Global Workplace Law & Policy

UK Supreme Court and Gig Economy: another step in the right direction for workers

Pascale Lorber (University of Leicester) · Monday, June 18th, 2018

The United Kingdom Supreme court confirmed on 13 June 2018 in the case of Pimlico v Smith what another three lower courts had already decided in the same case: that attempts by employers to label workers as self-employed under elaborate contractual arrangements can be unravelled by the judiciary to benefit the individuals. This decision follows a series of other recent cases that requalified independent contractors to workers (Uber or Addison Lee).

Mr Smith worked as a plumber for Pimlico between 2005 and 2011. When he asked for a reduction of his working hours (from 5 to 3 days) because of health issues, his contract was terminated. He sought redress by claiming unfair dismissal, unlawful deduction of wage, breach of the regulations on annual leave and discrimination on the grounds of disability. Those claims were dependent on qualifying as (i) an employee for the irregular termination of his contract under the Employment Rights Act (ERA) 1996, (ii) a worker for recovering wages under ERA 1996, (iii) a worker for the access to annual leave pay under the Working Time Regulations (WTR) 1998 and as (iv) employee or in employment to qualify for the protection of equality law under the Equality Act 2010.

While the claim for employment status was not won for the purpose of unfair dismissal, the dispute turned on the wider category of worker and employment within equality law context. The three limbs were treated as one by the Supreme Court. In essence, following the statutory definition of a worker (under ERA and the WTR), two questions had to be examined: (a) whether Mr Smith had to perform work or services personally and (b) whether Pimlico was not the customer or client of Mr Smith. In the affirmative of those two questions, Mr Smith would be a worker (and in employment for anti-discrimination law).

Performing personally the work is a condition which has been fatal to many worker status claims. If the contract signed by the individual contains a clause that stipulates that he can substitute another person for his work, this would usually constitute a bar to the worker claim. In this case however, the substitution clause was fettered as the person who could replace Mr Smith had to be another ‘operative’ or plumber from Pimlico. The Supreme Court therefore considered, in line with one of the lower courts, that this was akin to a shift swap rather than a ‘true’ substitution clause where the individual can select the person doing the work in her place.

Demonstrating that Mr Smith was not a customer or client derived from an analysis of the contractual documentation on two fronts. First, the Supreme Court confirmed that there was an umbrella contract between the parties. This was essential in showing that there was no need to

consider obligations between the times that Mr Smith worked for Pimlico. Second, there was an analysis of the factors that may point to a customer / client relationship and the ones that pointed to a worker status. Pimlico had put forward that Mr Smith had paid his tax as self-employed for six years, an indicium that pointed strongly to the independent contractor. However, the Supreme Court stated that 'no single key' could be determinative of status. As a result, the options to refuse work or to take outside work, the lack of supervision on the job by Pimlico and the bearing of financial risks (all pointers to self-employed) were balanced against what were company requirements (such as wearing of uniform or compliance with administrative processes), the strict fixing of payments penalty dictated by the company and contractual terminology akin to an employment or working relationships (such as wages, dismissal or use of restrictive covenant). In this case, the Supreme Court concluded that the first instance could reasonably conclude that Mr Smith was a worker.

The outcome constitutes another positive step for workers like Mr Smith as they will be deemed to pass the first hurdle for claims before employment tribunals: the qualifying status. The judgment was hailed as a victory by the Trade Unions Congress. The potential is also welcome for gig economy workers as such judgment may enlighten future decisions, such as in the case of Deliveroo where the Central Arbitration Committee had denied recognition for collective bargaining purposes on the basis that the drivers were not workers, precisely because of the substitution clause.

Nevertheless, the Pimlico case has limitations. Primarily, the analysis remains based on the contractual clauses. The fact that, in this instance, the contracts were drafted in a way that contained contradictory or unclear clauses on substitution or wages seem to play an important part in the court's justification. With the relevant 'army of lawyers', future contracts could be tightened so that the substitution clause was not fettered or that the terminology used was more in line with an independent contractor relationship.

It would therefore be more beneficial in terms of legal certainty, transparency and justice to reform the law as it currently stands. The Supreme Court highlights that it 'is regrettable that in this branch of the law, the same word can have different meaning and […] different words can have the same meaning'. It also points out to 'clumsy worded' requirements. A change in the law was advocated by the Taylor independent review last year, in favour of a new definition of worker (albeit by another name). Academics and trade unions are offering alternatives and simplification of the law keeping only workers (encompassing employees) and genuine entrepreneurs. The first category should also benefit from a presumption of being employed, removing the burden on working individuals to prove their status against employers who draft the contractual arrangements. The government has so far failed to follow the recommendation from Taylor or others even if it is consulting on employee status. It is therefore unfortunate that individuals have to continue battling alone even in a climate where the judiciary seems more sympathetic to their fate.

This entry was posted on Monday, June 18th, 2018 at 2:37 pm and is filed under Case Law, Labor Law, UK
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.