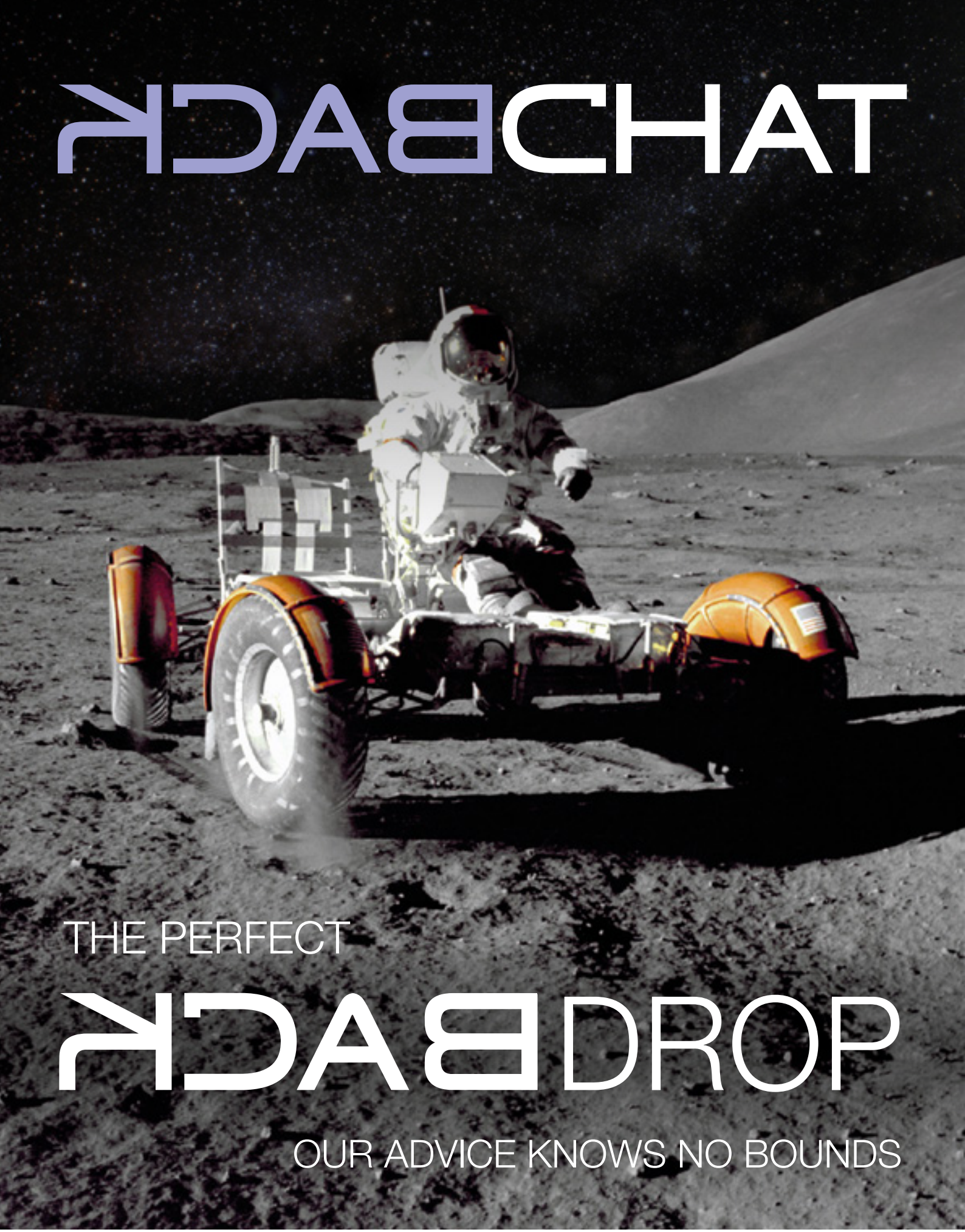
BACKCHAT



THE PERFECT

BACKDROP

OUR ADVICE KNOWS NO BOUNDS

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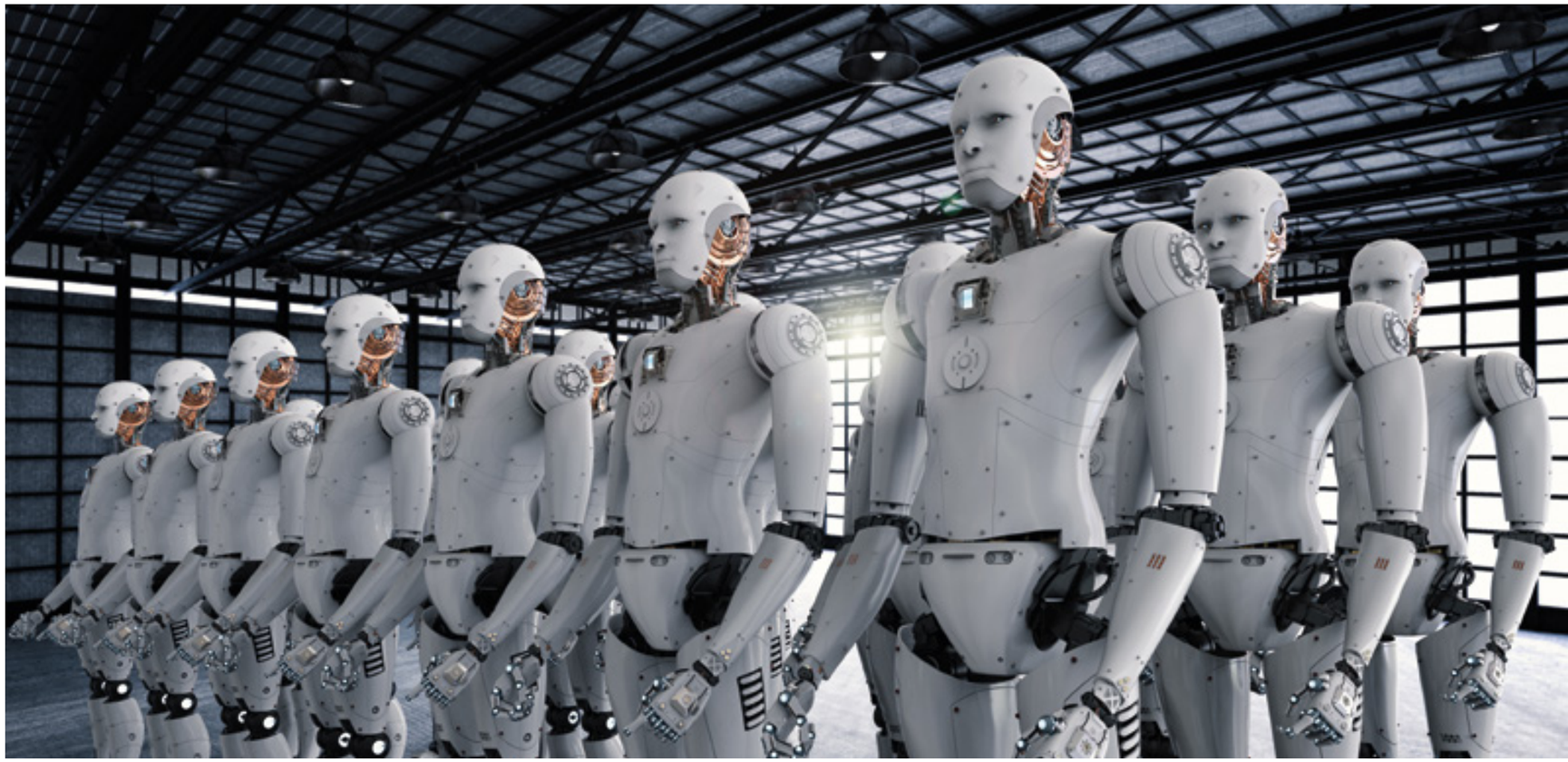
BACKHOUSE JONES

CONTENT

The Next Species of Human



Recently one of my clients described me as the "Mr Saturday night" of the legal profession. I took it as a compliment in a profession that can often be purveyors of doom and gloom.

This got me thinking about other paradoxical and unusual overlaps. Can you imagine a heavenly meeting between the recently departed Bruce Forsyth and Charles Darwin? "Nice to see you to see you nice but do tell me more about The Origin of the Species?"

What an interesting cultural overlap.

In terms of overlaps in evolution, the future of the workplace is perhaps more contested in 2017 than it has been since children were pulled BACK up from the mines and BACK down from the chimneys. Robots are muscling in and the transport industry is not immune as recent trials of pontooning of lorries on U.K. motorways has illuminated.

So what really big "reboots" are yet to come?

Some of you may know that I am significantly deaf. What has that got to do with driverless lorries? Well my answer is we shouldn't say something is impossible when there are already tyre tracks on the moon.

This said scientists as they engineer change are throwing up some really odd questions.

When I was a child watching - on a Saturday night - NASA astronaut Steve Austin being rebuilt as The Bionic Man with the strength of a bulldozer I thought it was mere science fiction.

Whilst I will accept my anecdotes will not challenge Ant and Dec for prime time telly I am genuinely already a cyborg! A cyborg is defined as "an organism to which exogenous components have been added for the purpose of adapting to new environments". That's me!

Evolution and Darwin's natural selection is well under way and my deafness is personal testament to it. The evolution of the humble hearing aid confirms how life itself is being rebooted. My deafness is hereditary and my grandfather had box hearing aids that would occasionally squawk over dinner. These evolved years ago into buds that fitted snugly inside my ear canal but now I have a bone anchored hearing aid fixed inside my scull which completely bypasses my ear to go direct to my brain which allows me to hear as well as you.

Ha ha - but where is it going to end? In 10 – 15 machine (not human) generations I might be able to hear significantly better than you and two to three years after that I might be able to hear whales sing or even a Traffic Commissioner whisper under his/her breath at a Public Inquiry. Inaudible noise, inaccessible to you mere ordinary humans, might be crystal clear to me. I might even be able to focus my hearing from within inside my brain to increase sensitivity and hear your inner most thoughts. Let's hope not.

As we look at the flames of the present we need to keep one eye on the future. The Six Million Dollar man had a 20:1 zoom lens and infrared capabilities and here at Backhouse Jones we have used our bionic hearing to listen to transport operators who tell us they want control of their legal spend and do not want to pay for lawyers by the hour.

We have therefore already prepared for this future by developing BACKup and RHA legal services subscription schemes which allow operators – of driverless or driver operated lorries – to take full control of their legal budget by paying just 26p per vehicle per day to secure advice on all matters to do with Regulatory Compliance and Human Resources.

In anticipation of the future being completely driverless with HR complimented by RR (Robot Resources) BACK up has even bundled the available options so that you can now tailor a bundle to your individual needs. Operators can subscribe to just regulatory cover in case your complete fleet goes driverless in the near future.

Perhaps we, as just the current species of hominid, are using technology to evolve into the next species of human that takes direct and deliberate control over - even - the evolution of our own species.

That reboot will put even driverless lorries into perspective! For the record, The Six Million Dollar Man would cost $34m at 2017 prices and having confessed that I am a cyborg, I will sign off with the mantra of one of my fellow cyborgs – "I'll be BACK".

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The Risk of Doing Nothing

The commercial vehicle industry is one of relatively high risk. Large, metal machines towering over their operators; heavy loads of hazardous waste and other articles; and long days of hard driving; means there are several dangers prevalent.

Thus, it is more important than ever that businesses and employers looking to enter this industry be aware of the duties they have towards their employees with regards to health and safety.

This is something that is true of any sized business; be it a small haulage company or a gargantuan company group, all must put in place measures to protect those they employ.

Fortunately, this article is here to help you do just that.

The Health and Safety at Work Act 1974

This is a vital piece of legislation, it is your sacred text when it comes to the duties you owe to your employees.

