Employment Newsletter

December 2018

BACKHOUSE JONES

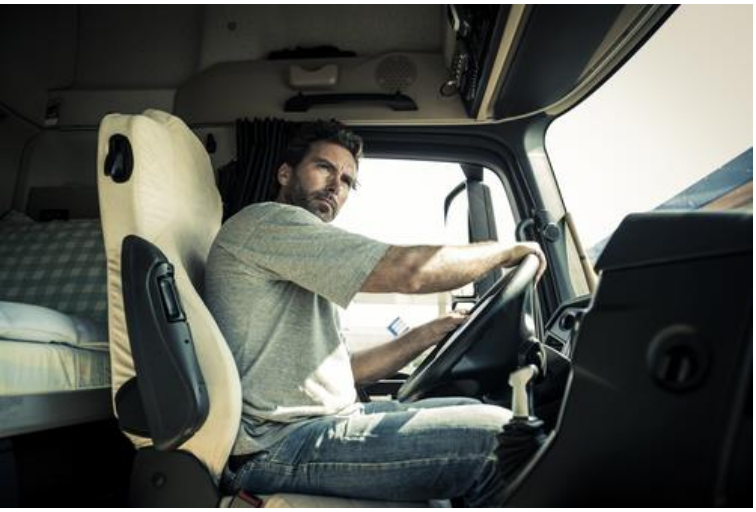
Self-Employed or Not?

In the case of *Addison Lee Limited v Lange, Olszewski & Morahan,* *the E*mployment Appeal Tribunal (EAT) held that the Employment Tribunal was entitled to use a "realistic and worldly wise" approach to determining employment status.

The Facts

The Claimants in this case were all private hire drivers who had entered into agreements whereby they would hire liveried cars from a company associated with Addison Lee. Included in the agreement was a requirement for each driver to log into a portable computer known as an XDA. Once they had logged into this, the work was automatically allocated to them via the XDA. If they refused a job that was allocated to them, they would have to provide reasons as to why and failure to do so could result in sanctions.

The Claimants brought claims against Addison Lee asserting they were workers and were entitled to holiday pay and national minimum wage. Although the contractual documents depicted each of the Claimants to be independent contractors, the Employment Tribunal (ET) found that each of the Claimants were workers and so were entitled to holiday pay and national minimum wage. The ET applied the "realistic and worldly wise" approach taken in Autoclenz Ltd v Belcher [2011], whereby it considered whether the provisions of a contractual arrangement did not, or might not, reflect the true agreement between the parties. Addison Lee appealed the ET's findings on two grounds. They argued that parts of the agreement had been wrongly disapplied in line with Autoclenz, and that the ET was not correct in law in finding that when the Claimants logged onto the XDA, they satisfied the definition of "working time" even when they were not actually engaged in carrying passengers.



The EAT rejected Addison Lee's appeal and said, "We consider that the tribunal, applying the realistic and worldlywise approach mandated by Autoclenz, was entitled to reach the conclusion it did". The EAT also rejected the appeal ground relating to working time and confirmed that each Claimant was 'working' when logged into the XDA.

