# EMPLOYMENT TRIBUNALS

**Heard at:** Croydon (by video) **On:** 11 and 12 July 2022

**Claimant:** Mr Adam Collett

**Respondent:** London Security Automation Limited

**Before:** Employment Judge Fowell

**Representation:**

**Claimant** Ms Bryony Clayton instructed by Tom Street & Co.

**Respondent** Mr Lee Bronze of counsel, instructed by Punter Southall Law

# JUDGMENT ON A PRELIMINARY ISSUE

1. The claimant was at all material times both an employee of the respondent and a worker.

2. His claim, and the employers contract claim, shall be determined at a further hearing to be held by video on 13 October 2019 before Employment Judge Fowell.

# REASONS

## Introduction

1. These written reasons are provided at the request of the respondent following oral reasons given on the day of the hearing.

2. The respondent (LSA) provides security systems for business premises, such as barriers, automatic gates, CCTV and intercom systems, and they employee a number of engineers to go out to clients, maintaining these systems or installing new ones.

3. Mr Collett was one of those engineers. The company say that he was self-employed even though, by the time he left, the other engineers all had contracts of

employment. The company says that his role was to provide extra cover as required, over and above the normal work assigned to the engineer's team.

4. His contract was terminated on 24 May 2020 because the company say that he was carrying out work privately for one of their clients and so was working in competition with them. He denies this, and on 27 August 2020 he brought this claim on the basis that he was in fact an employee, alternatively a worker, and was unfairly dismissed. The complaints presented are therefore as follows:

    a. unfair dismissal

    b. breach of contract in relation to notice pay, and

    c. breach of contract / breach of the Working Time Regulations 1998 in relation to outstanding holiday pay.

5. The company have also brought their own claim against Mr Collett, alleging that he should pay them for the earnings he made from the client in question, Caledonian Residents Management Limited (Caledonian). They also say that they lost the contract with Caledonian when it came to light (as a result of this claim) that they had been charged by Mr Collett for work which should have been covered under their maintenance contract with LSA. As a result, LSA are also claiming that loss from Mr Collett, together with an outstanding £200 loan.

6. Employer's contract claims of this sort can only be brought in an employment tribunal if the claimant is an employee, so there is a preliminary issue over Mr Collett's employment status.

**Procedure and evidence**

7. I heard evidence from Mr Collett and a supporting witness, Mr Neal Bingham, who used to work for Caledonian. His evidence was that LSA had a maintenance contract with Caledonian, but that other work such as supplying new equipment was outside the scope of that contract. Mr Collett and others used to bid for that work, so there was no conflict. On behalf of the respondent I heard from Mr Leigh Pheby, their Director and CEO.

8. There was a bundle of 223 pages with a number of additional items supplied by the parties in the run up to the hearing and which I will identify as required.

9. One issue which arose at the end of Mr Collett's evidence concerned a number of invoices which he had raised in his own name and addressed to Caledonian. They were numbered sequentially, but there were gaps in the numbering, indicating that other invoices existed which had not been disclosed.

10. An application was made by the respondent on 16 December 2020 for these

invoices (at page 134 of the bundle) together with any other contracts with clients. This was rejected by the Tribunal on the papers, on the basis that this was a fishing exercise. Unfortunately, it seemed to me that this information was relevant. The missing items were therefore obtained and disclosed in the course of the hearing.

11. Having considered this evidence and the submissions on each side, I make the following findings, confined to his employment status.

**Findings of Fact**

12. This is a small family business. It is run by Mr Pheby and the other director is a Mr Dean Smith. At present they have about six staff, having lost some during lockdown. The work for their clients is done by a group of engineers, now down to two, but for most of Mr Collett's time with the company there were about four. The other engineers are or were all part of the same family network, so for example, Frank Brooke is the son of Dean Smith and Mr Pheby referred to him as his nephew. The time they spend on each job is logged on timesheets, and that labour plus any parts or other charges are the basis of the bills sent out to their customers.

13. Mr Collett started with them in 2011. There are no records of that however. In fact there seem to have been no contracts in place for anyone at that time, so the precise date is unclear. At that time all of the engineers operated on a self-employed basis. That naturally saved the company the cost of running a payroll and accounting for tax and national insurance on what they paid. It was left to the individual engineer to submit invoices, keep their receipts and submit their own tax returns.