The duties of employers take pride of place in the second section of this law, outlined and accessible for all. As it stands, all employers have a duty to:

- Provide plant and systems of work that are safe and absent of risk
- Arrange for a safe way the handling, storage, and transport of substances is carried out
- Provide the appropriate training and information to ensure that their employees can operate safely
- Maintain its place of work with regards to both its condition and accessibility

Examples of how you might adhere to these duties within the commercial vehicle industry spring easily to mind:

- Ensure that you have designed a safe and risk free system or method in which employees load the articles or substances to be transported into the vehicles. It is also imperative that these employees are made aware that such a system or method is in existence.
- Conduct regular inspections of the commercial vehicles your employees will be driving. Unhealthy or damaged vehicles pose a danger to their drivers.
- Carry out regular checks on the place where the vehicles are stored to ensure that it is an appropriate location and does not compromise the quality of your vehicle or fleet.

These are just some examples of how you can protect your employees, by doing this you also protect yourself from expensive litigation and poor publicity.

Further examples and guidance has been helpfully provided in The Management of Health and Safety at Work Regulations 1999.

The Management of Health and Safety at Work Regulations 1999

Great emphasis is evident in these regulations on risk assessments. Risk assessments are crucial to the upholding of health and safety duties, they provide pre-eminence and highlight areas where improvement is required.

If you are running any sort of operation it is vital that you have your procedures and the relevant environment assessed, so that you can do all you can to minimise the risks of your employees becoming injured.

Maybe you don't have time to go around fixing every single potential hazard and wrapping your employees in bubble wrap, the answer to this problem is simple. Delegate. Ensure that there is always someone on hand with the appropriate training and competence to impose safety procedure and oversee operations. This person must be training and informed of all the safety procedures and how best to implement them in the work place.

Understandably, this may be difficult in running a commercial vehicle business as the delegated health and safety official is unlikely to be able to be in multiple vehicles at once.

Instead, perhaps ensure that the interior of all vehicles are decorated with the rules and regulations put in place by your business to prevent injury.

Failing to adhere to any of the precautions outlined thus far will almost definitely expose you to civil litigation in the event of minor injury, potentially stretching to criminal liability if the failure to impose health and safety standards is abhorrent enough.

Corporate Manslaughter and Corporate Homicide Act 2007

This is the Law that comes into play in the worst-case scenario.

Where, as a company, you have shirked your health and safety responsibilities and therefore caused the death of a worker. In such an instance, you are likely to attract criminal liability. Your business will be fined and you may well find yourself on the wrong end of a custodial sentence.

Indeed, only recently the companies Claxton Engineering and Encompass Project Management have found themselves encumbered with hefty fines after 4 workers were killed because of their ignorance of health and safety. The director of Encompass found himself awarded a 7-and-a-half-monh custodial sentence, suspended for 2 years.

The 2007 Act is very clear about the duty of care that businesses and companies owe, particularly involving:

- The supply of goods or services
- The carrying out of any construction or maintenance
- The carrying out of any activity on a commercial basis
- The use or keeping by the organization of any plant, vehicle or other thing

When carrying out any of these activities, businesses must be considerate of their employees or occupiers of premises. Should they breach any of these duties, then under the 2007 Act they will attract criminal liability.

Continued >

Continued >

What can directors do?

The quest for a safe working environment begins at board level. It is the responsibility of the directors, as the controlling body of the company, to ensure that the duties in law as they have been outlined above are respected and implemented into the carrying on of the business.

This is true of companies anywhere, regardless of size or turnover. The job of managing the company falls to the director(s) and it is they that must ensure that health and safety is always at the forefront of the managerial mind.

If, given the nature and size of the company, this is a burdensome task, then it would be wise to allocate one director specifically to oversee the implementation and respecting of health and safety procedures.

It is in the interests of the directors to ensure that the workplace is safe as much as it is in the interests of the employees of the company. If injury or death occurs, it will be the directors of the company that most likely face the wrath of litigation.

Final word

Directors of all commercial vehicle businesses must take charge of their operations and face up to the duties they shoulder as controllers of an organisation. If you feel the need, conduct a thorough evaluation of your health and safety procedures to see if there is anything more you can do to secure a safe working environment.

Feel free to contact Backhouse Jones on 01254 828300 for recommendations or advice on how your business can be made safer and less likely to attract any liability.

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news briefs

The Air you Breathe: UK Air Quality Plan Published

On 26 July 2017 the Department for Environment Food and Rural Affairs, along with the Department for Transport announced its plan to help reduce roadside nitrogen dioxide concentrations.

The plan includes an end to the sale of all new conventional petrol and diesel cars and vans by 2040 and a new Clean Air Fund.

It sets out how councils with the worst levels of air pollution at busy road junctions and hotspots must take robust action.

Air quality in the UK has been improving in recent years, with reductions in emissions of all of the key pollutants, and nitrogen dioxide (NO2) levels down by half in the last 15 years. Despite this, an analysis of over 1,800 of Britain's major roads show that around 4% of these are due to breach legal pollution limits for NO2. Evidence indicates that poor air quality is the largest environmental risk to public health in the UK. It is estimated to have cost the country up to £2.7 billion in lost productivity in 2012.

Local areas will be expected to produce initial plans within eight months and final plans by the end of next year. The Government will help towns and cities by providing £255 million to implement their plans, in addition to the £2.7 billion it is already investing.

Local authorities will be able to bid for money from a new Clean Air Fund to support improvements which will reduce the need for restrictions on polluting vehicles. This could include changing road layouts, removing traffic lights and speed humps, or upgrading bus fleets.

The government will also issue a consultation in the autumn to gather views on measures to support motorists, residents and businesses affected by local plans. This is likely to cover things like retrofitting, subsidised car club memberships, exemptions from any vehicle restrictions, or a targeted scrappage scheme for car and van drivers.

For more information on how this might affect your business, please call a member of our regulatory team on 01254 828300.

Su, Are you?

They are pivotal to the mechanics. Ever present and yet unnoticed. Suzie Lines. They tie the command centre, the driver's seat, to the precious cargo to be hauled cross-country; be it Oxford to Carlisle, Cardiff to Norwich or Preston to Blackburn.

There is, however, a mystery to these heroic wires, a question unanswered by history. That question: Who on earth is Suzie? The intrigue underlying the name "Suzie Lines" is quite frankly, palpable. What did she do that was so monumental, that this essential piece of kit was named after her? Did she invent them? Did she find a bizarre use for them? Who knows?

Backhouse Jones know. We feel it's about time that the clamoring for answers was muted.

The Suzie Lines are a set of electric wires that run from the back of the driver's carriage on a truck, to the platform at the back, upon which the load to be hauled is placed. They hang in the gap that exists between these two sections of the vehicle, often being overlooked by the innocent lay person.

They also feature on planes and airlines, carrying out the similar function of offering passage for electricity to travel from one area of the vehicle to another across a space.

No one can deny that the purpose they serve is practical and essential, but neither can anyone tell you why these wires are called 'Suzie Lines'.

The answer is rather simple. Suzie Lines are SUSPENDED in midair across gaps. Consequently, operators everywhere have taken the first three letters of the word 'suspended' and morphed them to sound out "Suzie". Simple yet elegant.

Unfortunately, there was no women called Suzie involved in the crafting of the Suzie Lines, nor have any bizarre or shocking uses of the Suzie Lines been discovered, the skipping rope industry do seem making headway on that last one though. Instead the name "Suzie Lines" has been birthed by the wit and colloquialisms of the industry, no longer a mystery anymore.

We do, however, recognise that you were hoping to hear an incredible story about a woman called Suzie when you began reading this article, so to satisfy this expectation, below is a list of impressive women called Suzie and their accomplishments:

- Susan Sarandon (Academy Award and BAFTA winning actress who dabbles in political activism)
- Susan Boyle (Previous contestant on Britain's Got Talent and current worldwide selling musician)
- Susan Francia (US Rower)
- Susan Collins (United States Senator from Maine)
- Susan Tedeschi (Successful Blues and Soul Musician)
- Susan J. Kelley (Former Dean of the College of Health and Human Resources)
- Susan Powter (Australian born motivational speaker, nutritionist, personal trainer and journalist)
- Susan Ivey (American businessperson: chairman, president and CEO of Reynolds American, Inc.)

Insured or not Insured? That is the Question!

Your vehicle is hit by a third-party vehicle, which does not stop. By chance you have cctv which identifies the registration of the offending vehicle. The police cannot identify the driver, it could be any one of several people and no one is owning up. The registered keeper is found, but they could not have been the driver. The vehicle was however covered under a valid policy of insurance.

> “The EU directive sets out the requirements of a mandatory third party motor insurance policy and with other EU regulatory law significantly limits the circumstances in which an insurer can refuse to pay out.”

The difficulty where the driver cannot be identified, and the journey is a private journey, is that it is not clear who can be sued for the negligent driving leading to the damage that you have suffered.

You wish to recover the cost of repairs to your vehicle. Traditionally you could claim off the MIB Untraced Drivers Agreement; an agreement meaning in circumstances like this (untraced driver) you can claim off the MIB scheme for your damages. This, in the UK, is the normal way an untraced driver claim is recovered.

It now appears you have another option; in the recent case of *Cameron v Hussain [2017]*. The Court of Appeal decided, as the vehicle had a policy of insurance related to it, which complied with the Road Traffic Act 1988 S151 obligation to carry insurance against 3rd Party risk, implementing the EC directive 2009/103 which requires the U.K. to impose such an obligation on its vehicle users (i.e. they cannot avoid their insured liability for third party loss), then you can claim against the insurance company providing that cover, in spite of the fact that the actual driver cannot be identified.

The EU directive sets out the requirements of a mandatory third party motor insurance policy and with other EU regulatory law significantly limits the circumstances in which an insurer can refuse to pay out.

In the *Cameron v Hussain* case the judgement allowed the claimant to sue: *‘The person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZIZ on 26 May 2013’.* The person unknown could, obviously, not contend the allegations of their negligence so once the court allowed the amendment then the claimant would normally obtain judgement and damages.

That judgement (providing the required notice had been given to the insurer under s 151 RTA 1988) could then be enforced against the insurance company direct.

In the U.K. it is often the individual who takes out a policy of insurance, not for the vehicle in general, but for the individual when he or she is driving the vehicle and perhaps other named drivers.

This is not necessarily the same across Europe where often the vehicle is insured no matter who is driving it. This European approach is more similar to the way that the European regulatory obligation is structured.

The Court of Appeal essentially are allowing, in these specific circumstances, a claimant to sue an unknown person simply to enable the enforcement of that judgement against the road traffic insurer in line with that insurer’s obligations under the EU directive.

Of interest here is, what the position would be if the vehicle was stolen? In such circumstances, it would appear that the insurer could, on the face of it, be liable regardless of the fact the journey was never authorised by whoever insured the vehicle. They or their insurer could of course claim off the thief, assuming the thief was found and could afford to pay which is doubtful. This was not decided in this judgement but is a potential application of the outcome.

In the *Cameron v Hussain* case above there appears to be no suggestion that the use of the vehicle was outside the control of the insured, just that the driver was not able to be identified, and in those circumstances the court has allowed a mechanism to require the insurance company to pay the judgement as they should do under the EU regulations.

The ability to plead a case against an unknown person is a significant shift, albeit in a highly restricted area like s 151 RTA, and it is not known whether there will be an appeal to the Supreme Court.

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news briefs

Change to the Overnight Subsistence Allowance

As of 6 April 2017, HMRC requires operators paying drivers the Industry Scale Rate for overnight subsistence allowance to apply for an Approval Notice. Operators must now demonstrate that they have a checking system to ensure that the amount claimed for subsistence correlates with the amount spent. The Industry Scale Rate is currently £26.20 per night for drivers with a sleeper cab in the vehicle and £34.90 per night for drivers without a sleeper cab. An operator who, due to their specific requirements, regularly pays more than these amounts must apply for a Bespoke Scale Rate Agreement which again must be backed up by an appropriate checking system.