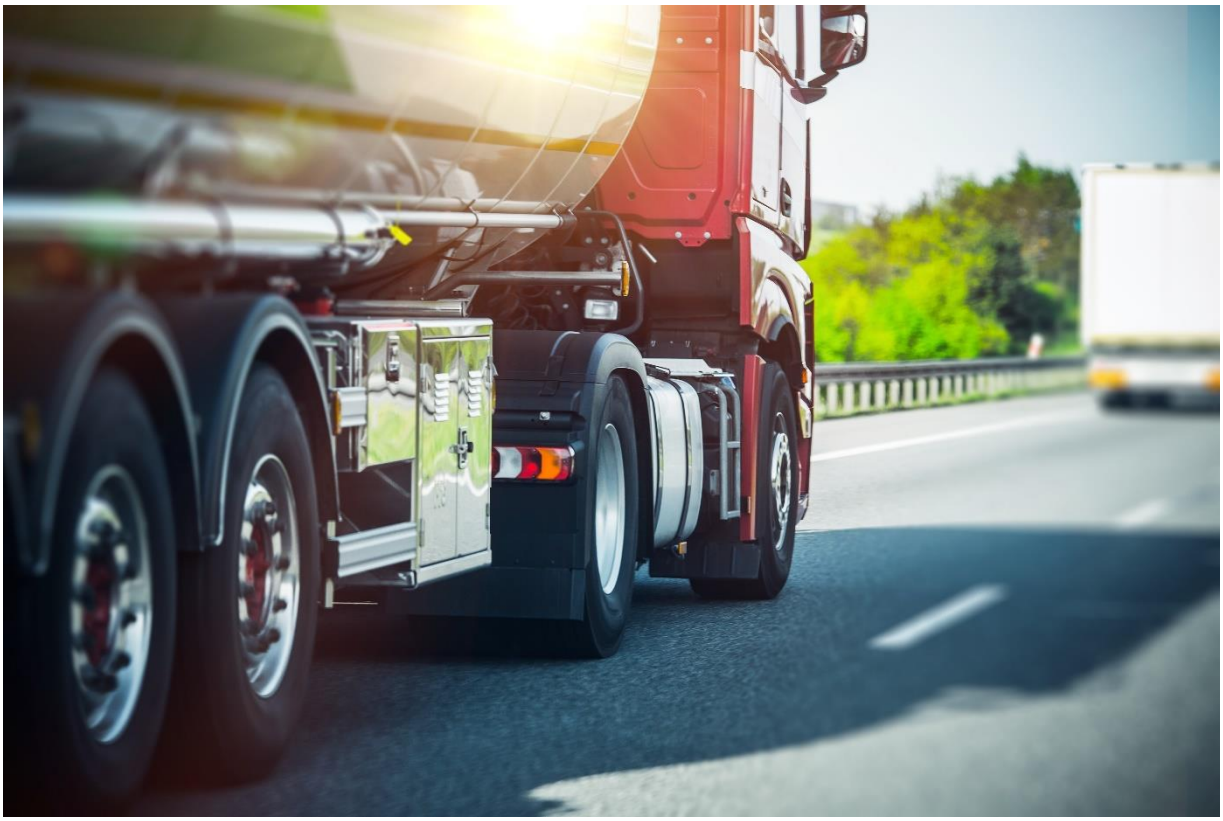
Commentary

The employment status of 'workers' and 'independent contractors' is a currently a hot topic in the industry, not just within the Employment Tribunals/HMRC, but also with the Traffic Commissioners. Clearly, where a business engages individuals on the basis that they are an independent contractor, to be truly independent, that individual must have control over what work they choose to accept. There are no definitive guidelines to exemplify what constitutes a worker and what constitutes a self employed independent contractor, however, there are some key factors to

consider if an individual is to be truly considered as independent or self employed:

- The individual is in business on his own account, he is responsible for the success or failure of his business and can make a loss or a profit. He actively markets his business to the outside world in general. You are a customer of his business undertaking or a client of his profession.
- He is not an integral part of your business and is not held out to customers as such.
- There is no control over what he does – he can decide what work he does and when, where or how to do it - *note the very nature of the industry and work doesn't allow for this.*
- He does not have to perform the work personally but can send someone else to do the work, hire in help or subcontract the work out.
- He is responsible for fixing any unsatisfactory work in his own time
- He provides his own equipment, vehicle, tools for his work, uses his own money to buy business assets, cover running costs etc (*including their own vehicle and therefore O' Licence*);
- There is no obligation to supply and accept work

A word of advice to employers therefore is that if you can satisfy most, if not all of the above, then they are probably self-employed. Any employers continuing to engage so called 'self employed' drivers when they do not appear to satisfy the above, are running the risk both from an employment law status as well as a tax perspective. This includes engaging an



individual through a Ltd Company's and/or Driver Agencies' who engage with the Ltd Company as an intermediary.

