

# THE INDUSTRIAL TRIBUNALS

CASE REF: 2372/20

**CLAIMANT:** Aleksander Mihaljev

**RESPONDENT:** Anncor Limited

## JUDGMENT

The unanimous judgment of the tribunal is that the claimant is not a worker of the respondent within the meaning of the Employment Rights (Northern Ireland) Order 1996. Accordingly, the tribunal dismisses the claimant's claim of unauthorised deductions from wages.

### CONSTITUTION OF TRIBUNAL

**Employment Judge:** Employment Judge Orr

**Members:** Mr A Kerr  
Mr I Atcheson

### APPEARANCES:

The claimant appeared and was self-representing.

The respondent was represented by Mr Thomas Cassidy, Managing Director of the respondent company.

### BACKGROUND

1. The respondent is a building and maintenance company based in Portglenone. The claimant was engaged by the respondent to carry out joinery work on a site in Carryduff from 15 April 2019 until the respondent's contract with the main contractor - Connolly and Fee Limited, ended in and around 16 January 2020. The claimant entered into a self-employed contract with Connolly and Fee Limited on an unspecified date in January 2020.
2. The claimant claims unauthorised deductions from wages pursuant to Article 45 of the Employment Rights (Northern Ireland) Order 1996 in respect of unpaid wages for the following dates:-
  - 16-20 December 2019
  - 6-10 January 2020
  - 13-16 January 2020

3. The legal and factual issues to be determined in this case are as follows:-
  - (a) Is the claimant a “worker” pursuant to the Employment Rights (Northern Ireland) Order 1996 or is the claimant a self-employed contractor?
  - (b) If the claimant is a worker, did the claimant suffer unauthorised deductions of wages?

## EVIDENCE

4. The tribunal heard evidence from the claimant on his own behalf and evidence from Mr Cassidy on behalf of the respondent. The tribunal was also provided with a bundle of documents from the respondent and a bundle of documents from the claimant.

## THE LAW

5. The definition of ‘worker’ is contained in Article 3 of the Employment Rights (Northern Ireland) Order 1996 as follows:-

*“Employees, Workers*

(3) *In this Order “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.”*

6. **IDS on Contracts of Employment (August 2019 Edition)** provides at paragraph 2.119:-

*“In contrast to ‘an employee’, a limb(b) worker is comprehensively defined in the legislation and ‘there can be no substitute for applying the words of the statute to the facts of the individual case’ – per Lady Hale in **Bates van Winkelhof v Clyde and Company LLP and Another [2014] ICR 730, FC**. However, Lady Hale agreed with Lord Justice Maurice Kay in **Hospital Medical Group Limited v Westwood [2013] ICR 415, CA**, that there is not ‘a single key to unlock the words of the statute in every case’. Distilling the statutory definition into its constituent elements, the following factors are necessary for an individual to fall within the definition of ‘worker’:-*

- *there must be a contract, whether expressed or implied, and, if expressed, whether written or oral.*

- *that contract must provide for the individual to carry out personal services, and*
- *those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's professional or business undertaking."*

7. The Supreme Court in **Uber BV and Others v Aslam and Others Worker's Status v Self-Employment [2021] UKSC5** recently considered the question of "worker" status:-

At paragraph 71

*"... The paradigm case of worker whom the legislation is designed to protect is an employee, defined as an individual who works under a contract of employment. In addition, however, the statutory definition of a "worker" includes in limb (b) a further category of individuals who are not employees. The purpose of including such individuals within the scope of the legislation was clearly elucidated by Mr Recorder Underhill QC giving the judgment of the Employment Appeal Tribunal in **Byrne Brothers (Formwork) Limited v Baird [2002] ICR 667**, paragraph 17(4).*

*"The policy behind the inclusion of limb (b) ... can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as the employees stricto sensu – workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the case of Part II of the Employment Rights Act 1996 of the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection, is that they are in a sub-ordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction 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 in the relevant respects".*

At paragraph 72

*"... Although there is no single definition of the term "worker", which appears in a large number of different contexts in the Treaties and EU legislation, there has been a degree of convergence in the approach adopted. In **Allonby v Accrington and Rossendale College (case C-256/01) [2004] ICR 1328**; the European Court of Justice held at paragraph 67, that in the Treaty provision which guarantees male and female workers' equal pay for equal work (at that time, Article 141 of the EC Treaty);*

*“there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration ...”*

The Court added (at para 68) that the authors of the Treaty clearly did not intend that the term “worker” should include “independent providers of services who are not in a relationship of subordination with the person who receives the services”.

