UK Employment Law Round-up

October 2017 | Issue 17

In this issue:

In this issue we look at some of the key employment decisions that have been reported this month. We also look at a case involving voluntary redundancy schemes, and two Judgments on employment status stemming from to the so-called "gig economy".

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New corporate offences of failing to prevent the facilitation of tax evasion

Summary

On 30 September 2017, the Criminal Finances Act 2017 (CFA) came into effect, introducing new criminal offences concerning the failure to prevent the facilitation of criminal tax evasion.

Issues

Essentially, the new law can be used to hold UK companies and partnerships to account if they have failed to prevent the facilitation of criminal tax evasion by an "associated person" (this can include an employee, agent, contractor, or anyone performing services for them), unless they can demonstrate that they took reasonable steps to prevent it from happening.

There are three main elements to the offence:

- **Stage one:** there must have been criminal tax evasion by a taxpayer (this can be either an individual or a legal entity). It doesn't matter whether the evasion involved UK or non-UK tax, but if non-UK tax is involved then the evasion must be a crime under both the relevant foreign law and the UK law;
- **Stage two:** an associated person knowingly and deliberately facilitated the tax evasion, in the course of being an associated person; and
- **Stage three:** the relevant corporate body failed to prevent their associated person from committing the facilitation.

In the Press

In addition to this month's news, please do look at publications we have contributed to:

- Personnel Today – See Michael Bronstein and Olivia Iasonos' case study on springboard injunctions.
- People Management – Emma Carter reports on a recent EAT ruling that highlights the importance of reasonableness
- Growth Business – See Victoria Albon's insight on managing an increasingly flexible workforce
- HR review – Michael Bronstein reports on the meaty question of TUPE transfers and outsourcing

If you have an idea of a topic you'd like us to cover in a future round-up, please provide your comments here.

What does this mean for employers?

The new offences carry a low burden of proof for prosecutors, and the penalties available include criminal conviction, unlimited fines and the confiscation of a business's assets. As such, businesses will want to ensure that they understand these new offences and have measures in place to protect themselves.

Organisations will have a defence if they have implemented procedures aimed at preventing tax evasion by their staff. However, the Government has made it clear that businesses should be implementing these plans as we speak, so those who haven't got any procedures in place will need to act fast as there is no transitional period.

The procedures implemented could include the use of risk assessments and fraud prevention policies that apply to agents and sub-contractors as well as employees. It could also involve putting preventative measures in place in overseas offices, if they are at risk of facilitating tax fraud.

This might also be a good time for HR teams to run updated training sessions on preventing tax evasion for staff involved in 'at risk' activities, and to ensure that appropriate and up-to-date whistleblowing procedures are in place to allow improper behaviours to be reported. The extent of any training/procedures implemented will, to some extent, depend on the level of risk in question and the size of the organisaiton, but being a small employer will by no means let an organisation off the hook entirely.

In light of the new offences, businesses also need be more careful than ever not to frame taxable payments as ex-gratia payments in settlement agreements. This would almost certain be seen as the facilitation of tax evasion and, as such, would be caught by the CFA.

Voluntary redundancy – Lynham & Anor v Birmingham City Council

Summary

In the case of *Lynam & Anor v Birmingham City Council UKEAT/0072/17/JOJ*, the Employment Appeal Tribunal (EAT) held that the Council had breached the employment contracts of a group of employees by failing to offer them the opportunity to apply for a voluntary redundancy package before dismissing them.

Issues

In December 2013, the Council announced that it was proposing to make redundancies as a result of expected budgetary cuts in 2014/2015. As part of those proposals, the Council posted a notice on its intranet with the heading "Voluntary Redundancy information and guidance for employees". The notice said that:

- the Council intended to offer a generous voluntary redundancy package to 'affected' employees; and
- affected employees would be contacted and invited to apply for voluntary redundancy.

However, in September 2014 a group of employees (the Claimants) were told that voluntary redundancy would not be available to them, and instead they were made compulsorily redundant with effect from the end of April 2015. They subsequently issued proceedings for breach of contract, based on the Council's failure to allow them to apply for voluntary redundancy notwithstanding its earlier offer.