There is a HMRC self employment "tool" available online called the Employment Status indicator (ESI). This can be used to input the facts of an engagement and it will give a decision as to whether the engagement should be treated as employed or self employed. If the ESI tool concludes that the engagements you are reviewing are self employed (not employed) it can be printed off and keep as contemporaneous evidence that you have treated the engagement correctly which will be vital in a dispute with HMRC.

However, in the vast majority of cases, drivers will not be deemed to be genuinely self-employed unless they are an owner driver and the advice is to correct their status soon than later. If in doubt, please contact a member of the Employment Team to discuss further.

Banter: The playful and friendly exchange of teasing remarks – 'there was much good -natured banter'[1]

The origin of the word banter remains obscure, although it appears to have started life in England about three hundred years ago as a verb. Its original meaning was to tease or ridicule, usually in an aggressive manner. Later banter came to be used as a noun and it acquired a slightly less aggressive, friendlier meaning.

This said, the boundary where banter in a workplace could be harmless jibbing or construed as harassment is dangerously thin. The EAT considered in ***Evans v Xactly*** the question of, was calling an employee a "fat ginger pikey" harassment?

The Facts

On the facts of the case, the EAT held that it wasn't. This does not however give you as an employer the green light to use the term.

Mr Evans was employed as a sales representative for just short of a year before being dismissed for poor performance. Upon his dismissal he brought several claims, including discrimination and victimisation of the grounds of disability and race. At tribunal, these claims were rejected having found that the reasons for dismissal were indeed genuine.

The final claim brought by Mr Evans was that of Harassment, the grounds being that he had been called a "fat ginger pikey" on at least one occasion. Mr Evans explained to the tribunal

[1] https://en.oxforddictionaries.com/definition/banter

that he was sensitive about his weight (he was diabetic – but colleagues did not consider him fat) and he had strong links to the traveller community. Upon reflection, the tribunal held that the comment is indeed potentially discriminatory and could be an example of a harassing comment. Assessing the context of the remark, the tribunal considered the nature of the office culture that Mr Evans was a part off. It was clear that there was and had always been good natured jibing and teasing amongst staff which consisted of competitive sale people. It was also highlighted that the company had previously spoken to employees when it deemed that boundaries had been crossed, on one occasion even dismissing one employee after their behaviour failed to improve.

The last consideration of the Tribunal was the fact that the claimant himself was spoken to by managers with regards to inappropriate behaviour to a female colleague who had raised issue with Mr Evans trying to hug and cuddle her and the fact he called her "pudding". She was upset that he was commenting on her size and said that she has asked him to stop but he had not done do.

The tribunal therefore found that the claimant was an active participant in inappropriate comments and behaviour in the workplace and seemingly comfortable with the office culture and environment. Finding that the specific incidents relied upon by the Claimant as harassment only amounted to one occasion where he was called a "fat ginger pikey" of which was done by a colleague with whom Mr Evans was very friendly with and socialised outside of work, the Tribunal pointed out that the claimant did not react or complain at the time and the evidence, which the Tribunal accepted, was that Mr Evans would have done so if he had been offended.

If you are an employer and concerned with the nature of your office culture and what steps you should have in place should anyone cross the boundaries, call a member of our employment team on 01254 828 300

Was it unfair to dismiss a bus driver for gross misconduct for failing a drugs test?

At face value you would say the obvious answer was no. However, that wasn't the conclusion reached by the Employment Tribunal (ET) in ***Ball v First Essex Buses Limited.***