14. The earliest record in the bundle is an email on 16 December 2011 to the engineers asking them all to get photos of themselves for their ID cards (page 66). The next is an email from Mr Pheby on 19 March 2012 reminding them to record the time that they arrive and leave the site so that the work sheets were accurate and he could bill the clients correctly. At that time there were six engineers in the group plus Mr Smith as a director. He followed this up on 5 April 2012 with another email to the same group, this time telling Mr Collett not to write the name of the parts supplier on the worksheet – "do not write other companies on the bloody worksheet." (Page 70). There was a further telling off about accuracy of work sheets and how to fill them in in October that year (page 71) and again in May 2013 (page 72). I note from all this that there were repeated, direct management instructions to Mr Collett about the way he did his work, and also that each of the engineers had a company email address.

15. With regard to tax, Mr Pheby had a relative at a firm of accountants – in fact, called Pheby's Accountants - and steered the engineers in their direction for preparing their tax returns. To illustrate this, there is an email from May 2013 (page 74) from Mr Pheby to Mr Collett telling him that the accountants wanted his year-end to be April, and reminding him to assemble all his receipts.

16. Mr Collett was not altogether happy with the self-employed arrangement. In June 2014 the engineers had an email from Mr Pheby (page 81) to say that after their recent health and safety inspection they needed to send off copies of their “self-employed contractors ECS cards”. He put the term “self-employed” in inverted commas. But the card cost £30 and Mr Collett declined to pay it. He may not have been alone as the company then decided to cover the cost (page 81).

17. They also had to complete and return their health and safety forms at the same time (page 80). Other such emails came from a colleague called Dawn. One in October 2014 (page 84) told them that she had been asked to compile an invoice template for them to use to submit each week for their salary and expenses.

18. In October 2014 Kelly emailed them all to say that they had been buying too many tools on the firm’s account (page 85). It seems from this that they would simply book out the tools they needed and LSA would pay. Mr Collett says that that continued to be the arrangement throughout his time with the company and there are no records to cast any doubt on that, so I accept that the company provided his tools.

19. They also provided him with a van, insured for his personal use, and a mobile phone. The phone was a vital tool as each engineer would be sent their jobs on it for the day ahead. They would be told which customers to visit. He was upgraded to a new iPhone and case at the company’s expense in September 2017 (pages 98 - 99).

20. He also had some company training from time to time, as shown by a training certificate (page 180) on 27 September 2017.

21. There are records of the amount of hours that Mr Collett was doing, but only as far back as 2017. This is in the form of a spreadsheet at page 178. There is a row for each week and the table says how many days that week he worked. Most of the entries are for five days a week and some for four. The amount earned varied with overtime, but the amount is fairly steady, and generally between £600 and £800 per week. The total is £37,453 including a Christmas bonus.

22. When Mr Collett needed some time off he would ask Mr Pheby, who sometimes refused if it was not convenient. There is no documentary evidence of those requests because no record was kept. From the company’s point of view there was no need to. Mr Collett put in timesheets for the days that he worked and was paid on them. There was a conflict of evidence on this point but I prefer Mr Collett’s recollection that he needed to get permission, or at least inform the company in advance if he wanted to take a day off. It is difficult to see how things would work otherwise. He was working for them almost every day and they booked him in for jobs in advance, so they would need to know if he was not available. It was an opt-out rather than an opt-in system. That is shown by an email from Mr Collett on 30 August 2019 (page 107) in which he told the office that his son was not back at school yet so he could not come in to work as there was no one else to look after

him. At page 64 there is a picture of him drinking beer, posted on social media, above the message "Happy Friday". Someone has commented on it and he responded "Got to love self-employed sick days". This was relied on by the company, as with the previous email, as an example of him working when he pleased, but it is also consistent with him having to tell them if he was sick or unavailable.

23. The same pattern of work and occasional absence continued during 2018 (page 181). There are entries for 49 weeks of the year. The great majority are for 5-day weeks. Twice, he worked a two-day week, and four times he worked on just three days. This time the total for the year was a little less - £33,597, but again this included a Christmas bonus.

