Employment

# Worker or not?

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Employment status has received a lot of recent press coverage, in particular in the 'gig' economy – Uber, CitySprint, Deliveroo. It is an area of law in which advisers and in particular clients desire certainty of outcome when they litigate.

Much of the current uncertainty derives from not knowing the approach that will be taken at first instance to the interplay between the contractual terms and the actual performance of the contract. Since Autoclenz, tribunals have been encouraged to search for the actual agreement of the parties and told that there is no need to find a formal sham before disregarding contractual terms which do not reflect that agreement. But knowing in which cases the ET will uphold the contract and in which they will be ignored is notoriously difficult to predict.

Anyone hoping that the Court of Appeal in Pimlico Plumbers ("PP") would increase that certainty of outcome will probably be disappointed.

The ET found that the claimant plumber was a worker but not an employee. The EAT upheld that decision on both grounds and the Court of Appeal (the leading judgment being given by Etherton MR) upheld the decision on worker status (there was no cross-appeal on employment status).

PP argued two main points: that the contract contained a right of substitution inconsistent with the personal service required to be a worker; and that there was no mutuality of obligation.

The relevant contract contained no express right of substitution and throughout used "you" and "your" when referring to the claimant's obligations. Although the ET had found that there was evidence that plumbers could get someone else to do the work, whether another specialist tradesman or another plumber if there was a more lucrative job offer, Etherton MR based his decision squarely upon the terms of the contract. He set out a summary of the principles that can be taken from the case law on substitution, though because the last 3 of the 5 principles are simply examples taken from the case law, it does not add much to the understanding of the law in this area.

An employer who argues that the reality of the agreement is more favourable to it than the contractual terms is unlikely to get much judicial sympathy, given that the asymmetry of bargaining position is generally all one-way. PP had to resort to the ambitious, and ultimately unsuccessful, submission that there was an implied term in the contract permitting unfettered substitution.

In contrast, when considering the question of mutuality of obligation the Master of the Rolls found it much easier to ignore the express contractual term, which stated that there was no obligation on PP to offer work and no obligation on the claimant to accept it. He found that that clause had to be interpreted "in the light of practical reality" and that a literal interpretation of the clause "would make no sense at all from either side's perspective".

PP did, in reality, offer work to the claimant – it needed the work doing – and the claimant did accept most of it (although he turned down some offers) – it was his way of earning a living. That is the economic imperative of a contractor situation; any self-employed person with fixed overheads will have to work sufficient hours to cover those expenses.

The economic reality relied upon by Etherton MR should not be sufficient to create legal obligations. That much at least was recognised by Underhill LJ at [136].

It is not easy to advise clients on the likely outcome of a case if the court or tribunal bases its decisions on its view of commercial common sense. However, in this case PP was not helped by the fact that the contractual terms were "to be discovered from a patchwork of different materials", as Underhill LJ said, which were in important respects inconsistent.

Underhill LJ said that the case was decided on its facts and that practitioners should be careful about drawing principles from it. However, he went on to make obiter comments that may become important in the development of the law in this area, possibly leading to more rather than less uncertainty. In paragraph 145, he postulates a contract which contains a clause to the effect that there is no mutual obligation in between periods of work. Even if the clause is clear and genuine (in other words presumably reflective of the agreement between the parties), Underhill LJ says that the fact that work has been regularly offered and accepted is a factor that points towards worker status during the times when the work is being performed.

While it is right that courts and tribunals should be alive to contracts drafted in such a way that they do not reflect reality, if the importance of the contractual terms becomes marginalized it will be harder for parties to use contracts to achieve a legal status that might very well be intended by, and mutually beneficial to, both parties.

Akash Nawbatt QC of Devereux Chambers was instructed by Pimlico Plumbers.

Chris Stone has a substantial employment and tax practice and is instructed regularly in the High Court on commercial matters, in particular involving injunctions. His employment practice specialises in high value and complex tribunal claims including all forms of discrimination, whistleblowing, collective consultation, working time and TUPE issues.