Therefore, Operators can continue to pay overnight subsistence tax free providing they get an Approval Notice from HMRC. In addition, they must have a random checking system in place to ensure that they are satisfied that drivers are actually incurring the expenses they are claiming. Whilst an operator will need to cross reference work schedules and time sheets, a further check on driver receipts e.g. for hotels/food/parking, should be carried out to ensure the costs were incurred.

Details of the HMRC checking model are available at https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim30275

The HMRC models suggests that for a small employer (less than 100 workers) a 10% check of all employees’ expense claims should be made, and the check must be random, for example every 10th claim received. Employees should be required to retain receipts for a period of 12 months from the date of expenditure.

For more details on the changes, see https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim66130 or contact a member of the employment team.

GDPR: Who Knows What?

The clock is ticking on the GDPR countdown and with under a year to go until the legislation comes into force on 25th May 2018, there is no time like the present to get your data protection ducks in a row. This new regulation will be compulsory and if you are found not to be compliant, your company could be fined up to €20 million or 4% of annual global turnover. This is obviously not a piece of legislation to flout and being landed with a fine of such hefty nature is enough to rain on anyone's parade.

The general idea of the GDPR is to provide a single legal framework, which will apply to all members of the EU, to streamline and simplify the jumbled legislation that currently covers data protection. Furthermore, our ever-evolving assortment of digital and online services leaves old legislation seeming prehistoric, so the GDPR will modernise the rules to reflect our digital age.

Previously, it was only 'data controllers' to whom compliance obligations fell. However, the GDPR shall apply also to data processors. The controller says how and why data is processed and the processor acts upon the controller's behalf, and the definitions shall be broadly the same as that set out in the Data Protection Act. So, what does all this mean for you and your business? In basic terms, you are required to keep a clear paper trail which clearly demonstrates where the data was sourced, what consents you have for its use, confirmation permission has been given and accounts of any third parties it has been shared with.

The first data protection duck we suggest you align is in relation to any data already held. You must ask yourself whether you know where the data has come from and that you have record of the obtained requisite permissions to use the data. Another good practice is to consider whether you have made contact with the data subject within the last 12 months, and abide by the motto 'if you don't use it, lose it'. If the data held does not comply with the GDPR, then it is best to remove it so you are not at risk of being fined. Another consideration to be borne in mind is that any privacy statements will need to be revised, so that you can ensure it is transparent and there is no doubt in the data subject's mind what their information is being used for.

Key principles that you and your business should take out of the GDPR include being accountable and transparent, which we briefly touched upon as you need a paper trail confirming the source of your consents and a transparent privacy statement. Secondly, but equally as important, the consent obtained must be freely given, unambiguous and given by means of a statement or clear affirmative action. Under the new legislation, the frequently used methods of silence or pre-ticked boxes are unlikely to be classed as a clear affirmative action.

If there are no legitimate grounds for you keeping the data, the subject has the right to request that their data be deleted, which also involves the obligation to take reasonable steps to inform third parties to whom the data has been shared. Similarly, to requesting removal of data, the subject has the right to request access their data free of charge within 1 month.

Subjects can request their data to be provided in a useable format to be transferred to another data controller. You must report any breaches to the supervisory authority within 72 hours as a general rule and any of which are high risk must also be communicated to the data subject. If your core activities include processing operations that require regular monitoring of individuals on a large scale and those dealing with sensitive data, you will be required to appoint a data protection officer.

You might be wondering why we must be compliant with this regulation in light of Brexit. Firstly, the new rules will come into effect whilst we are still members of the EU and therefore we will have to comply. Secondly, the laws are likely to be transposed into domestic legislation once we do leave as a result of the 'great repeal bill'. Finally, the GDPR will apply to all UK entities that do business in the EU. As this will be applicable to many UK businesses and will affect those trading within the EU member states, it seems plausible that the UK government will come to the sensible conclusion to reform UK legislation and harmonise with the EU. This will help to drive UK businesses into possessing the requisite standard required to trade in the EU.

In summary, businesses should start looking now at their data protection obligations and their levels of compliance. Just like construction and use rules, driver's hours and other road transport legislation, this must be complied with. Fines for non-compliance can come from both the courts and the Information Commissioner's Office.

If you require any further advice on data protection or the GDPR, contact us now for a chat, an audit or help!

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The Unintended Consequence

How to Find yourself at PI

It's the place every operator doesn't want to find themselves - standing before the Traffic Commissioner.

There are, in reality, a multitude of avenues to land yourself with a Public Inquiry, the most typical are through the DVSA finding a serious problem at a roadside check or through a visit by your local Officer following an application to increase your licence authorisation (the shoot in the foot technique).

Opening Pandora's Box

Quite often you have a driver or errant fitter to thank for opening Pandora's box as the simplest method of finding yourselves subject to a DVSA investigation is through an 'S' marked prohibition being issued – this is a prohibition that denotes there have been a significant failing in the maintenance systems. Sound serious – it is – but it can be something simple such as failing to secure the fuel cap which clearly arguably doesn't affect the roadworthiness of the vehicle but is something that you might expect the driver to identify on their walk round check.

As well as attracting double the amount of OCRS points of a non 'S' marked prohibition, as night follows day, a DVSA Examiner will be paying you a visit – usually unannounced – to review your maintenance systems and inspect some of your vehicles. No matter how good your systems are, the issuing of the 'S' marked prohibition will result in an "unsatisfactory" outcome to the investigation and a referral to the Traffic Commissioner. Your compliance history will be checked, Pandora's box is now open.

Depending on the compliance history, you are now staring down the barrel of a full Public Inquiry or perhaps a marginally more comfortable Preliminary Hearing.

What is it that the Examiner will be looking at? A Vehicle Examiner will concentrate on matters such as whether the Transport Manager is fulfilling their role and demonstrates the requisite level of knowledge; whether your inspection records are of the correct type, properly filled in and undertaken within the frequency specified on your licence and whether your forward planning is adequate. The driver defect reporting system will also be interrogated; the Examiner will be particularly interested to see if drivers are reporting any defects and if so, whether rectification work is recorded as well. They will also consider whether you have a maintenance contract in place with your maintenance provider and what the maintenance facilities are like. They will also look to see whether your operating centre is specified on the licence.

Remember, all of this arises from that 'S' marked prohibition.

So, what do you do if an 'S' marked prohibition is issued? The answer, is to fully investigate the driver and/or maintenance provider. If the prohibition has resulted through the driver missing something on the walk round check, discipline them. If the maintenance provider has let you down, review whether you should change maintenance provider – consider the MOT pass rates and whether the fitter has been properly trained. Then make representations to the DVSA about your investigation before they come to visit, particularly if you disagree with the 'S' marking of the prohibition or you have taken strong action against your driver/maintenance provider. You should also review your systems in full in preparation of the Examiner's visit and ask yourself whether all of your vehicle records are up to date and properly filed. Consider a compliance review, something which Backhouse Jones can assist with.

An alternative approach

If the maintenance systems don't land you in bother, your next best option is through driver's hours. If the DVSA undertake a download/tacho inspection at the roadside and find evidence of falsification/failing to record or just numerous infringements, you are set for a visit by a Traffic Examiner.

The Traffic Examiner is interested in your systems for planning journeys in accordance with the hours rules; how often you collect/download your tachograph data; whether infringements are acted upon; whether you have a system for ensuring compliance with the Working Time Directive and whether your records are adequately stored. The Traffic Examiner will consider your training regimes, particularly for new recruit; refresher training and records of driver CPC training. They review policies and techniques for load security and hazardous goods training if applicable. They will also look at how often you are checking driver licences (which should be a minimum of twice a year, but preferably quarterly). Also failing under the spotlight will be plating and testing, insurance, vehicle excise licences, your tachograph calibration and speed limiter functions. They are also interested in the operating centre and whether it is specified on the licence.

Recently, I have seen an Operator called to Public Inquiry for their speed limiters not been set to the correct limit. The Operator had no idea but had the data available to them through the tachograph calibration itself or running the overspeed report on the tachograph analysis. Had these checks been done the issue could have been identified and rectified.

The most serious issues as far as tachographs are concerned relate to a driver "pulling the card" or using a magnet. All of which can be detected by you – the secret is to download the data and run the reports, include the missing mileage/unknown driver reports and any reports that show overspeed and error codes. If you find that a driver is failing to record or falsify the records then strong disciplinary action needs to be taken and only in exceptional circumstances should the driver avoid dismissal. So what can you do in order to ensure that your drivers hours systems are as they should be? The answer is to have an independent compliance review of your driver's hours systems.

The shoot in the foot technique

This is the forehead slapping, sit in a dark room for a while, curse yourself approach. Make an application to increase the authorisation, which rather than results in shiny new discs, results in dirty underpants and lighter pockets! The road to hell can be paved with good intentions and never is that more true than making an application to increase the licence authorisation which triggers a visit from the local DVSA Officer, who is coming to check that everything is in order before the application is granted – you may as well have an 'S' marked prohibition or a driver falsifying the records – not quite, but you follow that they result in the same friendly face visiting your premises. The same checks are done and if problems are found, you find yourself before the same Traffic Commissioner in the same Public Inquiry room.

So, what should you do before making an application to increase your authorisation? Easy – have a full independent compliance review of your systems. This might cost you a few thousand pounds but it is significantly cheaper and less stressful than a Public Inquiry and will also save you the extra linen wash!

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AUSTRALIA

Boy (Stockport) meets girl (Adelaide) over the internet (started with a common interest in Star Wars). They get together in London. Nature takes it course and on 25 June 2017 they married in Adelaide. This then is the story of Ed, our eldest son, and Cass, a new Mrs Heaton.

It led to Debbie and I travelling to Australia for the first time, advance party of the British family and friends going to the wedding. I was asked to write something about Australia for BACKchat while trying to "keep it relevant". Oh – and the deadline is three days, off you go.

It did feel strange to travel so far and find things so familiar (the language, driving abroad but still on the left, much of the culture, food from the 1960's) yet so strange (the landscape, hot weather in winter but short daylight, the bird song) and some things are similar to home but somehow not quite the same (in Adelaide everyone lives in bungalows, Aussie Rules football, Japanese HGV's).

So this odyssey began with a flight from Manchester to Adelaide via Dubai (and what are the chances of meeting a fellow transport lawyer and his party at Dubai at midnight (hello Graham) – quite good apparently). No time for jet lag on arrival because we are straight into the Port Adelaide v Brisbane Aussie Rules match at the Adelaide Open – travelling by tram.

The next day a BBQ to "meet the family" of Cass. We had hired an Aussie built Holden while we could as local manufacture of these is to finish. The Vauxhall genes were recognisable and as the wedding approached we swapped it for a Toyota Hiace (12 seater minibus) bedecked with wedding ribbons much to the locals amusement (you see the transport theme going on here – trams, planes and automobiles).

The wedding went off splendidly, a very happy occasion with the reception at a winery near McLaren Vale (for you wine buffs – what's not to like?).

Then to Alice Springs, which is nowhere near Ayres Rock (Uluru – in fact it is 440km across a very empty desert.

We were advised to allow at least 1km when overtaking the roadtrains in the desrt and not to drive after dusk because the wildlife has no road sense and will write off your car if it hits you. Uluru is huge and mysterious and changes colour.

On to what the Aussies call "Far North Queensland", i.e. the tropical rainforest north of Cairns. Even in winter it is steamy hot with impenetrable jungle, endless sugarcane fields with their own railway system. The wildlife is different and you cannot avoid seeing and hearing kookaburras (which sound like monkeys in a sack bickering) and Cassowaries a sort of aggressive stone-age emu. Also Platypus, a great treat and very rare seen in a creek near Youngaburra.

