EMPLOYMENT TRIBUNALS

Claimant: Mr M Nowotnik

Respondent: Cedar Construction Services Limited

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 10 December 2025

Before: Employment Judge Brewer

Representation

Claimant: Mr W Slivinsky, Consultant
Respondent: Ms A Zablocka, Consultant

Interpreter: Ms I Konko

JUDGMENT

The judgment of the Tribunal is that during the period from July 2023 to April 2024, the claimant was a worker for the respondent in the sense set out in section 230(3)(b) of the Employment Rights Act 1996.

REASONS

Introduction

1. This case came before Employment Judge Butler at a case management hearing on 23 July 2025. He ordered that there be a public preliminary hearing to determine whether "the claimant was an employee, worker or self-employed contractor".

2. In the event it transpired that the claimant was not contending that he was employed by the respondent. He contended that he was a so-called limb b worker.

3. At the hearing, I had an agreed bundle of document, a written skeleton argument from Mr Slivinsky and written witness statements, and I heard oral evidence from, the claimant, Ms Paulina Cedro, a Director of the respondent, Mr Patryk Trzaska, a self-employed subcontractor for the respondent, and Mr Tomasz Kwiatkowski, also a self-employed subcontractor for the respondent. I heard brief oral submissions from both representatives. I have taken all of this into account in reaching my judgment.

4. I want to put on record my thanks to our interpreter Ms Konko who did amazing work interpreting in a way which did not cause too much delay in the hearing.

Issues

5. The agreed issue is whether the claimant was a limb b worker or was 'genuinely' self-employed when providing work for the respondent.

Law

6. I set out below a brief description of the relevant law.

7. Section 230(3) of the Employment Rights Act 1996 (ERA) defines a 'worker' as an individual who has entered into or works under (or, where the employment has ceased, worked under):

   7.1. a contract of employment ('limb (a)'), or

   7.2. any other contract, whether express or implied and (if 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 ('limb (b)').

8. Determining whether a contract includes an obligation of personal performance is a matter of construction and is not necessarily dependent on what happens in practice. It is of course relevant to note the Supreme Court's decision in **Uber BV and ors v Aslam and ors** 2021 ICR 657, SC, which established that the focus must be on determining the true agreement between the parties, by reference not just to the contract terms but to all the relevant circumstances.

9. Where an individual contracts directly with a client (and so a contract, express or implied, is in place), the three key questions for determining whether he or she is in fact genuinely self-employed, or a worker are therefore:

   9.1. is there an obligation of personal service,

   9.2. does the individual provide his or her services as part of a business or profession that he or she carries on,

   9.3. are the services provided to a client or customer of that business or profession?

Personal service

10. A common drafting tactic adopted by those who want to avoid a contract giving rise to limb (b) worker status is to include a 'substitution clause' — i.e. a clause that ostensibly allows the work to be done by someone who is not a party to the contract. The intention is that such a clause negates the obligation to personally perform the work or services, thereby depriving the contract of an essential component of 'worker' status.

Dominant purpose test

11. A line of case law on the 'contract personally to do work' test has focused on the question of whether the dominant purpose of the contract is the provision of personal services.

12. In **James v Redcats (Brands) Ltd** 2007 ICR 1006, EAT, Mr Justice Elias, then President of the EAT, held that it was appropriate to use the dominant purpose test in the context of limb (b) worker status as it attempts to identify whether a contract should be located in the field of dependent work relationships or whether it is in essence a contract between two independent business undertakings. However, Elias P noted that focusing on the dominant purpose test has its difficulties because it is not always clear what the dominant purpose of a contract is. He considered that the problem lay in the word 'purpose', which can mean both immediate and longer-term objectives.

13. In **Pimlico Plumbers Ltd and anor v Smith** 2018 ICR 1511, SC, the Supreme Court held that it was helpful to assess the significance of S's right of substitution by reference to whether the dominant feature of the contract remained personal performance on his part, although it stressed that this did not supplant the statutory test. And in **Varnish v British Cycling Federation (t/a British Cycling) 2021** ICR 44, EAT, the EAT stated that it would not be an error of law for a tribunal to consider the 'dominant purpose' of a contract when determining whether an individual has 'worker' status under S.230(3)(b) ERA. However, it cautioned that the answer given to this question must not be treated as determinative on its own. Furthermore, tribunals should beware the ambiguity of the word 'purpose', as highlighted by Elias P in James: the focus should be on the *immediate* purpose of the contract, or the dominant feature.