The Council defended the claims, arguing that the Claimants had no contractual right to apply for voluntary redundancy, so there was no breach of contract. In particular, the Council argued that:

- it had only offered an enhanced voluntary redundancy package once before, and was unlikely to do so again after 2014/15. As such, there was no "implied" contractual right to voluntary redundancy;
- only employees invited to apply for voluntary redundancy had a contractual right to make the application; and
- the contractual right was limited to a right to make an application. Even if an application was made, those employees had no right to receive a voluntary redundancy package.

At first instance, the Employment Tribunal found in favour of the Council's arguments. However, the Claimants appealed to the EAT.

Decision

The EAT upheld their appeal.

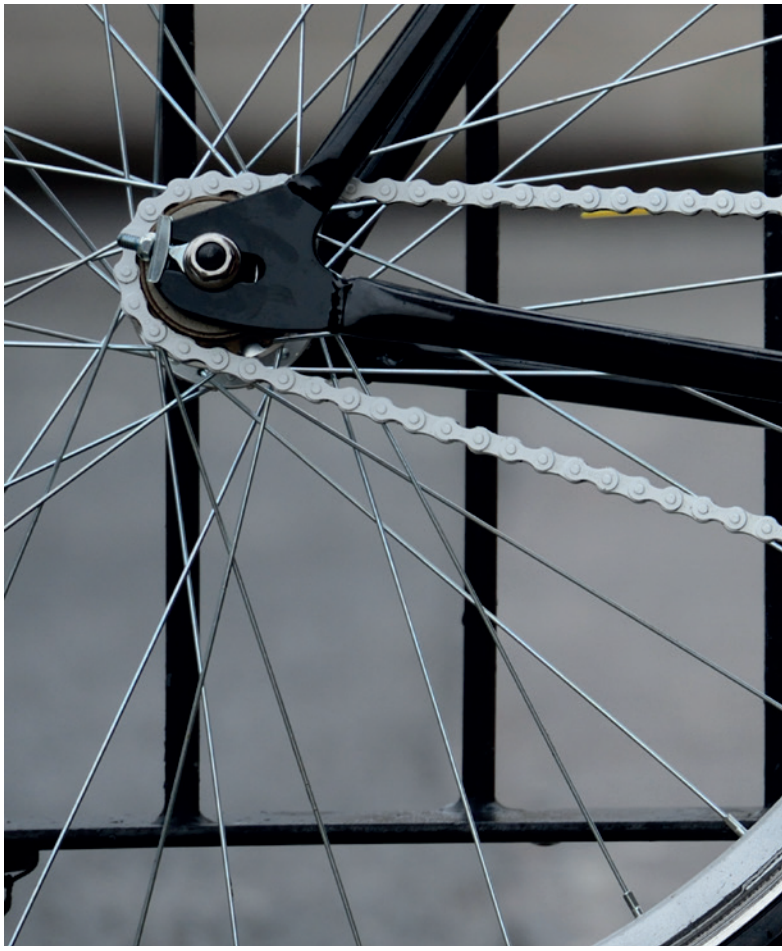
The Council's argument around whether or not there was an implied voluntary redundancy policy was simply not relevant. The claim was simple - the Council had told the Claimants that they could apply for voluntary redundancy, and had then told them they could not.

The EAT held that the focus had to be on what the Council had communicated to its employees - taking that into account, the EAT found that there had been a breach of contract.

The notice stated that all affected employees (which included the Claimants) would be contacted and invited to apply for voluntary redundancy. The fact the Council would not necessarily grant them voluntary redundancy if they applied did not affect the Council's obligation to invite them to do so. Further, at no point had the Council communictaed that there was any restriction on the right to apply for voluntary redundancy.

What does this mean for employers?

This decision is a helpful reminder for employers to be mindful of their communications to staff in the period leading up to possible redundancies. Given the finding in this case, there is a real risk that employers could be forced to deliver on any promises made, even where changing circumstances mean that it is no longer commercially practicable to do so.