At paragraph 74, Lord Leggett continued as follows:-

*“In the **Bates Van Winkelhof** case at para 39, Baroness Hale cautioned that, while “subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker.” In that case the Supreme Court held that a Solicitor who was a member of a limited liability partnership was a worker essentially for the reasons that she could not market her services as a Solicitor to anyone other than the LLP and was an integral part of their business. While not necessarily connoting subordination, integration into the business of the person to whom personal services are provided and the inability to market those services to anyone else gave rise to dependency on a particular relationship which may also render an individual vulnerable to exploitation.”*

8. In **Byrne Brothers (Formwork) Limited v Baird [2002] IRLR 96** at paragraph 18 Lord Justice Underhill (as he then was) stated as follows:-

*“Self-employed labour only sub-contractors in the construction industry are, it seems to us, a good example of the kind of worker who may well not be carrying on a business undertaking in the sense of the definition; and for whom the “intermediate category” created by limb (b) was designed. There can be no general rule, and we should not be understood as propounding one: cases cannot be decided by applying labels. But typically labour-only sub-contractors will, though nominally free to move from contractor to contractor, in practice work for long periods for a single employer as an integrated part of his workforce: their specialist skills may be limited, they may provide little or nothing by way of equipment and undertake little or no economic risk. They have long been regarded as being near the border between employment and self-employment: it is for this reason that their status has for many years been a matter of controversy with the Inland Revenue and has also given rise to a string of reported cases (see, e.g., **Lee v Chung and Shun Shing Construction Engineering Company Limited [1990] ICR 409** and **Lane v Shire Roofing Company (Oxford) Limited [1995] IRLR 493**). Cases which “could have gone either way” under the old test ought now generally to be caught under the new test in “limb (b)”. The fact that such a sub-contractor may be regarded by the Inland Revenue as self-employed, and holds certificates to prove it, is relevant but not decisive.”*

9. Lord Justice Underhill (as he then was) in **Windle v Secretary of State for Justice [2017] 3 ALL ER 568** in the Court of Appeal quoted Lord Clarke’s words in **Hashwani v Givraj [2011] UKSC 40**:-

*“The essential questions ... are ... those identified in paras 67 and 68 of **Allonby [2004] ICR 1327**, namely whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration, or, on the other hand he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties .... The answer will depend upon an analysis of the substance of the matter having regard to all the circumstances of the case”.* (Paragraph 11).

10. On the issue of mutuality of obligation Elias LJ in **Quashi v Stringfellows Restaurant Limited [2012] EWCA Civ 1735** stated at paragraphs 10-12:-

*“10. An issue that arises in this case is the significance of mutuality of obligation in the employment contract. Every bilateral contract requires mutual obligations; they constitute the consideration from each party necessary to create the contract. Typically an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to keep the relationship in place until it is lawfully severed, usually by termination on notice. But there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed; see the decisions of the Court of Appeal in **Meechan v Secretary of State for Employment [1997] IRLR 353** and **Cornwall County Council v Prater [2006] IRLR 362**.*

*11. Where the employee working on discrete separate engagements needs to establish a particular period of continuous employment in order to be entitled to certain rights, it will usually be necessary to show that the contract of employment continues between engagements ...*

*12. In order for the contract to remain in force, it is necessary to show that there is at least what has been termed “an irreducible minimum of obligation”, either express or implied, which continues during the breaks in work engagements; see the judgment of Stevens LJ in **Nethermere (Saint Neats) v Gardner [1984] ICR 612** approved by Lord Irvine of Lairg in **Carmichael v National Power Plc [1999] ICR 1226**. Where this occurs, these contracts are often referred to as “global” or “umbrella” contracts because they are overarching contracts punctuated by periods of work. However, whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference when he or she does work it is to provide services as an independent contract rather than as an employee.”*

