# February Report

The gig economy has been high on the agenda for some months now culminating in today's decision in the Court of Appeal in the case of Pimlico Plumbers and Charlie Mullins v Gary Smith.

The Manak Employment Relations Breakfast Forum today at Côte Brasserie Bluewater happened to be looking at the gig economy and the ramifications for employers. At Breakfast Time this morning the Pimlico decision had not been handed down but it was a keen conversation point for our employers at the forum led by Tony Bertin.

The phrase gig economy has been taken as referring to freelancers taking assignments using technology platforms like Über. In fact, Uber BV (based in Holland) had been the Respondent in a tribunal case in the Autumn whether it was held the drivers were "workers" and, as such, were entitled to be paid at the Minimum Wage and receive Holiday pay. Uber argued that they just offered a technology platform to their 40,000 drivers. Uber's position was that it acts as an agent for the drivers through the use of the Uber smartphone app, and that the contract for the provision of the taxi service was between the individual Uber driver and passenger. As a consequence, Uber treated its drivers as being genuinely self-employed, and therefore not entitled to the employment rights applicable to workers.

The tribunal had little truck with that and analysed the key factors and found Über

- Interviews and recruits drivers, and subjects them to an induction process.
- Controls the passengers' key information and does not share this with the driver.
- Requires drivers to accept fares, and it issues warnings and ultimately locks drivers out of the app if too many fares are refused.

And found that the drivers were workers

- They have the app switched on.

- They are in the territory in which they are authorised to work.
- They are willing and able to accept fares.

And as such were entitled to be paid at the minimum wage rate and be paid for holidays.

The decision has potential implications for all businesses which seek to offer customers the type of job-by-job services provided by Uber through the engagement of independent contractors. It is clear that arrangements between the business, the individual and the customer will be closely scrutinised, and contracts will be disregarded if these do not reflect the reality of the arrangements. In fact, the more the company tries to regulate the activities the more likely it is that the operatives are Workers.

**What is worker?**

Section 230(3) of the Employment Rights Act 1996 defines workers to include individuals who undertake to perform personally any work or services for another party to the contract. There is an exclusion for circumstances where the other party to the contract can be considered a client or customer of any profession or business carried out by the individual. An individual who does not fall within this definition will usually be regarded as genuinely self-employed.

Practically speaking the only difference between a worker and an employee is that the Worker cannot claim unfair dismissal. Common distinctions are:

- Is the individual integrated into the business?
- Is there was anything to indicate that he played any part in that company.
- Did he come and go as he chose and determine how and when he worked subject to any practical exigencies such as emergencies and deadlines?
- Was he involved in company procedures such as appraisals?
- Was he paid when he did not work.
- Did he have specialist skills which gave him a stronger bargaining position in the market place,

**Is a courier a worker?**

Another tribunal case with QCs on both sides. She was claiming 2 days' unpaid holiday and that she was a worker. The Citysprint contract was headed **Confirmation of tender to supply courier services to CitySprint (UK) ltd**. Remember this is one woman and her push bike. Decision not surprisingly, was that the courier was a worker.

**Pimlico Plumbers**

All of this now is reinforced by the Court of Appeal case Pimlico Plumbers and Charlie Mullins v Gary Smith which is binding on the lower courts and tribunals. What were the key characteristics.? Bear in mind that this is not some put upon cycle courier. The Claimant was on any basis well paid; by all accounts £80,000 per year. It was the application of the law to the facts and a working pattern that would be familiar in construction, professional services and insurance. At the heart of the case was the assessment of whether it was a contract for personal services and the Appeal Court held it was and that fairly and squarely made it Worker status. To quote from the facts outlined

> You shall provide such building trade services are within your skills"; in sub-paragraph 2.2 that "You shall provide the Services for such periods as may be agreed with the Company … The actual days on which you will provide the Services will be agreed between you and the Company …"; in sub-paragraph 2.4 that "you will be competent to perform the work which you agree to carry out", and "you will promptly correct … any errors in your work …"; in sub-paragraph 2.5 that "If you are unable to work due to illness or injury … you will notify the Company"; and in sub-paragraph 3.9 that "You will have personal liability for the consequences of your services to the Company"

**Conclusions**

Common sense dictates that if an individual depends on your business for all or most of their income then, that person will be a worker. In the name of workplace standards, you may well impose methods of working and provide equipment and tools. you will probably and rightly have health & safety protocols which you apply. un less the individual is a professional or tradesperson conducting business on their own account and for a number of clients then assume that person will be a worker.