24. It was much the same in 2019 (page 186). This time the total was almost identical - £33,535. But 2020 was heavily affected by the national lockdown. The first few months of the year continued as normal (page 198) but from the beginning of April, during the first lockdown, there was less work for Mr Collett.

25. The engineers were not required to stay at home during lockdown, and Mr Pheby took the view that they were key workers. Mr Collett questioned this (page 111) and asked for better PPE, to which Mr Pheby responded that as a self-employed person he was "entitled to self-isolate", meaning that he did not have to do the work if he did not want it.

26. By then, the other engineers had been taken onto the payroll, so they were furloughed. As a nominally self-employed worker, this did not apply to Mr Collett, but Mr Pheby decided pay him a retainer anyway, calculated at 80% of his expected earnings, i.e. the same amount a furloughed employee would have received. Those payments carried on for seven weeks. They dropped off in the last two weeks so it is not clear how they were calculated, but by mid-May there was nothing more. He returned his company van, and shortly afterwards, on 24 May 2020, he was dismissed. The company say that that was because it came to light that he had been doing work for Caledonia, in breach of his duty of loyalty to the company.

27. That duty is contained in the contract he signed in March 2017. In 2016 Mr Pheby decided to introduce some written contracts. There was some discussion between them about employment status in early 2016, as shown by an email string beginning with Mr Collett on 5 February 2016 (page 91). He emailed Mr Pheby to say that he had had a meeting with Dean Smith to ask for two weeks' paid holiday and a pay review, and that Dean would be speaking to him about it. Mr Pheby responded:

> "Since your enquiry we have had to have our legal people look into how engineers are considered, as you pointed out engineers could be classified as employees, which means you will not be entitled to self-employed status.

I am happy if an engineer prefers to be PAYE, but being self-employed you gain so much in tax allowance, and it would not be beneficial for you to become employees, as you would have to be taxed each and every month at the standard rate, I sent a sheet to Dean to show you the comparisons.

However, being an employee you would be eligible for 5.6 weeks holiday as you noted in your letter, but you lose nearly £9,000 a year in tax and national insurance contributions. So there is always a price to pay when the government is involved.

Our legal people are looking into our liabilities, and what you as engineers are or are not entitled to, and I will let you know what they say as soon as I hear, and we can have a meeting to sit down and discuss what they come up with.

The problem with this situation and the reason we have had to handle this legally is that all the other engineers are wating for the outcome as they all know of your grievance as you made it public, so whatever we offer you we will now have to offer the others."

28. This reference to publicity appears to be to Mr Collett contacting the BBC to run an article or feature about his situation. There is an email reference to contact with the BBC but no mention of the subject matter in the bundle (page 67).

29. The above email is the only real evidence of Mr Pheby's view on the issue about employment status. It seems to be regarded purely as a financial calculation, as though it is a matter of choice rather than the logical outcome of the working arrangements in place. He points to the pros and cons of being self-employed, but the tax implications seem to me considerably overstated. £9,000 would be about the total liability for tax and national insurance, not the difference between the two tax regimes.

30. Mr Collett responded (page 89) to says that:

"The reason I made this public was I have asked you on many occasions for holiday and have been ignored every time, yet the likes of Jon, Frank, James plus others were all given benefits and holiday. And this is very unfair.

As engineers are not self-employed, fact. If we are self-employed we dictate our wages, we price jobs, we supply parts, we can work when we choose and sub contract ourselves to other companies. As none of the above is the rule of LSA then this means we are classed as workers. Who are entitled to 5.5 weeks holiday. I will contact HMRC for advice and go from there.

You don't need a legal team to contact ACAS who will go through a survey with you on our circumstances and [the] end result will be we are not self-employed. I [have] done this 3 times so it can't be wrong."

31. That does not seem to have gone down too well. Mr Pheby responded with a holding reply, pending that legal advice, and included this passage:

> "I would be very careful with the HMRC as they will certainly prefer you to become PAYE, and may even push us as a company to do that, this I know for a fact, and everyone will suffer."

32. This is of course a clear statement that employed status was unwelcome. Mr Collett replied as follows:

> "First off there are such things as workers, I will send you a screen shot showing this. And this is what we are classed as."