Addison Lee suffers double defeat in ongoing battle over gig economy rights

Summary

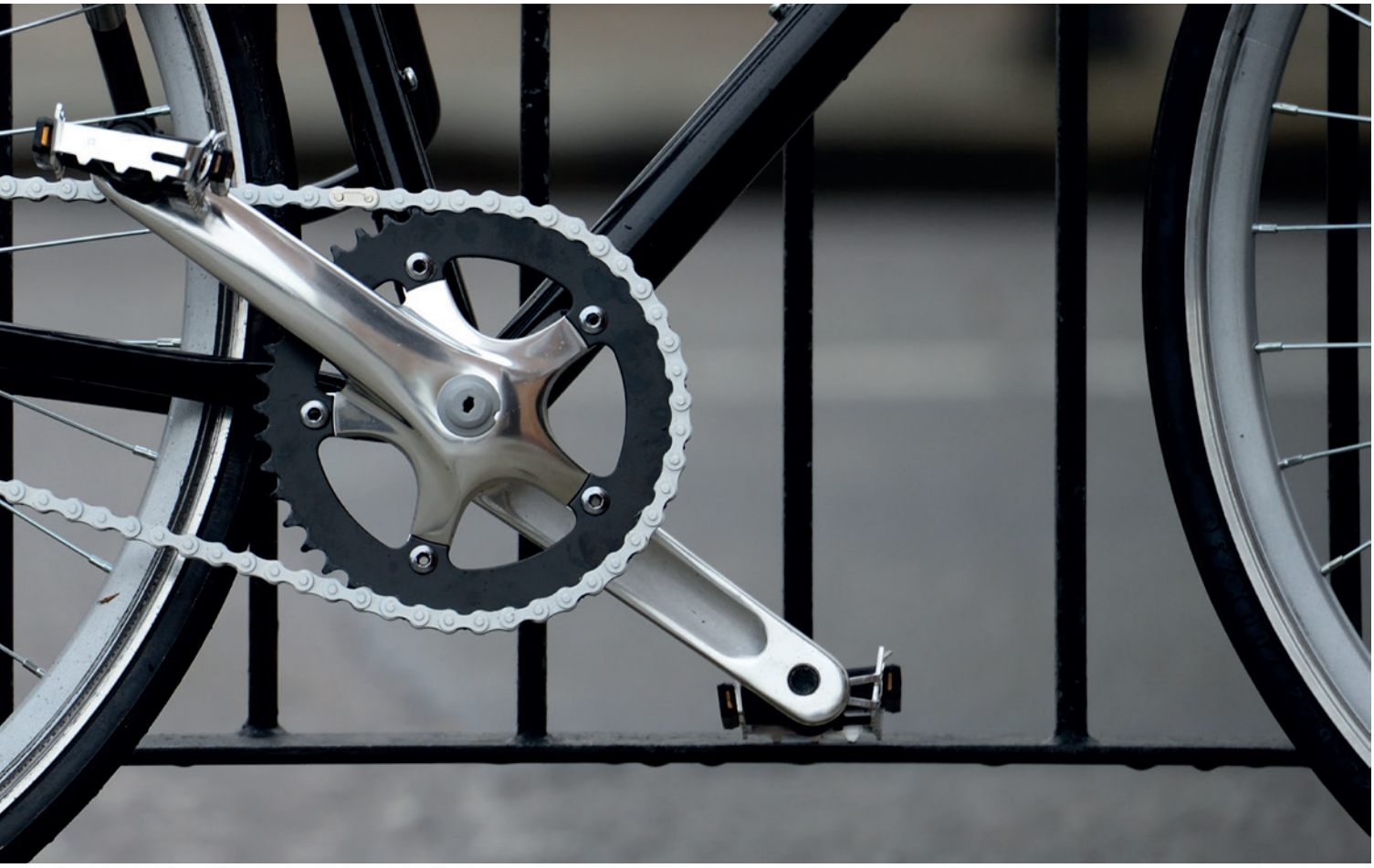
Addison Lee, the London-based minicab and courier company, recently lost two cases in decisions that echo the "gig economy" rulings against the likes of Uber, Excel, City Sprint and Pimlico Plumbers. The claims against Addison Lee both hinged on the legal distinction between "independent contractor" and "worker". In both instances, Addison Lee unsuccessfully argued that the claimants were the former and, therefore, not entitled to holiday pay or the national minimum wage.