11. In **Byrne Brothers (Formwork) Limited v Baird [2002] IRLR 96** Lord Justice Underhill stated at Paragraph 25:-

*“We accept that mutuality of obligation is a necessary element in a ‘limb (b) contract’ as well as in a contract of employment. The basis of the requirement of mutuality is not peculiar to the contracts of employment; it arises as part of the general law of contract.”*

12. Mr Justice Langstaff in **Cotswold Development Construction Limited v Williams [2005] EAT 0457/05** at paragraph 53 stated as follows:-

*“It is clear that the statute recognises that there will be workers who are not employees but who do undertake to do work personally for another in circumstances in which that “other” is neither a client nor customer of theirs – and thus that the definition of who is a “client” or “customer” cannot depend upon the fact that the contract is being made with someone who provides personal services but not as an employee. The distinction is not that between employee and independent contractor. The paradigm case falling within the proviso to 2(b) is that of a person working within one of the established professions; solicitor and client, barrister and client, accountant, architect, etc. The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shopowner, or of the customer of a tradesman such as domestic plumber, cabinet maker or portrait painter who commercially markets services as such. Thus viewed, it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal’s operations, will in most cases demonstrate on which side of the line a given person falls”.*

13. The claimant provided the tribunal with a copy of the judgment of the Supreme Court in **Pimlico Plumbers Ltd and another –v- Smith [2018] UKSC 29**. This is a case in which the claimant worked under a written contract which described him as a self-employed independent contractor. The court found that there was a limited right of substitution by reason of the fact that the plumbers could swap assignments between themselves only on the basis that the swap was with another plumber engaged by Pimlico Plumbers Limited on the same contractual terms. The court held this constituted an obligation to perform services personally. The tribunal notes that the question of whether the claimant could substitute himself with another joiner did not arise, there was no evidence adduced by the claimant or the respondent on the issue of substitution.
14. The relevant statutory provision in respect of the right not to suffer an unauthorised deduction from wages is contained in Article 45 of the Employment Rights (Northern Ireland) Order 1996 and provides as follows:-

***“Right not to suffer unauthorised deductions***

**45.—(1)** *An employer shall not make a deduction from wages of a worker employed by him unless—*

- (a) *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
  - (b) *the worker has previously signified in writing his agreement or consent to the making of the deduction.*
- (2) *In this Article “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—*
- (a) *in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
  - (b) *in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
- (3) *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

## **RELEVANT FINDINGS OF FACT**

15. The tribunal made the following findings of fact on the balance of probabilities on the basis of the documentary and oral evidence together with the submissions of both parties. The findings of fact relate only to the issues to be determined.
16. It is common case that the claimant responded to an advertisement placed by the respondent on Gumtree.com/jobs for the role of joiner/apprentice joiner. The claimant forwarded his CV to the respondent on the 15 March 2019.
17. By email of 5 April 2019, Mr Cassidy responded as follows:-
- “We are in a position to offer you work the rate is £10.00 per hour self-employed joiners. You would be able to start this Monday the site is in Carryduff. Hours on site 7-30/4-30.” (sic).*
18. By email of the same date, the claimant responded:-
- “Hi Thomas and thanks for getting back to me. I am fully booked for the next week and I might be able to start on Monday 15<sup>th</sup> if that works for you? Also when it comes to wage can we at least make it for £11 p/h? Kind regards Aleks”*