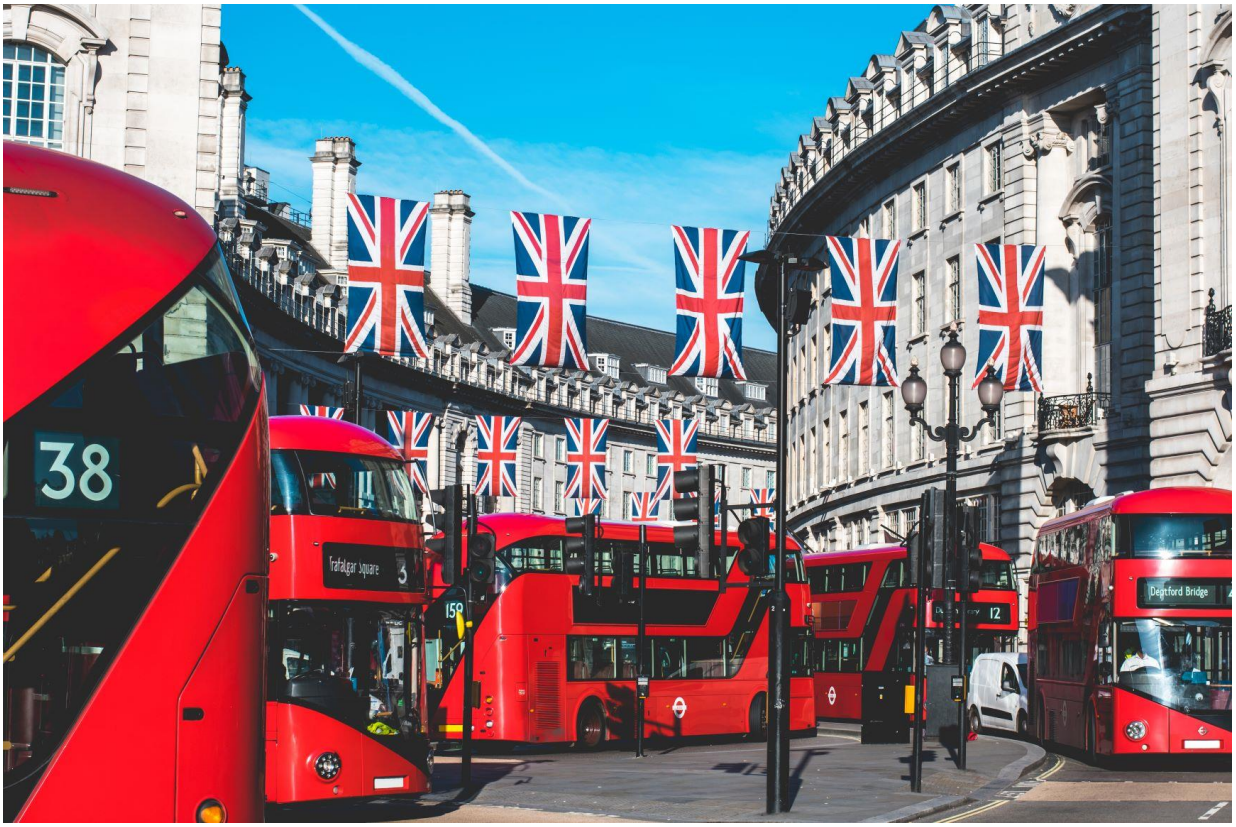
The Facts

Mr Ball was a 61-year-old bus driver who had worked for First Essex for nearly 20 years and had an unblemished record and was considered of good character by his managers. Mr Ball had type 2 diabetes and had to test his blood sugars every two hours with a finger prick test; this caused his fingers to bleed and he would often lick them to relieve the pain. He was also on medication for high blood pressure.

As is common in the industry, Mr Ball was subject to a routine random drug screening test which tested positive for cocaine and he was subject to formal disciplinary action.

Simple you might say.

However, during the disciplinary process, Mr Ball protested his innocence stating that he



had never taken drugs and suggested the saliva test may have been contaminated due to the process followed. He also suggested that as he handled money it was possible that the bank notes were contaminated with cocaine (*as was accepted in the case of First Bristol v Bailles*) and that as he often licked his fingers due to his diabetes, the drug could have got into his system that way.

Mr Ball provided his own hair follicle test on two occasions during the disciplinary process, both of which did not detect any cocaine in his system. However, his employer rejected the evidence as it was not carried out by the Company's approved tester. They did however send off the same saliva sample to another drug testing agency and that again came back positive.

Mr Ball was dismissed for gross misconduct and subsequently went through a two-stage appeal process against the decision, which was rejected on both occasions.