Issues

In the case of *Gascoigne v Addison Lee Ltd (August 2017)*, Mr Gascoigne (a cycle courier who worked for Addison Lee for nine years) claimed that he was a worker and, as such, was entitled to holiday pay following a week's holiday. Supporting Mr Gascoigne's argument was the fact that his workload was directed by a "controller", who allocated jobs and tracked him via GPS and radio. The controller would allocate jobs on a piecemeal basis and it was expected that Mr Gascoigne would wait in an allocated area on standby throughout his shift. There was no 'decline' button available on his system; instead Mr Gascoigne would instead have to contact the controller directly to refuse a job. Although it was expected that Mr Gascoigne would carry out his work personally, if he did refuse a job another Addison Lee courier would be assigned to it. Mr Gascoigne was also provided with various items of technology by Addison Lee, as well as branded materials including bags and t-shirts.

Similarly, in *Mr M Lange (and others) v Addison Lee Ltd (September 2017)* a claim was brought by three Addison Lee minicab drivers. The drivers in this case also argued that they were workers and, as such, were entitled to holiday pay. In addition, they argued that they had each earned the equivalent of £5 an hour throughout their time with Adison Lee, being £2.50 below the National Minimum Wage of £7.50.

The drivers in this case were subject to a detailed manual with strict performance standards and rules. Whilst under no obligation to log on to Addison Lee's system and accept jobs, there was an expectation that the drivers would work regular and long hours. Drivers



who failed to meet the performance standards could also suffer penalties. Whilst with Addison Lee, the drivers did not work for any other minicab businesses; indeed, the contract they signed precluded them from carrying out taxi work for any other company. As in the case of Mr Gascoigne, the drivers were directed by a controller and could not begin a journey without their express authority. They also had to wear Addison Lee branded clothing and their cars were branded with the company logo.

Decision

In both instances, the Employment Tribunal ruled that Addison Lee had been wrong to classify the drivers as independent contractors – they were in fact workers and entitled to essential workers' rights, including the right to be paid the National Minimum Wage, receive holiday pay and not have their contracts terminated because they were members of a Trade Union.

The Employment Tribunal reached this decision despite the fact that documentation the drivers had signed with Addison Lee expressly stated that they were self-employed independent contractors. In reaching its decision, the Tribunal demonstrated a willingness to disregard any clauses in the documentation that did not match the reality of the working relationship.

What does this mean for employers?

These were both significant decisions, and will no doubt affect thousands of individuals working in the gig economy across the UK. The rulings also follow hot on the heels of the Taylor Review, a government-backed investigation into the gig economy which suggested, amongst other things, that workers should be renamed "dependent contractors", so that deeper clarity would be given to the status of people such as couriers.

For businesses, these decisions serve as a warning that Tribunals are willing to take a microscope to working practices in order to challenge employment status. As such, employers will need to take great care and carefully consider how they classify their staff moving forward. Together with other recent judgments on this issue, these

cases may also represent only the start of a wave of claims around employment status, particularly in light of the recent Supreme Court ruling abolishing tribunal fees.

It is also worth noting that the decision in *Mr M Lange (and others) v Addison Lee Ltd* could have significant implications for Uber's ongoing appeal against the ruling that its drivers are to be classified as workers. Uber has sought to defend its employment practices by arguing that it operates a model that is "closely analogous" to that of most minicab firms. However, that argument is going to be less attractive for them in light of these decisions.

