and equitable to extend time. The employer's appeal against the ET's decision was subsequently dismissed by the Employment Appeal Tribunal (EAT). In rejecting the employer's challenge to the latter ruling, the Court emphasised that Parliament had granted ETs the widest possible discretion in deciding whether or not to waive the full rigour of the three-month time limit. The exercise of that discretion should only be disturbed in cases where an ET had erred in principle.

The employer bore some of the responsibility for the delay in launching proceedings, which was also in part explained by the woman's acute mental health difficulties. The employer had suffered relatively little prejudice and, in the circumstances, the ET was entitled to find that it would be unjust to dismiss a good claim on grounds of delay alone.

The woman's case had already been the subject of two ET and two EAT hearings, and the proceedings had stretched over almost six years. A third ET hearing would be required to assess the amount of her compensation, but the Court urged both sides to adopt a sense of reality in achieving a final resolution of the matter.

Sleeping at work and the National Minimum Wage

It would not be a natural use of language, in a context which distinguishes between (actually) working and being available for work, to describe someone as 'working' when they are positively expected to be asleep throughout all or most of the relevant period." So said Lord Justice Underhill in a guideline ruling of the Court of Appeal that two care workers are not entitled to be paid the National Minimum Wage (NMW) for time when they are asleep during sleep-in shifts *(Royal Mencap Society v Tomlinson-Blake and Shannon v Jaikishan and Others)*.

Noting that conflicting authorities had given rise to a need for clarification of the law on the point, the Court found that, on a straightforward reading of the National Minimum Wage Regulations 1999, workers sleeping in under such arrangements will only be entitled to have their sleep-in hours counted for NMW purposes where they are, and are required to be, awake for the purpose of performing some particular task. This conflicts with many previous decisions that sleep-in workers were entitled to be paid the NMW for the entirety of the time they were available to work, whether they were actually working or not. These decisions were also reflected in the Government's updated guidance on this topic.

The decision has been hailed as a victory for common sense and one that provides a lifeline to an industry that hitherto faced higher wage bills and back-dated pay claims. However, the question is likely to be appealed to the Supreme Court and we will keep you appraised of developments.

The Government's guidance on calculating the NMW and the National Living Wage, currently acknowledges awareness of the Court of Appeal's judgment and states that the Government is considering its implications. Revised guidance will be provided shortly.

Meanwhile, employers who have already committed to paying sleep-in workers the NMW for the entirety of their shift are reminded that they cannot simply revert to paying them at a flat rate, as it is a breach of contract for an employer to unilaterally change the terms of an employee's employment without their agreement. Most employers will probably choose to wait until the Supreme Court has had its say before taking any action.

Contact Charlotte on charlotte.braham@allanjanes.com for advice on your individual circumstances.

Allan Janes solicitors

ALLAN JANES SOLICITORS

21-23 Easton Street, High Wycombe
Buckinghamshire, HP11 1NT

Tel: (01494) 521301
Email: charlotte.braham@allanjanes.com

WWW.ALLANJANES.COM