ActifHR

Where people matter...

June 2018 Update

Welcome to this month's update - where we discuss the latest guidance and legislation.

GDPR

It's not too late! We can still assist your business with GDPR compliance for employee and customer data.

When the 25th May 2018 came around, the regulatory body (Information Commissioner's Office - ICO) website crashed – typical!

In this Edition we report on:

- The Question is - Self Employed or not Self Employed?
- Payslips
- Constructive Dismissal

Tel: 01327 317537
M: 07947567661
E: caroline.robertson@actifhr.co.uk/info@actifhr.co.uk
ActifHR Ltd, Innovation Centre, Silverstone Park. NN12 8GX

The Question is - Self Employed or not Self Employed?

In the Pimlico Plumbers case, The Supreme Court has just found that the Employment Tribunal was right to conclude a plumber who worked under a contract describing him as an independent contractor, was a worker.

Mr Smith was a plumber, who carried out work solely for PP Ltd from August 2005. In his contract it stated that he was an independent contractor, in business on his own account, that PP Ltd was not obliged to offer him work and he was under no obligation to accept it. Guidelines however said he had to complete a minimum of 40 hours' work per week, wear a PP Ltd uniform and hire and drive a PP Ltd-branded van.

There was no explicit right of substitution in the contractual documentation, but PP Ltd.'s plumbers could swap assignments amongst themselves. When PP Ltd terminated its arrangement with Mr Smith on 3 May 2011, he brought claims against them in the employment tribunal including unlawful deductions from wages, failure to pay holiday pay and disability discrimination. Therefore, an employment judge had to determine whether Mr Smith was a worker under S.230(3)(b) ERA (a 'limb (b) worker'), a worker for the purposes of the WTR and/or an employee for the purpose of the extended definition under S.83 EqA.

The employment judge retained that Mr Smith was a limb (b) worker, a WTR worker and an EqA employee. In the judge's view, the main purpose of the contractual documentation was for Mr Smith personally to provide work for PP Ltd and he did not have an unfettered right to substitute at will. He was therefore obliged to provide his services personally, satisfying the key element of the 'worker' definition. The EAT dismissed PP Ltd.'s appeal against that decision, as did the Court of Appeal. The Court agreed that Mr Smith was required to provide personal service. Although individual plumbers working for PP Ltd were able to swap assignments, that was at most, an informal concession. Furthermore, Mr Smith was not in business on his own account, which would negate worker status under S.230(3)(b) ERA; he was an integral part of PP Ltd.'s operations and was subordinate to it. PP Ltd appealed to the Supreme Court.

The appeal has now been dismissed by the the Supreme Court. With regards to the question of Mr Smith's right to provide a substitute, it held that the employment judge had found, and had been entitled to find, that Mr Smith's only right of substitution was that of another PP Ltd.'s operative. Thus, the substitute had to come from the ranks of those already bound to PP Ltd by an identical suite of heavy obligations. In the Supreme Court's view, this was the converse of a situation in which the employer is uninterested in the identity of the substitute, provided only that the work gets done. The employment judge was therefore entitled to conclude that this limited right of substitution was not inconsistent with an obligation to perform services personally. Mr Smith was therefore a limb (b) worker unless it could be said that PP Ltd status was, by virtue of the contract, that of a client or customer of his.

Tel: 01327 317537
M: 07947567661
E: caroline.robertson@actifhr.co.uk/info@actifhr.co.uk
ActifHR Ltd, Innovation Centre, Silverstone Park. NN12 8GX

On the 'client or customer' question, the Supreme Court noted first that the tribunal had legitimately found that there was an umbrella contract, placing a continuing obligation on Mr Smith to make himself available for work. PP Ltd argued that, despite that obligation, Mr Smith was entitled to reject work and was free to take outside work. It also pointed out that PP Ltd did not supervise or otherwise interfere in the way Mr Smith carried out his work, and that he bore some financial risk in taking on work through PP Ltd. However, the Supreme Court held that the employment judge had been entitled to have regard to a number of factors that strongly militated against recognition of PP Ltd as a client or customer of Mr Smith's. These included the requirement that he wear a branded uniform, drive a branded van, carry an identity card and closely follow the administrative instructions of its control room; the severe terms as to when and how much PP Ltd was obliged to pay Mr Smith; the contractual references to 'wages'; 'gross misconduct' and 'dismissal'; and the suite of restrictive covenants regarding his working activities following termination. Thus, the tribunal was, by a reasonable margin, entitled to conclude that Mr Smith was a limb (b) worker. This conclusion meant that Mr Smith was also a worker for the purposes of the WTR and in employment for the purposes of the EqA.

