Case Number: 1302370/2016

EMPLOYMENT TRIBUNALS

Claimant | Respondent

Mr S Adkins and 34 others -v- **Lex Autolease Limited**

OPEN PRELIMINARY HEARING

Heard at: Centre City Tower, Birmingham

On: 13 & 14 February 2017 and in chambers on 15 February 2017

Before: Employment Judge Perry (sitting alone)

Appearances

For the Claimant: **Mrs B. Pemberton (lay representative)**

For the Respondent: **Mr M Islam-Choudhury (counsel)**

JUDGMENT

1. The claimants were not employed pursuant to contracts of employment at the material time within the meaning of s. 120 Employment Rights Act 1996 and reg. 2 Working Time Regulations 1998. It was conceded if that was so the tribunal does not have jurisdiction to hear the claimant's claims for unfair dismissal, redundancy pay and notice pay (pursuant to Art. 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994) and accordingly they are dismissed.
2. The claimants were workers at the material time within the meaning of reg. 2(1) Working Time Regulations 1998.

ORDER

1. The claim shall be listed for a closed preliminary hearing before me (or that is no possible, another Employment Judge sitting alone) **at 10:00 am on 12 May 2017** time estimate 90 minutes.
2. On or before **29 March 2017** the claimants shall forward to the respondent and the Tribunal a calculation setting out their claims for holiday pay which shall include their methodology for calculating such claims to include the holiday entitlement and gross weekly pay claimed, in table form, if possible (the Schedule). The columns (identified by brackets as follows) shall include the name of each claimant (1), the claim number (2), their start (3) and anniversary dates (4), holiday entitlement claimed (5), the raw data applied in the methodology for its calculation (6) and the weekly (gross) pay (7) and the raw data applied in the methodology for its calculation (8). That shall be forwarded to the tribunal and respondent by the date specified in excel format if possible.
3. On or before **26 April 2017** the respondents shall:-
    a. Reply to the Schedule copying the same to the claimants and the Tribunal indicating which elements are agreed, those that are not, and if not agreed why

not, its methodology for calculation, the raw data it adopts and the sums, if any it concedes, by endorsing the same in additional columns of the Schedule

b. forward a draft list of issues, directions for trial, time estimate and trial timetable and availability.

4. On or before **2 May 2017** the parties shall attempt to agree 3.b. and forward an agreed draft list of issues, directions for trial, time estimate and trial timetable and availability to the tribunal.

5. On receipt of (4) a Judge will consider if a preliminary hearing is required at all, if so, how long is needed and if it can be conducted by telephone.

REASONS

Unless the context otherwise connotes references in square brackets below are to the page of the bundle or if prefaced by a witness's initials or the year of a contract the paragraph number of the witness statement or contract. References in parentheses are to the paragraph herein.

1 This claim includes complaints of unfair dismissal, redundancy payments, notice and holiday pay. The employment status of the claimants was in dispute and so at a hearing on 22 November 2016 before Employment Judge Camp ('the Order') this Open Preliminary Hearing was listed to consider if a number of lead claimants that were to be identified pursuant to the Order ([4]) were (and I paraphrase): -

1.1 Workers or employees at the relevant time?

1.2 If neither should their claims be struck out as having no reasonable prospects of success?

2 As Mrs Pemberton was a lay representative and many of the claimants were present, I explained to the parties the way the hearing would proceed, the need to disclose evidence and to provide witness statement(s) incorporating all matters they wished to rely upon, the need to challenge disputed matters and the need to summarise their claims at the end. I sought to ensure any technical or legal issues were explained in plain language to the witnesses. Both she and Mr Islam-Choudhury had provided skeletons, Mr Islam-Choudhury's included some 11 authorities, as they are listed and were enclosed I do not propose to repeat them here. Mrs Pemberton principally referred me to Autoclenz v Belcher *[2011] IRLR 820* (SC) the first of the authorities he listed. I was also referred to the Court of Appeal decision of Friday last in *Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51*. Both made closing (oral) submissions. At the end of the claim I checked if there was anything either wished to add or that had been omitted; both confirmed there was not.

3 I had before me a bundle of 627 pages and I heard from 4 of the claimants, selected as lead claimants **Mr Andrew Oates**, **Mr David Cook**, **Mr Anthony Hutchinson** and **Mr David Wiseman** and two witnesses for the respondent, **Mr Ian Bluck** (who was essentially the line manager of the manager of the department that engaged the claimants) and **Mr Andy Hartley** (who gave some background to the respondent's business model and the background) all of whom provided written statements.

4 I sat through lunch on day 2 have given the representatives half an hour or so to prepare submissions. Submissions concluded at about 2:30 pm. I was conscious that some of the claimants travelled from some distance and thus whilst I was hopeful of giving oral judgment on day 3 I could not guarantee when this would be. Mrs Pemberton indicated that as many of the claimants were not going to be in attendance she was likely to ask for written reasons in any event. I canvassed if it would assist if I

gave judgment orally on day 3 say by telephone but Mr Islam-Choudhury rightly expressed misgivings. I thus have decided to reserve but heard from the representatives as to future case management on the basis of each eventuality.

5 As to the strike out I queried why this was listed as such. Mr Islam-Choudhury told me it was his understanding that the claims would be struck out as having no prospect of success if the claimants were independent contractors and all but the holiday pay claim if they were found to be workers. In my view as I am required to make a determination based on evidence the proper course is that the claims should not be struck out but dismissed for want of jurisdiction; strike out is appropriate where a determination is made based on non-compliance or submissions rather than where evidence has been heard as here because of the different consequences it gives rise to.

6 I should briefly address two other matters. During my seeking clarity of the issues and what directions were required I sought to clarify if reg. 2(1) Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') was at play given in the evidence there was reference to a failure to consult. I reminded the representatives the definition of employee in reg. 2(1) TUPE there was different again to the definition in s.230(1) ERA. Mr Islam-Choudhury told me no TUPE claim had been identified at case management and given it was the putative transferor, any liability automatically passed to the transferee and given the respondent was the sole respondent named, and thus no claim having been pursued against the transferee it would seek that any claim should be dismissed against it. Given that the respondent argued that if I found the claimants were employees the claim should be struck out in any event I am surprised this was not raised by it at an earlier point.

7 I thus now turn to my primary findings of fact which I make on the balance of probabilities and from the information before me.

MY FINDINGS OF FACT

8 The Respondent is engaged in the leasing of vehicles to both commercial and private entities. It is part of the Lloyds Banking Group (the Group). The Claimants (whom I shall refer to as the Drivers) were contracted to collect and drive vehicles principally to or from the respondent's customers at the end of a lease or to move a vehicle from one user/place to another mid lease.

