13 June 2018

PRESS SUMMARY

Pimlico Plumbers Ltd and another (Appellants) v Smith (Respondent) [2018] UKSC 29
On appeal from [2017] EWCA Civ 51

JUSTICES: Lady Hale (President), Lord Wilson, Lord Hughes, Lady Black, Lord Lloyd-Jones

BACKGROUND TO THE APPEAL

The Respondent, Mr Gary Smith, is a plumbing and heating engineer. Between August 2005 and April 2011 Mr Smith worked for the First Appellant – Pimlico Plumbers Ltd - a substantial plumbing business in London which is owned by the Second Appellant, Mr Charlie Mullins. Mr Smith had worked for the company under two written agreements (the second of which replaced the first in 2009). These agreements were drafted in quite confusing terms.

In August 2011 Mr Smith issued proceedings against the Appellants before the employment tribunal alleging that he had been unfairly dismissed, that an unlawful deduction had been made from his wages, that he had not been paid for a period of statutory annual leave and that he had been discriminated against by virtue of his disability. The employment tribunal decided that Mr Smith had not been an employee under a contract of employment, and therefore that he was not entitled to complain of unfair dismissal (a finding that Mr Smith does not now challenge), but that Mr Smith (i) was a 'worker' within the meaning of s.230(3) of the Employment Rights Act 1996, (ii) was a 'worker' within the meaning of regulation 2(1) of the Working Time Regulations 1998, and (iii) had been in 'employment' for the purposes of s.83(2) of the Equality Act 2010. These findings meant that Mr Smith could legitimately proceed with his latter three complaints and directions were made for their substantive consideration at a later date. The Appellants appealed this decision to an appeal tribunal and then to the Court of Appeal, but were unsuccessful. They consequently appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Wilson gives the judgment with which Lady Hale, Lord Hughes, Lady Black and Lord Lloyd-Jones agree. The tribunal was entitled to conclude that Mr Smith qualified as a 'worker' under s.230(3)(b) of the Employment Rights Act 1996 (and by analogy the relevant provisions of the Working Time Regulations 1998 and the Equality Act 2010), and his substantive claims can proceed to be heard.

REASONS FOR THE JUDGMENT

Conceptually, it is both legitimate and convenient to treat the three positive findings of the tribunal as having been founded upon a conclusion that Mr Smith was a 'worker' within the meaning of s.230(3)(b) of the Employment Rights Act 1996 (otherwise known as a 'limb (b) worker') **[15]**. This was because regulation 2(1) of the Working Time Regulations defines 'worker' in identical terms to s.230(3)(b), and case law has suggested that the meaning of 'employment' in s.83(2) of the Equality Act is also essentially the same **[12-15]**.

Proceeding on that basis, if Mr Smith was to qualify as a 'limb (b)' worker under s.230(3)(b) then it was necessary for him to have undertaken to personally perform his work or services for Pimlico Plumbers, and that the company be neither his client nor his customer.

When considering whether Mr Smith had undertaken to provide a personal service, it was relevant that when working for Pimlico Mr Smith had a limited facility (not found in his written contracts) to appoint another Pimlico operative to do a job he had previously quoted for but no longer wished to undertake [**24-5**]. However, it is helpful to assess the significance of this 'right to substitute' by considering whether the dominant feature of the contract remained personal performance on his part. In this case the terms of the contract (which referred to 'your skills' etc.) are clearly directed to performance by Mr Smith personally, and any right to substitute was significantly limited by the fact that the substitute had to come from the ranks of those bound to Pimlico in similar terms. Consequently, the tribunal was entitled to hold that the dominant feature of Mr Smith's contract with the company was an obligation of personal performance [**32-34**].

On the issue of whether Pimlico Plumbers was a client or customer of Mr Smith, the tribunal had legitimately found that there was an umbrella contract between the parties, i.e. one which cast obligations on Mr Smith even when he was between assignments for Pimlico. It was therefore not necessary to consider what impact a finding that there was no umbrella contract (and therefore that the contractual obligations subsisted only during the actual assignments) would have had on the 'limb (b)' analysis [**37, 41**]. Instead, one had to look at the wording of the written contractual documents to determine whether Pimlico was a client or customer of Mr Smith. On the one hand, Mr Smith was free to reject a particular offer of work, and was free to accept outside work if no work was offered by any of Pimlico's clients. He also bore some of the financial risk of the work, and the manner in which he undertook it was not supervised by Pimlico. However, there were also features of the contract which strongly militated against recognition of Pimlico as a client or customer of Mr Smith. These included Pimlico's tight control over Mr Smith's attire and the administrative aspects of any job, the severe terms as to when and how much it was obliged to pay him, and the suite of covenants restricting his working activities following termination [**47-48**]. Accordingly, the tribunal was entitled to conclude that Pimlico cannot be regarded as a client or customer of Mr Smith [**49**].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html