Next on to Sydney where our younger son Andrew lives, great to see him and Emily. Sydney is spectacular, all steel and glass and Harbour Bridge and Opera House on the water. We swam at Bondi (but it was like a millpond on that day, no surf) and saw whales from the cliffs. A brief trip to hear some legal cases at the New South Wales Supreme Court (bit of a bus man's holiday).

Then back to Adelaide briefly to stay with the newlyweds in their new home. And a hospitable meal at Ed's inlaws including a game of pool in the Bradman Bar – Justin has a signed cricket bat in pride of place.

Then to Hong Kong, bizarrely hot and humid. It is difficult to describe such an extraordinary place – all human activity, traditional temples, skyscrapers and wooded mountains. The transport was racing buses, the taxi Grand Prix, Star Ferry, Peak cable railway, Mass Transit Railway, minibuses, light rail, trams like Blackpool and Catamarans. A treat for the most hardened transport buff.

Then home and get over the jetlag!

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Missing Mileage –
The Missing Piece of the Jigsaw

Most, if not all, of you are probably quietly confident that, if faced with a DVSA Traffic Examiner audit, your systems for ensuring compliance with the drivers' hours rules would be found to be sufficiently robust.

You have trained your drivers, so they should know the rules. They all have valid driver cards - you've checked them and have copies on file – and they have all been issued with print rolls and know where the spares are kept. You download their driver cards weekly (at most) and vehicle units monthly – far more frequently than the legislation requires. You then use your analysis software to generate infringement reports, which tell you if a driver has driven for too long, not taken the required breaks, taken an inadequate daily or weekly rest or committed any other breaches of the drivers' hours and/or working time rules. You then speak with the driver concerned, obtain their explanation for any infringement(s) and you both sign the report (which is retained on file).

So, imagine the following scenario…

…One of your drivers, John, is stopped by the DVSA at the roadside, his driver card and the vehicle unit are downloaded and, when the two sets of data are cross-referenced, it reveals that, on three occasions, there is missing mileage - he has driven without his driver card inserted.

Within days, if not hours, a Traffic Examiner turns up unannounced at your operating centre and presents you with a letter, which requires you to supply the DVSA with tachograph data for all your drivers and vehicles for the last three months within 10 days.

You provide the data requested within the required timeframe. Then a few weeks pass and you hear nothing…but you didn't really expect to. You are sure the DVSA won't find anything – you have a good system in place and, apart from a few mode switch errors and the odd occasion where a driver has miscalculated his breaks, your drivers are pretty good.

Then you are shocked to receive a letter from the DVSA inviting you to attend an interview under caution. The letter explains that the analysis of your tachograph data has identified further discrepancies and that you are to be interviewed in connection with a number of offences of permitting the creation of false tachograph records by John and another three of your nine drivers. The drivers – John, Scott, Chloe and Ian - are also to be interviewed for false record offences.

The day of the interview arrives. You arrive at your local test station and the Traffic Examiner explains their analysis shows that your drivers have removed their driver card whilst driving…some – particularly Chloe - on a number of occasions.

During the interview, you are provided with details of each occasion on which the drivers have 'pulled their card' - they have all been hiding the fact that they haven't taken the required breaks…presumably so they can get back (and home) earlier. John and Ian have done this on a few occasions each, Scott only once…but, to your absolute disbelief, Chloe has driven without her card inserted on a total of nine occasions.

The Traffic Examiner asks whether you have ever instructed or encouraged your drivers to do this - "Certainly not! Why would I?" - whether you were aware of what they were doing – "Not at all!" - and whether your own analysis of drivers' hours data had identified the periods of missing mileage – you concede it did not…you were not comparing driver card and vehicle unit data. You also point out that your other drivers, Andrew, Laura, Mark, Jonathon and James were carrying out the same activities without committing any false record offences - or any offences at all…which demonstrates that the job can be done perfectly legally.

The Traffic Examiner then asks whether you have a disciplinary policy and procedure in place for dealing with drivers' hours and tachograph infringements. You explain that you produce infringement reports and speak to the driver concerned…but you have never had any need for anything more than that, as there was only ever the odd, minor infringement.

All four drivers are prosecuted for offences of knowingly creating false tachograph records and, a few months later, are convicted in the Magistrates' Court. John, Scott and Ian receive hefty fines…and, due to the number of offences committed, Chloe is transferred to the Crown Court where she receives a nine-month prison sentence…she won't be getting home early for a while!

You are not prosecuted. Neither is the company. The DVSA were satisfied that you did not tell the drivers to commit the offences and you did not actually know what they were doing – the drivers were cutting corners for their own benefit (not yours!) and were pulling their cards to hide what they were doing from both you and the DVSA!

But…

…a report has been made to the Traffic Commissioner.

The next thing you know, you receive a letter calling you and the company to a Public Inquiry. You face potential regulatory action - revocation, suspension or curtailment of your Operator's Licence…and all because your drivers wanted to get home quicker!

The drivers are all called to Driver Conduct Hearings and lengthy suspensions, possibly even revocation, of their vocational driving entitlements seem likely…

At the Public Inquiry, the Traffic Commissioner asks why your own analysis hadn't identified the offences, why you weren't looking for missing mileage…and what you thought you were downloading vehicle unit data for if you were going to do nothing with it.

The Traffic Commissioner then asks how you deal with drivers where infringements are identified, whether you have a written disciplinary policy and whether it makes specific reference to drivers' hours breaches and how they might be dealt with.

You explain that you had never previously appreciated the need to compare driver card and vehicle unit data – you had never been told and, in fact, you were not even aware that your analysis software had the facility to do this. As for a disciplinary policy, you accept that, prior to the DVSA investigation, you didn't really have anything in place…and certainly nothing that specifically referred to drivers' hours infringements.

The Traffic Commissioner suspends John's and Ian's vocational driving entitlements for 12 weeks and Scott's for four weeks.

Chloe's entitlement is revoked entirely and she is disqualified for a year.

He finds that your system for ensuring compliance with the drivers' hours rules was inadequate – you were not comparing driver card and vehicle unit data and you had no robust disciplinary policy and procedure in place for dealing with drivers' hours infringements. You have now addressed this, but you should have done so far sooner than the week before the Public Inquiry - you did too little too late.

He therefore suspends your Operator's Licence for 14 days…

Now, in 2017, any sound system for the management of drivers' hours compliance requires thorough analysis of missing mileage and a comprehensive disciplinary policy and procedure, which specifically deals with drivers' hours offences and which can be evidenced to the DVSA and Traffic Commissioners. John, Scott, Ian and, particularly, Chloe, would normally be expected to have been dismissed for gross misconduct.

Sadly though, in our experience, the above scenario is an all too common nightmare for operators and transport managers…and one that can easily be avoided.

If only you had been looking for missing mileage!

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Nosey Neighbours

As an operator of vehicles, how well do you get on with your neighbours? Do you understand the ramifications that can occur when you are seen by the local community as a "bad neighbour"?

Whilst it is more prevalent when operating heavy goods vehicles, some of the principles below are equally applicable to PSV operators and, as such, when dealing with your operating centre and the neighbours that surround you, the same principles may apply.

Under the Goods Vehicle (Licensing of Operators) Act 1995, an operator must have an operating centre in which to park its vehicles and trailers. As part of an application process for a new operating centre or for a change in the number of vehicles at an operating centre, a HGV operator is required to advertise the use, or change of use, at this site by placing an advert in the local newspaper. This advert allows persons in the vicinity of the operating centre to make representations over the use of that site as an operating centre and as such, this may cause adverse effects on the environment conditions in the vicinity of that centre or whether the site would be unsuitable for use as an operating centre on other grounds.

Furthermore, upon a review of your operators licence every five years, the Traffic Commissioner may have regard to any representations or complaints about the use of the operating centre and may call your licence to a Public Inquiry to consider those complaints.

Over the previous years, we at Backhouse Jones have dealt with a number of Public Inquiries arising out of complaints about the use of an operating centre on behalf of our clients. The majority of these complaints are unsubstantiated and the people that complain tend to misunderstand what the jurisdiction of the Traffic Commissioner's Office is.

Complaints tend to range from the use of vehicles on the public highway and the noise etc that this will create. However, this is beyond the jurisdiction of the Traffic Commissioner and is, instead, controlled by the Highways Agency.

> **In reality, the Traffic Commissioner is more interested in what is going on in and around your operating centre and the point at which your operating centre meets the public road for the consideration of road safety.**

In reality, the Traffic Commissioner is more interested in what is going on in and around your operating centre and the point at which your operating centre meets the public road for the consideration of road safety.

The issue that we tend to find is if a local resident to your operating centre feels that you are a bad neighbour and creates noise and therefore adversely affects their life, they can make your life very difficult as an operator, even though their complaints may not be valid. Traditionally, we have seen representations being made by local complainants who will then get other residents involved to sign petitions or to put in joint letters to the Traffic Commissioner's Office.

Why does this cause operators a problem?

It is simply because it delays your application for changes on your licence for a current, or for a new, operating centre and there is little chance of an interim licence being granted whilst this is going on. This can sometimes mean the delay of an application between 3-6 months whilst the matter is ultimately resolved at a Public Inquiry.

You can try to mitigate this by making promises to the Traffic Commissioner's Office, namely so-called undertakings or with conditions being placed on your site, that the use of the site will be restricted in some way. However, this is not always feasible by way of the nature of your operation.

Again, we have comments made by our clients that the complainant has only recently moved to the area and how were they not aware that the site was an operating centre previously, but the Traffic Commissioner's do have the jurisdiction to review an operating centre, or review the changes made to an operating centre, where they believe that it will be a material change to the site.

In reality, dealing with such complainants is incredibly difficult and certainly if there is a new local development ongoing at one of your sites for new housing or you believe that your operating centre may be in a sensitive area, there are measures that you can take to mitigate the risk of complaints being made to the Traffic Commissioner's Office.

These are, for example, restricting noise at time sensitive hours or approaching the local residents, through a residents committee to understand their concerns and complaints and giving them an access point to your operation where, hopefully, any issues can be resolved in a mutually convenient fashion without having to resort to the Traffic Commissioner's Office.

Whilst some of these complaints may be a pain and completely unfounded, usually we find that by having a better dialogue with your neighbour and giving them a point at which to vent and complain usually works better in the long run.

Finally, if you are looking to move to a new operating centre, or if there is going to be a change of use of your current site, it is incredibly important to check the planning restrictions at that site to ensure that you are compliant with them. It is preferable that your planning permissions include the use of vehicles and the parking of vehicles at that site and if it is a site without planning permission, it is incredibly important to try and obtain a certificate of lawful use. If such certificate or planning is in place, it does make it difficult for the Traffic Commissioner's Office to put in further restrictions over and above what the planning authority thought was correct at that time.

In addition, it is important to check the planning permissions on site as a breach of the planning permissions will go to the operator's repute.

If you are in the process of making an application for an operator's licence at a site, or a variation of an operator's licence at a site, and you feel as though you are at risk of receiving representations or you have already received representations after advertising, please do feel free to call us as there are measures that we can put in place to hopefully speed up the application process and to start liaising with the Traffic Commissioner's Office and the local residents to mitigate any problems that may arise.

We have in the past undertaken reviews of operating centres for environmental suitability and can give an assessment of best practice over matters such as the location and parking of vehicles, the loading of vehicles and even down to simple things such as the placement of driver restroom facilities so that it may not impact your local neighbours as much as it may have through a poor approach to site planning.

Don't fall foul of the Nosey Neighbour……..

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Time is of the Essence

The past few months have seen a significant change in the law relating to insurance claims.

As from 04 May 2017, insurance companies have had a duty to pay their customers' insurance claims within a 'reasonable time'. The duty applies to insurance policies taken out, varied and renewed after this date.

If insurers fail to pay for a valid claim within a reasonable time, they could be required to pay compensation to their insured if they have suffered additional losses following the delay in payment.

