APSCo Update on Legal & Compliance Issues

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Court of Appeal Decision on Employment Status – Smith v Pimlico Plumbers

Employment status and corresponding rights has been a pressing issue, particularly for those operating in the service sector, or the 'gig economy' (Deliveroo and Uber).

On 1 February 2022, the Court of Appeal handed down its decision on the case of Pimlico Plumbers v Smith regarding 'unpaid annual leave'.

Case overview

Mr Smith worked as a plumber for Pimlico Plumbers. During his engagement, Mr Smith was denied worker status and was classed as self-employed and thereby denied any subsequent rights, including an entitlement to be paid holiday pay. After his contract came to an end, he brought a claim alleging, among other things, that he was a worker who was entitled to paid annual leave throughout his engagement over the previous six years. In 2018, the Supreme Court found that Mr Smith was a worker and was therefore entitled to proceed with his holiday pay claim against Pimlico Plumbers. The Court of Appeal's recent decision concerned the holiday pay claim.

In this action, Mr Smith sought to claim back compensation for the unpaid annual leave that he had taken during his engagement. The relevant legislation (under which a similar successful claim (King v Sash Windows) was brought) grants employees and workers the (basic entitlement) of 4 weeks of paid annual leave (the Working Time Directive as implemented into UK Law via the Working Time Regulations 1998.

In defending the claim Pimlico Plumbers ('Pimlico'), did not advance the argument that Mr Smith was not a 'worker' (that had already been ruled in previous judgments; Mr Smith was declared a 'worker' of Pimlico Plumbers for the purposes of the Working Time Regulations) but instead, contested the period for which Mr Smith could claim for.

The normal limitation period

Usual position

The standard position is that complaints for unpaid wages (which captures unpaid holiday), are limited to claw backs of no more than two years. If a series of deductions are claimed, each underpayment in the chain of underpayments, must not have gap of more than three months between them.

'Euro weeks'

The recent wave of case law (such as King v Sash Windows) where employment/worker status is disputed has allowed individuals to indefinitely carry over and accumulate any untaken parts of 'four weeks' leave (in line with the general entitlement (of the EU directive) for paid leave).

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The Court of Appeal decision

The Court of Appeal (reversing the decision of the Employment Appeal Tribunal and the Employment Tribunal) ruled that Mr Smith was entitled to recover compensation for all the unpaid leave taken throughout his six-year engagement.

The conclusion was reached on the following basis:

A. previous case law had determined that for each year that an individual was denied status (worker/employee); and holiday was accumulated but **not taken**; the portion of accumulated but **not taken** leave could be carried over

B. if it was acceptable for the above to happen, then in Mr Smith's case these was no reason why that principle was not equally applicable to **any taken** but unpaid leave.

Therefore, whenever Mr Smith took leave, but was not paid for it, up to four weeks of that unpaid leave in respect of each leave year (carried into the following leave years) accumulated until the termination of his employment.

When his engagement ended, the court ruled that this obligation crystallised, and the payment was then due to him (calculated based on his normal remuneration).

The outcome

Workers could already rely on previous case law to carry over the untaken portion of four weeks' leave each year and obtain unpaid compensation for that on termination. This recent decision means that a worker can now also carry over 'taken leave' too.

Notwithstanding that, there is now no restriction on carry over. It essentially means that individuals who satisfy the criteria at b) above can recover without limit, the compensation for all four weeks 'euro leave' taken or untaken for every year of denied 'worker'/'employment' status.

The removal of the two-year backstop means that an individual in essence can claim for their whole engagement. The Tribunal will also not be required to consider whether that leave was 'untaken' removing the burden of the individual to evidence that.

The implications

The decision presents material difficulties for businesses operating in the 'gig economy' and SME's who often classify individuals as 'self-employed' when they are in fact 'workers'.

For example, a 'worker' engaged for 15 years, who did or did not take unpaid leave each year would be entitled to payment of 60 weeks' (of normal remuneration on termination). There is also case law to suggest that any payment should also include interest.

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The consequence is costly for businesses who may be liable.

How to tackle

Defending a claim

A claim could be defended on two fronts. A company may wish to either a) dispute employment status (which may be tricky in itself), or b) attempt to argue that any leave taken was in fact paid (that would require a paper trail).

The entanglement with EU case law

The decision in this case gave effect to principles of 'European law'. Mr Smith's case arose before the legislation giving effect to Brexit was enforced. A company may seek to argue that as EU Law is no longer applicable, those principles should not be applied to any further decisions. In short this is not good enough. The Court of Appeal's judgments in previous case law (when EU principles had greater weight) would still apply 'horizontally' to any future decisions. Further, other legal doctrines (such as 'Ius gentium' where a stance on a matter is widely shared by other jurisdictions) would most likely mean that a Tribunal would not want to depart from the decisions of its European neighbours.

Practical solutions

The liability to pay only crystallises on termination. A business therefore may wish to make payments only when a person's engagement has ended.

It may also be premature for a company to make a payment if the individual has not yet contacted ACAS to incite proceedings. It may be better for a business to wait and settle any cause of action raised at conciliation, particularly if this mitigates any cost of defending complex proceedings, where there may not be good enough evidence or legal grounds to refute a claim.

If a business chooses to pay on an 'open basis' i.e., outside of any settlement that may be agreed by ACAS or otherwise, that could have a domino effect, leading to a multitude of claims. If the business is exercising its discretion to make payments (to one individual and not another) then the application of that practice could lend itself to a potential discrimination claim (which automatically captures employees and workers) unless the business can show some form of proportionate reason for that decision.

What's next

It is important to note the 'other commentary' in this decision.

The usual position is as above, that there can be a gap of no more than three months between each underpayment for a claim to be brought as a series. In dissenting commentary, it was noted that this is not the correct position and that the three-month gap should be abolished. This would of

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course mean that an individual would then be able to claim for a wider remit of deductions (potentially spanning back over a period of years).

The above is a complex area of law which can be difficult for businesses to navigate. A business should first be prepared to consider the actual 'status' of the individuals they engage before then considering any subsequent rights and risks when deciding how to tackle any problems.

Businesses should now conduct audits to identify any contractors who may qualify as workers for Employment law purposes. All workers and employees should be provided with clear information about their paid annual leave entitlement, when that leave entitlement will be lost at the end of the leave year or able to be carried over to the next leave year. Businesses will need to be able to show that the employee or worker was provided an opportunity to take their paid annual leave entitlement. Contracts of employment, letters of engagement, handbooks, and policies should include this information to assist to show compliance.

Audits should also be conducted to identify potential historic liabilities so that any legal and financial risks are addressed.

jmw

Simon Bloch
Partner
T: 0203 002 5833
E: simon.bloch@jmw.co.uk

If you have any queries, please contact the legal helpdesk at legalhelpdesk@apsco.org.