9 At the end of a lease for the most part vehicles that had been leased commercially were taken to one of the sites operated by a car auction company, BCA, that was also part of the Group and vehicles that had been leased privately were collected and taken to the respondent's "de-fleet" centre (Fortnum Close) where the condition of vehicles was assessed before they were transferred either to a car auction site being moved to one of two Car Supermarkets the Group also operated (one of which, Mackadown Lane, was very close to the de-fleet centre, and the other in Oldbury. In May/June 2014 The de-fleet centre and Mackadown Lane were closed and their operations moved to a new site in Coventry,

10 The respondent allocated work and organised deliveries via what some of the Drivers called it's "Planning Department". That comprised a transport manager, initially Mr Hopps, who was succeeded in turn by 2 secondees, two planners and an administrator.

11 As part of the merger of HBOS and Lloyds TSB in 2009 Lex Vehicle Leasing Limited and Lloyds TSB Autolease Limited also merged. It is not disputed by the respondent that sixteen of the claimants were engaged by Lex Vehicle Leasing Limited prior to the merger [AH/1.3].

12 Mr Oates first commenced undertaking engagements with the respondent on 4 July 2001, Mr Wiseman on 10 October 2006, Mr Hutchinson on 14 November 2011 and Mr Cook on 6 January 2014.

13 At the time of the matters that concern me 80 or so Drivers were engaged by the respondent. In addition, it used a number of vehicle logistics suppliers including BCA Logistics (BCAL) BCA and others including NKL.

14 This claim arises because on 17 March 2016 Mr Bluck announced to the Drivers the respondent had decided to appoint BCA and BCAL as the sole providers of driving services and vehicle remarketing with effect from May 2016 [IB/4.2]. The Drivers' contracts were terminated with effect from 20 May 2016.

15 There were a number of Drivers' contracts in the bundle before me :-

15.1 A Delivery Agent Contract between "Lloyds TSB Autolease Limited" and a named Driver, Mr Oates dated 24 July 2006 [29-32] ('DAC'),

15.2 Two Driver Services Agreements which were materially in the same terms and both of which stated they applied to all assignments after 1 September 2007 which referred in turn to "Lloyds TSB Autolease Limited" [43-53] and "Lex Autolease Ltd" [35-42]. I will refer to both of these as the 'DSA' for the reasons I give at (16), and

15.3 The Terms and Conditions of Contractor Service Agreement 2014 [54-58] ('TCCSA').

16 I asked at the start of the hearing why there were two versions the DSA given both parties accepted it was materially the same and the commencement dates in each were the same. Given the DAC and first version of the DSA referred to "Lloyds TSB Autolease Limited" I undertook a search against the respondent's name. It revealed that between 29 December 2000 and 6 October 2009 Lex Autolease Limited (Company number 01090741) was styled "Lloyds TSB Autolease Limited". I thus intend to refer to both versions of that document as the DSA as the only material difference appears to concern the change in the respondent's company name on 6 October 2009.

17 I do not propose to relay the terms of the contracts in full at this point as I summarise the principal terms at (32) below. The contracts are within the bundle and for the most part they are not in dispute, the claimants having accepted they reflect the way the contracts were undertaken. I thus merely précis their terms here to show how the terms have changed over time.

18 As to the DAC (hereafter referenced using the convention [2006/clause number]), there was no obligation on a Driver to accept any vehicle transportation job (hereafter "an assignment"), or power for the respondent to force the Driver to accept an assignment or any obligation on the respondent to offer an assignment [2006/1]. The Driver was entitled to stop accepting and the respondent to cease offering assignments at any time without notice [2006/2]. Once accepted the Driver was obliged to carry out the assignment or to communicate to the respondent why the assignment could not be carried out [2006/1] and it was his or her responsibility to plan and time the journey [2006/3]. If a vehicle was not delivered to the nominated compound, it was the Driver's responsibility to make alternative arrangements for collection and delivery [2006/8] and failed deliveries/collections had to be reported to the respondent [2006/14]. The Driver was not to drive a car that he deems not to be roadworthy [2006/9] and was to be liable for any damage to a vehicle that was "obvious" and not recorded at the time the Driver took possession of the vehicle [2006/17]. Payment was made the Driver following the raising of an invoice the rates of which were set out in a schedule (appendix B)

[2006/25]. The contract stated "*This is not a contract of employment and can in no way be construed as such."* [2006/26]. Throughout it referred to the Driver as to "you", "your" etc.

19 As I state above the DSA was stated to apply to all assignments provided after 1 September 2007 so I will refer to its provisions adopting the style [2007/clause number]. The terms of the DAC that I refer to above were duplicated in the DSA. In addition, the DSA expressly provided a Driver could work for third parties at any time, including whilst carrying out any particular assignment [2007/5], that if for any reason the Driver was unwilling or unable to carry out an assignment that he has already accepted he can arrange for a replacement Driver to carry out that assignment provided that the replacement driver was approved prior to the replacement carrying out the assignment [2007/9]. The Driver was expressly required to hold a full valid driving licence [2007/10] was to be held liable for any loss or damage caused by his negligence [2007/19] and *"for the avoidance of doubt"* the DSA stated it did not give rise to a contract of employment [2007/33].

20 Mr Oates told me [AO/14] that in 2007 all the Drivers were issued with uniforms, required to comply with standards of dress (which are now relayed out in the Guidelines that were subsequently issued [295-356]) and required to pay a £50 deposit for the uniform (see Appendix C [84]).

21 Mr Bluck stated that following a large insurance claim against the Group in 2012 a review of insurance took place that led to the respondent reviewing its contracts generally. That included the Drivers' contracts. He stated that the contracts had last been reviewed in 2007 and so one of the reasons for a review was to ensure the contracts reflected practice.

22 In February 2014, new terms and conditions in the form of the TCCSA were issued, they were stated to be effective from 1 April 2014 [2014/2.1]. They repeated in substantially the same form, the provisions I refer to above but in addition required the Driver (referred to as the Contractor) to provide where possible, 72 hours' notice of availability for planning purposes [2014/2.3], to provide the "Service" on "an ad hoc basis" [2014/2.8]. The Drivers were also required to either purchase Motor Insurance through the respondent or provide his own alternative insurance [2014/4.1], to provide his own trade plates, or alternatively use those of the respondent [2014/4.2], and to provide his own Public Liability Insurance for at least £1 million cover, and supply a copy of the insurance certificate [2014/4.5], to provide evidence of self-employed status [2014/7.1], to account for his/her own tax to HMRC [2014/7.2] and to indemnify the respondent in respect of any tax or national insurance that s/he owed; [2014/7.3]. Again, the agreement stated "This Agreement does not form the basis of an employment relationship between the Company and the Contractor". [2014/7.4]

23 I also accept Mr Bluck's evidence that there were other reasons for the contract review in that there had been problems with too many failed collections of vehicles ("failures") due to not being able to collect the vehicles allocated for a number of reasons and also negative customer feedback concerning not assurances allegedly given by Drivers as to the condition of a vehicle on its collection but also between the difference between the assessment of condition and damage recorded by the Driver on collection and that by a further assessment carried out when the vehicle was assessed on arrival at the de-fleet centre/car auction site.

