



# NeTWork

February 2017

## Employment Law Update

This month we talk about:

- Apprenticeship Levy
- Increases to the National Minimum Wage
- Court of Appeal finds "Self-employed Operative" was a worker
- Increases in compensation limits
- National Minimum Wage – Argos ordered to pay back pay of £2.4m

### Apprenticeship Levy

The apprenticeship levy comes into force on 6 April 2017. The scheme requires UK employers with an annual pay bill of £3 million or more to pay an apprenticeship levy at a rate equivalent to 0.5% of their payroll costs. All employers will be able to claim money from the levy to subsidise the hire of apprentices.

The Department for Education and the Skills Funding Agency have encouraged large employers to register in advance for the online apprenticeship service. The service is the platform through which payment of the apprenticeship levy will be managed and includes a facility to estimate the required levy. The service also aims to help employers find apprenticeship training and to post details about current apprenticeship and traineeship vacancies.

### Increases to the National Minimum Wage

The draft National Minimum Wage (Amendment) Regulations 2017 were published on 1 February 2017. The Regulations propose to change the rates of the national minimum wage in accordance with recommendations from the Low Pay Commission. The changes are expected to come into effect from 1 April 2017:

The following increases have been proposed:

1. The national living wage (for workers aged 25 and over) is expected to increase from £7.20 to £7.50.

2. The standard adult rate (for workers aged between 21 and 24) is expected to increase from £6.95 to £7.05.
3. The development rate (workers aged between 18 and 20) is expected to increase from £5.55 to £5.60.
4. The young workers rate (workers aged under 18 but above the compulsory school age who are not apprentices) is expected to increase from £4.00 to £4.05; and
5. The rate for apprentices (under 19 or over 19 and in the first year of an apprenticeship) is expected to increase from £3.40 to £3.50.

Accommodation provided by an employer can be taken into account when calculating the National Minimum Wage or National Living Wage. The daily accommodation offset is expected to increase from £6.00 to £6.40.

### Court of Appeal finds "Self-employed Operative" was a worker

*Pimlico Plumbers v Smith*

In this case, the Court of Appeal has upheld the judgments of an employment tribunal and the Employment Appeal Tribunal (EAT) that a plumber was a worker for the purposes of the Employment Rights Act 1996 and the Working Time Regulations 1998 as well as an employee within the extended meaning of



that term in the Equality Act 2010.

Mr Smith is a plumber who was engaged by Pimlico Plumbers Limited (PP) under an agreement which labelled him as a 'self-employed operative'. Mr Smith provided worked for PP for around 5 years before the arrangements were terminated by PP.

In January 2011, Mr Smith suffered a heart attack and was unable to work full time hours for PP. Four months later, PP decided to end its arrangements with Mr Smith and he proceeded to challenge his status as a self-employed contractor. Mr Smith alleged that he was an employee or a worker of PP for employment law purposes and brought various claims against PP including unfair dismissal, wrongful dismissal, disability discrimination, entitlement to pay during the period of a medical suspension, failure to provide particulars of employment, unpaid holiday pay and unlawful deductions from wages.

As Mr Smith had been dealt with as a self-employed contractor during the time that he was working for PP, the tribunal had to assess whether he was an employee or a worker for employment law purposes. Mr Smith's employment status would determine which claims (if any) he was able to pursue against PP.

When considering employment status the tribunal will consider the contractual documentation between the parties and the arrangements in practice. The tribunal and the EAT found that Mr Smith did not have employment status but that he was a "worker" for employment law purposes. PP appealed the finding that Mr Smith was a "worker". Accordingly, the Court of Appeal only considered the issue of whether Mr Smith had worker status during the time that he was working for PP.

A worker is defined under the Employment Rights Act 1996 as "an individual who has entered into or works under a contract of employment **OR** any other contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

In this case, the contractual documentation between the parties included the following terms:

1. That Mr Smith was a "self-employed operative". Mr Smith agreed in evidence that he had considered himself as an independent contractor whilst working for PP.
2. That Mr Smith was under no obligation to accept work from PP and PP was not obliged to offer Mr Smith any work. Mr Smith agreed in evidence that he could reject work offered to him by PP.