The laboratory used by the Company confirmed at appeal stage that the transfer of cocaine from money to onto hands and then saliva was highly unlikely to cause a positive result. They also believed that the amount of cocaine detected may not necessarily have been sufficient to show up in the hair follicle test. Whilst the appeal officer acknowledged that it was hard to believe a diabetic man on blood pressure medication would take cocaine, he had to 'follow the evidence' which was the positive saliva test.

Decision

Mr Ball brought a claim for wrongful and unfair dismissal to the ET. The ET found in Mr Balls favour in both claims. Given Mr Ball was a longstanding employee with an unblemished record, it was unreasonable for his employer not to conduct further enquires in light of the issues of contamination raised and the hair follicle test supplied. The Tribunal heard evidence that 4 out of 5 bank notes can test positive for traces of cocaine. They also found that the Company had failed to follow their own Drug and Alcohol Policy and contractual Disciplinary Procedure.

The Judge was of the view that "*the Respondent would pursue any avenue that would shore up the case against the Claimant yet ignored any factor that might support the claimant's position"*.

It found that the representations put forward by the Claimant were all but ignored and commented that "*any disciplinary process requires a degree of common sense*".

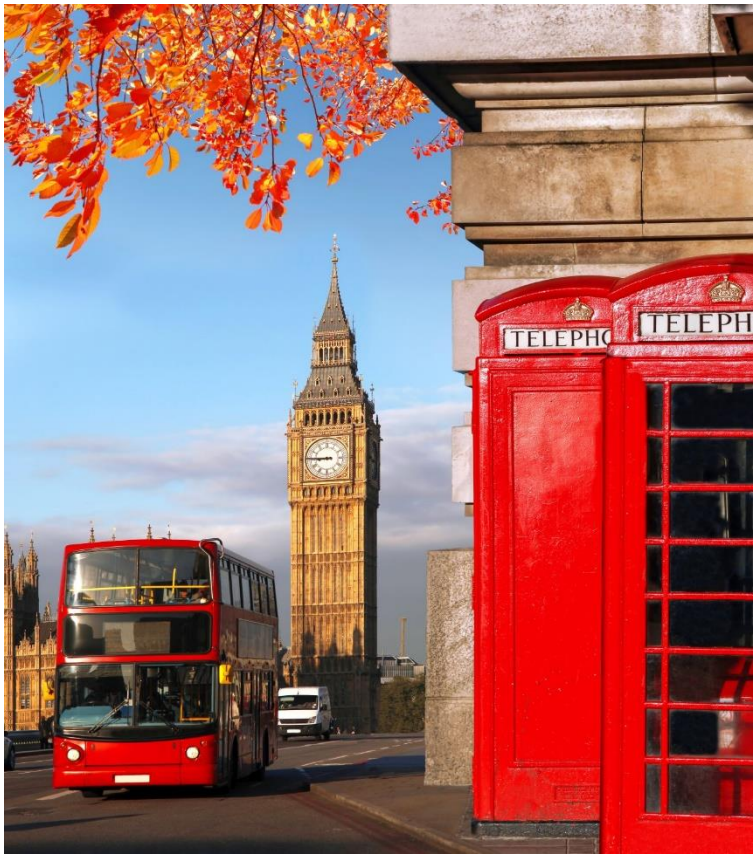
Mr Ball was awarded 3 years loss of earnings in the sum of approximately £40,000.

Comment

Whilst this shouldn't instil any fear in Operators who operate random drug testing, it serves as a really useful reminder, that even when something appears on the face of it to be a "black and white" case, employers should never apply a "closed mind" when disciplining an employee in these, or indeed any, circumstances. It is vitally important that you follow the ACAS code as well as your own internal procedures to avoid any criticism. Employers should ensure that every line of enquiry is followed to show you have kept an open mind and have looked for evidence not only against the employee but also that which supports the employees' case, before reaching a decision.

FOR ALL RELATED ENQUIRIES, PLEASE CONTACT OUR EMPLOYMENT TEAM ON 01254 828300

Please note: This publication does not constitute legal advice



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