24 The latter not only had an effect on customer feedback but Drivers were charged for missed damage in accordance with Appendix C [84]. As a result, Mr Bluck told me that the Planning Department allocated a Vehicle and Driver to transfer Drivers to their

collections something that prior to that time had previously agreed between themselves.

25 By the time of the 2014 contract Drivers were require to attend an induction that included training on how to capture damage to the Industry Standard (copies of the training materials were provided in Guidelines issued to Drivers that they were issued with and required to sign for [e.g. 88].

26 The Guidelines also recorded that respondent also operated a Red - Amber – Green ("RAG") assessment of driver performance based on feedback from customers, chargeable damage recorded and refusal to work [299 & 366]. Work was allocated first to Drivers assessed as Green, Amber then Red. Mr Bluck told me the RAG system was applied in some detail between April and the end of 2014 but due to resource challenges was applied less rigorously thereafter.

27 The TCCSA was required to be signed and returned by 4 April 2014 and an undated but what appears to have been a covering letter [53] also required the Drivers to provide the required evidence of their self-employed status via a letter/correspondence from HMRC or their Accountant along with a number of other These included an agreement to deductions, acknowledgements that the Guidelines and appendices had been read and received as had health and safety information, a certificate that the drivers had attended an induction course, providing personal details, a completed medical questionnaire, a data protection mandate and terms of issue relating to trade plates.

28 A new schedule of rates that included a new method of charging to that used previously was attached (although it is not known whether that new schedule of rates and charging was actually adopted in April 2014 or had been used prior to that).

29 Mr Oates signed the TCCSA on 3 April 2014 [124] and the ancillary documents not already signed for on 2 April 2014 [125-130]. Mr Cook signed the TCCSA on 2 March 2014 [80] and the ancillary documents not already signed for on 4 April 2014 [87-92]. Mr Hutchinson signed the TCCSA 30 March 2014 [63] and the ancillary documents on 3 April 2014 [64-69]. Mr Wiseman signed the TCCSA on 4 September 2014 [105] and the ancillary documents not already signed for on 16 May 2014 [106-111].

30 Mr Wiseman stated he was told if the documents had not been returned by the date specified no further assignments would be offered [DW/2]. He thus queries if he was permitted to continue undertaking assignments without having provided the required information. However, he does not say specifically that he was permitted to do so. Instead, he states he cannot recall if that was the first document he was asked to sign [DW/2]. He had certainly already obtained Public Liability Insurance and trade plates before that time [113 & 116]. That is unsurprising given he had commenced undertaking assignments on 10 October 2006. Given the date he supplied the ancillary documents, 16 May 2014 it is possible the TCCSA was also supplied at that time but was misplaced. What I do not have is evidence from either party that allows me to conclude that on balance he undertook assignments after 4 April 2014 without having provided the required documents. Whilst I do not have a signed copy of the agreement until September the other documentation suggests he had accepted its terms by 16 May 2014 as the subsequent provision of the signed copy endorses.

31 Mr Bluck also told me that around the same time the respondent agreed a new service agreement with its logistics suppliers [IB/2.8].

32 Thus, by 4 April 2014 the terms of the contract between the parties were embodied in the TCCSA the principal terms of which so far as is relevant were as follows:-

"…

2. Terms & Conditions

2.1 Agreement Scope
This Agreement applies to Services provided on or after 1 April 2014

2.2 The Services
2.3 The Contractor will be required to provide the Company where possible with 72 hours notice of their availability for planning purposes.

2.4 The Contractor is under no obligation to accept any request by the Company for the Contractor to provide the Services and the Company is under no obligation to request the Contractor to provide the Services. Further the Company cannot insist on the Contractor providing the Services.

2.5 There is no restriction on the Contractor working for third parties at any time whilst providing the Services to the Company or whilst carrying-out any particular Contract provided that the Contractor does not use any Company vehicle in providing such other services.

2.8 The Service of the Contractor in each instance will be requested on an adhoc basis.

2.9 If the Contractor accepts a request to provide a Service they will provide the Service in accordance with this Agreement, and the reasonable instructions of the Company.

2.10 The Contractor will comply with the terms of the Company's, Contractor Driver Operating Guidelines ("the Guide") at all times when providing the Services.

2.11 Once a Service is accepted the Contractor is responsible for completing that Service, in line with the specified instructions from the Company.

2.12 In the event the Contractor is not able to complete a Service due to a failed collection, the Contractor must contact the Company to notify and/or obtain further instructions. — refer to Appendix D (failed collections).

3 Fees
3.1 The Company will pay the Contractor for the Service according to the rate set out in Appendix A. The Company may revise these rates and will advise the Contractor of any change to them.

3.2 The Company will also reimburse the Contractor for any authorised expenses validly incurred by the Contractor in providing the Service on the production of a valid receipt — refer to Appendix B for details of authorised expenses.

…

3.5 The Company will pay the Contractor via electronic transfer directly in to a Bank/Building Society account notified by the Contractor, within 10 days of receipt of a validly submitted invoice for the Service.

3.6 Unless specifically agreed otherwise, invoices should be submitted by the Contractor on a weekly basis.

3.7 The Company reserves the right to deduct any fines, charges or penalties as detailed in Appendix C, from any sums payable by the Company to the Contractor under this Agreement. The Company may revise these rates and will advise the Contractor of any change to them.

4 Insurance

4.1 Any vehicle subject of a Service must be insured fully comprehensively. The Company has block motor insurance to allow any Contractor to drive any vehicle, (subject to the Terms and Conditions of the Insurance Policy) in the control or custody of the Company. A Contractor may take advantage of this insurance but in doing so agrees to the Company deducting a weekly charge for this, as set out in the Rate Schedule — refer to Appendix C. Any accident or incident, regardless of level of damage, must be immediately reported to the Company — refer to the Guide for contact telephone numbers. In the event of an accident or incident caused by the Contractor resulting in a claim under the insurance, or any uninsured loss, the Contractor will be liable to pay the Company an amount as specified — refer to Appendix C. The Company shall be entitled to deduct any such amount from any sums due to the Contractor from the Company under this Agreement.

