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PEOPLE & LEADERSHIP SOLUTIONS

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Employment Status

At the heart of both employee and worker status is a requirement for personal service. The contract must require that the individual performs work personally for the employer. If all the employer cares about is that the work gets done, and it doesn't matter who actually does it, then the contract is not about the employment of an individual and employment rights don't apply.

We have to draw a distinction sometimes between high profile cases and important ones. Just because an employment law decision makes the headlines, that does not always mean that it is legally significant. In *Pimlico Plumbers v Smith* the Supreme Court has reaffirmed what we already knew about employment status, but has not moved the law on in any significant way.

The reporting of the case in the press has been somewhat confused but, to be fair, this is understandable. Mr Smith is a self-employed plumber claiming employment rights. He was held not to be an employee for the purposes of an unfair dismissal claim but to be 'in employment' within the meaning of the Equality Act. He was also held to be a 'worker' for the purposes of his claims for paid annual leave and unlawful deductions from wages. Those of us familiar with the distinction between workers, employees and the 'genuinely' self-employed can easily forget how counter-intuitive it seems to those encountering it for the first time.

But just because the law can seem confusing from the outside, that does not mean that it is actually confused. The outcome in *Pimlico Plumbers* is just what most employment lawyers would have expected it to be. The Employment Tribunal, the EAT, the Court of Appeal and the Supreme Court have all agreed that Mr Smith was working for Pimlico Plumbers and was not running an independent business of which Pimlico was merely a client or customer. The only reason there was any question mark over his status was that, over time, Pimlico Plumbers had inserted provisions into his contract which sought to claim that he was more independent than he appeared to be. The EAT held that the contractual documentation had been 'carefully choreographed' by Pimlico so that their plumbers could be presented to the world as being part of their workforce, remain under their control and yet be treated in law as independent contractors with no employment rights. An employer who attempts to have its cake and eat it in this way is unlikely to win the sympathy of the courts and *Pimlico Plumbers* can hardly feel surprised or aggrieved at the result.

Indeed, when we look at the cases that have been coming before the courts in the past year there is a remarkable consistency in their approach. Time after time those working in the so-called 'gig economy' have established that they are workers rather than wholly independent contractors. This does not suggest any great ambiguity in the test to be applied. To that extent, I think last year's Taylor Review was wrong in its diagnosis. If we are to keep the distinction between employees and workers, there really is no need to simplify or clarify the definitions of either. The distinction is already about as clear as we can reasonably expect it to be.

Perhaps, however, one issue does emerge from the *Pimlico Plumbers* case with a little less clarity than we might hope for – and that is the effect of a substitution clause. At the heart of both employee and worker status is a requirement for personal service. The contract must require that the individual performs work personally for the employer. If all the employer cares about is that the work gets done, and it doesn't matter who actually does it, then the contract is not about the employment of an individual and employment rights don't apply.

Over the years, the courts have held that a right to send a substitute to do the work is therefore inconsistent with either employment or worker status. Pimlico Plumbers argued that there was just such a right in Mr Smith's contract because he was free to arrange for another Pimlico Plumber to take a job that he had quoted for if, for example, he had a more lucrative job to work on. The Supreme Court agreed with the Tribunal that this did not prevent Mr Smith from being a worker. The right to send a substitute was a limited one. It was not set out in the contract itself and in any event the substitute had to be another Pimlico plumber – this was not a case in which the business did not mind who did the work as long as somebody did.

But the Supreme Court also seemed to attach importance to the fact that personal service was a 'dominant feature' of the contract as a whole. Substitutes were rarely sent and much of the contract related to the personal obligations of Mr Smith in terms of how he presented himself and performed his work. This lessened the significance of the contractual right (such as it was) to send a substitute. Does this represent a loosening of the rule that a clear substitution clause is an absolute bar to employment or worker status? Or is the 'dominant feature' test something that only applies where the substitution clause is vague or limited?

We have had an initial answer to that question already. Last year Deliveroo defeated an application for union recognition on the basis that they had successfully inserted a substitution clause into their contracts allowing their riders complete discretion to have someone else work in their place. The Central Arbitration Committee found that the term was genuine in the sense that Deliveroo were prepared to accept substitutes if they were sent and there was evidence that at least one Deliveroo rider was subcontracting all of his work to a friend and making a (presumably modest) profit in the process. The union (Independent Workers of Great Britain) is seeking a judicial review of that decision and the High Court has just ruled that it cannot be argued that the CAC was wrong to find that the substitution clause meant that Deliveroo riders were not workers. Despite what the Supreme Court said in *Pimlico Plumbers*, the test is still whether there is a contractual obligation for personal service rather than just an expectation of it. Asking whether personal service is a 'dominant feature' of the relationship may be useful where the contractual position is unclear, but not when the substitution clause is express and unqualified. I would expect an appeal on that point – and for the issue to be raised in other cases currently making their way through the system. I suspect, however, that the High Court's view will prevail. In that case, the Supreme Court's decision will really have added little or nothing to our understanding of employment status.

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