33. That is certainly correct. Some workers, like Uber drivers, have been held to be workers and so entitled to holiday pay and national minimum wage, even though they account for their own tax and national insurance, and are regarded by their employers as self-employed.

34. Mr Collett also disputed the tax savings, stating:

> "Seeing that Pheby's accountants were giving engineers such high tax bills, knowing full well we can't claim half of the receipts we hand in as we are not VAT registered, the tax difference is not that different [to] PAYE."

35. Mr Pheby's patience seems to have been exhausted by this. He responded bluntly:

> "I told you I would deal with this at the meeting and not over e-mails
>
> As regards Phebys, you know nothing about tax returns and so should watch who you slander"

36. It seems from all this that Mr Collett had a clear preference to working as an employed engineer. Various objections to that were raised by Mr Pheby, at first under the guise of being helpful, then more forcefully. Mr Collett had researched the tax position, which was the main selling point of being self-employed, and was not convinced of the benefits. Although Mr Pheby said at the outset of this exchange that he was happy if an engineer prefers to be PAYE, that is at odds with the concern about HMRC forcing employed status on the company and on the other engineers. Nor would there be any need for legal advice about whether Mr Collett could be classified as an *employee* – he had been working for them on a full-time basis for several years. There is no suggestion by that stage that Mr Collett had ever worked for anyone else, or taken advantage of the flexibility given by being regarded as self-employed. Legal advice would only be needed as to whether in those circumstances it could be maintained that he was in fact self-employed.

37. Mr Collett's evidence was that he was never given the chance of being employed, unlike the other engineers, who were all connected by family ties with Mr Smith or Mr Pheby. That last point was not disputed, and seems a plausible distinction. Mr Pheby says that he did have the option. Ms Clayton, on Mr Collett's behalf, submitted that Mr Pheby gave him no choice and if he had not signed he would not

have been allowed to continue with the company. That submission was based on an answer he gave to one of her questions, but that seems to be a mistake. It is not my record of his evidence in any event. It remains unclear what would have happened if he had not signed the self-employed contract, but equally Mr Pheby did apply pressure on him to sign. The contract is dated 1 December 2016 and Mr Collett did not sign it until 23 March 2017, so it seems to have taken some time for that pressure to have effect.

38. The contract (page 171) sets out the basic position at clause 3 that Mr Collett was a self-employed contractor, contracted to carry out "the Services" for LSA. They are defined at Schedule 1 and include attending client sites for breakdowns, emergency repairs and maintenance work. While on site he had to wear his LSA security ID, his corporate work wear and appropriate PPE. He had to adhere to any health and safety rules and participate in a call-out rota with other engineers. He also had to look after the company vehicle and phone, and be prepared to travel across the UK, including away from home on occasions.

39. For this, at Schedule 2, there was a flat day rate of £130 from 08.30 am to 5.00 pm. After 5.30 pm overtime rates applied, with a minimum call-out fee of £80 and a maximum time on call-out of 2 hours. Schedule 3 set out in considerable detail the Use of Company Vehicles policy.

40. Otherwise, the main contract provided that he did not qualify for any benefits such as holiday or sickness pay (clause 5) and was responsible for his own income tax and national insurance (clause 7). In fact, he agreed in that clause to indemnify LSA for any claims by the relevant authorities over tax and national insurance, so the risk of being self-employed fell on his shoulders. By clause 5, LSA had no obligation to provide him with any work and Mr Collett was not obliged to accept any.

41. Several clauses then provided restrictions on other work. By clause 4 he agreed not to undertake any additional activities or accept any other engagements that lead or might lead to any conflict of interest between him and the best interests of LSA. By clause 11 he agreed to not approach, solicit or try to entice away business from any of LSA's existing or prospective clients for a period of 12 months from termination of the contract, and also not to disclose their confidential information.

42. Other restrictions were imposed on the way he carried out his duties. Clause 6 required him to submit a worksheet to LSA on the first working day of the week for the previous week's work, or as soon as reasonably possible. Clause 8 allowed for the reimbursement of expenses, subject to prior agreement and being properly evidenced. Clause 9 provided that the vehicle was for business use only and it was said that the fee was factored into his daily rate. He was responsible for making rental payments on the van, and also for making weekly checks on other LSA property. Despite this, clause 10 stated that he had to provide his own tools and equipment.