Client or customer exception

14. The 'integration test' set down by Mr Justice Langstaff in **Cotswold Developments Construction Ltd v Williams** 2006 IRLR 181, EAT, may be relevant in determining whether a person is a worker or in business dealing with a customer or client. According to this test, it is possible (in most cases) to determine whether a person is providing services to a customer or client by focusing on whether that individual actively markets his or her services as an independent person to the world in general (and thus has clients or customers) or whether he or she is recruited to work for the principal as an integral part of its organisation.

15. Other relevant case law is cited below.

Findings of fact

16. I make the following findings of fact (references are to pages in the bundle).

17. The claimant is a person who provides what was described as general building work including tiling, painting and so on.

18. The claimant carried out some work for the respondent in 2020 and in early 2022.

19. However, the period with which this case is concerned is from July 2023 through to April 2024 (which I shall refer to as the relevant period).

20. During the relevant period the claimant worked as a general builder for the respondent. The respondent's main business during the relevant period was building Houses of Multiple Occupation.

21. A contract requires an exchange of promises. A contract of employment requires a specific exchange of promises, often referred to as mutuality of obligation being an obligation to provide and if provided, to do work. Here there was no obligation on the respondent to offer work to the claimant and if offered, no obligation on the claimant to accept it. However, he was paid to work, and I am satisfied that there was a contract between the parties. The key question is, of course, what type of contract was it.

22. Since there was no written contract nor any evidence of specific oral conversations about contractual terms, I had to work from the evidence I had before me to ascertain what the terms of the contract were. In doing so I adopt the approach set out in the speech of Lord Hoffmann in **Carmichael v National Power Plc** [1999] ICR 1226 at 1233C-1234D, where he pointed out (at 1233C) that the intention of the parties to a contract in the employment sphere may have to be discovered from oral exchanges and conduct, concluding (at 1234C-D):

> *"… I think that it was open to the Industrial Tribunal to find, as a fact, that the parties did not intend the letters to be sole record of their agreement but intended that it should be contained partly in the letters, partly in oral exchanges at the interviews or elsewhere and partly left to evolve by conduct as time went on. This would not be untypical of agreements by which people are engaged to do work, whether as employees or otherwise. ….. On this basis, the ascertainment of the terms of the agreement was a question of fact with which the Employment Appeal Tribunal were right not to interfere."*

23. The respondent requires all of those who it engages to be Construction Industry Scheme (CIS) registered. Under the CIS, contractors (which confusingly means the person engaging the subcontractor, so in this case the respondent) deduct money from a subcontractor's (i.e. the claimant in this case) payments and pass it to HM Revenue and Customs (HMRC). The deductions count as advance payments towards the subcontractor's tax and National Insurance. Contractors must register for the scheme. Subcontractors do not have to register, but deductions are taken from their payments at a higher rate if they are not registered.

24. The claimant was CIS registered, and the respondent deducted the required 20% from their payments to him which they accordingly passed on to HMRC.

25. The claimant submitted his own tax return (with the assistance of an accountant). A copy of the relevant tax return is at [92].

26. The tax return shows that in the relevant period the clamant earned £30,672.00 from 'Building'.

27. The payments to the claimant from the respondent are shown at [41 – 80]. These show net pay in the relevant period of the sum set out in the tax return.

28. The claimant was paid £200.00 per day. He was not paid expenses but any allowable expenses he incurred in connection with the work he did for the respondent was set off against his earnings as shown in the tax return [97]. This of course acted to reduce his taxable earnings.

29. To receive pay, the claimant was obliged to inform the respondent of the hours he had worked in any given day/week.

30. The claimant did not receive sick pay, holiday pay or any of the benefits normally associated with employment.

31. If the claimant did not turn up for work, which happened on a few occasions, he was not paid.

32. The claimant provided some of his own basic tools, but the respondent made available for his and others use, electric tools. The heavy equipment used on site, such as earth movers (which they hire) were provided by the respondent and the respondent provided all materials.

33. The responded had branded T-shirts and hoodies, but I am satisfied that there was no obligation on the claimant to wear them. Anyone who wished to could, and the claimant did, but, as I say, there was no requirement that he do so.

34. During the relevant period the claimant was free to accept work and free to work elsewhere. As I have set out above, based on the evidence before me, during the relevant period the claimant worked exclusively for the respondent.

35. The claimant inevitably worked as part of the team undertaking work on the projects he was assigned to at any given time. As an experienced subcontractor he was relied upon by Mr Trzaska, who managed all of the respondent's sites, to stand in for him when he was at a different site and unavailable. However, I am satisfied that in so doing the claimant was not acting in a managerial capacity. In reality the respondent operated as one would expect a building operation to operate. There was a schedule of work, a start date, a completion date and agreed pricing. There are penalties if the work overruns.