19. This was the extent of any written terms of agreement between the claimant and the respondent. There was no written contract or written agreement of any other nature.
20. There was no dispute between the parties and the claimant fully accepted in evidence that he was engaged by the respondent to work on the Carryduff site as a self-employed joiner. The tribunal unanimously finds that the clear intention of both parties was that the claimant was engaged on a self-employed basis.
21. There was also no dispute that the claimant received supervision and instructions equally from Mr Cassidy, of the respondent and Mr Rooney, the site manager of the main contractor Connolly and Fee Limited.
22. It is common case that the claimant received payment only for the days he attended the Carryduff site and carried out his joinery services. The claimant produced copy payment cheques received from the respondent and these reflected the fact that payment was made only for the days the claimant was on site. There was no dispute that the claimant was at liberty to choose not to report to the Carryduff site at any time on any particular day. The claimant presented copy WhatsApp messages to the tribunal of when he informed Mr Cassidy that he would not be on site and the tribunal notes that at least on one occasion he did so with little or no notice.
23. There was also no dispute that the claimant was not paid sick pay or holiday pay at any time and the tribunal accepts the claimant's evidence that he had no expectation of any entitlement to payment for sickness absence or holiday pay at any time. It is common case that the claimant was out of the country on holiday in September 2019 for a period of over three weeks. He simply informed Mr Cassidy via WhatsApp of his intended date of return to the site.
24. The tribunal determines from the evidence of both Mr Cassidy and the claimant that there was no obligation on the respondent to provide the claimant with work; nor was there any obligation on the claimant to carry out his services for the respondent or even to attend the Carryduff site. The tribunal finds that the claimant understood that he was engaged by the respondent to provide his joinery services on the Carryduff site only. This was a one off assignment limited to this site. The unchallenged evidence before the tribunal was that the respondent company engaged other joiners, although not necessarily on the Carryduff site. It was also clear from the evidence that the claimant could only attend the Carryduff site when the site was open and this was entirely outside the control of the respondent. When the site was closed by the main contractor at Christmas, the claimant was free to market and provide his services elsewhere as evidenced by the WhatsApp exchanges between the claimant and Mr Cassidy. The claimant sought alternative work elsewhere when the Carryduff site closed for the Christmas period. Although not determinative of the issue, at no time did the claimant assert or suggest that the respondent was obliged or responsible for providing him with work.
25. The tribunal finds from the content of the WhatsApp exchanges between the claimant and Mr Cassidy that the claimant was instructed on 19 December 2019 by Mr Cassidy not to undertake any further work on the Carryduff site. He specifically stated, "*don't do anything under no circumstances*" (19 December 2019). The claimant responded on 20 December 2019:-



*“I hope you will be better soon and get back. Money is the least of the problems. Things are heating up a bit here. They might consider of hiring another joinery company because of delays which would leave us out of work. Also instead of 02. of January they moved the start day on 6<sup>th</sup>. That’s 16 days of break which is total nonsense. Better talk with Andy and do something before they do. Just my honest advice. I am trying to find something to do until 6<sup>th</sup>. If you have anything anywhere please let me know. This was unplanned and decided to close the site two days ago. Nobody told us on time.” (sic)*

Mr Cassidy responded as follows:-

*“There a joke Alex there cutting my payments all the time listen if you can get something until the 2<sup>nd</sup> week in January just until I can get a week on site to get things moving again.” (sic)*

26. The claimant sought to argue that he had not received any instructions from the respondent to not attend the Carryduff site. He contended that he was under the impression that he was to return to the site in January 2020. In this regard the claimant relied on the contents of the WhatsApp exchange set out above at paragraph 25. The tribunal unanimously rejects this argument and finds from the clear and unambiguous content of the WhatsApp messages that the claimant was instructed not to report to the Carryduff site.
27. It is also apparent from the content of the WhatsApp exchanges that the claimant was fully aware of a dispute between the respondent company and the main contractor, Connolly and Fee Limited. The nature of this dispute is not relevant to the matters to be determined in this claim, save to the extent that the respondent company did not return to the Carryduff site after the Christmas period, (i.e. from 23 December 2019). Despite this, and the instruction not to attend the site, the claimant returned to the Carryduff site on 6 January 2020 and continued to provide his joinery services. The claimant accepted in cross-examination that no one had instructed him to attend the site. The tribunal unanimously finds that he did so by choice and at his own risk as he had not been engaged by the respondent to do so. From this date the claimant received instructions only from the site manager of Connolly and Fee Limited.
28. The claimant entered into a contract with the main contractor, Connolly and Fee Limited in January 2020 on a self-employed basis. He did not contact the respondent company or Mr Cassidy to inform him of this nor did he give any notice; furthermore there was no suggestion by the respondent or the claimant that the claimant was required to give notice.
29. The tribunal accepts the claimant’s evidence that at all times he was solely responsible for submission of his annual self-assessment tax returns under which he claimed expenses as a self-employed contractor and had a unique tax reference (UTR) for the purposes of his self-assessment tax returns. These expenses included expenditure incurred by the claimant for tools, clothing and travel costs.
30. It was common case that the respondent provided the claimant with a hard hat and high visibility vest displaying the respondent company’s name; there was no dispute