3. That Mr Smith should complete 40 hours of work per week for PP.
4. Restrictive covenants which prevented Mr Smith from being a plumber in the Greater London area for three months following the termination of his arrangements with PP.
5. Mr Smith was required to provide his own materials and tools. Mr Smith was also required to drive a PP branded van and wear a PP uniform.
6. If a customer failed to make payment to PP, Mr Smith would not receive payment. In addition Mr Smith was liable for any concerns arising in respect of his work and was responsible for insuring his own work.

In addition to the contractual arrangements, the tribunal considered the following matters:

1. Mr Smith was registered for VAT, submitted invoices to PP and filed tax returns on the basis that he was self-employed.
2. There was no express right of substitution in the contractual documentation. However, the tribunal found as a fact that PP plumbers could swap assignments between themselves and Mr Smith was permitted to bring in external contractors for specialist jobs for which he, or other PP plumbers, did not have the necessary skills, provided that he obtained PP's consent to do so.

The Court of Appeal dismissed PP's appeal and agreed that Mr Smith had worker status. The Court found that

1. Mr Smith was personally obliged to provide services to PP. The Court noted that the contractual documentation did not include any right of substitution. The Court felt that the fact that PP plumbers could swap assignments between themselves and bring in external contractors when required was not inconsistent with a requirement to provide services personally, it was no more than an informal concession.

The Court's judgment gave a useful overview of when a right of substitution may be inconsistent with a requirement to provide work personally. The Court felt that an unfettered right to provide a substitute is inconsistent with an undertaking to provide services personally. A conditional right to provide a substitute may or may not be inconsistent with personal performance. It will depend on the degree to which the right is limited.

2. PP was not a client or customer of Mr Smith. This part of the appeal focussed in particular on whether Mr Smith was obliged to work a minimum number of hours per week. The issue centred on separate

contractual provisions the first of which stated that Mr Smith was not required to accept work and the second of which said that he had to work a minimum of 40 hours a week. The court decided that, on the particular facts of the case, the two provisions could be reconciled. The Court stated "Mr Smith normally had to be available to take on work for a minimum of 40 hours per week, but PP did not have to offer him work if there was none to offer him, and Mr Smith was not obliged to take on any particular assignment on any particular day if he was unable or unwilling for any reason to do so." The court felt that these arrangements indicated that Mr Smith was an integral part of PP's business and was not dealing with PP as if they were his client or customer.

PP has stated that it is considering appealing to the Supreme Court. Unless any appeal is successful, the case will return to the employment tribunal to consider whether Mr Smith suffered disability discrimination and whether PP failed to pay holiday pay and made unauthorised deductions from wages. As Mr Smith failed to establish that he worked under a contract of employment, he is not eligible to pursue his other claims.

Determining the difference between employees, workers and self-employed individuals is not straightforward and each case will turn on its own facts. Employers who engage individuals as self-employed contractors in circumstances where the individual is providing services on a regular basis would be well advised to review the arrangements. Taylor Walton is able to assist businesses with issues relating to employment status.

#### Increases in compensation limits

Tribunal compensation limits will increase on 6 April 2017 under the Employment Rights (Increase of Limits) Order 2017. The maximum compensatory award for unfair dismissal will rise from £78,962 to £80,541. The maximum amount of a week's pay, used to calculate statutory redundancy payments and various awards including the basic award for unfair dismissal also rises from £479 to £489.

#### National Minimum Wage – Argos ordered to pay back pay of £2.4m

Argos has been ordered to pay 37,000 former and current staff back pay amounting to £2.4m, after an HMRC investigation revealed its failure to pay staff the national minimum wage. According to the investigation, Argos had scheduled staff briefings before workers began their shifts and had insisted on carrying out staff security checks outside of working hours. HMRC has also fined the company £1.5m for the underpayment.

Employers should be aware of and review any practices which may cause staff earnings to fall below National Minimum Wage rates.

If you have any questions about these or other employment issues please call:

**Heather Cowley** (Partner & Head of Employment Law Department) on **01582 731161**.

Alternatively you can contact Heather via email at [heather.cowley@taylorwalton.co.uk](mailto:heather.cowley@taylorwalton.co.uk)