



Pupils and Pensions Auto-Enrolment

Purpose:	To draw chambers and barristers' attention to their obligations under the Pensions Act 2008
Scope of application:	All practising barristers
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Status and effect:	Please see the notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.

Summary

1. The decision in *Edmonds v Lawson* provides Court of Appeal authority for the assumption that pupil barristers do not work under a contract by which they undertake to do work or perform services personally for their pupil supervisor or for chambers as a whole. As a result, the Bar Council considers that they pupils will not ordinarily be workers for the purposes of Part 1 of the *Pensions Act 2008* and do not need to be auto-enrolled.
2. The judgment is however fifteen years old and the legal analysis of what constitutes worker/employee status may have developed over time. A court may take a different view, depending on the facts of a particular case.
3. Given the risk, individual chambers should ensure that both contractual arrangements with pupils and policies and procedures reflect arrangements which do not suggest a pupil has worker status. Chambers may consider obtaining independent legal advice as to its specific status.
4. Chambers should also keep in mind that 'pupils' and 'pupillage' are regulatory terms defined by the BSB Handbook. They do not include 'third six pupils', which is a form of practice that does not have a specific regulatory status as 'third six pupils' are for regulatory purposes barristers with full practising certificates. Chambers with 'third six' pupils should also ensure that any contractual arrangements or policies and procedures reflect arrangements which do not suggest a 'third six' pupil has worker status.

Legislation and case law overview

5. Concern has been expressed to the Bar Council about whether or not auto-enrolment for pensions applies to pupils under the Pensions Act 2008.

6. The legislation requires workers to be automatically enrolled in to a pension scheme by their employer, rather than having an option of opting into the scheme.

7. Section 3 Pensions Act 2008 requires an employer to make arrangements for the auto enrolment of any:

- “jobholder (a) who is aged at least 22,
- (b) who has not reached pensionable age, and
- (c) to whom earnings of more than £10,000 are payable by the employer in the relevant pay reference period

8. Section 1 Pensions Act 2008 defines a “jobholder” as being:

- “(1) ... a worker—
- (a) who is working or ordinarily works in Great Britain under the worker's contract,
- (b) who is aged at least 16 and under 75, and
- (c) to whom qualifying earnings are payable by the employer in the relevant pay reference period ...”

9. Section 88(3) Pensions Act 2008 defines a “worker” as being:

- “... an individual who has entered into or works under—
- (a) a contract of employment, or
- (b) any other contract by which the individual undertakes to do work or perform services personally for another party to the contract.”

10. Section 88(4)-(5) provides further:

- “(4) But a contract is not within subsection (3)(b) if the status of the other party is by virtue of the contract that of a client or customer of a profession or business undertaking carried on by the individual concerned.
- (5) For the purposes of subsection (3)(b), it does not matter whether the contract is express or implied or (if it is express) whether it is oral or in writing.”

11. A similar issue arose in relation to the National Minimum Wage legislation, concerning whether or not this applied to pupils.

12. It was held in The Court of Appeal in *Edmonds v Lawson & Others* [2000] ICR 567 that pupils were not ‘workers’ for the purposes of that legislation. The definition of worker under that legislation is effectively the same as that under the Pensions Act 2008.

13. The National Minimum Wage Act 1998 defines ‘worker’ at section 54:

“(3) In this Act “worker” (except in the phrases “agency worker” and “home worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under) —

- (a) a contract of employment; or
- (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, 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;

and any reference to a worker’s contract shall be construed accordingly.

14. The Court of Appeal held that there was a contract between a pupil and chambers, but that contract was not a contract of apprenticeship (and so the pupil was not a worker pursuant to section 54(3)(a)), and that contract was not a contract for meaning of section 54(3)(b), meaning the pupil was not a worker pursuant to that section either.

15. The decision that the pupil’s contract with chambers does not render him or her a worker for the purposes of section 54(3)(b) of the National Minimum Wage Act 1998 can be used as an analogy with section 88(3) of the Pensions Act 2008 as it is effectively the same terms.

16. The decision was reached on the basis that:

16.1. The purpose of the contract is to provide for the training of the pupil and there is no obligation upon the pupil to do anything that is not favourable to the pupil’s own training and development

16.2. Where work is carried out by a second six pupil in his or her own right, the work is not being carried out for the pupil supervisor or chambers but for the benefit of the pupil, and

16.3. Where the pupil carries out remunerated work for a particular members of chambers so that they are entitled to be paid, those particular members of chambers are to be regarded as the client of the pupil for the purposes of the pupil's own professional practice. Overall, the pupil was not contracting to carry out work for the chambers or pupil supervisor.

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