Usually, if one party breaks a contract then the other party is entitled to claim compensation in respect of any foreseeable losses. Until now, that principle did not apply to indemnity insurance contracts due to a particular legality. As per previous law, indemnity insurers could keep costs down by putting little effort into defending a claim or throwing up unreasonable problems in the claims process. Consequently, this development in the law seems to be a radical change in the favour of the insureds.

The legal advance will be welcomed by small and medium-sized businesses, for whom delays in insurance pay-outs can be detrimental.

Take the example of Mr Sprung in the case of Sprung v Royal Insurance (UK) Ltd – his insurers took four years to make a payment, in which time his business struggled severely and subsequently ceased trading. Despite Mr Sprung's financial suffering, the Court of Appeal decided that he could not recover compensation for his losses.

The rules eventually came under scrutiny by the English and Scottish Law Commissions, and their report recommended an obligation should be placed upon insurers to prevent them from delaying payments.

This then resulted in a duty being drawn up in the Enterprise Act 2016. Under this new right, not only can insureds claim compensation for unreasonable delays in insurance payments, but they can also claim interest on those amounts.

There are some important details which need to be noted, though:

- A 'reasonable time' is not a defined term. It is, however, an objective (as opposed to subjective) test of the circumstances.
- Relevant circumstances will include the type of insurance, the size and nature of the claim, compliance with regulations and guidance, and factors beyond the insurer's control.
- 'Reasonable time' includes time taken to carry out investigations and assessments of the claim, which in themselves can cause substantial delays.
- Customers must be aware that the insurer does not automatically have to pay compensation if there is a long delay; as long as the delay is reasonable, the insurer is safe. It is the 'unreasonable' element of the delay which is important.
- Customers have one year from the date on which their insurer made full payment in respect of the claim, to bring a claim for late payment.

If faced with a delay in their insurance payment, customers will not only have to prove that the delay has been unreasonable, but a number of other factors too. Insureds must prove the following:

- Causation
- Foreseeability
- Mitigation

Firstly, customers looking to claim compensation must prove that there is a direct link between the delay in insurance payment and their business suffering additional losses – the loss must have been caused by the insurers breaching their contract.

Secondly, the loss which occurs to the customer must have been foreseeable at the date when the contract was created (as opposed to later on, when the loss actually occurs).

Thirdly, the customer must prove they have tried to reduce or prevent a loss from occurring – they must attempt to mitigate their losses.

In light of the above, it is crucial to discuss the potential consequences of a delayed insurance payment with your insurance company when the contract is being created. For example, if the business suffers from an insured loss, it may be unable to make its loan payments which could lead to financial difficulties. It is important to keep records of this type of correspondence in case proof is needed at a later stage.

Ultimately, however, an insurance company may contract out of their new duty in an attempt to discharge themselves of more responsibility.

This insurance law reform is expected to be gratefully received by insurance customers. It provides them and their businesses with some reassurance that, if properly documented at an early stage, any foreseeable losses which arise out of an unreasonably late insurance pay-out can lead to compensation.

There are some uncertainties, though, due to this development being in its infancy. Hopefully case law in the next year or two might shed some light as to how the courts will deal with the insurers' new duty. Perhaps it will also become clearer as to whether customers will be compensated purely for economic loss, or whether emotional distress can be compensated in addition. After all, an insurance policy is supposed to provide a safety net to its customer.

One thing is for sure, though – if you and your business are faced with delays in insurance payments – or insurance problems of any kind – please feel free to get in touch with our Insurance Litigation department. We can BACK you up.

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Have you Heard?

On 19 July 2016 the European Commission issued a press release confirming the existence of a price fixing cartel among European truck manufacturers. MAN, Volvo/Renault, Daimler, Iveco and DAF admitted to the European Commission that they had colluded for 14 years, between 1997 and 2011, to coordinate the gross list price of trucks over 6 tonnes, the timing for the introduction of emissions technologies (Euro III to Euro VI) and the passing on of costs for emissions technologies.

The European Commission handed the manufacturers an overall fine of €2.9 billion. This is by far the largest amount ever imposed for any case of this nature. An additional fine of €1.2 billion would have been imposed on MAN, but MAN had its fine reduced to zero as it was the immunity applicant.

Scania was also part of the investigation but has so far denied the allegations against it. The investigation against Scania will therefore continue and a decision will likely be published in due course. However, this does not in the meantime stop operators from seeking compensation in relation to the purchase of Scania trucks.

Naturally many operators have been keen to understand the impact of the cartel on their business and what action can be taken to obtain compensation. Below is a brief summary of the current position.

Has the alleged cartel impinged on your business?

Initial evidence suggests the operation of the cartel will likely have had an impact on your business, thereby entitling you to compensation. Further investigations are underway to establish the precise level of the damage to the industry. It is important to be aware that the cartel could have affected those who purchased new or second hand vehicles whether outright, through lease agreements and/or through hire purchase agreement.

It is also not relevant whether the purchases were made direct from the manufacturers or through dealers. In addition, the cartel may well have had an impact on other aspects of the operating costs of haulage firms during its 14-year operation.

What action is being undertaken?

The Road Haulage Association (RHA) is now giving UK haulage and logistics firms (whether or not they are RHA members) the chance to sign up to its legal action for compensation against truck manufacturers found guilty of illegal price fixing. In July last year the European Commission fined MAN, Volvo Group (which includes Volvo Trucks and Renault Truck), Mercedes-Benz parent company Daimler, Iveco and DAF close to €3 billion (£2.6 billion) for price fixing and other cartel activities between 1997 and 2011.

The compensation claim will be brought before the Competition Appeal Tribunal. If successful, haulage and logistics companies will get money back for vehicles sold or leased to them at inflated prices because of the cartel, if they sign up to the claim.

This is the first fully funded group claim against the truck manufacturers on behalf of affected hauliers. All UK truck owners can join the group legal action at www.truckcartellegalaction.com.

What is Backhouse Jones' involvement?

Backhouse Jones' Solicitors, and barristers from Exchange Chambers and Brick Court Chambers will lead the claim. The group legal action is being funded by litigation funder Therium Capital Management Limited, who will cover the costs, including significant insurance cover. The RHA has therefore carefully organised the claim so as to avoid any cost or risk to hauliers joining the legal action.

There will be no cost for hauliers to be part of the group claim.

Early indications are that compensation could be in the region of £6,000 per truck on average across different truck sizes. Companies that have purchased or leased new or second-hand trucks direct from manufacturers (including Scania) or dealers from 1997 onwards are eligible to join the claim.

During the period the cartel operated we believe around 650,000 new trucks were sold. Although this legal action is being spearheaded by the RHA, non-RHA members are able to join.

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news briefs

The Latest Holiday Pay Instalment

You should all be familiar from recent updates of the current position relating to overtime and what should be included in the calculation of holiday pay.

This month saw a further Employment Appeal Tribunal (EAT) decision relating to holiday pay. As you may be aware claims for back pay of non-payment or underpayment of holiday pay can go back up to two years. When the case of Bear Scotland & Ors v Fulton & Ors originally went to the EAT in 2015 part of the judgement stated that more than three months between an underpayment of holiday pay broke the 'series of deductions' preventing the Employment Tribunal (ET) from considering claims relating to earlier underpayments.

The case was remitted back to the ET to consider the claimant's individual circumstances. The ET considered itself bound by the EAT's ruling and would not consider claims where more than three months had passed between the successive underpayment; this meant that the majority of the claimant's claims were out of time. The Claimant's appealed to the EAT on the basis that the previous decision relating to the break was a rebuttable presumption and not a universal rule, that it conflicted with previous decisions on the word "series" and that the three-month rule would lead to arbitrary and unfair results.

The EAT held that this second appeal could not succeed and the ET was correct to consider itself bound by the earlier decision.

It therefore appears settled that in respect of holiday pay claims, a three-month gap between underpayments will break the series of deductions and limit the scope of the amount of back pay for underpaid holiday.

What Are you Tweeting About?

Everyone keeps mentioning the importance of digital and social media but I'm still not sure how this can help my transport business?

"Streamline", "optimize", "dovetail", "benchmark", "ad words", "hash tag" …all twenty first century marketing jargon, or is it?

It's widely acknowledged that today we live in a digital era. Again, perhaps another term overused, but there seems to be no other fitting description that can be used to highlight the incredible – in fact phenomenal - use of social media platforms (another buzz word) such as Facebook, Twitter, Instagram, Linked In and Google, that have seemingly taken over both our personal and professional lives.

I often reflect on what life was like before the world wide web, smiling at the memory of standing in the photocopier queue at the university library, frantically copying material to write an essay, books piled high filled with post it notes.

To own a mobile phone was even revolutionary – and it had to be the NOKIA with the changeable colour screens. Remember those? My friend had the poorer relation Erickson at the time with extendable aerial. Now that was a hilarious sight, seeing her try to obtain a better signal in the Student's Union, not exuding one ounce of coolness whilst she looked more like she was chatting to Air Traffic Control than to her boyfriend at the time.

Whichever way you look at it, it's hard to believe how the world has changed so dramatically since the early noughties and how our working lives have been entirely shaped by social and digital evolution.

Is it for the better I hear you ask?

Well, occasionally criticised by some as an opposer to technological change (most probably through fear), the answer is of course, yes. Whilst this digital era means that we never switch off – quite literally –what it has done is make the world a smaller place with much easier, instantaneous access to our clients and prospective customers.

Gone are the Yellow Pages and it's a big hello to Google and other social media platforms that enable us to run our business operations and, let's face it, social lives. You know when David Dimbleby starts talking about 'tweeting' and 'hash tagging' on Question Time that it's time to sit up, smell the coffee and acknowledge the power of the social.

So, what can #Twitter do for your business and do you have an account?

Well, for those who are yet to get to grips (and don't be shy, there will be plenty of transport operators out there who are still wary of using this method of communication), Twitter can be a super-efficient tool enabling you to talk to your customers. Offering a space of 140 characters per tweet, it means that your posts are straight to the point and succinct.

You must be blunt and quick witted as there isn't the space to be anything other. Furthermore, this is free! When do you often hear that. Years ago, marketing consisted of paid advert spaces in directories, wall planners, direct campaigns (such as flyers through letterboxes) however to have a Twitter account is – yes – totally free, meaning you can tweet and harp on about your business strengths, news and service updates to your hearts content. You might only have space for 140 characters each time but you can post with as much frequency as your nimble finger will let you.

Twitter Facts & Figures:-

319 million
Worldwide Twitter users

14% increased
Twitter has increased their year over year Daily Active Users by 14 percent year-over-year

151% higher
Twitter advertising engagement for 2016 was 151 percent higher than it was for 2015.

66%
According to eMarketer, nearly 66 percent of the businesses who have 100 or more employees have a Twitter account and expect it to rise through 2017.

Note – if you are a smaller transport business, do not be afraid to set up a Twitter account, thinking that it is only for the big boys. SME's can have equal success on the social front with impressive numbers of followers. It's all about getting in the groove and developing a certain mindset and Twitter chat.

"Gone are the Yellow Pages and it's a big hello to Google and other social media platforms that enable us to run our business operations and, let's face it, social lives."

An avid tweeter and advocate of social media, Jo Dawson-Gerrard provides some interesting pointers when contemplating your tweets: -

1. Be organised and systematic in your approach. Consider what you want to say and be concise.

2. Set clear objectives. What are you hoping to achieve from this tweet? Is it a call to action or state of mind thought? Be mindful that whatever you post may generate a response so make sure you are prepared for that!

3. If your Twitter account takes off and it requires full time management (e.g. someone checking for posts daily), make sure you provide suitable resource for this. If this involves delegating the responsibility, ensure they have a good concept of grammar and that they are aware what they can and cannot post. Remember, "it takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently" (Warren Buffett.) With this in mind, draw up guidelines, mandatories and best practice.