4.2 Trade Plates are required. The Contractor can supply their own, or the Company can supply — refer to Appendix C.

…

4.5 The Company also requires the provision of Public Liability Insurance. The Contractor will maintain in force, full and comprehensive Public Liability Insurance, for cover of at least one million pounds £1,000,000) including, without limitation, personal injury and property damage, in respect of the provision of the Service. A copy of the Policy and Certificate of Insurance must be provided to the Company.

…

5 Conduct & Requirements

5.1 The Contractor will conduct her/himself in a proper and professional manner and the Company requires a certain standard of work conduct and appearance, as set out in the Company standards within the Guide.

5.2 The Contractor agrees to abide by the Company's Health, Safety and Fire Policy whilst on Company property — refer to the Guide.

5.3 The Contractor must hold a full and valid Driving Licence, held for a minimum of 1 year, and this must be available for inspection by the Company on demand.

5.4 The Company must be kept up to date with any changes or endorsements to the Driving Licence, immediately.

…

5.9 The Contractor will be issued with an Identification Card before any Service can be undertaken and must be worn at all times whilst carrying out the Service.

…

7 Tax & National Insurance

7.1 The Contractor will provide the Company with appropriate evidence of their Self Employed status. This can be either a letter or correspondence from HMRC covering this issue (not just a unique Tax Reference).

7.2 The Contractor will account to the appropriate authorities for any income tax and national insurance charges arising out of any payment made by the Company to the Contractor under this Agreement.

7.3 The Contractor agrees to indemnify the Company against any income tax or national insurance due in respect of the Contractor, which may be levied on the Company by the appropriate authorities.

7.4 This Agreement does not form the basis of an employment relationship between the Company and the Contractor, and the Contractor is responsible for paying her/his own tax and national insurance.

7.5 The Contractor must provide their national insurance number, as the Company will maintain a record of the Contractor's name, address and national insurance number for inspection by the DWP and HMRC, if required.

8 Termination

The Contractor may at any time cease to provide any further Services to the Company. The Company may at any time cease to use the Contractor to provide any/all Services with immediate effect.

…"

33 From 18 February 2015 [503] the respondent started to require the Drivers to complete vehicle assessments using an iPad app. They were given training on how to use the appl. I heard that at least one Driver (Ron Nolan) did not want to work on that basis and that other work postal duties were found for him to do.

34 Whilst iPads could be purchased from the respondent over a period of a few months that only was available after a month's engagement so initially at least any Driver would have need to have provided his/her own iPad. In addition, the Drivers were required to have their own email address, mobile data connection and mobile phone.

THE LAW

35 Section 230 of the Employment Rights Act ('ERA') provides as follows:

"(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act 'worker' (except in the phrases 'shop worker' and 'betting 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.

(4) In this Act 'employer', in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act 'employment'—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract; and 'employed' shall be construed accordingly."

36 Regulation 2, the interpretation provision in the Working Time Regulations 1998 provides:

"In these Regulations—

'employer', in relation to a worker, means the person by whom the worker is (or, where the employment has ceased, was) employed

'employment', in relation to a worker, means employment under his contract, and 'employed' shall be construed accordingly;

'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;"

37 Whilst the definition of "worker" in reg. 2(1) Working Time Regulations 1998 ('WTR'), is in materially the same terms as s. 230(3) ERA. the definition of worker in the WTR is wider than that in s.230(3) ERA in that it covers agency workers (Reg. 36) as well as individuals in Crown employment, the Armed Forces (subject to certain conditions), Parliamentary staff, police constables and non-employed trainees (Regs.37-42). I raised that with the parties and no point is made by either party in that regard here.

38 The Employment Tribunal only has jurisdiction to hear contract (and thus notice pay) claims of an 'employee' pursuant to art. 3 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 ('EJO'). There is no definition of 'employee' within the EJO. It was helpfully conceded by Mrs Pemberton that if the lead claimants were not employees within the meaning of s.230(1) ERA their claims for notice pay pursuant to the EJO (and those for unfair dismissal and redundancy pay) would fall.

39 Baroness Hale in *Bates Van Winkelhof v Clyde & Co [2014] 1 WLR 2047 SC thus* stated at [31] that employment law distinguishes between three types of people:

39.1 those employed under a contract of employment (hereafter 'employees');

39.2 those self-employed people who are in business on their own account and undertake work for their clients or customers (hereafter 'self-employed').; and

39.3 an intermediate class of workers who are self-employed but do not fall within the second class (hereafter 'workers' although I should add for the benefit of the claimants that persons falling within s.230(3)(b) and reg. 2(b) are therefore sometimes referred to as limb 'b' workers).

40 My task is to determine which of those categories the claimants fall within. In doing so I must look at matters in the round (they must *"be gleaned from all the circumstances of the case"* per Lord Clarke in *Autoclenz* [35]).

MY FURTHER FINDINGS AND CONCLUSIONS

My Approach

41 The authorities make clear I must look at matters holistically. In order to do so I must adopt a structured approach to ensure issues are not omitted. I thus attempt to do that below addressing the various issues the authorities identify in turn. I adopt headings merely to highlight the structure I have adopted.

42 Given that I need to determine whether the contract truly reflects the reality I firstly identify the relevant time and the express contract terms at that time, then go on to compare the written contract terms to my findings as to the reality, and what differences there are (if any) and the consequences of those differences (if any).

43 Given personal service is a requirement of both worker and employee status I then turn to look at that issue. I hasten to add personal service is **NOT** determinative as *Autoclenz* (CA) and *Cotswold* make clear (see (83)). It is merely one factor of many. Having considered that issue I then in the final section stand back and reflect on all the evidence before forming a view.

The relevant time

44 In my judgment in relation to the unfair dismissal and breach of contract claims the relevant time is 20 May 2016 the date the Drivers' contracts were terminated. For the holiday pay claim the relevant time is the end of the holiday year including that date. I say holiday year singular as the WTR does not provide for carry over of leave from an earlier year, there is no workplace agreement that provides for the same and thus Mrs Pemberton does not seek to claim in relation to previous years. Accordingly, as all the lead claimants commenced their relationship with the respondent after 30 September 1998 their respective leave years commence on the anniversary of their commencement. Thus, Mr Oates, 4 July, Mr Wiseman, 10 October, Mr Hutchinson, 14 November and Mr Cook, on 6 January.

The terms of the contract at the relevant time.

45 In my judgment the terms of the contract between the parties were those embodied in the TCCSA. I have summarised the main terms above at (32). The respondent set those terms without consultation with the Drivers. It also felt able to determine when changes in rates could be imposed and to impose these unilaterally and without consultation.