43. Finally, clause 13 provided for four weeks' notice on either side, although LSA could summarily terminate the contract if he was in material or persistent breach of any of the terms or had done "any action which is prejudicial to the interests of LSA."

44. On signing up to these terms, Mr Collett was also given a copy of the Employee Handbook. It had his name on the front. This is a 13 page document which includes the company's disciplinary policy, grievance policy, policies on equal opportunities, payment, timekeeping, holidays and other leave, company rules, a holiday request form and a self-certification of absence form.

45. The individual policies refer to employees, and the respondent says that only some of this applied to him. Mr Pheby gave evidence that it was not meant for him, and he did not know that he had been given a copy. However it contained, he said, "just the basic stuff, as a guide." That did not, in his view, include things like the disciplinary policy.

46. It is not clear why he was given this, or what applied. If, for example, Mr Collett had been in breach of a health and safety rule, would the company have disciplined him? Broadly however, it seems that giving him this Handbook was in keeping with the company's view that he was regarded as self-employed but required to comply with all relevant company rules.

47. There was no suggestion by the respondent that this contract introduced any practical changes in Mr Collett's working arrangements. As already noted, he was working throughout 2017, essentially full-time, informing the company if he needed time off and requesting holiday verbally. His rate of pay did not change and no extra charge was levied for the van.

48. Hence, the contract was introduced to codify Mr Collett's situation, it expressly stated that LSA had no obligation to provide him with work, and he was free to work for other people. That ultimately led to a dispute with LSA because he was believed to be doing work for Caledonia in competition with them, or undercutting them. That is the basis of the employer's contract claim, which has yet to be addressed, but his dealings with Caledonia are relevant to the question of employment status.

49. It is clear that Mr Collett submitted a number of invoices to them. The last one in the bundle is numbered 24. There are many gaps in the numbering, and despite the application by the respondent for copies of them, given the refusal of that application by the Tribunal, this request was not passed on to Mr Collett. He only began looking for the others during this hearing. His evidence is that this was the only other body he did work for.

50. The respondent points to the fact that he is also listed as a director of a company called CANDBACCESS Limited – phonetically "C and B Access" – i.e. Collett and Brooke, the other director being Frank Brooke, Mr Pheby's nephew. Mr Pheby did

not know whether that business is still trading. Mr Collett says it is not, which I accept. Mr Collett says that he was just helping Mr Brooke with some work. The only evidence relating to this company is that it did some work in 2013. Given the family connection I take the view that if there had been any more widespread work through that company it would have come to Mr Pheby's attention. That would also be very difficult to reconcile with the hours Mr Collett was working for LSA. So there was, in my view, some limited work in 2013 for this other company, and nothing to show that this was in competition with the respondent.

51. The contract between LSA and Caledonia was a maintenance contract, dated 4 December 2019, so any competing work by Mr Collett was confined to the period of about six months, his final six months, from then to May 2020.

52. However, there are some earlier invoices raised by Mr Collett to Caledonia, the first of which was on 29 June 2018 (page 185). That is unnumbered. There is a number 14 dated 14 May 2019 for £1000 (page 188), invoice 15 on 17 July 2019 (page 189) and then invoice 17 (page 190) on 15 December 2019, just within the competition period.

53. Putting to one side for now the competition question, this indicates that from June 2018, on up to 24 occasions, Mr Collett raised invoices to other firms or companies. His evidence is that each time it was for Caledonia and that the work was completed on evenings and weekends. Accordingly, his work was exclusively for LSA until mid-2018, after which he occasionally began to do some outside work, outside normal working hours.

54. A further indication of his asserting himself towards the end of his time with the company is that there was a disagreement about overtime. The out-of-hours rota was being compiled by Mr Brooke, who would assign himself most of the local jobs, leaving Mr Collett the ones that were further away. Mr Collett then asked for a proper rota, but that arrangement did not last, and so he opted out altogether. Nothing was done about that by LSA although that is in fact a breach of the contract he had signed.

