

Employment practices come under the spotlight

Stephen Radcliffe of **Walker Morris LLP** reviews some recent employment developments and their implications for construction. Modern slavery, the gender pay gap and self-employed status are among the issues attracting increasing attention.

KEY POINTS

- The Supreme Court delivered a significant decision on 'worker' v 'self-employed' status in the *Pimlico Plumbers* case
- It has also provided useful guidance on when a notice of termination of employment is deemed to be received
- Mandatory gender pay gap reporting has highlighted the issue of gender imbalance in the construction sector
- A new report sets out proposals for reform of workplace protections against sexual harassment
- There are calls for a new approach to tackling modern slavery in the construction sector
- The Secretary of State for Justice proposes employing prisoners to help fill the Brexit skills gap

In a significant decision which will impact on the construction sector, the Supreme Court recently confirmed that a plumber who had worked for Pimlico Plumbers for six years, was a worker and not self-employed (*Pimlico Plumbers Ltd v Smith [2018] UKSC 29*). This distinction in employment status is important, because being a 'worker' attracts certain employment rights and protections. Companies in industry sectors, such as construction, which commonly use self-employed contractors, will need to take steps to check if their contractors are genuinely self-employed.

The facts in the *Pimlico Plumbers* case

Gary Smith worked for the company as a plumber

and heating engineer until 2011, when he suffered a heart attack. He then asked for a three-day week but this was rejected, his rented Pimlico Plumbers' van was taken away and he was dismissed. Pimlico Plumbers disputed that he was sacked because he wanted to work fewer days.

Mr Smith had paid tax as a self-employed person and was VAT registered but he claimed that he was, in fact, a worker and was therefore entitled to certain payments such as holiday and sick pay. The first question for the employment tribunal was whether he was a worker or self-employed (as the company claimed). This is because workers do not benefit from the full range of employment rights given to employees, but they are entitled to certain 'worker' protections including holiday and sick pay.

The Supreme Court ruling

Upholding previous decisions of the lower courts, the Supreme Court held that the tribunal was entitled to conclude that the company could not be regarded as a client or customer of Mr Smith. As he has been found to be a worker, his claim for compensation can now proceed and will be heard by the tribunal probably before the end of this year.

Although the contract did provide him with elements of operational and financial independence, Mr Smith's services to the company's customers were marketed through the company. More importantly, its terms enabled the company to exercise tight administrative control over him during his periods of work for it; to impose fierce conditions on when and how much it paid to him, which were described at one point as his wages; and to restrict his ability to compete with it for plumbing work following any termination of their relationship.

The dominant feature of Mr Smith's contracts with Pimlico was an obligation of personal performance.

The ultimate deciding factor was that Mr Smith had a lack of control over his work. For example, he was contractually obliged to do a minimum number of hours a week and he did not have the right to use a substitute if he was not available. Moreover, he wore a Pimlico Plumbers uniform, had a tracker in his Pimlico Plumbers' branded van and carried a Pimlico Plumbers' ID card. His contract referred to 'wages', 'gross misconduct' and 'dismissal'.

The Supreme Court recognised that there were some factors in his case that pointed towards self-employment (for example, that he was VAT registered and paid tax as a self-employed person) but, ultimately, the overall contract with Pimlico Plumbers was inconsistent with him being a truly independent contractor.

Need for clarification

The law on worker status remains in a state of confusion. Employers using self-employed contractors face significant challenges in properly categorising and structuring their workforce. The decision will put renewed pressure on government to take urgent steps to provide clarification. It recently proposed putting the onus on private sector companies to determine whether their contractors are genuinely self-employed for tax treatment reasons. If this proposal is enacted, companies who mis-classify contractors as self-employed could bear liability for the resultant tax bill. This is a system that has already been brought into force, despite significant objections, in the public sector.

Notice periods

In another recent decision, the Supreme Court gave useful guidance on the question of whether a notice of termination of employment is deemed to be received when it is delivered to the employee or when the employee actually reads it.

Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood [2018] UKSC 22 confirms that the default position, at least in the context of employment contracts, is that it is receipt by the employee – and not delivery by the employer – that is paramount when it comes to the question of whether or not a legal notice has been validly served.

The case highlights that the courts may therefore take a different approach in employment contract disputes than in other commercial situations. It is, however, open to employers to alter the default position by expressly providing otherwise in the employment contract itself, and it is suggested that that may be sensible to do.

The best advice is to leave the service of any legal notice entirely to the experts. The consequences of getting a notice wrong can be too costly to gamble.