46 In my judgment all the agreements made plain the Drivers were self-employed and in the TCCSA they were required to provide evidence to that effect in the form of a registration under the Construction Industry Scheme or from their accountants. They were required to invoice for their services and were paid gross subject to a tax indemnity.

47 Whilst there was no obligation on the Drivers to make themselves available for work, there was an assumption that if the Drivers did not make themselves unavailable for

work by giving 72 hours' notice they would be available for work. Even if they did make themselves available (or as the case may be not make themselves unavailable as the reality was) there was no obligation for the respondent to offer or on the Driver's to accept work. For the avoidance of doubt I find that that assumption was not at odds with the contract terms, and the practice merely reflected the way the terms were interpreted and implement in practice.

48 Both parties could terminate the agreement immediately. I, address termination further at (63) below.

49 In a schedule of days worked in 2015 prepared by the respondent from its records [143] Mr Oates was recorded as having worked 211 days, Mr Hutchinson 168, Mr Wiseman 176 and Mr Cook 185. Whilst none could recall definitively, none disputed in general terms the number of days worked was incorrect. That of course reflects that on some days the Drivers made themselves unavailable, on some they were not offered work and on some they did not accept it. As Mr Hutchinson identified, it was unclear if that included other duties such as chauffeuring.

50 Even if work was accepted it could be subsequently declined. I find there was a disincentive from doing so in the way work was subsequently allocated. I find the principal reason why that occurred was when the Drivers were unable to undertake the assignment in the time allowed. I heard a number of complaints that schedules required morning collections/deliveries to Newcastle upon Tyne and similar far flung places from the respondent's base. The DAC provided once accepted the Driver was obliged to carry out the assignment or to communicate to the respondent why the assignment could not be carried out [2006/1]. Mr Bluck told me that there had been problems with failures prior to 2014 and thus this was amended in 2014 and the practice was adopted of allocating a vehicle to transfer a "team" of Drivers although this could be departed from by an individual Driver.

51 The documents before me also show assignments were declined. On 18 September 2015 Mr Oates ran out of time [152], on 28 September 2015 [152] & 14 December 2015 [155] he called in sick and on 17 November 2015 Mr Oates father was not well [154]. The documents record on 10 November 2015 Mr Wiseman gave a job back because he did not want to go to Wakefield twice [153]. The maker(s) of those notes have not been called. Mr Oates and Mr Wiseman did not dispute they had declined those assignments. What is not clear is at what point they were declined or how that was done. Following the introduction of iPads work was assigned by a text message the day before and assigned via the iPad app. The records before me do not record if jobs had actually been accepted and then rejected, or were not accepted as would be the case with someone reporting in sick before accepting an assignment. Similarly, if the job could not be undertaken the Driver was expected to notify the respondent of this [2014/2.12]. In relation to the example put to Mr Wiseman where having been sent to Wakefield for a collection twice in one day I am not satisfied the respondent has shown that firstly Mr Wiseman rejected that job having previously accepted it (as opposed to having accepted it, he then rejected it) and secondly that he rejected it on the basis he did not want to undertake it as opposed to him being unable to undertake the job in the time permitted (an example of which Mr Hutchinson gave when he told me he declined a job in Leatherhead because he could not get back in time).

52 Whilst it is true the TCCSA permitted Drivers to arrange for a subcontractor to undertake the assignment and Mr Cook accepted swaps did take place occasionally between drivers but not following the introduction of iPads. He told me that was it could not in practice be done. As both Mr Oates and Mr Cook stated it was not their responsibility to reallocate assignments. Nor following the introduction of iPads as Mr

Cook identified did the Drivers did not know how to re-allocate assignments. I accept in practice following the introduction of iPads that swapping roles was not in practice possible and instead the assignments were passed back to the Planning Department. Irrespective of the reallocation of the assignment on the iPad app that was so given the time constraints and that the Driver's did not have all the other Drivers details, they did not know who had made themselves available for the next day and who had been allocated assignments.

53 However, there was a further problem with that in practice. An assignment could only be assigned to one of the pool of Drivers the respondent had approved and had given access to its secure app. Thus, all the Drivers who were asked told me they passed assignments back to the Planning Department.

54 The Drivers were entitled to work for third parties without any restrictions as I state above the Guidelines stated that the failure of Drivers to offer themselves as available for work would reduce the work offered to them. Mr Oates stated he never worked for anyone else in 15 years and had not heard of anyone else doing so. Mr Oates told me an assignment could be rejected if a Driver was ill. That is essentially no different to the assignment being unable to be performed rather than a refusal to undertake it. The respondent further required the Drivers' to be fit to carry out their duties [2014/5.6] and required them to provide a completed medical questionnaire [92].

55 The TCCSA and Guidelines were prescriptive, if damage was not identified not only was it charged in most instances to the Driver but effected the work he would be assigned going forward by reference to his RAG rating. The Drivers were required to undergo training in that regard and I was told the Guidelines for assessment of damage were no more than the industry standard. I accept that and these were on balance the same requirements that were probably expected of the corporate vehicle logistics suppliers. There were good business reasons for requiring them to be so.

56 Similarly, there were understandable reasons for requiring the use of an ID badge and uniform; customers would understandably wish to know they were handing over a vehicle whose value was in £10,000s to a representative of the respondent. However, that does not mean the individual was an employee as Mrs Pemberton suggested the use of corporate vehicle logistics suppliers reinforces that view.

57 The Drivers were obliged to follow a script with customers and whilst I was told the wearing of uniforms was not compulsory, negative customer feedback effected the RAG rating and that included the presentation of and statements made by the drivers. The guidelines set out the other factors in detail [160-169]. I also heard of examples how fault accidents were charged; an excess of £100 was charged for a fault accident by Mr Wiseman on or about 5 September 2014 [151].

58 Following the TCCSA not only was work planned but the teams and cars the Drivers would drive in. Whilst that could be departed from it was not in the driver's interests to do so. Drivers could decide the routes they took and when they collected cars this was dependent on the other members of their team and the risk they were prepared to take. Thus whilst they could key up a car; take possession of the keys to collect it later once collected the Driver was liable for any damage to a vehicle. The Drivers had relatively little time to make alternative arrangements and in the absence of knowing what colleagues were doing little means of doing so.

Did contractual relations subsist when an assignment was not undertaken?

59 Langstaff J in *Cotswold Developments Construction Ltd v Williams [2006] IRLR 181 EAT made clear* [34] that mutual obligations are required before the definition of worker

can be satisfied, the reason for that being [47] *"Mutual obligations are necessary for there to be a contract at all. If there is a contract, it is necessary then to determine what type of contract it is."* That view was also endorsed *Autoclenz* by Lord Clarke (at [19(i)]). In *Stringfellow Restaurants Ltd v Quashie [2013] IRLR 99 (CA)* (a case where worker status was not the issue for determination) Elias LJ stated *"Every bilateral contract requires mutual obligations; they constitute the consideration from each party necessary to create the contract."* Thus, it is clear mutuality is required for every contract whether it as an employee, as a worker, or self-employed.