55. His dismissal came out of the blue. There was no meeting or prior notice of the concern. He was simply sent a letter (page 124) stating that he had been providing services to Caledonia in breach of his service contract and was dismissed with immediate effect. There was no mention of any right of appeal and although it was put to Mr Collett that he could have done so, the company's position was clearly that he was not an employee and so no such process applied.

**Applicable Law**

*Employees*

56. Turning to the applicable law, section 230(1) ERA defines an employee simply as an individual working under a contract of employment. Section 230(2) defines a contract of employment as:

> "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

57. The terminology is often confusing. A contract of service is therefore a contract of employment. That is quite different from a contract *for services* which means a self-employed contract.

58. The question whether someone is a worker or not is a broader question. All employees are workers, but not all workers are employees. As already noted, Uber drivers may have a contract for services (i.e. a self-employed contract) but they still count as workers and enjoy a range of statutory rights such as a maximum working week and national minimum wage. I will start with that issue here.

*Workers*

59. The definition of a worker in the Working Time Regulations is the same as in the Employment Rights Act 1996. It is set out in Regulation 2, the interpretation section. Among the various definitions there it states:

> "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."

60. So, employees are in limb (a) of this definition and workers are at limb (b). The two key elements here are:

    a. whether Mr Collett was undertaking to do work personally; and

    b. whether LSA were his client or customer of a business he was carrying on.

61. It was recently confirmed by the Court of Appeal in **Nursing and Midwifery Council v Somerville** [2022] EWCA Civ 229 that there is no extra requirement, as for employees, of some mutuality of obligation – i.e. some obligation on the "employer" to provide work and on the "employee" to accept it. It is just these two factors.

**Conclusions – Worker status**

*Personal service*

62. So, was Mr Collett undertaking to do work personally? Certainly the vast majority of his work was done for LSA. It was to all intents and purposes, full-time, exclusive work for the respondent. One common argument on this issue is that the putative worker was entitled to provide a substitute to do the work, but here there is nothing in the contract to permit that. Mr Pheby also confirmed that this was never discussed. The contract states that Mr Collett is to provide “the Services” as defined at Schedule 1. He was the one agreeing (clause 4) to provide his services to the best of his ability, to comply promptly and faithfully with all reasonable requests and instructions from time to time” etc. It seems unarguable in the circumstances that this was personal service. As he pointed out, from a practical point of view the van was only insured in his name. There is no need therefore for me to address the guidance on such clauses, recently summarised and confirmed in **Pimlico Plumbers Ltd v Smith** [2017] IRLR 323.

*Was he in business on his own account so that LSA was a client or customer?*

63. The second question is a broader one. In the case of **Byrne Brothers Ltd v Baird & others** [2002] IRLR 96 (EAT) Mr Recorder Underhill (as he then was) gave the following guidance on the position of such workers:

> “The intention behind the regulation is plainly to create an intermediate class of protected worker who, on the one hand, is not an employee but, on the other hand cannot in some narrower sense be regarded as carrying on a business. The policy behind the inclusion of limb (b) can only have been to extend the protection accorded by the Working Time Regulations to workers who are in the same need of that type of protection as employees in the strict sense – workers, that is, while viewed as liable, whatever their employment status, to be required to work excessive hours. The reason why employees were thought to need protection is that they are in a subordinate and dependent position vis-à-vis their employers. The purpose of regulation 2(1)(b) 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.

64. Applying that guidance there is a very clear answer. Mr Collett was very much in the same position of dependence as an employee. The freedom to work for other people was only exercised towards the end of his engagement and even then only occasionally. Indeed the very fact of him agreeing to this contract, against his inclinations, shows the dependent position he was in. From a sheer numerical point of view, LSA was essentially his only source of income and it would be almost

ludicrous on the facts to describe them as merely a client or customer of his. That can be contrasted with the recent case of **Johnson v Transopco UK Ltd** EA-2020-000780-AT in which the taxi driver spent only 15% of his time working for Transopco and had many other regular clients.