4. If you are new to Twitter and social media, you may be wondering what you can post or what your customers will be interested in. You may even wonder why they would be interested! Well let me tell you, people, customers, clients ARE interested. We all have a hint of nosiness and social media platforms are the king for providing this. If you have been on an interesting journey, taken an interesting load or driven to a challenging destination on a scenic route, followers would be intrigued to find out more. You could even take it one step further and film some of your escapades and then upload to a You Tube account. Again, free and publicity that is far reaching. Social media is all about content and google loves fresh content! Therefore, ensure it is relevant, entertaining, interesting, valuable and furthermore compelling.

Continued >

Continued >

Chloe West, who most of you will know through our events and own marketing e-shots, highlights the power of Facebook: -

1. Worldwide, there were over 2.01 billion monthly active Facebook users in June 2017 (Facebook MAUs) which is a 17 percent increase year on year (source, Facebook, 26 July 2017). What does this mean for you? In case you had any lingering doubts, statistically, Facebook is just too big to ignore.

2. In December 2016, there were 1.74 billion mobile active users (mobile DAU) which is an increase of 21% year over year (source Facebook, 1 January 2017).

3. On average, the 'like' and 'share' buttons are viewed across almost 10 million websites daily.

4. Age 25 to 34, at 29.7% of users, this is the most common demographic. What does this mean for your business? That this is the prime target demographic when targeting your marketing.

5. Five new profiles are created every second. In other words, your potential audience on Facebook is growing exponentially.

6. Timing does matter! On Thursdays and Fridays, engagement is 18% higher. Useful information when considering when best to post in order to optimise your social media marketing efforts.

7. Average time spent per Facebook visit is 20 minutes (source infodocket) meaning you have, potentially, a short time to make your impression, hence use it wisely with relevant, eye catching and thought-provoking posts in order to get the most return on your efforts.

8. Every 60 seconds on Facebook: 510,000 comments are posted; 293,000 statuses are updated and 136,000 photos uploaded

Let's Be Frank; What Does all this Mean for you and for your Transport Business?

Well, 42% of marketing reports suggest that Facebook *is* critical or important for their business. The key is to use Facebook marketing correctly and make sure that your efforts stand out from the crowd and your competition. Always post with integrity and remember that whatever you say is now in the public domain.

If you are still uncertain about the power of social media, consider this. The digital revolution is happening. Don't get left behind. As Peter Asman, Head of ICT for Public Sector and Regulated Markets, O2 suggests, the fact you are far more likely to leave home without your wallet than your mobile highlights how much we value the effortless connectivity that having a mobile to hand gives to us. Your phone is no longer just your phone - it's your life – and the reality is that most of us would be more distraught about leaving our phone on a train than our purse (and speaking from personal experience here).

One thing is clear; mobile technology is at the very centre of every business and will only expand further as 4G (and perhaps soon to be 5G) covers the UK. Embrace the revolution.

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Rights of Working Fathers

The protection and rights afforded to pregnant women and mothers at work are both well-known and well-used and, until recent years, the rights of fathers took more of a BACK seat. However, there has been a slow but definite change in the UK's social and economic structure which has seen the gig economy flourish and traditional roles at home and work almost disappear.

Part-time working has increased by over a quarter in the last 20 years and there has been a similar surge in self-employment over this time-period. Furthermore, UK employers are recognising that part-time working is no longer the preserve of mothers and double the number of fathers now stay at home to look after children now compared to 20 years ago.

So how should employers deal with requests from working fathers in this regard? A good beginning is understanding the rights of working fathers or fathers-to-be, which can be broadly summarised as follows; -

- The right to time off to accompany the mother to up to two antenatal appointments;
- The right to one or two weeks' paid paternity leave and the protection of employment rights during this period, including accrual of holidays and a return to the same job;
- The right to shared parental leave of up to 52 weeks and pay, to be split with the mother;
- The right to take unpaid parental leave of 18 weeks for each child aged up to 18 years old, to a maximum of four weeks a year;
- The right to take emergency unpaid leave to look after a dependant;
- The right to make a flexible working request.

As these rights are statutory rights, the employer must honour them. The effect of not doing so could leave the employer liable to a claim in the Employment Tribunal but also, and perhaps even more importantly, with a very disgruntled and unhappy employee.

You may also wish to consider whether, if you provide enhanced rights to mothers at work (such as the right to enhanced maternity or parental leave pay), you may be discriminating against fathers if you do not provide a similar enhancement to them.

There is not yet any definitive case law on this issue but there is a definitive sea-change towards a recognition of both the increasingly active role of fathers at home and how support and flexibility in the workplace can help sustain this.

Clearly, providing enhanced maternity and paternity rights may not be a cost that can be supported by an employer; however, support can be provided in other ways such as flexible working.

If you would like to discuss any issues surrounding the rights of fathers at work, please get in touch with the Employment Team.

and, apart from a few mode switch errors and the odd occasion where a driver has miscalculated his breaks, your drivers are pretty good.

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Less than Two Years' Service – In or Out?

We often advise operators who simply want to dismiss, or have already dismissed an employee without following their usual disciplinary, capability or redundancy procedures, having shared a misconception that because an employee has less than two years' services, it is "safe" to dismiss. We therefore thought it was useful to highlight some reminders when considering "short-service" dismissals.

In the majority of situations these are generally considered to be relatively low risk; without two years qualifying service an employee is not able to bring an unfair dismissal claim in the Employment Tribunal. However, employers need to be very wary of the fact that there are various claims, often linked to dismissal, which employees can bring from day one of their employment, and many will try to do so as a way to circumvent the fact that they don't have the necessary service for a 'normal' unfair dismissal claim.

It can often be more difficult, in the absence of any procedural formalities, to show what the reason for, and circumstances, of the dismissal were and to evidence this at Tribunal. Therefore, it is very important that employers take advice prior to dismissing an employee, regardless of length of service. You should bear the following in mind:

Two years, or 103 weeks…?

Technically, if you dismiss someone short of two years' service, you should ensure that you do it prior to week 103 of employment. This is because, the Tribunal will add on the statutory notice period of one week onto any dismissal date which could take them over the two-year line even if you have opted to dismiss and make a payment in lieu of notice a day before they reach their two-year anniversary.

Contractual polices

Employers need to be careful to check whether their disciplinary, capability and/or redundancy policies are contractual. If they are and you fail to follow them, regardless of length of service, an employee can bring a breach of contract claim for damages.

This usually involves damages to put them in the position they would have been in had the contractual policy been followed, which might be limited to the amount of time it would take to go through the process, but could be more significant.

If such policies are contractual, employers are advised to follow them. They might also wish to consider making them non-contractual which gives flexibility to deviate from them in certain circumstances.

Discrimination

Claims for discrimination can be brought at any stage of employment and therefore if an employee can demonstrate that the dismissal is linked in any way to a protected characteristic under the Equality Act 2010 then they would bring a discrimination claim. Compensation for discrimination claims is uncapped, unlike unfair dismissal claims.

Therefore, when considering a short service dismissal, consider whether there are any protected characteristics which the employee could point towards being linked to their dismissal, such as: Age, Race, Pregnancy and Maternity, Disability, Gender Reassignment, Civil Partnership, Religion or Belief, Sex and Sexual Orientation. The more common examples we see of employees running these types of claim are race, pregnancy and maternity and in the cases of capability, ill health dismissals and/or disability.

The "Whistleblower"

Employees are protected from suffering any detriment or dismissal regardless of length of service, if the reason for the detriment or dismissal is that they have made a 'protected disclosure', more commonly known as having blown the whistle.

A protected disclosure involves an individual reporting/disclosing certain types of wrongdoing, usually to their employer. They must reasonable believe that the alleged wrongdoing is, or is likely to take place. The wrongdoing disclosed must also be in the public interest.

The 6 types of malpractice are:

- criminal offences
- breach of any legal obligation
- miscarriages of justice
- danger to the health and safety of any individual
- damage to the environment
- the deliberate concealing of information about any of the above

Common whistleblowing claims we see, particularly from drivers, are allegations that they have reported certain malpractices relating to breaches of working time and driver's hours, dangers to health and safety due to lack of training, or unsafe vehicles etc.

Therefore, consider whether the employee has raised any grievances or made any

Continued >

Continued >

'complaints', however trivial they may have appeared at the time, which may fit into the 6 categories above, as this may raise a warning sign to a potential claim.

Health and Safety

In addition to health and safety reasons under the whistle-blower protection, if an employee is dismissed for acting over health and safety issues, a dismissal will be automatically unfair regardless of length of service. This includes dismissal for the following reasons:

- carrying out any health and safety activities which they have been asked to do
- performing or proposing to perform any functions as a health and safety official
- bringing a reasonable health and safety concern to your attention if there is no recognised health and safety representative available
- leaving the workplace because they believe they are in serious and imminent danger which could not be avoided
- taking appropriate steps to protect themselves or other people because they believe they are in serious and imminent danger. For example, an employee might refuse to drive a lorry because they believe the brakes are defective and likely to cause an accident.

Asserting a statutory right

Employees have numerous statutory rights connected with their employment, and if they seek to assert those rights, or make a claim to enforce such a right and are dismissed as a result, they have a claim regardless of length of service.

These can include asserting rights under the working time regulations in relation to holidays and breaks, asserting rights to receive a written statement of terms of employment within two months of starting work or to receive an itemised pay slip.

Comment

Whilst we have highlighted some of the more common exceptions used, there are a number of other exceptions to the two-year qualifying rule and therefore it is always important to seek advice before making any hasty decisions which could lead to you facing a claim in the Employment Tribunal despite an employee's short service.

Whilst it may sometimes be acceptable to call an employee with short service to a meeting, tell them that you are terminating their employment and that you will pay any notice pay/salary etc. owing to them, this should be done with caution and not before taking advice.

Best practice is to ensure that you follow a procedure to dismiss them that is in line with your own internal policies and/or the various ACAS Codes of practice. Whilst this takes up more time, it has a number of advantages not least that it will help you to understand and head off any potential claims that might come your way. If an employee is going to allege that they believe they are being dismissed because of a protected characteristic for example, its highly likely that they will raise this during any disciplinary procedure which they may not have done had you simply terminated, without any sort of process.

Following a fair procedure will also help you to demonstrate the actual reason for, and the thought process behind the dismissal in the event that you are faced with a claim.

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Brexit Sentences Judges to Confusion

There are in existence two proposed outcomes of Brexit; the first is that put forward by the Brexiteers, the second is insisted upon by Remainers. Brexiteers promise a United Kingdom independent and self-sustaining, Remainers swear that the world will end and Voldermort will return (this may be an exaggeration).

Whichever camp you find yourself in the truth is simple, no one knows. There is no precedent, no history, no guidelines for the path the British people have chosen to tread. If anyone turns to you on the street and says, "I know what's going to happen" they are lying to you, even if it's your own mother.

In such uncertain times, a significant portion of the burden of guiding us through falls on the Judges in the country.

Since its inception, the United Kingdom has submitted itself to the provisions laid down by the European Union (EU), not absolutely, but a considerable portion of EU law is incorporated into UK legislation.

The UK judiciary has also, pre-Brexit, submitted itself to the decisions laid down by the European Court of Justice. The highest court in the UK is the Supreme Court, if your case goes all the way up to the Supreme Court, that is the highest in the land. The Supreme Court, however, is bound by another, the European Court of Justice (ECJ). The Supreme Court listens to the decisions of the ECJ and applies them to the UK. The phrase "there's always a bigger fish" regularly springs to mind when describing international court structure.

Now, this is not the case. The British Government has stated that as part of Brexit, the UK will be shrugging off the ECJ and taking itself out of its jurisdiction. This leaves Judges very much in the dark about how to apply the law and where they should go to find the law.

Lord Neuberger the, soon to be retired, President of the Supreme Court has spoken his thoughts on the assistance that must be provided to Judges during the aftermath of Brexit. It is his view that Parliament must be abundantly clear when passing its Repeal Bill what it wants of Judges. Otherwise Judges will not know what to do, and believe me, indecisiveness is not good in Judges.