that this was means of identifying personnel on site and a health and safety requirement.

## CONCLUSION

31. On the question of whether an individual is a worker or self-employed, the tribunal must conduct a balancing exercise. In furtherance of this, it is necessary to step back and consider the overall position taking into consideration and weighing up a number of different factors which are indicative of the reality of the contractual position between the respective parties. As the legal authorities set out above have made clear any single factor is not determinative of the issue.
32. Based on the unanimous findings of fact as set out above and in applying the relevant legal principles, the tribunal determines that the claimant is not a 'worker' as defined by the Employment Rights (Northern Ireland) Order 1996 by reason of the following:-
  - (1) Both parties entered into the arrangement with the clear intention and understanding that the claimant was engaged on a self-employed basis.
  - (2) The claimant was entirely free to choose when he commenced on site and if and to whom he provided his joinery services.
  - (3) The claimant negotiated and set his own hourly rate and was responsible for his annual self-assessment HMRC tax returns. There was no entitlement or expectation of paid annual leave or sick pay.
  - (4) The site opening times were dictated by the main contractor on site and not the respondent. The claimant was supervised on site and took instruction equally from both, Mr Cassidy of the respondent and the site manager of Connolly and Fee Limited.
  - (5) The tribunal concludes that the arrangement between the parties was for the claimant to undertake joinery work at a site in Carryduff. There was no mutuality of obligation. The claimant was not obliged to provide his services to the respondent nor was the respondent under any obligation to guarantee work for the claimant. The tribunal's concludes, on the facts as found, that there was no "*irreducible minimum of obligation*" and that the claimant contracted to provide his services as a self-employed contractor at all times. It was clear from the evidence that the claimant was fully aware and understood that the respondent and/or the main contractor engaged other joiners to carry out joinery work irrespective of whether or not the claimant attended on site.
  - (6) There was no evidence that the claimant was integrated into the respondent's business and nothing to suggest that he was an integral part of the respondent's business. The tribunal is not satisfied that the provision of a hard hat and high visibility vest is evidence of the claimant being integrated into the respondent's business – this was a health and safety requirement for all personnel on site and not, on the facts of this case, indicative of worker status.

- (7) Neither the claimant nor the respondent suggested that the claimant could or could not substitute his joinery services. There was no evidence adduced by either party on the issue of substitution; a right of substitution as per ***Pimlico Plumbers Ltd and another –v- Smith [2018] UKSC 29*** did not arise on the facts of this case.
- (8) As per the findings of fact set out above, the claimant was entirely independent and received instruction from both the respondent and the main contractor. He attended the site when he chose and provided his joinery services during the hours the site was open which was dictated by the main contractor. The tribunal unanimously finds from all the evidence that the claimant was not in a subordinate or dependent position vis-à-vis the respondent company.
- (9) This was a single assignment and the claimant was free to market his services. It was clear to the tribunal that he was marketing his services to whatever contractor could provide him with work. He was free to move from contractor to contractor and he did as he ceased providing his services as a self-employed joiner to the respondent company and began providing them to the main contractor, Connolly and Fee Limited without recourse to the respondent.
- (10) The tribunal concludes from all the evidence that the claimant was operating a business on his own account as per the findings of fact set out above.
33. As the tribunal has unanimously determined that the claimant does not meet the definition of ‘worker’, his claim of unauthorised deductions from wages is dismissed.

**Employment Judge:**

**Date and place of hearing: 25 June 2021, Adelaide House, Belfast.**

**This judgment was entered in the register and issued to the parties on:**