65. The position is sufficiently clear-cut that there is no need for me to go through much further guidance on the point, but both parties set out the main lessons to be drawn from the recent important decision by the Supreme Court in **Uber BV v Aslam** [2021] UKSC 5 as follows:

    a. all questions of remuneration were fixed by Uber; the only way the drivers could increase their pay was by working more hours on those fixed amounts;

    b. all other contractual terms were drafted and imposed by Uber;

    c. drivers could choose when to turn on the app, but once logged on the choice of work was subject to constraints by Uber, including disciplinary penalties for too few fares;

    d. although the drivers provided the cars, these were subject to conditions by Uber, who provided all the technology and operated their own rating system for drivers and customers; and

    e. Uber not only collected all the fares, but also deliberately limited a driver's contact with the customer.

66. Those factors were not intended to be of general application to all types of work. They are tailored to illustrate the extent of control and dependency in operation for Uber drivers. But none of them support the respondent's case here. Pay was set by the company. There was at least one request for a pay rise by Mr Collett, but that was not agreed. They wrote the contract and imposed the terms, as shown by the email exchanges from earlier in 2016. There was no app to control his movements, but Mr Collett was given his assignments for the day in advance, and required to be at the right place and time, using his work van and phone, in work wear, with his ID badge, and to account strictly for his time. Unlike the Uber drivers he could not turn his phone off and disregard these instructions. He would have to let them know in advance and (in respect of holidays) seek permission. And lastly, he did not bill the customers of LSA directly.

67. There is also no reason why an outside contractor would be issued with their Employee Handbook, or given a work email address, or given a template for claiming fees and expenses, required to do overtime on a rota or required to indemnify them against the risk that he was in fact treated by HMRC as an employee. In those circumstances, including the degree of control and integration

referred to below, I have no hesitation in finding that LSA was not merely a client or customer of Mr Collett's. Hence, he was a worker.

68. It therefore follows, applying the recent authority of **Smith v Pimlico Plumbers** [2022] EWCA Civ 70 that no time limit or other issues arises to prevent Mr Collett being awarded his holiday pay for the duration of his service.

**Conclusions - Employee Status**

69. I have already set out the definition of employee in the Employment Rights Act 1996. The leading case on the question of employment status remains **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** 1968 1 All ER 433 QBD. There, the court set out the following three main questions:

    a. Did the worker agreed to provide his own work and skill in return for remuneration?

    b. Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of [using the language of the day] master and servant?

    c. Were the other provisions of the contract consistent with its being a contract of service?

70. Taking these in turn, the first point is about providing his own work and skill – i.e. whether this was personal service. That has already been dealt with.

71. The next question is over the degree of control. This is not an infallible guide. As both parties recognised, skilled employees, working unsupervised, such as doctors, may be employees and yet their putative employer may have no real control over the way in which they do their work. For that reason other tests have been suggested, to which I will come. But the fact is that Mr Collett was subject to a high degree of control as already related. In the assignment of work, for example, I can see no difference between his position and that of his fellow engineers who later became acknowledged employees. It was not suggested, for example, that when they made that change, there was any alteration in their daily role or circumstances. As with Mr Collett, they went out every day in their van, provided by the company, with their phones, attending clients as directed. The employees may have completed holiday request forms, but that is a matter of form rather than substance.

72. An alternative to the control test, which has been considered more appropriate in many cases is whether the worker is integrated into the business: **Stevenson Jordan and Harrison Ltd v MacDonald and Evans** [1952] 1TLR 101, CA. But again, Mr Collett was fully integrated into the business. The suggestion that he was just doing overflow work is belied by the regular hours he was working over such an extensive period, just as by the arrangements made to ensure he went where he

was sent. Other indications are the use of his work ID, his work wear, his work email address, and the fact that the company provided tools. (The contract said he had to provide his own tools, but I have found as a fact that he did not.)

73. The only stumbling block to the conclusion that Mr Collett was an employee is the contract he signed in 2017 and the continued application of some aspects of the contract, such as accounting for his own tax and national insurance. Before considering that, for completeness, there is a further requirement. The House of Lords in **Carmichael v National Power plc** 1999 ICR 1226 held that to be an employee there had to be an irreducible minimum, involving not only control, and personal performance but also “mutuality of obligation.” It is argued for the respondent that there was none, given the contract itself, which said that there was no obligation on the company to provide work.

