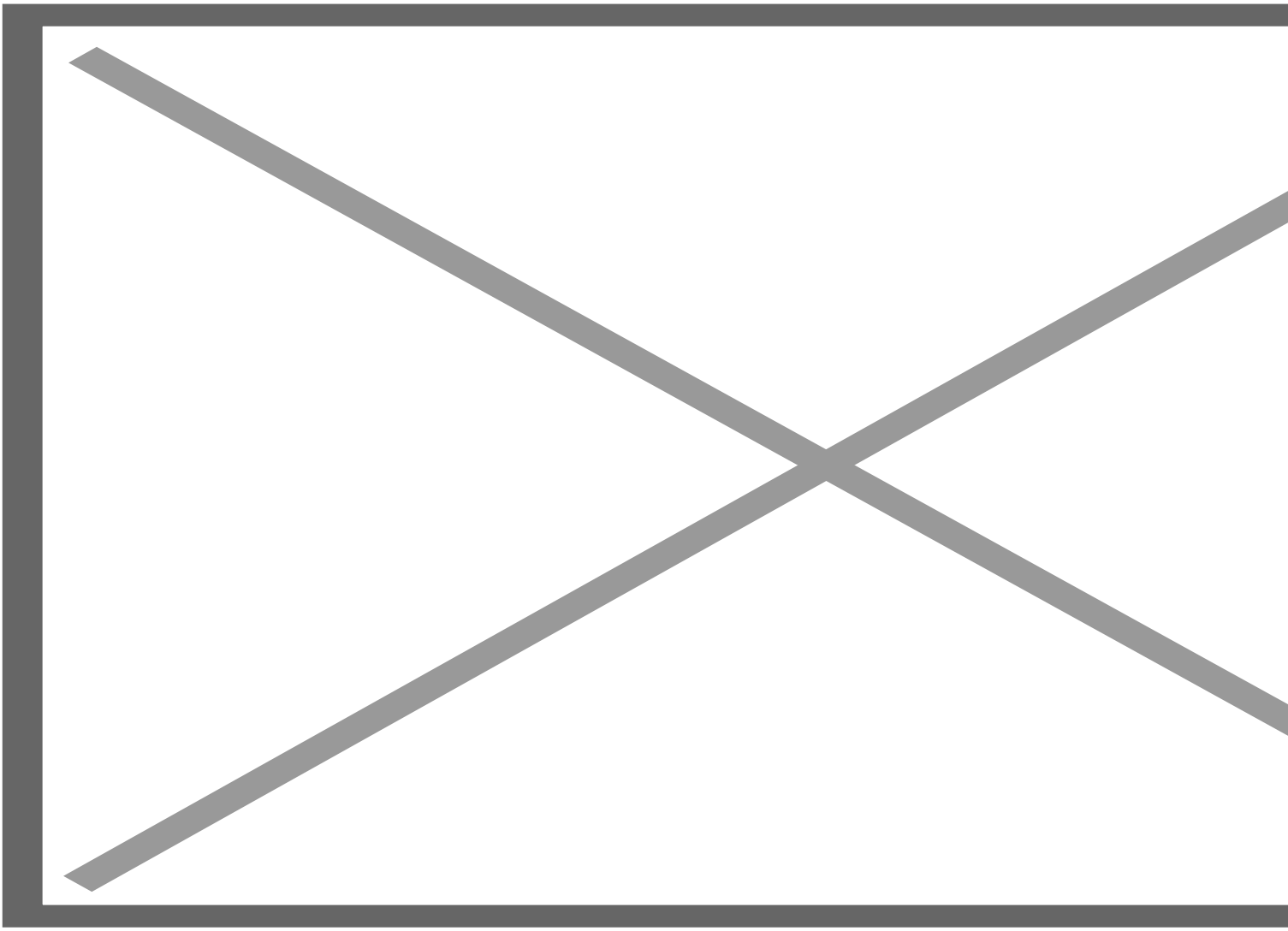
Workers rights

Employment Tax



01 July 2018

Bill Dodwell considers the recent decision in Pimlico Plumbers

The Supreme Court's decision in Pimlico Plumbers tells us two important things about employment rights and taxation of the gig economy.

