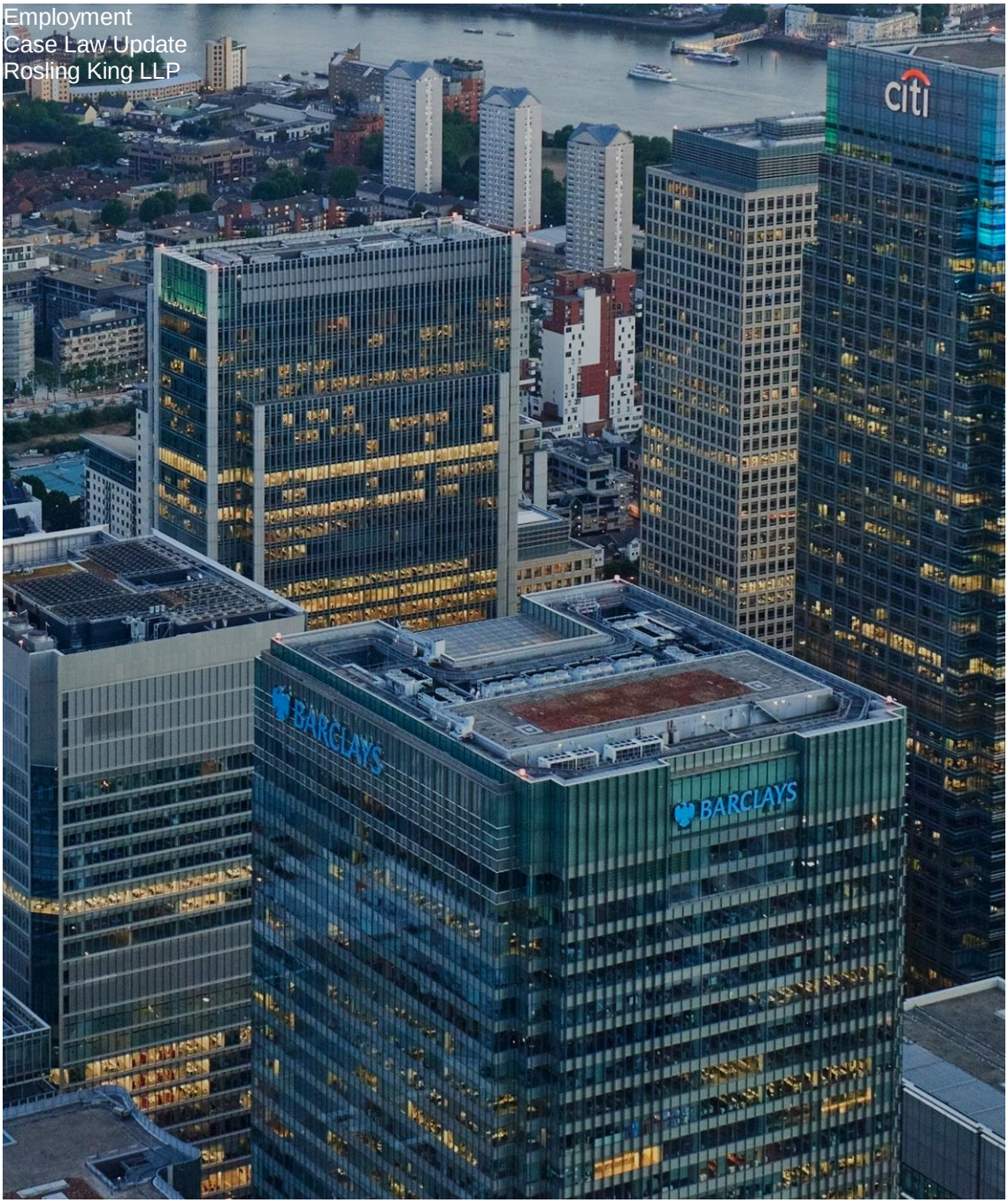
Employment
Case Law Update
Rosling King LLP



Background

Between August 2005 and April 2011 Mr Smith worked for Pimlico Plumbers Ltd (the "**Company**"). Mr Smith had two written agreements with the Company (the second of which replaced the first in 2009). Mr Smith presented himself as self-employed for the purposes of income tax and VAT.