60 The period when the individual is actually working poses no difficulties *"Unless and until the power to terminate is exercised, these mutual obligations (to work on the one hand and to be paid on the other) will continue to exist and will provide the fundamental mutual obligations*" (see Elias LJ in *Quashie* at [13] approving his own judgment in *Stephenson v Delphi Diesel Systems [2003] ICR 471 also at [13]*, the question he posed was whether *"the fact that a worker only works casually and intermittently for an employer may, … justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee." (Quashie at [12*]). However, as the old case of *Clark v Oxfordshire Health Authority [1998] IRLR 125*, identified mutuality of obligation can subsist during the "gaps" between the periods when the Applicant was engaged for instance if one party paid a retainer to the other (see Sir Christopher Slade [41]).

61 Mr Islam-Choudhury referred me to *Secretary of State for Justice v Windle & Arada [2016] EWCA Civ 459 [2016] IRLR 628*, where the Court of Appeal (in construing worker under section 83(2)(a) Equality Act 2010, that is "a contract personally to do work") per Underhill LJ held:

> *"23…I accept of course that the ultimate question must be the nature of the relationship during the period that the work is being done. But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course it will not always do so, nor did the employment tribunal so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it* ***in limine*** *runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances.*
>
> *24 ... The factors relevant in assessing whether a claimant is employed under a contract of service are not essentially different from those relevant in assessing whether he or she is an employee in the extended sense, though (if I may borrow the language of my own judgment in Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667, para 17(5)), in considering the latter question the boundary is pushed further in the putative employee's favour—or, to put it another way, the pass mark is lower."*

62 Mr Islam-Choudhury thus suggested [skeleton 31] that if I find that there is no mutuality of obligation in respect of employment status, there is no mutuality of obligation for worker status. I disagree, in my judgment the degree of mutuality required is a function of status. That does not mean there has to be a high correlation between the two in a mathematical sense, but it is a guide. Thus, there can be sufficient mutuality for worker

status, but not employment and usually, although there may be exceptions, greater mutuality will be required for employees than workers.

63 Turning to the question I posed: did contractual relations subsist when an assignment was not undertaken? In my judgment they did. All three contracts expressly included a termination provision [see 2014/8 for the most recent version]. There was no suggestion before me any such provision was exercised between assignments. On termination Appendix C to the TCCSA provided for the return of the uniform and on receipt of the same the deposit paid for it. That implies the uniform did not have to be returned between assignments. Further, I find an assumption was made by the Planning Department that if Drivers had not given 72 hours' notice of their non-availability [2014/2.3] that a Driver was available to undertake assignments. Thus Drivers were under an ongoing obligation in the period between assignments to notify the respondent if they did not wish to accept work.

64 Finally, two of the contractual requirements upon the Drivers were to obtain Public Liability Insurance and Motor Insurance (or to take that offered by the respondents for which a fee was deducted from each weekly invoice rendered). No evidence was led by either party to specifically indicate if the Drivers paid for motor insurance for weeks they did not carry out assignments. Mr Bluck told me there was a reduced payment for less than 3 days' work of £4.00 was made. Mr Bluck did not state that no charge was made if no assignments were taken. I thus took his evidence to say that the reduced charge was payable even if no assignments were offered and accepted. None of the documents that I was taken to supported that; all the evidence before me suggested that the full charge of £6.50 per week was paid each and every week. Nor did Appendix C refer to the same. Further the Drivers I heard from made no reference to the reduced charge

65 I was told they remained on cover with the respondent's insurers. As they would have with the Public Liability Insurers as the certificates before provided that they were on cover for a year. In my judgment the obligations to obtain Public Liability and Motor Insurance or to take up that offered by the respondent in the latter case are further support for the view the contract subsisted between assignments and I find as such.

Did the contract reflect the reality?

66 How the parties to a contract describe the effect of their agreement is not conclusive of the nature of the contractual arrangements *(Street v Mountford [1985] AC 809,* where the parties described the arrangement between them as a licence but where the actual circumstances gave rise to a tenancy). Whilst that is so, in *Stringfellow Restaurants Ltd v Quashie [2013] IRLR 99 (CA),* a case in which the claimant's contract stated that she was self-employed the effect of which was that it was asserted she could not claim unfair dismissal, Elias LJ stated [52] *"… parties cannot by agreement fix the status of their relationship: that is an objective matter to be determined by an assessment of all the relevant factors. But it is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain it can be decisive…"*

67 Having referred to *Street v Mountford*, Lady Smith in *Autoclenz v Belcher (CA) [2010] IRLR 70* said*: -*

> *"14. Where contractual terms are in writing, they will usually be taken as representing the agreement between the parties, but, if one party to the agreement claims that the written terms do not represent the true agreement, the court will have to decide what the true agreement was. The correct approach to determining the true nature of an agreement has been the subject*

of discussion in several recent cases including two in the Court of Appeal. It will be necessary to discuss these cases in some detail later. However, for present purposes, I do not think it is contentious to cite briefly from my own judgment in Protectacoat Firthglow Ltd v Szilagyi [2009] IRLR 365:

> ***'57. In a case involving a written contract, the tribunal will ordinarily regard the documents as the starting point and will ask itself what legal rights and obligations the written agreement creates. But it may then have to ask whether the parties ever realistically intended or envisaged that its terms, particularly the essential terms, would be carried out as written. By the essential terms, I mean those terms which are central to the nature of the relationship, namely mutuality of obligation: Carmichael v National Power [2000] IRLR 43 and the obligation of personal performance of the work.' "***

68 That approach was approved by the Supreme Court in *Autoclenz [2011] IRLR 820* but Lord Clarke cautioned that the focus must be to discover the actual legal obligations of the parties and not to concentrate too much on the private intentions of the parties:

> **"***[32] …* we were *also reminded that Carmichael v National Power [2000] IRLR 43 (HL)* makes clear, it must always be kept in mind that the question for the Tribunal is what the parties agreed. Subsequent practice may be a guide to what they agreed, but it is not substitute for it."