The first point is that the issue isn't new. Lord Wilson, who delivered the judgement of the court, traced the history of workers' rights: 'As long ago as 1875 Parliament identified an intermediate category of working people falling between those who worked as employees under a contract of service and those who worked for others as independent contractors. For in that year it passed the Employers and Workmen Act, designed to give the county court an enlarged and flexible jurisdiction in disputes between an employer and a "workman"; and, by section 10, it defined a "workman" as, in effect, a manual labourer working for an employer under "a contract of

service or a contract personally to execute any work or labour".

'From 1970 onwards Parliament has taken the view that, while only employees under a contract of service should have full statutory protection against various forms of abuse by employers of their stronger economic position in the relationship, there were self-employed people whose services were so largely encompassed within the business of others that they should also have limited protection, in particular against discrimination but also against certain forms of exploitation on the part of those others… Now we have section 230(3) of the Equal Pay Act, in which a "worker" is defined to include not only, at (a), an employee under a contract of service but also, at (b), an individual who has entered into or works under

> "any other contract … whereby the individual undertakes to … 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 …"'

Today we call this category 'freelancers' or gig economy workers. The importance in the workforce of this intermediate category is growing. Engagers of services wish to have the benefits of a flexible workforce; the question is, what obligations are owed to workers in this category?

Mr Smith, a heating and plumbing engineer, claimed before the Employment Tribunal that he was an employee of Pimlico Plumbers under a contract of service and alternatively that he was a 'worker'. The Tribunal dismissed his employment claim but concluded he was a 'worker'. Pimlico appealed this finding to the Supreme Court.

Mr Smith's contract stated that he was an independent contractor, but he clearly operated in a manner set out by Pimlico. His income was half the fee charged by Pimlico to the customer. He had to represent Pimlico to the customer and wear a Pimlico uniform. In principle, he should work a five day, 40-hour week. He had to provide his own tools and materials except when provided by the company. His mobile phone was provided by the company.

The Courts had to consider whether Mr Smith had undertaken to 'provide personally' his work or services to Pimlico. 'Where, then, lie the boundaries of a right to substitute consistent with personal performance?' The contracts with Pimlico contained no express right of substitution, although Pimlico's manual did allow workers to benefit from 'assistance' – which the court took to involve working with other Pimlico operatives. The Tribunal had rejected Pimlico's contention that there was a wider facility to substitute and concluded that there was no unfettered right to substitute at will. The Court of Appeal interpreted the tribunal's findings to be that Mr Smith's facility to substitute another Pimlico operative to perform his work arose not from any contractual right to do so but by informal concession on the part of Pimlico. Having reached that conclusion, the court was easily able to acknowledge that Mr Smith did indeed have an obligation of personal service and thus qualified for the limited employment protections due to a worker.

Tax status was not part of the case, but Lord Walker noted 'Mr Smith correctly presented himself as self-employed for the purposes of income tax and VAT.' None of the court's conclusions on 'worker' status is affected by his taxation status.

There has been much debate on employment rights and tax treatment of individuals engaged in the so-called gig economy. The Supreme Court demonstrates that the issue goes back to 1875 – and that in some cases self-employed individuals do have additional rights below those of employees engaged under a contract of service.

Mr Smith was entitled to protections due to a 'worker' primarily because his contract with Pimlico Plumbers was one of personal service – and the company was not a client or customer of his.

We now know that employment law and tax status may overlap – but are not the same. Almost certainly, employees for employment rights and tax treatment are identical. ‘Workers’ may be both employed and self-employed for tax and national insurance purposes. No doubt many will argue that ‘workers’ should automatically be treated as employees for tax and NI. Going down that route may remove a valued flexibility – but we cannot ignore the current economic incentive to engage the self-employed rather than the employed.