Gender pay gap reporting

The deadline for private and voluntary sector employers with more than 250 staff to publish their first gender pay gap results was 4 April 2018. There was a huge surge of reports in the final days and more companies uploaded their reports in the 24 hours before the deadline than had reported in the first 326 days.

The Equality and Human Rights Commission (EHRC) has been writing to employers who remain in default stating that it will take enforcement action against them if they fail to comply. It has also confirmed that it intends to 'name and shame' those who are in default.

Preliminary results show that 78% of large private companies pay men more than women and only 8% of employers reported no pay gap at all. The construction sector is widely reported to have one of the worst median gender pay gaps – the difference between the midpoints in the ranges of hourly earnings of men and women.

Initiatives already in place to seek to address the imbalance include partnering with schools and education providers to encourage the take up of STEM subjects, schemes to support and improve the career prospects of those women already working in the sector, and returner programmes for women who have taken career breaks.

Findings of a recent report on women in construction

A report published earlier this year by HR consulting firm Randstad ('Women in Construction Gender Equality Report 2018') found that, of the more than 5,400 construction, property, engineering and rail professionals who were surveyed, just under half of respondents said that they had never worked with a female manager.

The research found that 43% of organisations do not actively monitor pay equality. Factors identified as limiting the retention and progression

of aspiring female leaders included inappropriate comments from a male colleague, being passed over for promotion, and being overlooked for important projects. Unconscious bias is a key concern. As the report says, by analysing and understanding the gender pay gap data they are required to publish, 'firms will be better equipped to ensure equality of pay in line with the government's aspirations'.

Gender pay gap reporting is an ongoing duty and the 'snapshot date' of 5 April 2018 on which next year's figures need to be based has already passed. Businesses need to take steps to begin updating their reports within a year of this date.

A parliamentary inquiry into executive pay and the gender pay gap in the private sector was launched in March 2018. Among other things, it is looking at issues around businesses' compliance with reporting requirements, the steps companies are taking to address the pay gap, the measures to be taken for non-compliance, and checking on the implementation of the Prime Minister's undertaking to crack down on excessive executive pay.

While the reasons for the gender pay gap in the construction sector may be numerous and complex, it is clear that firms have nowhere to hide, and, reputationally, they have a lot to gain from rising to the challenge of addressing the wider and well-recognised gender imbalance in the industry.

Workplace protections against sexual harassment

With the issue of sexual harassment very much in the public's consciousness, the construction sector is certainly not immune. The EHRC recently published a new report, 'Turning the tables: ending sexual harassment at work', which sets out several reform proposals aimed at addressing perceived inadequacies in current protections for victims of sexual harassment at work. It proposes that employers should be placed under a specific and enforceable duty of care to prevent sexual harassment in the workplace, backed up by a new statutory code of practice which would specify key expectations and a requirement on organisations to publish sexual harassment policies online.

The EHRC also recommends that: tribunal time limits for victims to bring sexual harassment claims should be extended to six months; any non-disclosure agreement or confidentiality provision which may prevent the disclosure of past, current

or future acts of discrimination or harassment would be unlawful; and tribunals should be given the power to apply an uplift to compensation for harassment of up to 25% for breach of mandatory elements of the code of practice.

Modern slavery – new report urges action

The Chartered Institute of Building has published a report, 'Construction and the Modern Slavery Act: Tackling exploitation in the UK', in which it calls for a new approach to tackling modern slavery in the construction sector. The report examines the industry's response to the *Modern Slavery Act 2015*:

'... and the systemic problems that are eroding the rights of domestic and foreign workers in the sector.'

It concludes:

'... there is little doubt that UK construction supply chains are at risk of being infiltrated by criminal activities such as modern slavery ... Changing the narrative to acceptance, rather than denial of risks, will open up conversations and create opportunities for innovation.'

A number of organisations have signed up to a protocol for construction launched by the Gangmasters and Labour Abuse Authority in October 2017.

And finally ...

In a recent speech 'From the wings to the workplace: the route to reducing reoffending', the Secretary of State for Justice talked about how leaving the European Union is likely to have an impact on the workforce in sectors such as catering, construction and agriculture. He sees an opportunity for both prisoners and employers:

'By expanding the use of ROTL [release of prisoners on temporary licence for work], more prisoners will not only be able to get a foot through the door to sectors like these, but employers will be better able to fill short-term skills gaps whilst also developing potential permanent employees for the longer term. That in my eyes is a "win-win".'

The day before the speech, the government published promotional material on employing prisoners and ex-offenders. **CL**