69 Mr Islam-Choudhury suggests that if the contract does reflect the reality of the situation, then there is no scope, if any, to imply a contract of employment and refers me to *Tilson v Alstom Transport [2011] IRLR 169* and *James v London Borough of Greenwich [2008] IRLR 302*, both CA, and *Autoclenz*. In my judgment Lord Clarke at in *Autoclenz* [20] (citing and approving the judgment of Aikens LJ in *Autoclenz* (CA)) outlined the principles concerned and specifically stated that nothing in *Autoclenz* departed from the same:-

> *"once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. The only way it can be argued that a contract contains a term which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties." Where it is asserted that a written agreement fails to reflect the agreement of the parties a court may grant rectification of the contract.*

70 He approved the formulation of Smith LJ in *Szilagyi*:

> *"……where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right."*

71 Lord Clarke also approved the judgment of Elias J in *Consistent Group Ltd v Kalwak [2007] IRLR 560*:

> *'"57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p 697G)*
>
> > ***'Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so.'***
>
> *58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.*
>
> *59. … Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance…'"*

72 Mr Bluck told me (21) that one of the reasons for the review of the contracts between 2012-14 was to ensure contracts reflected reality given they had been last reviewed in 2007. All the Drivers from whom I heard were asked if the TCCSA reflected the reality. Whilst Mr Oates and Mr Cook accepted the contract provided for a right to substitute, in practice Mr Oates stated that was only done when he (or his father had been ill) and Mr Cook not since the introduction of iPads. Both identified similar practical reasons why that was not possible (see (52 & 53)). Both told me it was not their job to re-allocate assignments and they were passed back to the respondent. That is also what happened in relation to the Wakefield example put to Mr Wiseman (see (51)). Save with respect to the right to substitute (and I return to that issue below at (77) to (82)) I find the TCCSA did reflect the terms of the agreement between the parties.

Did the contract require personal service?

73 Lady Smith in *Autoclenz (CA)* reminded us the statutory words in relation to workers require personal service, that is also a requirement of employment, thus:-

> *"If the individual is free to choose whether he will do the work himself or send someone else to do it, he is not under an obligation to do the work personally and will be neither an employee nor a worker ... because an obligation to perform work personally is also an essential requirement of a contract of employment."*

74 Lord Clarke in *Autoclenz:*

> *"19(ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status:* Express & Echo Publications Ltd v Tanton *[1999] ICR 693, per Peter Gibson LJ at p 699G."*

75 Thus, even if a Respondent can establish that a Claimant had a contractual *right* to delegate his work or to provide a substitute a Claimant can still be considered to be a worker if the right was fettered (*MacFarlane and Another v Glasgow City Council [2001] IRLR 7* most recently applied in *Premier Groundworks v Jozsa UKEAT/0494/08) per Silber J).*

76 Sir Terence Etherton, MR in *Pimlico Plumbers Ltd v Smith [2017] EWCA* provided this helpful guidance:-

> *84. … I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.*

77 Mr Islam-Choudhury drew a distinction between cases where a contract allowed a claimant to provide a substitute when s/he was 'unable' to work, but not when she was simply unwilling (*James v Redcats (Brands) Ltd [2007] IRLR 296* where it was held there was an obligation to perform work personally) and where a claimant had an unfettered right to delegate work to someone who was 'at least as capable experienced and qualified' (as in *Premier Groundworks Ltd v Jozsa UKEAT/0494/08* where the claimant was not under an obligation to perform the work personally). He suggests the situation here is more akin to *Jozsa* than it is to *James*.

78 The substitution clause in the TCCSA provided:-

> *"2.13 The Contractor can arrange a substitute Contractor to carry out the Service, providing the substitute is approved by the Company and meets the Company's insurance and driving licence requirements."*

79 Whilst the Drivers stated they never took up the option instead they passed the job back to the Planning Department because only the Planning Department was aware of who was available to do the work and had the necessary contact details. Further, even if this was not the case before the introduction of the iPads certainly after them there was a pool of individuals fixed by the respondent who could do the work namely those who had the app had undertaken the training and who complied with all the other requirements of the respondent. Lord Clarke in *Autoclenz* [19(iii)]*:* made clear *"If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see e.g.* Tanton *at p 697G."*

80 In my judgment the substitution clause was highly fettered as drawn. The substitute had to satisfy the stated requirements and also be approved by the respondent. The substitute would have had to have in place the relevant public liability and motor insurance, and certify that he/she had self-employed status. There was no limit on the discretion granted to the respondent. Essentially the respondent had restricted the pool of possible alternatives to the Drivers it had already approved. Essentially the right to substitute was the right to swap an assignment with another Driver, even then had to

be approved, the respondent had an unfettered right to withhold that approval and thus was an almost identical position to that an employee who wished to swap shifts or days off would have been in. He/she would have needed his/her employer's approval to do so. Accordingly, in my judgment the TCCSA as drawn was a contract of personal service.

81 I am reinforced in that view when I considered what the effect would have been. Who would have rendered the invoice for the work and would the substitute been paid by the Driver and thus have done the work under some form of implied indemnity? Whose insurance would have covered the work? Whose RAG would any errors have counted against? The latter is telling in that the respondent kept performance records against the individual drivers it used personally and using these to allocate work yet further reinforces the view the contract was a personal one.

82 However, after the introduction of iPads in 2015 it was common ground that the substitute would have had to attend the induction course, have an iPad with the app downloaded and the Drivers were not aware how they could pass on an assignment to another Driver even if they wished to do so. That being so and notwithstanding my determination as to the nature of the TCCSA after the introduction of iPads in 2015 the substitution clause in the TCCSA did not reflect the reality; an assignment thereafter could in my judgment only be returned to the respondent. In my view thereafter Drivers had the option of undertaking the assignment personally or passing it back.

Were the Drivers self-employed, workers or employees?

83 Whilst personal service is a requirement for both employees and workers, even if an individual is under an obligation to perform work personally, that is not of itself enough to make him/her a worker; s/he might not be a worker because s/he could be providing a personal service as a self-employed contractor to a customer of his/her business (see Lady Smith again *Autoclenz* (*CA*) [10] and (*Cotswold [53]*). Thus, whilst I have concluded the Drivers were required to provide a personal service that is not determinative of their status as a worker or employee.

84 In undertaking the assessment, the Tribunal must look at matters holistically; the tests historically proposed to assess the nature of the relationship; control, integration, and subordination only give a single perspective. The modern approach is to consider the contract as a whole*. "The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract."* (Elias J (as he then was) in *Stephenson v Delphi Diesel Systems [2003] ICR 471 at [11] approved in Quashie at [13]* but as he then went on to say at *Quashie at [14]* "*Even where the work-wage relationship is established and there is substantial control, there may be other features of the relationship which will entitle a tribunal to conclude that there is no contract of employment in place even during an individual engagement."*. As to integration as Elias LJ in *Tilson v Alstom Transport [2011] IRLR 169 CA* stated

> *"48. … the mere fact that there is a significant degree of integration of the worker into the organisation is not at all inconsistent with the existence of an agency relationship in which there is no contract between worker and end user. Indeed, in most cases it is quite unrealistic for the worker to provide any satisfactory service to the employer without being integrated into the mainstream business, at least to some degree, and this will inevitably involve control over what is done and, to some extent, the manner in which it is done. The degree of integration may arguably be material to the issue whether, if there is a contract, it is a contract of service. But it is a factor of little, if any,*

weight when considering whether there is a contract in place at all. This argument repeats the error of asserting that because someone looks and acts like an employee, it follows that in law he must be an employee."