Employers: This case is very specific. The fundamental thing about the right of substitution is the contractor's ability to put forward a substitute that the client does not necessarily know.

Contact us: We can help your business with an assessment of contractor agreements.

Payslips

The catchily named Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No.2) Order 2018 requires businesses to provide all 'workers' with an itemised pay slip.

Only employees were entitled to receive itemised statements previously. Workers will now also have the right to bring an employment tribunal claim if businesses do not comply, and this extension of the right will now mean many people in the gig economy (self-employed but classed as workers) will be entitled to an itemised pay slip as well. Ultimately more paperwork it seems.

The Low Pay Commission recommended this law in 2016 following the Taylor Review on Modern Working Practices. The change is so that low paid workers can calculate whether they have been paid correctly or not.

Tel: 01327 317537
M: 07947567661
E: caroline.robertson@actifhr.co.uk/info@actifhr.co.uk
ActifHR Ltd, Innovation Centre, Silverstone Park. NN12 8GX

Particularly good news for businesses is that this new requirement is not scheduled to come in until April 2019 so there is time to get the necessary systems in place. The change will not apply to wages paid for work carried out before this date.

Employers: Clarify who may be classed as a 'worker' to consider if they will need an itemised pay statement.

Contact us: We can help with reviewing whether any people you contract with could be deemed as workers.

Constructive Dismissal – Imposing a Pay Cut

Occasionally employees resign and then claim constructive dismissal based on a breach of the implied term of trust and confidence.

An employer must not behave in a way which impairs trust and confidence without 'reasonable and proper cause'. Recently, The Employment Appeal Tribunal has looked at whether there can ever be reasonable and proper cause for an employer to impose a pay cut.

Mr Mostyn was employed by S and P Casuals as a Sales Executive with diminishing sales figures in recent years. The company did not undertake a formal capability process and instead asked Mr Mostyn to take a significant pay cut. He refused to agree to this and the company said they were progressing his pay cut anyway. Mr Mostyn resigned and claimed constructive dismissal.

Mr Mostyn lost at the tribunal. The tribunal found that the employer had behaved in a way which could damage trust and confidence, but they said that the company had reasonable and proper cause for cutting pay. The tribunal did consider Mr Mostyn's bad sales figures and his lack of action to address this. So, Mr Mostyn appealed.

It appears that the Employment Appeals Tribunal agreed with Mr Mostyn. They established that by cutting Mr Mostyn's pay, the employer had also breached an express term of Mr Mostyn's contract. It seems there cannot be a reasonable basis for breaching the implied term of mutual trust and confidence where the breach consists of a unilateral pay cut.

Employers: This unfortunately leaves employers in an arduous position when needing to reduce an employees' pay when they are not performing.

Contact us: We can help advise you through this difficult process as there are other ways of achieving the result you may require as an employer.

Tel: 01327 317537
M: 07947567661
E: caroline.robertson@actifhr.co.uk/info@actifhr.co.uk
ActifHR Ltd, Innovation Centre, Silverstone Park. NN12 8GX

Caroline Robertson, CEO

Caroline has a wealth of experience supporting business clients with practical hands on HR and Employment Law advice. Caroline's pragmatic approach helps businesses of all sizes deal with complex HR situations. She qualified as a Solicitor in 1999 and now acts as a specialist Human Resource / employment Law Consultant to business.

Tel: 01327 317537
M: 07947567661
E: caroline.robertson@actifhr.co.uk/info@actifhr.co.uk
ActifHR Ltd, Innovation Centre, Silverstone Park. NN12 8GX

SILVERSTONE TECHNOLOGY CLUSTER

You are receiving this e-mail from ActifHR Limited as you are either a client of ActifHR Limited or have consented to receiving these updates, being one of the lawful basis to process under the General Data Protection Regulations. To stop receiving these emails, please send a return email with 'unsubscribe' in the title.

Disclaimer: This newsletter is provided for general information only and does not constitute legal or other professional advice. If you require advice on a specific Human Resource issue please contact caroline.robertson@actifhr.co.uk. ActifHR Limited accepts no responsibility for any loss which may arise from reliance on information contained in this newsletter.

Tel: 01327 317537
M: 07947567661
E: caroline.robertson@actifhr.co.uk/info@actifhr.co.uk
ActifHR Ltd, Innovation Centre, Silverstone Park. NN12 8GX