In early 2011, Mr Smith suffered a heart attack and his contract with the Company was terminated. In August 2011, Mr Smith issued proceedings against the Company alleging unfair dismissal; that an unlawful deduction had been made to his wages; that he had not been paid for a period of statutory annual leave; and he had been discriminated against by reason of his disability.

The Employment Tribunal held that Mr Smith was not an employee of the Company and therefore could not complain of unfair dismissal. However, it ruled Mr Smith was a 'worker' under section 230(3) of the Employment Rights Act 1996 (the "**Act**") and within regulation 2(1) of the Working Times Regulations 1998 (the "**Regulations**") and further that Mr Smith had been in 'employment' under the Equality Act 2010. The result of the decision meant that Mr Smith could proceed with the majority of his complaints. The Company appealed to the Employment Appeal Tribunal and subsequently to the Court of Appeal but was unsuccessful on both occasions. As a result, the Company appealed to the Supreme Court.

Decision

In considering the appeal, the Supreme Court proceeded on the basis that the decisions of the Tribunal will "*stand or fall together*" because all three decisions had been founded upon the conclusion that Mr Smith had been a 'worker' under section 230(3) of the Act. This is because the Regulations define 'worker' in identical terms to the Act and case law suggested the meaning of 'employment' under the Equality Act 2010 was essentially the same.

In deciding whether Mr Smith was a 'worker', the Supreme Court had to consider two issues, namely:

1. Whether Mr Smith had undertaken to perform personally his work or services for the Company so as to be a worker within the meaning of section 230(3) of the Act; and

2. Whether the Company's status by virtue of the contract was of a client or customer of Mr Smith, with the effect that Mr Smith was not a 'worker' within the meaning of section 230(3) of the Act.

1. Personal Performance

Mr Smith had no express right in the contract to appoint a substitute to do his work but he did have a "*limited facility to substitute*" another Company operative and this arose "*not from any contractual right to do so but by informal concession*" on the part of the Company. The

question arose as to whether Mr Smith's right to substitute another Company operative was inconsistent with an obligation of personal performance? It was helpful to assess the significance of Mr Smith's right to substitute another Company operative "*by reference to whether the dominant feature of the contract remained personal performance on his part*."

The Supreme Court agreed with the Tribunal that the 2009 contract was clearly directed to performance by Mr Smith personally and the right to substitute was significantly limited as the substitute had to come from the ranks of the Company operatives. Therefore, the Tribunal was entitled to conclude that Mr Smith had established he was a 'worker' unless the status of the Company by virtue of the contract was that of a client, or customer of his.

2. Client or Customer?

The Supreme Court had to look at the wording of the contract to determine whether the Company was a client or customer of Mr Smith. The Company's contractual obligation was to offer work to Mr Smith but only if it was available. Mr Smith's contractual obligation, by contrast, was in principle to keep himself available for work for up to 40 hours on five days each week on such assignments as the Company might offer him.

On the evidence before it, the Supreme Court held that the Tribunal had by a reasonable margin been entitled to conclude that the Company could not be regarded as a client or customer of Mr Smith. Accordingly Mr Smith was a 'worker' and the Company's appeal was dismissed.

Commentary

This case is a further example of worker's rights being afforded to those who work in the so-called gig economy. Businesses should carefully consider whether those who perform work for them may fall within the definition of 'worker' before making decisions regarding their contracts.

It will be interesting to see what the government's reaction is to this ruling as it is currently consulting on the issue. We may see legislation brought in sooner, rather than later, which effectively overrules the Supreme Court's decision.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.