Employment Law Update

by Lynsey Howes Issue 138 – June 2018

This month's newsletter would not be complete without mention of Pimlico Plumbers and the GIG economy. The impact of this case unless Parliament decides to legislate could have a huge impact on the self-employed and those businesses who engage their services. To some the GIG economy means flexibility and freedom, for others it means a lack of job security and no real rights. For these reasons the decision of the Supreme Court is extremely important. Of course this is not the only news, so please sit back, enjoy the sunshine and feast your eyes on the latest developments.

Whistleblowing

What constitutes a disclosure of "information" in the context of a whistleblowing claim? The case of Kilraine v London Borough of Wandsworth examined the key questions of whether making an allegation could amount to a disclosure of information and therefore afford the complainant the protection of a whistleblower.

The Court of Appeal has concluded that an allegation will qualify as a disclosure of information. The reasoning given was that "allegation" and "information" are not mutually exclusive terms.

An allegation must however be specific and contain words which are attributable to one of the protected matters listed within s 43B(1) of the Employment Rights Act 1996. Without this the allegation will not be considered information.

An allegation which on first glance falls short of the requirements of s43B(1) of the Employment Rights Act 1996 may be bolstered by the context surrounding the information. Being specific about for example a breach of health and safety by confirming why it was considered there was a breach, the cutting machine has no safety guard, would make that allegation of breach of health and safety a piece of information for the purposes of whistleblowing.

And lastly, ultimately it will be for the Tribunal to determine whether the allegation has been sufficiently communicated to make it a qualifying protected disclosure.

Equal Pay

Female council employees at Reading Borough Council brought claims to have their pay equalised from 2002 until the present day. The comparator was a male colleague who they claimed did work of equal value to them, but who was then promoted in 2006.

The Employment Tribunal made a finding that the claimant's should have their pay equalised from 2002 until the present day. The Council appealed on the grounds that the equalisation should only have been made until 2006 when the male comparator was promoted.

The EAT made a finding that it did not matter that the male comparator had been promoted. As long as it could be established that in 2002 the male comparator was earning more the female claimants for doing a job of equal value the claim would succeed to the present day. The Claimant's would have their pay equalised.

Pimlico Plumbers

The key factor of this case was whether Mr. Smith was a worker within the meaning of s230(3)(b) of the Employment Rights Act 1996. A worker is entitled to some of the statutory rights enjoyed by an employee, for example holiday pay, but crucially would not be entitled to unfair dismissal rights. A self employed person on the other hand would not be entitled to any of those rights at all.

The GIG economy as it has come to be known, refers to a situation where a person is self-employed and moves from one job or assignment to another. This is known as "gigging", hence the term GIG economy. So the individual will move from one gig to the next, not employed and until now presumed not to be a worker.

The Supreme Court has upheld the decisions of the Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal, that Mr. Smith was in fact not self-employed but a worker. But why? How has this conclusion been reached?

The Supreme Court has agreed that Mr. Smith was required to provide personal service, that he was subordinate to Pimlico and subject to their rules, so Mr. Smith:

1. Could not send in a substitute to undertake any work assigned to him by Pimlico (though he could swap a shift with another Pimlico plumber)
2. Could not set his own rate of pay
3. Was required to wear the Pimlico uniform
4. Had his administrative tasks controlled by Pimlico

Against this Mr. Smith could refuse work, so did bear some financial risk, but the other factors had greater sway and mitigated against Pimlico being a genuine client of Mr. Smith's for whom he simply provided services.

The idea of control by Pimlico and subordination and personal service to Pimlico were decisive in the decisions of each court, when confirming that Mr. Smith held the status of worker.

Pimlico have vowed to continue, though the decisions so far have very much found against them in very crucial areas.

What next – those who have subcontractors or self-employed labour should be looking carefully at the arrangements they have in place. Questions should be asked about the status and the reality of the relationship. How much control, how much freedom is allowed? What rules, processes and procedures are those engaged as "self-employed" subject to. And then ask the question, are we exposing ourselves to a claim? Does our documentation help or hinder our case? As always any questions please call.

Overtime

Since the explosion of case law on holiday pay, overtime has become a more contentious issue, particularly as average overtime payments now form part of holiday pay, in light of this ACAS has issued guidance on overtime.

Included in the guidance are a discussion on the types of overtime, working time implications, overtime for part time workers and crucially a look at its impact on holiday pay. The guidance can be found on the ACAS website and is worth a read.

And finally…..

So end another newsletter, if you have any questions about the content or this has sent you rushing to determine the agreements you have with your self-employed contractors and would like reassurance, please give us a call.

Bye for now.

Lynsey and the team.

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