74. Apart from the first lockdown period however, when there was no work for Mr Collett to do, no example has been given of an occasion when the company failed to assign Mr Collett work. That is over a nine-year period. And even during lockdown, he was paid a retainer almost to the end of his service. I conclude that there was plainly an obligation on the part of the company to provide work and an obligation on Mr Collett to do it.

75. The status and relevance of such contracts was considered in **Autoclenz Ltd v Belcher** [2011] ICR 1157 SC. That case concerned car valeters who had been treated for years as self-employed (with the agreement of HMRC). However, in the Court of Appeal held that a tribunal must take an objective approach on deciding employment status. In other words, it is not just a matter for the parties to agree. Even where “they have been content to accept self-employed status for some years”. Lord Clarke stated at [35] [A/112]:

> “…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.”

76. Both parties cited this passage, and there is no doubt that the contract aimed to continue the arrangements which had applied to that point it time. As in **Autoclenz,** it had suited each side to present the working arrangements as self-employed, or at least it had suited Autoclenz, and the bargaining power of the valetters was insufficient to change the situation. At best, it seems to me, the contract here aimed to continue a state of affairs which had tax and administrative advantages for LSA and which avoided a number of potentially expensive rights, like paid holiday, unfair dismissal or redundancy pay. Whereas the reality, as already found, is that in all other key respects, Mr Collett was treated in the same way as an employee.

77. So, in **Autoclenz**, Lord Clarke described the tribunal's task as identifying the "true agreement" between the parties. In the **Uber** case however, as Lord Leggatt explained (at [68]), the theoretical basis of **Autoclenz** was unclear. According to counsel for Uber, the written documentation should be treated as determinative of the true agreement save where there was an inconsistency between the written terms and actual working practices. For Lord Leggatt, however, that interpretation neglected the statutory dimension to the enquiry:

> "Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation … In short, the primary question was one of statutory interpretation, not contractual interpretation" (at [69]).

78. The question is whether the worker protection legislation, construed purposively, was intended to apply to the relevant relationship, viewed realistically. To treat the contractual documentation as the providing the basic framework would subvert the protective statutory purpose. He went on:

> "The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterized in the written documents determine, even prima facie, whether or not the other party is to be classified as a worker".

79. So, a purposive approach has to be taken to the situation. In other words, did parliament intend that someone in Mr Collett's position, working effectively full time for many years for a single company, would have the right to notice pay, or not to be unfair dismissed, or made redundant without compensation. That is a broader question than whether the contract represents the real agreement between the parties, but it yields the same positive answer in Mr Collett's favour.

80. I conclude both that in all practical respects the relationship between him and LSA involved an insistence on their part on a high degree of control, i.e. it was essentially an employment relationship, and in so far as the contract departed from that, in suggesting that he was merely a contractor, it did not represent the reality, or their intentions. A small indication of that pretence is the clause providing that he should provide his own tools.

81. I note too that at the time the contract was signed Mr Collett had no other clients. He had been working exclusively for LSA for several years, apart from the few jobs in 2013 for CANDBACCESS. In those circumstances alone, the suggestion that LSA were merely a client of his is so unrealistic as to amount to a sham.

82. Stepping back from these individual factors, having concluded that the contract in question was a sham, given the length of time Mr Collett was working for the company, and given that he was working on a full-time, exclusive basis for almost all of the period in question, as part and parcel of the business, I have no hesitatin

in concluding that he was in reality an employee throughout.

**Footnote**

83. You can appeal to the Employment Appeal Tribunal if you think this decision involves a legal mistake. There is more information here https//www.gov.uk/appeal-employment-appeal-tribunal. Any appeal must be made within 42 days of the date you were sent the decision.

84. There is also a right to have the decision reconsidered if that would be in the interests of justice. An application for reconsideration should be made within 14 days of the date you were sent these written reasons.

85. A decision may be reconsidered where there has been some serious problem with the process, such as where an administrative error has resulted in a wrong decision, where one side did not receive notice of the hearing, where the decision was made in the absence of one of the parties, or where new evidence has since become available. It is not an opportunity to argue the same points again, or even to raise points which could have been raised earlier but which were overlooked.

Employment Judge Fowell
Date 12 July 2022