36. Mr Trzaska, was managerially responsible for getting the work done to schedule and when he stood in for Mr Trzaska, the claimant was a conduit for Mr Trzaska's instructions. The claimant was in no sense a 'manager'.

37. The respondent's sites operated between 8.00 am and 4.00 pm; an 8-hour day. The daily rate agreed with the claimant reflects that work pattern. The payments to the claimant in the relevant period indicate that he fairly regularly met the 8-hour day, but not invariably.

38. The claimant was, on occasion, spoken to about failing to give sufficient notice of unavailability but there is no evidence that any capability or disciplinary procedure was ever applied to him.

39. There was some discussion about 'substitution'. That discussion, it seems to me, was more relevant to the employment question, but for the sake of completeness, my finding on the point is as follows.

40. It was suggested by Mr Trzaska that the claimant could, if he wished, send a substitute to do his work. But when pressed by Mr Slivinsky on this point, it seems to me that the evidence was that if for any reason the claimant could not attend work, and if he had found someone to help the respondent who had the necessary skills, they could have used that person. That does not seem to me to be the right to send a substitute but more the ability on the part of the claimant to offer the name of someone who could help the respondent if needed. In any event I consider that nothing in this case turns on this point.

41. Finally, there was also some discussion about whether the claimant sent invoices against which he was paid. But again, that seems to me to be relevant to the employment versus self-employment argument. In any event I am satisfied that for all practical purposes, since the claimant only got paid for the time he worked, his provision of the number of hours he worked was the provision of information against which he got paid which is tantamount to providing an invoice.

Discussion and conclusions

42. I turn now to my conclusions on the question set out in the list of issues.

43. There is no dispute that there was a contract between the parties in the relevant period. It has not been argued otherwise.

44. The claimant does not contend he was employed by the respondent. In my judgment he was right to do so. On the facts there was no mutuality of obligation (in the employment sense) as there was no obligation on the respondent to offer work and no obligation on the claimant to accept it if offered.

45. However, there was clearly mutuality of obligation in the general contract sense; that is there was a promise of paid work which the claimant accepted, the work was done, and the respondent paid the claimant for doing that work. There was therefore a contract.

46. That begs the question as to the nature of the contract. Was the claimant a limb b worker or was he genuinely self-employed?

47. I mean no discourtesy to Ms Zablocka when I mention that her submissions seemed to focus only on the employment versus self-employment question, and she seemed completely at sea when I asked for her submissions on the actual

question before me, which is not whether the claimant was self-employed, as self-evidently he was, but rather whether, as a self-employed person, he was carrying on a profession or business undertaking and that the respondent was receiving the claimant's services as a client or customer of that profession or business undertaking, because that is the only escape route from limb b worker status. Suffice it to say Ms Zablocka made no submissions on the point.

48. Mr Slivinksy was clear that in no sense was the claimant carrying on a business. He was, therefore, he said, a limb b worker.

49. Early guidance on the 'client or customer' exception in S.230(3)(b) ERA was given by the EAT in **Byrne Bros (Formwork) Ltd v Baird and ors** 2002 ICR 667, EAT. Describing it as a 'clumsily worded exception', the EAT held that it was nevertheless clear that it was intended to create an 'intermediate class of protected worker' made up of individuals who were not employees but equally could not be regarded as carrying on a business. According to the EAT,

> *'the essence of the intended distinction* [created by the exception] *must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves'.*

50. It must also be remembered that it is not sufficient to show that the claimant carried on a profession or business undertaking. It must also be shown that the respondent was a client or customer of that undertaking.

51. Looking at the dominant purpose of the agreement between the parties, it seems clear to me that the purpose was to engage the services of an experienced worker to undertake general building work and be someone who could be relied on to stand in for the site manager, albeit in the limited way I have set out above.

52. In that context, there is no evidence of a wider business, no evidence that the respondent was one of the claimant's clients or customers. He was doing the same work he would have been doing had the respondent's model been one of employment rather than subcontracting.

53. There is no evidence that the claimant actively marketed his services, indeed the opposite seems to have been the case, he responded to adverts for building work, he did not place adverts advertising his building services.

54. Finally, and insofar as integration is relevant (here I refer to integration in the self-employed sense, not the integration test applied as part of determining if a person was an employee), it seems to me that the claimant was as integrated into the respondent's business as it was possible to be given the model they operate for their workers. He was to put it simply, an important part of the team, which is why his occasional short-notice absences were so problematic.

55. For all of these reasons I am satisfied that the claimant was a worker for the respondent in the sense set out in section 230(3)(b) of the Employment Rights Act 1996.

Employment Judge Brewer

Date: 10 December 2025

JUDGMENT SENT TO THE PARTIES ON

.....04 February 2026.....

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