Editor's top pick of the news in this month:

- Landmark legal battle that could prevent women earning less than men in the UK http://www.ukemploymenthub.com/landmark-legal-battle-that-could-prevent-women-earning-less-than-men-in-the-uk
- Safeguarding the status of EU citizens: UK and EU negotiation update http://www.ukemploymenthub.com/safeguarding-the-status-of-eu-citizens-uk-and-eu-negotiation-update
- Ethnicity Facts and Figures http://www.ukemploymenthub.com/ethnicity-facts-and-figures
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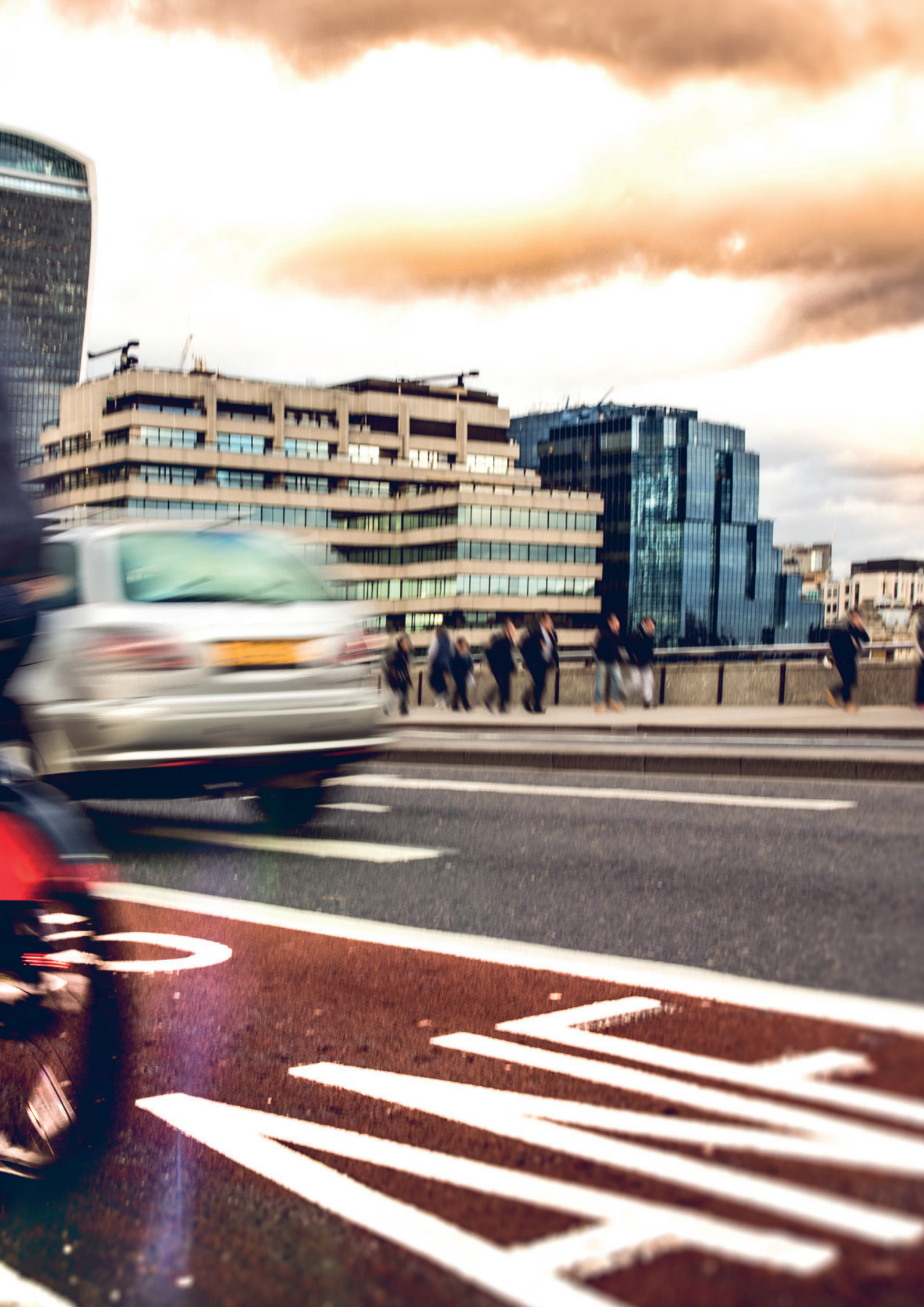

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