The pressure on Judges is so heavy; Lord Neuberger insists that Parliament must spell out in legislation how it wants Judges to interpret the law and which law is the most important.

Currently, it is unclear whether the UK court system will mimic the decisions of the ECJ or depart and instigate its own line of legal interpretation, all this hinges on the law to be passed by Parliament.

It is worth bearing in mind, given the uncertainty that will come with Brexit, that Judges are people too. To blame and badger them via the media or any other medium because you disagree with their decision is unpleasant and inconsiderate. If you disagree with a Judge's ruling, tough, become a Judge, then we'll listen.

To blame Judge's in the aftermath of Brexit where the law is uncertain would ultimately be unfair and it is an important message to everyone to treat the people burdened with managing Brexit with respect.

Fees – A Bar to Justice

> “The Employment Tribunals and Employment Appeals Tribunals Fees Order 2013 will now be quashed with immediate effect and the Employment Tribunals have now completely removed the requirement for Claimant’s to pay a fee when issuing their claim.”

The morning of 26 July 2017 brought with it the surprising news of the Supreme Court judgment that the Employment Tribunals and Employment Appeals Tribunals Fees Order 2013 has prevented access to justice, is unlawful and will be quashed.

Employers will be aware that in 2013 the Employment Tribunals and Employment Appeals Tribunals Fees Order 2013 ordered that a fee had to be paid to bring a claim in the Employment Tribunal; these fees were £160 to bring a level 1 claim (for simpler claims such as holiday pay, redundancy payments and unlawful deduction from wages) and £250 for a level 2 (for more complex claims such as discrimination, unfair dismissal and equal pay) claim. The hearing fee for a level 1 claim was £230 and £950 for a level 2 claim. For Employment Appeal Tribunal (EAT) cases, the issue fee was £400 and the hearing fee was £1,200.

Perhaps unsurprisingly, an almost immediate 70% drop in Employment Tribunal claims was reported and this reduction has been palpable for many businesses.

The Trade Union UNISON challenged the legality of the Employment Tribunals and Employment Appeals Tribunals Fees Order 2013, stating that the level of fees in the Employment Tribunal compared to those in the Small Claims Court to bring claims for small sums of money prevented access to justice for employees. Furthermore, it was argued that the two-tier system of fees was discriminatory by making it more expensive for those claiming discrimination to bring a claim.

The arguments finally reached the Supreme Court, which adjudged that the Employment Tribunals and Employment Appeals Tribunals Fees Order 2013 prevented access to justice and was unlawful and also that it is indirectly discriminatory on the basis that it costs more to bring more complex claims to the Employment Tribunal.

The Employment Tribunals and Employment Appeals Tribunals Fees Order 2013 will now be quashed with immediate effect and the Employment Tribunals have now completely removed the requirement for Claimant’s to pay a fee when issuing their claim.

Furthermore, the Supreme Court ordered that those fees already paid by Claimants shall be refunded. This could mean an overall reimbursement in the region of £32million from the Lord Chancellor’s department. In practical terms, this will be no easy task as it could require a manual review of all claims issued over the past four years.

There is now a legal question regarding those who did not bring a claim because it was cost-prohibitive, or those whose claims were dismissed for failure to pay the required fee. Will Tribunals consider that these individuals should have the usual three-month time limit (excluding the ACAS conciliation period) to bring a claim extended in the circumstances?

This all remains to be seen and there will no doubt be a flurry of new - and potentially old – claims.

The Presidents of the Employment Tribunals in England and Scotland have confirmed in their latest Case Management Order that all applications for the reinstatement of claims rejected or dismissed for non-payment of fees, shall be made in accordance with administrative arrangements to be announced by the Ministry of Justice and HMCTS shortly.

Finally, there is a view that this is unlikely to mean the end of Employment Tribunal fees and there is likely to be a consultation soon on a new fee regime which is lower and may even include a transfer of the fee burden from the employee upon issuing the claim to the employer upon defending the claim.

We will confirm any further updates in due course but please contact us with any queries.

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Don't Go 'Tender'ly into the Night, Act Now or Lose your Right to Claim

Winning public contracts is the lifeblood of many businesses within the transport sector. Whilst such contracts may not carry the promise of high profit margins, they can be considered to be of significant value and a safer bet that private sector contracts. The consequence of failing to have a significant public contract renewed (or of being unsuccessful in a bid for a new public contract) can be disastrous to the continued viability of a business.

The aim of this article is to provide a brief guide on the process involved in challenging the award of a public contract under the Public Contract Regulations 2015 ("the Regulations") and the strict time limits a business must adhere to, to make such a claim.

Please note a financial threshold applies to the value of the contract for the Regulations to apply and for the purpose of this article we assume that the financial threshold has been met.

What gives rise to a claim?

Participants in the tender process for a public contract must be informed, in writing, of the outcome of the process and must be given a summary of the reason for rejection of their tender, along with details of the scoring process and who the successful bidder was ("the Notice").

If this is not provided, the validity of the Notice can be challenged and must be done without delay.

If the Notice is valid or upon the receipt of a valid Notice, the decision of the public body to make the award to another party may be challenge. Examples of actions which would give rise to a challenge are (not limited to) the following:

1. Wrongly determining that a candidate does not meet the pre-qualification criteria.
2. Giving one bidder important information that is not provided to other bidders
3. Bias in favour of one party (or against another)
4. Incorrect application of the award criteria
5. Challenging the award criteria or their relative weightings after receipt of bids.

You may suspect that one of the above has occurred, or it may be that as a company experienced in working with public bodies you just feel that something about the tender process was not as it should be. If this is the case you need to act quickly if you wish to challenge the decision as there are very stringent time limits that need to be adhered to.

What are the time limits?

If you want to stop the contract being awarded to the "successful" bidder, in the hope that the contract will be awarded to your company then then the challenge needs to be made within the 10 day standstill period provided in the Notice. The 10 day standstill period is effectively a period of grace which runs for 10 days from the Notice whereby whilst the contract has been awarded, it will not start to run until after the standstill period has expired in case an unsuccessful bidder wishes to challenge the decision.

A bidder has an overall time period of 30 days from the Notice in which to challenge the award and issue Court proceedings, however if this occurs outside of the standstill period the contract may have started to run and whilst you can ask the Court to revoke the contract and award it to your company, the Court is unlikely to do this and damages, mainly the loss of the revenue from the contract, will be awarded if you are successful with the claim.

Crucially, prior to issuing a claim you must send a letter of claim to the public body to notify of your intention to make the claim. This letter is imperative as it provides formal notice of your claim and is a pre-requisite to any Court proceedings.

Conclusion and practical steps

As soon as is possible the company must send a formal letter of claim to the public body and certainly within the 10 day standstill period. This allows time for the public body to respond and, if the response is a denial of the claim, a decision can be made on whether to continue with the claim and initiate Court Proceedings. If the claim is left until the last minute, this puts the company under serious time pressure when time is already limited. The decision to issue Court proceedings is a big one and, ideally, it must be made with enough time and information to ensure it is the correct one.

Practical steps to take

- Act swiftly, time limits for taking action are short so do not delay. Remember that the company will need time to make an informed decision on the options available.
- Ask questions. The company is entitled to be given reasons for the rejection of its tender. If the reasons given are not satisfactory, ask for a meeting to obtain further information. Although it may be difficult to accept, there may be a valid reason for rejecting the company's tender and it is better to find out at an early stage as opposed to mid-way through costly litigation.
- Create a paper trail. Keep notes of any relevant conversations and, where possible, record the concerns of the company in writing.
- Consider the company's preferred result and be realistic, should the company have been awarded the contract? Is the company seeking damages or the award of the contract?
- If you are not comfortable with the process, seek legal advice on the options available to the company

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news briefs

Managing your O Licence Online. Are you?

The DVSA and Traffic Commissioners for Great Britain recently published information about the progress of their new digital services for operator licence applicants and licence holders. These new services allow businesses to apply for and manage vehicle operator licences online.

The new services have been accessed over 600,000 times and have been used to:

- process 200,000 vehicle changes;
- make over 3,600 licence applications; and
- make over 40,000 licence.

The new online services have also apparently helped to reduce licence processing times. Nine weeks has been the service standard for a long time. For the first 3 months of the service, the average processing time for digital applications was less than this. Quarterly figures are expected to be available in the future.

Managing your licence online is an important part of the service. The new services allow you to:

- apply to increase your vehicle limit;
- apply to add a transport manager to your licence; and
- add more vehicles to your licence.

So, what can we expect next from the new online services? Two main improvements have been proposed.

The first is making the service safer and more secure, using GOV.UK Verify. It's the new way to prove who you are online. It gives safer, simpler and faster access to government services. It will effectively replace your signature on a paper application form and will involve your identity being verified

The second improvement will let you continue your licence online. As you know, operator licences have to be continued every 5 years. Sometimes operators miss payments or fail to return the paperwork on time. This is expected to be available in late 2017.

Backhouse Jones helped with the trial of the new system so are well-versed in how it works. If you want any further information why don't you give one of our regulatory team a call on 01254 828300 and see if we can help?

Public Procurement – It's not a Done Deal

Public Procurement is where organisations, or businesses, of a public nature widely advertise contracts that they are hoping to enter into. This is also known as 'tendering'.

The advertisement is placed in the Official Journal of the European Union (OJEU) and makes businesses from around the continent aware of the opportunity that has arisen. Businesses can then show themselves to be the best option for that contract and win the business opportunity.

This article will outline in brief the advantages of public procurement to consumers; when businesses must publicly tender a contract; and how.

Competition

The markets most beneficial for consumers are those that are competitive. Competitive markets force businesses to innovate, in their production or service, in a way that enables them to price lower. This is beneficial for any consumer as, simply, more competition means lower prices.

By publicly advertising a prospective contract, businesses and organisations stimulate hopeful undertakings to compete against each other for that contract. Companies hoping to secure the contract will begin developing ways to produce with less expenditure without sacrificing the quality of their product or service.

Given how attractive competitive markets are, the law has evolved to prescribe situations in which public procurement is compulsory for certain organisations seeking to contract.

The public transport industry

Enter, the Utilities Contracts Regulations 2016. These are the rules that are most relevant to any entity or organisation hoping to do business in the market of public transport.

These types of companies must ask themselves two questions before contracting with any business without tendering that contract publicly: (a) do the 2016 Regulations apply to my business? and (b) does the value of the contract pass the threshold?

Do they apply to you?

Fortunately, the 2016 Regulations are very clear about when they do and when they don't apply.

Businesses that amount to a "contracting authority" or a "public undertaking" that are providing public transport services should take a hard look at the 2016 Regulations before contracting with anyone, as they may apply to you.

A "contracting authority", in relation to the 2016 Regulations, is an organisation established to meet the general interest of the public, devoid of commercial character, that possesses the ability to contract by itself under its own name. That organisation must also be financed either by the State or a local authority, be managed by such an organisation, or have administrative staff appointed by such an organisation.

Alternatively, if your business does not have any of those characteristics, but has been created by an organisation that fits the above description, then you are also a "contracting authority".

If you do not fit the description of "contracting authority", I'm afraid you are not free of the 2016 Regulations just yet, you may still be a "public undertaking".

A "public undertaking" is an undertaking which is influenced by a "contracting authority" by virtue of its ownership, financial participation, or the rules of the influenced undertaking.

An example of this that springs to mind is if you were establishing a company that provided bus services. To integrate your buses and bus routes into the already existing bus systems, you would have to abide by the rules of the authority that manages all the buses in the area. That authority is likely to be a "contracting authority" and possess some form of public nature.

If your organisation fits this description then you too must become familiar with the 2016 Regulations, as they probably apply to you too.