85 Thus, in order to be an employee the SC in *Autoclenz* reminded us that we must have in mind at the heart of our assessment whether a person is a worker, employee (or contractor), the classic description of a contract of service is found in the judgment of MacKenna J in *Ready Mixed Concrete (South East) Limited v Ministry of Pensions [1968] 2 QB 497* (at page 515C):

> *"A contract of service exists if these three conditions are fulfilled. (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.*
>
> *…*
>
> *An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract [a task like that of distinguishing a contract of sale from one of work and labour]. He may, in performing it, take into account other matters besides control."*

86 If a contract of service does exist Langstaff J in *Cotswold* reminded us:-

> *"47. … consequences will follow of the greatest significance – not only in terms of whether the employee is entitled to, and the employer subject to, those rights and duties conferred by statute upon employees and employers alike, but also common law considerations such as whether the employer may be, for instance, vicariously liable for the torts of the employee. ..."*

87 The respondent accepted the contracts were merely placed before the Drivers and whilst it states (something they dispute) they were told to take advice; I find the contract was offered on a take it or leave it basis. It contents were devised entirely by the respondent. The respondent determined the Drivers' rates of pay with no recourse to them; the respondent felt able to adjust them unilaterally. The economic interest they had in the way they undertook or organised the work they were given, was thus in my judgment small.

88 In *Autoclenz* Lord Clarke reminded us at [34 & 35] of what Aikens LJ (CA) identified as the critical difference between this type of case and the ordinary commercial dispute because in the latter contracts were agreed between parties of equal bargaining power are agreed and thus in this type of case *"the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."*

89 Save that their attendance, success rate for identifying damage and performance (RAG) ratings effected if they were allocated work, and if they were involved in an accident or undertook an assignment negligently it would give rise to a loss in my

judgment the drivers had little real control over what work they would be allocated, and the small degree of flexibility they had over the routes they took and order in which they collected vehicles, the Drivers had anything other than a relatively minor real say over the way they performed their work and the income they derived from it. Even in that respect the Planning Department allocated teams in which they would work the following day and someone who would drive them to collections/drop offs etc. albeit they could if they wished depart from that.

90 The Drivers have no real control over the hours that they worked, and save if they could not undertake the collections in the time permitted they were required in practice to inform the respondent of this and to decline the job. I am told that rarely happened and was one reason why the respondent started to plan Drivers' days and the teams in which they would work for them after 2014.

91 The Drivers were given a script of what to say to the respondent's customers and detailed instructions on the checks they were to undertake of vehicles and way in which the vehicle reports were to be completed (via an iPad application). They were required to undergo induction training in that regard.

92 Whilst the Drivers were not prohibited from undertaking work for others and indeed some did (and no restraint of trade provisions were imposed restricting that ability) in practical terms the requirement to give 72 hours' notice gave rise to little opportunity to take up work from third parties at short notice and the failure to be available gave rise to what the drivers told me was less work on offer. Whilst the respondent does not suggest that if Drivers did not offer themselves for work each day they would suffer a consequence, it did accept that the RAG rating at least would determine the priority in which work was allocated. In my judgment that supports the perception the Drivers had that if they did not offer themselves for work each day they were less likely to get work.

93 The Drivers were required to pay a deposit for uniforms and given identification badges. That in my judgment is merely a consequence of their assignments relating to the collection form customers of expensive motor cars.

94 Whilst the Drivers were integrated into the respondent's business I find that this was little more so than one of the contractors engaged by the third party suppliers of services the respondent contracted some assignments out to. The third party suppliers' contractors also wore uniforms and were required to undertake the same checks and assessments to industry standards. They also wore uniforms (although not badged with the respondent's name) and provided identification. The same Industry Standards were required of the Drivers.

95 Whilst as I say above the Driver's personal performance and customer satisfaction was measured and appraised there was no suggestion of any disciplinary sanction and the contract did not provide for it save for indicating work would be allocated to the highest ranked performers first.

96 However, a number of factors point towards self-employment. The TCCSA and its predecessors all stated in terms that that the employees were not employees (see [2006/26]) and had to be registered as self-employed with HMRC. I find that unlike the respondent's employees the Drivers had to provide invoices for their work, were paid without the deduction of Tax and National Insurance had to provide their own mobile phones and email addresses and provide (or in some instances at least take up and pay for) Public liability and Motor Insurance, iPads (and data connections) offered by the respondent.

97 Unlike the respondent's employees the Drivers excesses for fault accidents were treated differently (the first fault accident in a rolling 24-month period was waived for employees) whereas all fault accidents were subject to an excess which increased depending on the number in a 12 month rolling period).

98 However, and critically in this respect I find the contract reflected the reality in that even if the Drivers made themselves available for work on a given day the respondent was under no obligation to offer or the Driver's to accept assignments offered. Even if they were offered the Drivers were able to return assignments. The numbers of days in 2015 the lead Drivers worked reinforced the view that they could chose to make themselves available or not, the respondent could choose or not to offer work, the Driver choose if to accept it and even if accepted could subsequently decline it if unable to undertake the assignment due to health or time constraints.

99 Whilst the respondent suggested Drivers could reject roles after acceptance that is not what the TCCSA provided for and I found for the reasons I give above at (51) that the respondent has not shown that was so. Notwithstanding that, I find the lack of mutuality is fundamentally at odds with a contract of employment and the contract between the respondent and Drivers is not a contract of employment.

100 Notwithstanding that determination taken as a whole the contract in my judgment is more akin to a "worker" contract than one of "employment" because whilst the Drivers were required to undertake the assignments personally the control and expectations and requirements imposed on the Drivers were no more than that expected of the third party suppliers.

101 As I state above, in my judgment the contract between the respondent and the Drivers was not a contract of employment and the Drivers were not employees. However, the Drivers were obliged to personally undertake the assignments they were given and looked at holistically they were workers.

Mr S Adkins and 34 others v Lex Autolease Limited
Open Preliminary Hearing
on 13 & 14 February 2017
and in chambers on 15 February 2017 [22/22]
Case Number: 1302370/2016

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Employment Judge Perry
Dated: 1 March 2017