The 2016 Regulations apply to your organisation if it fits one of the two above descriptions, and provides a network offering one of the following services:

- Railway
- Automated Systems
- Tramway
- Trolley Bus
- Bus
- Cable

These are the services described in the 2016 Regulations specific to the public transport industry, the 2016 regulations also outlines what services it captures in other industries, however they shall not be discussed in this article.

If your business fits one of the two descriptions given, and provides a network offering one of the above services, then the 2016 Regulations will apply to you.

Does your contract pass the threshold?

Just because the 2016 Regulations apply to your organisation, this does not mean that you must publicly procure every single contract you enter into. If the contract you are hoping to create does not have a value that passes the relevant threshold, then you do not have to advertise that contract widely.

The thresholds are set by the European Union and are outlined in the EU Directive 2014/25/EU. The relevant threshold for those doing business in the public transport industry is €414 000. If the contract you are hoping to create has a value greater than this, then you must advertise it through public procurement.

How do I publicly procure?

Firstly, you must send out something called a "call for competition". This is essentially the widespread publication of the business opportunity through the OJEU. The three possible methods in which you can do this are outlined under Regulation 44(4) of the 2016 Regulations.

The first of these three is called a 'periodic indicative notice'. It is the form of notice to be given where the contract you are hoping to award is to be awarded by a restricted procurement procedure. This means prospective contractors must ask your permission before responding to your publication.

A restricted procedure may also be required if you elect the second of the three options. This is a notice of the existence of a system, set up by your organisation, that permits hopeful undertakings to lodge their interest in the contract and provide to you information about their business.

The third and final option available is a simple contract notice. This is given where you have selected to use an open procedure to tender your contract. This is a publication in the OJEU of information about the contract you are hoping to award.

As you may have noticed, there has been mention to several different types of procedures available through which organisations can tender their contracts.

When you are tendering your contract, you have a choice of procedures.

An 'open procedure' does exactly what it says on the tin. A hopeful party may see your "call for competition" and submit to you a response accompanied by information they feel may sway you to select them as the party you wish to contract with. Following these submissions, you select who to award the contract to.

A 'restricted procedure' is where a hopeful party submits a request to be allowed to participate in responding to your "call for competition" and you permit them to do so (or don't).

Lastly, there is something called a 'negotiated procedure'. This is also where a hopeful party submits a request to be allowed to participate in responding to your "call for competition". Should you permit them to do so, they will provide you with information requested by you specifically and no more.

Final word

Public procurement is here to stay. It is difficult to avoid and strives to promote competition in a way that benefits consumers of goods or services.

All organisations looking to enter the market for public transport should always have public procurement at the forefront of their mind and would be wise to familiarise themselves with the 2016 Regulations. That way they are better positioned to make informed decisions when contracting with other parties.

The Game Changer?

Manchester to Leeds in 9 minutes
Liverpool to Hull in 29 minutes

As I sit here waiting for the welcome address from Professor Brian Collins I start to wonder why on earth a corporate transport lawyer (and a newly appointed one at that) would come to such an event – should I even be here? Was this all just an elaborate ruse to get a free jolly to London?... I am as it happens here on a free pass due to my role in local government, I am a local City Councillor, but sat here on company time. I'm sure however this will be a productive and insightful day for me.

So finally, things get underway and we hear the welcome address from the events Chair, and the Director of the International Centre for Infrastructure Futures, Professor Brian Collins, whilst I work out what on earth I am doing here.

Whilst first setting the big picture and explaining how infrastructure is an international issue, he talks about the Infrastructure Industry Innovation Platform (i3P). As a primary driver for innovation in the UK infrastructure industry, they believe that i3P will help transform ideas into opportunities and practical solutions; providing a mechanism for strategically directing innovation to address the major challenges facing the infrastructure industry. All sounds very glossy and non-descript at this point, and I do wonder if I am going to enjoy today.

On to the keynote speaker, Lord Andrew Adonis, the Chair of the National Infrastructure Commission. He starts his talk with an ear catching Japanese proverb – incredibly simple yet succinct – "an inch ahead in darkness", and I cannot help but admire how well chosen that line is given the current economic and political climate – and this really sets the scene for the day ahead. Perhaps we are going to shine a light into the future and reveal what tomorrow might look like – my interest is peaked.

The good news, according to Lord Adonis, is that Infrastructure unites the political parties and there is a degree of consensus on the infrastructure investments which this sector believes is required – and I suspect this is the reason we don't hear as much about it, there is no controversy here so nothing to report on. The largest current project, Crossrail, is on time and on budget – something which I receive with a bit of scepticism – are these things ever on time and on budget? For those of you who might well have a life outside of London (how very dare you), Crossrail (also known as the Elizabeth line) is the new railway for London and the South East, running from Reading and Heathrow in the west, through 42km of new tunnels under London to Shenfield and Abbey Wood in the east. The next big project on the horizon is HS2 and we are reminded that the legislation to deliver that part of HS2 from Euston to Birmingham became law just before the general election – that part is happening and construction starts in 2018. The legislation for Phase 2, from Birmingham to Crewe, will pass through Parliament later this year, and Lord Adonis does not believe, even with a hung parliament, that it will be held up. Other projects such as Heathrow and Crossrail 2 were confirmed to be on track (no pun intended).

Next we hear from Mark Enzer, the Group Technical Director of Mott MacDonald, on digital transformation. The most interesting concept which I glean from this speech is the rethinking of the definition of value as we come to what he termed "Infrastructure maturity". The theory goes that in the early stages of developing infrastructure, we all want to see a lot of "stuff" for our money – roads, pipes, bridges etc – the physical. Once we get to a stage where the infrastructure starts to mature, we should focus less on how big a bang we get for our buck, and should instead be more concerned with what the outcome is for our customers. The focus shifts to (and I quote here): "the outcome per whole life pound for the ultimate customers." In my short time of being exposed to the transport sector, I think this is an outlook which certainly resonates with those in the transport industry. Those who are bringing and driving change within the sector are those who are committed to improving the passenger/customer experience through the use of clever and cutting edge technology – think free wifi on buses or by the minute tracking of your consignments. The other point made by Mark Enzer which resonates with me is the issue of data having a value, and that it is not only important to collect this data, but to be able to process it effectively to produce useful information. By ensuring the data is better, it enables better decisions to be made. I know there are a great deal of operators out there that collect an incredible amount of data, about their customers, their vehicles, their staff, on a daily basis. How many of them though are actually looking at this data, scrutinising it to learn where improvements might be made? A common problem we come across at Backhouse Jones with operators is that they have the relevant information there, such as driver defect reports or issues with time entries for drivers, but they don't take it upon themselves to review that data and improve things. The broken taillight stays broken. The driver still logs a false record.

Next I move into the Transport Theatre and am expecting to hear from Leon Daniels, the Managing Director for Surface Transport, Transport for London. It looks like Leon has had second thoughts unfortunately as we hear from his bewildered and nervous looking substitute. The discussion here is centred around the prediction that London's population is set to reach 10.11 million in 2036 and will hit 13 million by 2050. This in turn will result on 6 million more trips a year by 2041 and a total increase in travel by 23%. How on earth then is an already congested city expected to cope with this increase? The answer provided, which is supported by the discussions held in a Q&A session with London's deputy mayor, is that there will be some infrastructure provision to combat the congestion, but there will also be much more emphasis on walking and cycling in London. The plan for London is for it to reduce emissions and for it to become a zero carbon city. That to me can only realistically be achieved one way, with electric vehicles. We already have some hybrid and fully electric passenger buses on our roads, but I do wonder when it will be we see a fully electric HGV on the tarmac – they will be here sooner than you think.

Finally, at possibly the most interesting presentation of the day, one by DCN300+. Direct City Networks 300+ (DCN300+) is an Anglo-American collaboration looking at how proven Maglev technology can be adapted to meet the unique demands facing transport in the UK. The headline: Manchester to Leeds in 9 minutes. Liverpool to Hull in 29 minutes. That's for passengers and freight by the way. How? Maglev trains running under the ground. I couldn't quite believe it myself but the feasibility studies have been done and the investors are on board, as are the two mayors of Manchester and Liverpool.

With such a game changer on the horizon I had to speak after the presentation to the Group Managing Director of DCN, Daragh Colemand, and ask him what impact he thought his proposals might have on road transport in the North. He doesn't see it as a competitor to on road transport as his view is the roads are already too congested – their solution will just help to alleviate a problem which will only get bigger as the population continues to increase. I suppose I can see his point – sometimes we choose to drive to the South of France even though we could fly there in a fraction of the time. I suppose therefore it will at least give operators something to think about in terms of what they need to do to offer an attractive alternative to this type of transport, and once again the Customer experience is going to be critical to this. Yes you might be able to get from one side of the Pennines to the other in under 10 minutes under the ground, but the view is unrivalled if you choose to travel above ground.

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GUEST FEATURE

Closing the Cashflow Gap: Invoice Finance

The haulage industry is often regarded as a barometer of how the UK economy is performing. The movement of goods around the UK and overseas can provide a strong indication of how buoyant businesses are, yet, whether the UK is prospering or struggling, many hauliers face the same issues, namely, how to get paid on time and how to meet all the financial demands of running a successful business.

As an industry, hauliers face a stream of recurring costs which are often outsourced in order to run lean operations. This may be in the delivery element itself, such as contract or agency drivers, fully maintained vehicle fleets/leases and fuel cards; it may be the operational aspects like outsourced payroll/ accounts and credit control. Managing these intricacies involves managing complex cashflow demands.

The costs themselves fluctuate too. Typically, fuel can account for over 25% of running costs so any increase can have an enormous impact on the profitability and cashflow of the business, particularly where backloads are hard to find. Another consideration is the change to driver legislation, constantly increasing the reliance on agency drivers, the cost of which is set to increase as the drivers' rights issue storms on. Finally, the DVSA requirement to have access to a pot of cash can leave many businesses without any reserves or simply unable to comply.

So, with a cycle of recurring costs and customers who generally pay on terms of 30-60 days (sometimes longer) how can hauliers bridge that gap between payments out and payments in?

Historically overdrafts have been used as working capital, however there has been a decline in appetite for these due primarily to their high cost and inflexibility. Consequently, Invoice Finance has increased in popularity as a far more accommodating and affordable form of cashflow.

So why is this and how does it work?

The key here is flexibility and choice.

Businesses need funding which moves in tandem with their cashflow requirements and can bring meaningful, added value products, such as Asset Finance, Credit Control, Bad Debt Protection and Cashflow Loans. Funders need to provide more of an all-round service for their clients.

An overdraft is a fixed amount, which can prove both costly and inflexible, whereas Invoice Finance uses the sales ledger (monies owed) to generate cash for the business. The facilities ability to mirror the activity of the ledger enables Invoice Finance to provide the business with the week to week cashflow that so many hauliers need.

The Invoice Finance industry has evolved enormously in recent years offering a wide range of products available from Confidential Invoice Discounting to Full Factoring.

So what are the key benefits:-

- Clients can release cash from their invoices immediately rather than waiting up to 90+ days for customers to pay.
- Factoring means clients can outsource their credit control without any loss of goodwill, freeing up valuable time to concentrate on running the business.
- The recurring flow of cash on a week by week basis means clients can meet important bills such as fuel, wages and other key supplier payments.
- There will be an initial lump sum made available which can be used for growth, property deposit or vehicle deposits.
- The facility will grow as the business grows removing the need for constant renegotiation of more traditional funding such as overdrafts and loans.
- Bad Debt Protection can be included as part of the facility. This can protect clients against customers going bust leaving unpaid debts. It can also provide credit limits for new and existing customers so that clients don't run the risk of trading with poorly rated debtors
- Confidentiality means that customers don't need to be aware that clients are using Invoice Finance
- Export debts can be funded as part of the facility, which can also incorporate credit control.

Invoice Finance isn't for everyone, but there is no doubt that it provides a very flexible way of funding any growing business and can help most hauliers with the day to day cashflow pressures that so many face in an increasingly competitive market.

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